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Monday, 25 March 2019

(10.36 am)

THE CHAIR: Can I remind everybody of the tweeting restrictions, pause two minutes before you send out anything so as to permit objections to be made, if there are any. The penalty for not complying with that requirement, as you know, is the potential of committal proceedings.

Ms Ailes, you're going to introduce the representatives, I think.

MS AILES: Sir, Mr Pitt-Payne and I appear for the Inquiry.

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1 To our right, your left, Mr Hall, Ms Mannion and
2 Ms Lyons appear for the Metropolitan Police Service, and
3 to my left, your right, Mr Facenna and Ms Brander appear
4 again for the Non-state Core Participants. Ms Morrison
5 as well.

6 THE CHAIR: And Ms Morrison, yes.

7 MS AILES: Sir, to the rear of the seating on your right sit
8 Mr O'Driscoll and Miss Steel, who are both present in
9 person. Mr O'Driscoll would like to address you after
10 Mr Facenna has made his submissions, and Ms Steel would
11 like to reserve her position on that for now.

12 THE CHAIR: Yes, I'm more than happy to let Mr O'Driscoll
13 address me at that stage. I want to do things in
14 an orderly manner, and those from the non-state side
15 should go first. So if Ms Steel you do have anything to
16 say, I would be grateful if you would say it first
17 rather than at the end. Thank you.

18 MS AILES: One row behind me and to your left, sir,
19 Mr Sanders and Mr McAllister appear for the
20 Designated Lawyer Officers, and to their right from your
21 perspective are Sir Robert Francis, Mr Milford and
22 Ms White for the National Police Chiefs' Council.

23 In the centre of the back row of the lawyers'
24 seating, Mr Payne and Mr Moss represent individual
25 officers from the National Public Order Intelligence

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1 Unit. To their left from your perspective, Mr O'Brien
2 represents the National Crime Agency, and then further
3 down, Ms Brown represents the Home Office. Finally,
4 behind me to your right, Mr Summers represents the
5 Information Commissioner.

6 THE CHAIR: Yes.

7 MS AILES: So, sir, I think the agreed order is that those
8 are the Inquiry's preliminary remarks, if I may.

9 THE CHAIR: Yes.

10 MS AILES: And then I will give the floor to Mr Facenna.

11 THE CHAIR: Yes. Mr Facenna, I intend to invite you to
12 start, and then anyone else who wishes to say anything
13 on the non-state side. I will then invite, if I can
14 call them this, police responses, and Home Office
15 responses. I will then ask Mr Pitt-Payne to make any
16 submissions that he wishes to do for the Inquiry, and
17 last, but by no means least, I will invite Mr Summers to
18 say anything that he wishes to on behalf of the
19 Commissioner.

20 MR FACENNA: Save the best until last.

21 THE CHAIR: Yes. I intend, unlike on previous occasions, to
22 let everybody have one go at it, so we deal with
23 everything in one set of submissions rather than doing
24 it topic by topic.

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1 Submissions on behalf of the Non-Police, Non-State Core

2 Participants by MR FACENNA

3 MR FACENNA: Yes sir. Well our position, if I can jump in
4 then, our position is obviously fully set out in our
5 written submissions dated 8 March, and it may be useful
6 while I'm making my oral submissions if you have those
7 open.

8 THE CHAIR: Certainly. I took them home with me at the
9 weekend, and I hope I can find them in the same place
10 I had them then. I can.

11 MR FACENNA: Behind tab 1. Those obviously build on the
12 submissions on the pragmatic proposals we made in our
13 original submissions at the hearing in January.

14 In the light of the number of parties you need to
15 hear from today, I'm obviously not going to be available
16 to develop fully all the arguments in the submissions,
17 but what I propose to do is first of all set out our
18 position on the legal issues on which the Inquiry has
19 invited submissions in its note of 12 February, which
20 we've referred to as the Exemptions Note, in other words
21 the extent to which articles 13, 14 and 15 of the
22 General Data Protection Regulation apply to the work of
23 the Inquiry. In doing that I'll take you only to one or
24 two authorities and documents which we say support our
25 positions on the law, and as I do that I'll also to the

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1 extent necessary respond to what other parties have said
2 on the law, including the Information Commissioner's
3 position.

4 Then once I've done that I'll address the question
5 of the practical effect of any obligations which do
6 arise, including our response to the points in the
7 Inquiry's note of 26 February, which we've referred to
8 as the Process Note, and to the note from counsel to the
9 Inquiry dated 19 March, and one or two other aspects
10 raised by the parties.

11 So on the law, paragraph 6 of the Exemptions Note
12 raises three issues on which you seek submissions. The
13 first is the extent to which articles 13, 14 and 15 of
14 the General Data Protection Regulation apply to the work
15 of the Inquiry. The second is insofar as they do, and
16 there are no exemptions which are applicable, what are
17 the obligations that they impose, and what are the
18 practical implications, and then the third is the
19 converse of that, if an exemption does apply, then what
20 are the obligations that arise and what are the
21 practical implications.

22 THE CHAIR: Yes.

23 MR FACENNA: So turning to the first of those issues, the
24 extent to which those articles apply. It doesn't appear
25 to be seriously in dispute that the Inquiry's processing

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1 of personal data falls within the scope of the General
2 Data Protection Regulation, and that on their face --
3 THE CHAIR: Plainly it is within the scope of the General
4 Data Protection Regulation.

5 MR FACENNA: It is, yes.

6 THE CHAIR: Can I try and clear away one or two what I hope
7 are uncontroversial points. The basis upon which the
8 Inquiry can lawfully process personal data is to be
9 found in articles 5.1(b) and 6.1(e), I think.

10 MR FACENNA: Yes. I think we agreed this at the last
11 hearing, yes.

12 THE CHAIR: Yes, I'm simply trying to ensure that there is
13 no lurking controversy.

14 MR FACENNA: There's no controversy about that as far as
15 we're concerned.

16 THE CHAIR: And in the domestic statute it's section 8(c)
17 and schedule 1, part 2, paragraphs 5 and 6.

18 MR FACENNA: Yes, without turning it up, I don't know them
19 off the top of my head, but we don't take any point
20 about that.

21 THE CHAIR: No, there is no reason why you should. So we
22 can lawfully process for the purposes of fulfilling the
23 terms of reference.

24 MR FACENNA: Yes.

25 THE CHAIR: So the next question which I think arises,

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1 although we've asked it in the way round that you've
2 said, the next question I think which arises is: is the
3 Inquiry subject to a statutory exemption or not, and if
4 it's not inconvenient to you, I'd like to deal with that
5 as the next question.

6 MR FACENNA: That's where I was going straight away in fact.

7 THE CHAIR: Right.

8 MR FACENNA: Just before I do that, there's one minor point
9 raised by the Designated Lawyer Officers about
10 processing in the form of taking oral evidence, and
11 essentially it's dealt with in the Information
12 Commissioner's submissions at, I think, paragraph 19.

13 THE CHAIR: Yes.

14 MR FACENNA: 26 and 27, rather. So the exemptions, then.

15 First of all, there's common ground in relation to
16 the application of one exemption, which is the partial
17 exemption from the right of subject access under article
18 15, and that's the exemption found in paragraph 16 of
19 schedule 2.

20 THE CHAIR: Yes.

21 MR FACENNA: And we dealt with that in paragraphs 43 and 44
22 of our submissions, but we essentially agree with what
23 the Information Commissioner says in paragraph 19 of her
24 submissions. And as the Commissioner points out, there
25 are essentially four points about that exemption. It

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1 only applies to article 15, so not 13 and 14.

2 THE CHAIR: No. I would like if I may to go back to the
3 statutory foundation, the enabling provision, for our
4 own UK statutory exemption.

5 MR FACENNA: Yes.

6 THE CHAIR: Which I think, under the 1998 Act, would require
7 us to look at article 13(1)(f) of the Directive.

8 MR FACENNA: Yes.

9 THE CHAIR: And nowadays requires us to look at article
10 23(1)(h).

11 MR FACENNA: Of the Regulation, yes.

12 THE CHAIR: Yes. They're identically worded.

13 MR FACENNA: Yes.

14 THE CHAIR: And they're worded in fairly wide terms,
15 I think, are they not? They talk about the scope of the
16 passages in the Directive.

17 MR FACENNA: Shall we just look at it?

18 THE CHAIR: Yes, of course.

19 MR FACENNA: So article 23, it's in the first volume of
20 authorities, behind tab 2, that's on page 47 of the
21 Regulations.

22 THE CHAIR: Yes.

23 MR FACENNA: And so you'll see that in (a) to (g) there are
24 essentially legitimate interests identified, and they're
25 all the things you would expect, national security,

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1 defence and so on. And then the way that (h) is drafted
2 is that it applies to a monitoring inspection or
3 regulatory function connected even occasionally to the
4 exercise of official authority in the cases referred to
5 in points (a) to (e) and (g).

6 THE CHAIR: Yes. That wording is identical to that in the
7 Directive and the Regulation.

8 MR FACENNA: Yes.

9 THE CHAIR: The opening words of article 23(1):

10 "Union or Member State law ... may restrict by way
11 of legislative measure the scope of the obligations and
12 rights ..."

13 That too is identical.

14 MR FACENNA: Yes.

15 THE CHAIR: So we have in effect the same enabling
16 provision, and the UK Parliament has acted in a manner
17 that is either different or not materially different.
18 That I think is what the critical argument is about.

19 MR FACENNA: I think that probably is a good way of
20 characterising it, yes. So far as article 23 and the
21 Directive are concerned, you will have seen from the
22 case law, and the other documents, that the General Data
23 Protection Regulation is on the whole a stricter and
24 more proscriptive piece of legislation than the
25 Directive.

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1 THE CHAIR: Yes.

2 MR FACENNA: And so for instance in article 23(1) there is
3 specific reference to a restriction respecting the
4 essence of the fundamental rights and freedoms in
5 a necessary and proportionate measure, although the
6 reality is that those words simply reflect the
7 development of the case law, the CJEU's case law under
8 the old Directive.

9 THE CHAIR: Yes, we'll come to what those words mean in
10 a moment, though I accept what you say about that.

11 We then look at the statutory provision made under
12 the enabling provision in the Directive and Regulation.
13 Section 31 of the 1998 Act deals with it, and the
14 wording is different from paragraph 7.2 of schedule 2.
15 It says:

16 "Personal data processed for the purpose of
17 discharging functions to which this subsection applies
18 are exempt from the subject information provisions in
19 any case to the extent to which the application of those
20 provisions to the data would be likely to prejudice the
21 proper discharge of the functions."

22 If we look at the current provision, in
23 paragraph 7.2 of schedule 2, we find somewhat different
24 wording:

25 "The listed General Data Protection Regulation

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1 provisions do not apply to personal data processed for
2 the purposes of discharging a function that (a) is
3 designed ... (b) meets the condition ... to the extent
4 that the application of those provisions would be likely
5 to prejudice the proper discharge of the function."

6 MR FACENNA: Yes.

7 THE CHAIR: So one is directing the decision-maker in terms
8 to look at the case with which he is confronted and the
9 other refers in rather more general terms to the
10 application of provisions.

11 MR FACENNA: I see the wording is different. Is the
12 suggestion -- I was going to do exactly this comparison
13 between these two, although more by reference to the
14 substantive aspects than the introductory wording.

15 THE CHAIR: Given that the Parliamentary material is at best
16 equivocal, for both sides, I think it may be necessary
17 to look at the language.

18 MR FACENNA: It may be useful to look at the language.
19 I suppose my overarching submission is that when one has
20 regard to the ECJ case law and the domestic case law, it
21 is clear that whatever the niceties of the language, it
22 is not possible to apply these exemptions on a blanket
23 basis and you must take a case by case approach.

24 THE CHAIR: There's a significant difference of principle
25 between you and Mr Pitt-Payne and the Metropolitan

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1 Police, which has to be explored.

2 MR FACENNA: Yes, obviously Mr Pitt-Payne, I don't know when
3 he was instructed but I haven't seen anything from the
4 Inquiry, I don't know what his position is or what
5 advice you've received on this yet, so in a sense
6 I can't respond to that. I do know what the
7 Metropolitan Police has said, because it's in their
8 submissions, and I'll come on to that.

9 If you're telling me, sir, that the Inquiry's
10 present position, which we'll hear from Mr Pitt-Payne
11 later, is that it's possible to apply these exemptions
12 in a blanket or class based way based on a difference in
13 language, it's the first time I've in a sense heard that
14 from the Inquiry, and I'm not sure it makes that much
15 difference to my submissions, but perhaps I ought to
16 hear how Mr Pitt-Payne puts it and then be given
17 an opportunity to say what I want to say about that at
18 the end.

19 THE CHAIR: Well no, you're asking for a right of reply
20 which I'm at the moment not minded to give you, but I do
21 not want to cut short an argument of importance so I'm
22 not shutting you out --

23 MR FACENNA: It is of critical importance and it's exactly
24 the argument I was going to deal with now. In a sense
25 all I'm saying is if you're putting to me a new point

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1 which is not set out in any of the submissions yet about
2 the introductory language, and if that's a point that
3 the Inquiry's counsel's going to take, I think I need to
4 hear it to be fair before I can really respond to it.

5 THE CHAIR: It's a point that I am putting to you as
6 a result of my own reading of the legislation, and
7 I hope I'm right in saying that Mr Pitt-Payne does not
8 disagree with the point I'm making.

9 MR FACENNA: Just to understand the point, is the suggestion
10 that by comparing the language in paragraph 7 of
11 schedule 2 with that which was under section 31 of the
12 previous Act, that whereas all of the case law which
13 says that the requirements of proportionality and so on
14 mean that you must take a case by case approach, that
15 the Parliamentary intention under paragraph 7 was that
16 you could now take a blanket approach?

17 THE CHAIR: Forget "blanket", it doesn't appear in any
18 statutory provision. What it says is:

19 "The General Data Protection Regulation provisions
20 do not apply to personal data processed for the purposes
21 of discharging a function to the extent that the
22 application of those provisions would be likely to
23 prejudice proper discharge of the function."

24 It's perfectly ordinary English. On one view, which
25 I happen to share at the moment, the application of the

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1 provisions of articles 14 and 15, let alone 16 and
2 others further down the line, to the functioning of the
3 Inquiry would prejudice its functions, the proper
4 discharge of its functions.

5 MR FACENNA: The difficulty with the argument, sir, is that
6 whatever the language in paragraph 7, there is
7 a directly applicable piece of legislation in the form
8 of the Regulation, and if one goes back to article 23,
9 under article 23(1), there is a requirement that any
10 restrictions which are imposed respect the essence of
11 the fundamental rights and freedoms and are a necessary
12 and proportionate measure in a democratic society to
13 safeguard the relevant interests."

14 THE CHAIR: Quite. Well you've read what the Commissioner
15 says about that in paragraph 8 of her submission, have
16 you not?

17 MR FACENNA: I have read it, yes.

18 THE CHAIR: And this is directed to the quality of English
19 law, not individual decision making.

20 MR FACENNA: Well, it's a totally formalistic analysis in my
21 submission, because the real question is in individual
22 cases where we are dealing with fundamental rights
23 guaranteed under the Charter, how exactly are the
24 exemptions to be applied in a way that complies with the
25 general principles of EU law, including proportionality

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1 and necessity? It's pretty well established in EU law,
2 and you can see paragraph 80 of Mr Justice Green's
3 judgment, as he then was, in *Zaw Lin*, that it is simply
4 incompatible with the basic principles of EU law and
5 proportionality to say that you can have a class based
6 approach in circumstances where you're dealing with
7 fundamental rights, which by their nature are rights
8 granted to individuals.

9 THE CHAIR: He was dealing with the 1998 Act and the
10 Directive and not the Regulation.

11 MR FACENNA: But the reality is that the fundamental basis
12 of these rights hasn't changed, it's Article 8 of the EU
13 Charter. So there is now, if anything, a stronger, more
14 proscriptive, more restrictive provision of EU law which
15 now applies directly.

16 THE CHAIR: We can come to that argument in a moment, and
17 I know that's your argument, and I will listen to it
18 with respect, but if what we have here is a question,
19 does UK law satisfy the requirements of article 23(1) of
20 the Regulation, then we are into territory which
21 ultimately only the Luxembourg court can decide.

22 MR FACENNA: First of all, that's not correct, because
23 national courts can make a determination as to the
24 compatibility of EU law -- compatibility of national law
25 with EU law. Secondly, that's not the question. The

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1 question is: what are the Inquiry's obligations, how is UK
2 law, which gives effect to a directly applicable
3 regulation, to be interpreted and properly applied?

4 So I'm not seeking to make an argument about the
5 compatibility of those provisions because in my
6 submission it's perfectly obvious that those provisions
7 aren't compatible with EU law. Apart from anything else
8 under Marleasing obligations one would be required to
9 interpret them in a manner that makes them compatible
10 with EU law.

11 So no-one is raising a question as to the
12 compatibility of domestic legislation. It is compatible
13 and must in accordance with the European Communities
14 Act, at least until the end of this week or some time
15 shortly afterwards, be read consistently with the rights
16 that apply under EU law.

17 THE CHAIR: Well I anticipate that whatever happens during
18 the course of the next few days, we will still be
19 subject to the jurisdiction of the Luxembourg court in
20 respect of matters that have arisen before we formally
21 depart from the European Union.

22 MR FACENNA: To be clear, none of the issues we're arguing
23 about need to end up in Luxembourg or anywhere near
24 them. There is no issue about the compatibility of the
25 legislation. If an issue arises following a ruling that

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1 you, or indeed any other court or tribunal, might make
2 as to how that's to be interpreted, that's a matter
3 which can be ruled on by first of all the Information
4 Commissioner and secondly the national courts. And
5 equally, in relation to any individual case in which
6 a person seeks to exercise their rights, it's a matter
7 for which the Information Commissioner is the competent
8 authority under the Regulation.

9 So we're not on any view going to end up in
10 Luxembourg on any of these issues.

11 THE CHAIR: The Information Commissioner, in paragraph 8 of
12 the submissions made on her behalf, states a position
13 which I have no difficulty with, that I must apply the
14 United Kingdom law. That is the means by which we give
15 effect to article 23(1).

16 MR FACENNA: I'm afraid that is wrong, because that's not
17 correct.

18 THE CHAIR: You're submitting that the Commissioner is
19 wrong?

20 MR FACENNA: I'm submitting that an EU Regulation is
21 directly applicable as a matter of national law in
22 accordance with section 2 of the European Communities
23 Act, and I am surprised if the Information Commissioner
24 is saying something different from that, I didn't
25 understand them to be saying something different from

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1 that.

2 But this is not a situation in which you, sir, are
3 entitled to look at the Act and say well this is the
4 thing that Parliament has put in place to implement the
5 Regulation. It isn't. The Regulation is directly
6 applicable under the European Communities Act, so we
7 must comply with the Regulation.

8 THE CHAIR: The Regulation provides for member states to
9 make exemptions to its effects. We have done that.

10 MR FACENNA: It does, subject to compliance with the general
11 principles of EU law, including article 52 of the
12 charter, which makes it clear that any interference with
13 fundamental rights must be restricted in a way that's
14 strictly necessary and proportionate.

15 Shall I take you through the submissions I was going
16 to make? I think the answer, from my point of view, may
17 well be in Mr Justice Warby's decision in Guriev,
18 because there, one of the things he finds is that, the
19 words "to the extent that", which are the words found
20 both under the old Act and in paragraph 7, require
21 a case by case approach.

22 THE CHAIR: That's because he was considering a particular
23 application. He rejected the argument that there should
24 not be disclosure to the data subject for two reasons:
25 one, because the data was not being processed for the

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1 purposes of crime and so forth, or at any rate not
2 mainly for that purpose, so that it was necessary to
3 look at the purposes for which it was being processed
4 and they didn't fall within that exception; and
5 secondly, on the facts of that case, the data controller
6 was required to disclose.

7 MR FACENNA: Well, in my submission, the relevant paragraphs
8 of Guriev, which I was going to take you through, set
9 out points of principle which have been adopted in other
10 cases. They're supported in Mr Justice Green's decision
11 Zaw Lin, they're supported in Mr Justice Munby's
12 decision in Lord, they are matters of principle as to
13 the correct approach, they are not a fact specific
14 approach to the facts as they arose in Guriev.

15 THE CHAIR: They are observations applied in the case of
16 a different statutory regime.

17 MR FACENNA: A different statutory regime, giving effect to
18 precisely the same underlying fundamental rights in EU
19 law, which have not changed either under the Directive,
20 if anything they've got stronger because they're now
21 expressly set out in the EU Charter and in the
22 Regulation.

23 To the extent that you are looking at these matters
24 through the prism of the domestic statutory regime, that
25 is the wrong approach, because we are dealing here with

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1 an EU Regulation which gives effect to fundamental
2 rights which are guaranteed under the Charter. Which is
3 why, for example, in the Data Retention and
4 Investigatory Powers Act litigation, and in Tele2, you
5 had an Act of Parliament, a piece of primary legislation
6 which Parliament had enacted to give effect to highly
7 pressing issues of national security, and which the
8 national courts set aside. They found it to be
9 incompatible with these -- precisely the same rights
10 under the Charter, articles 7 and 8, because it was
11 processing of personal data which Parliament had set out
12 how it should happen in relation to retention of
13 communications data, and the divisional court, upheld by
14 the Court of Appeal and subsequently by the court in
15 Luxembourg, found that that Act of Parliament was
16 inconsistent with EU law.

17 So it isn't -- one cannot simply look at the words
18 of that this statute.

19 THE CHAIR: The Act of Parliament was inconsistent with EU
20 law and therefore had to be revisited. But here the
21 exemption is not inconsistent with article 23. You are
22 saying that forget about the exemption, we must go
23 direct to the necessity and proportionality in the
24 individual case.

25 MR FACENNA: No, sir, I'm not saying that. The question

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1 then is how does one interpret and apply the words in
2 the statute, and my submission, if you want to
3 characterise it in terms of the relationship between
4 domestic and EU law, it is that it must obviously be
5 interpreted in a manner that gives effect to both the
6 Regulation and the underlying rights in EU law, and
7 consistently with general principles of EU law,
8 including proportionality.

9 THE CHAIR: This brings us to the heart of the question,
10 I think, which is: what if the application of the
11 relevant provisions, articles 14 and 15, prejudices the proper
12 discharge of the functions of the Inquiry, not on
13 looking at an individual request or the data held upon
14 an individual subject, but generally.

15 MR FACENNA: But, sir, it plainly doesn't.

16 THE CHAIR: Forgive me, it does.

17 MR FACENNA: In every case, it's being suggested in every
18 case.

19 THE CHAIR: If the Inquiry were to receive, as it did a year
20 and a half ago, 200 requests for data access, it would
21 unquestionably prejudice the functioning of the Inquiry.

22 MR FACENNA: Let's assume you receive one from Ms Steel, if
23 she doesn't mind me using her as an example, or
24 Mr O'Driscoll, or another core participant who is
25 already involved with the Inquiry. First of all, if you

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1 are processing their data, do you need to notify them?
2 Pretty obviously yes, under article 14. To suggest that
3 doing so is either impossible or would substantially
4 prejudice the work of the Inquiry seems unsustainable.

5 THE CHAIR: But that is a submission that is not founded on
6 fact. The plain fact is that for the Inquiry to notify
7 every data subject that it had personal data and special
8 category personal data about that subject, and then to
9 provide a copy of that data to them, would be completely
10 impossible.

11 MR FACENNA: But, sir --

12 THE CHAIR: It would ruin the functioning of the Inquiry.

13 MR FACENNA: What would be the difference if the Home Office
14 were to say that? If they were to say we don't
15 currently have any processes for dealing with data
16 protection, it would take us years and lots of money and
17 would be incredibly disruptive to have to do that, or
18 indeed any public authority or business --

19 THE CHAIR: I'm not answering for the Home Office, I'm
20 answering for the Inquiry. I have a particular
21 statutory function to discharge, which is set out in the
22 terms of reference. I have a staff, or head count, now,
23 of about 60, office space just accommodates them, IT
24 capacity which just accommodates what we're doing at the
25 moment. If on top of all that I am required to divert

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1 attention of the staff and the IT equipment to answering
2 individual requests, or to notify everybody, it will
3 scupper the work of the Inquiry.

4 MR FACENNA: To be clear, it's never been our position that
5 you need to notify everybody, and I'll come on to
6 notification, because our position is repeatedly
7 mischaracterised by both the Inquiry and by other
8 parties, it's never been our position that there's
9 an obligation to notify everyone.

10 THE CHAIR: How are we to determine who we should notify?

11 MR FACENNA: Sir, there is a built-in exemption in article
12 14(5)(b) which makes it clear that if it's either
13 impossible or disproportionate or would prejudice the
14 relevant process, that you take appropriate measures.
15 You don't have to notify everyone.

16 THE CHAIR: Hold on. Before we get to 14(5)(b), we have to
17 determine whether or not it applies at all.

18 MR FACENNA: I agree.

19 THE CHAIR: Because the statutory exemption includes 14(1)
20 to (4).

21 MR FACENNA: I agree, sir, but I was responding to the point
22 you were making, which was if it applies, the sky will
23 fall, and the answer to that is that it will not,
24 because, in particular in relation to notification,
25 there is a proportionality balance built in. It is not

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1 an absolute obligation.

2 There is also the exemption which applies to mixed
3 personal data, and when one comes to article 15, and
4 subject access, I'm bound to say there are other
5 statutory inquiries who are complying with these
6 obligations. This Inquiry's own privacy notice makes it
7 clear that it's bound by those obligations and must
8 comply with them. The Information Commissioner's
9 submissions make it clear that those are obligations
10 which apply to this Inquiry as much as to any other
11 public authority.

12 THE CHAIR: You've seen what's said by the Independent
13 Inquiry into Child Sexual Abuse, have you not? They're
14 not conscious of having received any inquiry of the kind
15 that would be submitted to this Inquiry.

16 MR FACENNA: Well, I think there was a reference to
17 a conversation with counsel with the data protection
18 solicitor who is advising the Independent Inquiry into
19 Child Sexual Abuse as to whether they had received
20 a significant number of subject access requests.

21 THE CHAIR: They've conceived subject access requests under
22 article 13 for documents provided by those who provided
23 information to the Inquiry. That's easy. Article 13
24 doesn't cause a problem for us, I don't think, I'd be
25 surprised if it did. But they have not received

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1 requests for information, data, contained in information
2 provided to them by others.

3 MR FACENNA: The question is, if they were to receive those
4 requests, are they in a position to deal with them, and
5 my understanding of the Independent Inquiry into Child
6 Sexual Abuse's position is they are and they would deal
7 with them.

8 Moreover, in a sense it highlights precisely the
9 problem, because the Independent Inquiry into Child
10 Sexual Abuse is an Inquiry where there is an ongoing
11 process of disclosure to core participants on all sides.
12 So individuals are already getting access to their data
13 within confidentiality confines.

14 THE CHAIR: My Inquiry intends to provide disclosure to --

15 MR FACENNA: I understand that.

16 THE CHAIR: -- Non-state Core Participants. One of the
17 things we will have to look at later on is how we can do
18 that.

19 MR FACENNA: Yes.

20 THE CHAIR: But to say that oh, well, other inquiries don't
21 have any problems with this, if you get a whole lot of
22 requests that's not going to scupper you, is simply
23 wrong.

24 MR FACENNA: Sir, I can quite see that if this Inquiry
25 receives 200 data subject access requests, that I think

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1 I said at the last hearing would be a complete
2 nightmare. That's precisely the situation which our
3 proposals are seeking to avoid.

4 THE CHAIR: Hold on. Do you submit that these 200 people
5 are entitled to make those requests and are entitled to
6 have them met?

7 MR FACENNA: Sir, how could there possibly be any
8 controversy about that? Individuals whose personal data
9 has been processed by another are entitled to make
10 subject access requests and to have them complied with,
11 subject to the exemptions which are set out in the
12 information. Anyone's entitled to make subject access
13 requests at any time.

14 THE CHAIR: Of course they are, but the important part of it
15 is what must the Inquiry do about it, and your
16 submission is that if we get 200 requests, we must
17 answer them?

18 MR FACENNA: I think it's not only my submission, it's the
19 position of the regulator, the Information Commissioner.

20 THE CHAIR: No, I want to know your submission. That's your
21 submission, is it?

22 MR FACENNA: My submission is if you were to receive subject
23 access requests you would be required, in accordance
24 with the legislation, to take proportionate steps to
25 comply with them, subject only to the exemptions which

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1 apply in the Regulation.

2 THE CHAIR: What are the proportionate steps that should be
3 taken?

4 MR FACENNA: Can I come to that, because I was going to deal
5 with the law first and then the practicalities, and in
6 a sense us having this badinage about the
7 practicalities, we're doing it in a position where we're
8 obviously coming from different points of view about
9 what the legislation requires, so perhaps if I can make
10 my submissions as to what the law is and what it
11 requires, and it's in the context of that within which
12 I can then perhaps more meaningfully address what we say
13 is required.

14 THE CHAIR: Certainly, I'm perfectly happy that you should
15 do that.

16 MR FACENNA: Where I was going to start first was
17 a comparison, and you've obviously had an opportunity to
18 look at the legislative materials, was a comparison
19 between section 31 and paragraph 7 of the Act. Without
20 taking you through those, and we don't have all the
21 Hansard and so on in the bundles in any event, but you
22 will have seen I hope and had an opportunity to consider
23 the points which we set out in the annex to our
24 submissions about the legislative history.

25 THE CHAIR: I find the legislative history equivocal. I can

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1 find nothing in -- or not much in the legislative
2 history and what's said in Hansard to indicate
3 an intention to widen the scope of exemptions to include
4 a public inquiry, nor can I find anything which
5 discloses a Parliamentary intention to make the conduct
6 of a public inquiry more difficult.

7 MR FACENNA: But that's not what you're looking for.

8 I certainly agree with the first statement, that there
9 is no indication of an intention to legislate to exempt
10 a public inquiry. The second is: is there any evidence
11 of intention to widen the scope of the relevant
12 exemption for regulatory functions, and on that there is
13 clear evidence that that was not the lexis of intention,
14 namely the letter which you may have seen from ministers
15 to peers which include a table of the relevant
16 provisions and where there was either a widening of the
17 scope or a partial widening, there is an explanation in
18 the column, and where it was simply a replacement on the
19 same terms for a previous exemption, it simply refers to
20 the previous exemption.

21 THE CHAIR: What about the change in the Parliamentary
22 language, which refers to functions? What about the
23 statement by the minister in the House of Lords that we
24 don't want to scupper investigations?

25 MR FACENNA: Well, we have addressed -- I mean, we've set

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1 out an absolutely full picture of the legislative
2 process, and what I can say about that is that the
3 legislative process, as we see it, discloses a decision
4 to break down the various odds and sods which had ended
5 up in section 31 into a more meaningful and coherent set
6 of exemptions. So --

7 THE CHAIR: But there are also a whole lot of new functions.
8 The audit function, the Bank of England function.

9 MR FACENNA: What I was going to suggest is if you have them
10 side by side, so if one has section 31 alongside
11 paragraph 7, so in the original section 31, if I can
12 just go through, there's a pretty clear and quite
13 compelling, in my submission, read-across in mapping
14 from one to the other.

15 In section 31 of the Act, in subsection 2, you first
16 of all get subsection 2(a) which relates to protecting
17 members of the public against, and then: (i) financial
18 loss due to dishonesty and malpractice, that's pretty
19 clearly now row 1(a) of the table in paragraph 7;

20 (ii) is financial loss due to the conduct of discharged
21 or undischarged bankrupts, which is now pretty clearly
22 found in row 1(b), and (iii) is dishonesty, malpractice or
23 seriously improper conduct by or the unfitness or
24 incompetence of practices authorised to carry on any
25 profession or other activity, which is what now finds

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1 itself in the exemption we're talking about, and

2 I accept there is a change in the wording.

3 THE CHAIR: Well there's a very significant change in the
4 wording. It's nothing to do with persons authorised to
5 carry on professional or other activity.

6 MR FACENNA: That's the only change, in fact, is the removal
7 of those last half a dozen words.

8 THE CHAIR: Well it's rather an important change.

9 MR FACENNA: It is, and it's fully explained, in my
10 submission, in the legislative process. So that maps on
11 to 2, but anyway I was going to make the point that 2(b)
12 in 31 becomes 3(a); 2(c) becomes 3(b); 2(d) becomes
13 3(c), they're all clear read-across. Health and safety
14 at work is now 4(a) in paragraph 7; (f) is now 4(b).
15 What was in subsection 3 has now obviously been put in
16 the second column, but again it's exactly the same
17 wording. Subsection 4, which is maladministration by
18 public bodies and so on is now exactly what you find in
19 paragraph 5.

20 Then it gets more complicated, because you'll see
21 that all of the exemptions in 31 which we were just
22 talking about refer to, for example in (a), protecting
23 members of the public, protecting charities, protecting
24 the property of charities, protecting persons at work
25 and so on, and that is why you see that the heading now

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1 in paragraph 7 refers to "functions designed to protect
2 the public" et cetera, and what it's taken from
3 section 31 are those half a dozen functions which
4 were expressly referred to as protecting members of the
5 public and charities and other persons.

6 And the last one is the one that was previously
7 found at subsection 5, which is the functions of the
8 Competition and Markets Authority protecting the public
9 in relation to anti-competitive conduct.

10 Whereas the other provisions under section 31 are
11 not described as protecting individuals, they are more
12 simply functions based, and that's why they have been
13 moved, for example, so what was 4(a) under the Financial
14 Services and Markets Act is now found in
15 paragraph 9(2)(c) of schedule 2 to the Regulation; what
16 was in 4(b) and 4(c) in relation to the Legal Services
17 Board and the Legal Services Act is all now in
18 paragraph 10; what was in 5(a) and 5(b) is now found in
19 paragraph 11, and what was in 6 is now found in
20 paragraph 10(2).

21 THE CHAIR: And we have two new ones, don't we, audit
22 functions and the Bank of England.

23 MR FACENNA: So we have the audit functions, exactly, and
24 there's a slightly expanded version of the Bank of
25 England one. So the Prudential Regulation Authority in

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1 9(2)(c) is carried across from the old Act, but there
2 are some other functions under the Banking Act, for
3 example, which -- and there's a general provision in
4 relation to the Bank of England.

5 Now, if you have the annex to our submissions, so at
6 paragraph 2 of the annex to our submissions we refer to
7 the explanatory note which simply says that all of these
8 paragraphs replace the provision under section 31 of the
9 1998 Act, and then you'll see that in paragraph 3 we've
10 set out what was the original version of the bill, and
11 you'll see that the original version did include the
12 words "persons authorised to carry on any profession or
13 other activity".

14 Then we get to the letter -- these materials haven't
15 been put in the bundle but if you haven't had a chance
16 to see it, could I hand up a copy of the letter which is
17 referred to at paragraph 6 of our ...

18 THE CHAIR: Yes, you're right, I haven't seen it.

19 MR FACENNA: Let me show you, because it's pretty
20 compelling. We have copies, so we can hand those up.

21 (Handed)

22 You see what we've said at paragraph 6 is that
23 essentially there had been insufficient time in the
24 House of Lords to cover the debate. So this was
25 a letter from the two responsible ministers from

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1 Digital, Culture, Media and Sport and Home Office.

2 I don't think you need to worry too much about the
3 letter beyond them explaining that they've provided
4 an annex, which provides a comparison.

5 So in the accompanying table, where there are gaps
6 in coverage for other regulators and regulated
7 functions, these are identified. So, for example, one
8 sees -- a good example, paragraph 4 of schedule 2 --

9 THE CHAIR: Sorry, where in the letter is the table referred
10 to?

11 MR FACENNA: No, the table is in the second document, the
12 annex to the letter. You should have been handed two
13 documents.

14 THE CHAIR: You've handed me a letter.

15 MR FACENNA: Yes. There ought to have been another
16 document, which is a table.

17 THE CHAIR: I have a table.

18 MR FACENNA: Yes.

19 THE CHAIR: Where do I find -- is there any reference in the
20 letter to the table?

21 MR FACENNA: Yes.

22 THE CHAIR: Where's that?

23 MR FACENNA: It is ... yes, first page, "prior to the
24 debate", so the penultimate paragraph on the first page.

25 THE CHAIR: So it's cross-referring. There was a debate,

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1 and there was a motion put down that was designed to
2 tease out problems, and it produced the answer that was
3 given by Lord Ashton of Hyde.

4 MR FACENNA: Yes. So what one sees here is that in the
5 second column of that table, where there's something new
6 or different, there's an explanation as to how it's new
7 or different and why it's there. So for example
8 paragraph 4 of schedule 2, there's a completely new
9 exemption for immigration matters, and you'll see that
10 there's an explanation there. Whereas paragraphs 7 to 9
11 are simply referred to as section 31, so there's no
12 suggestion at that stage of the bill there's anything
13 new, it was simply a carry-across. So they hadn't
14 introduced the audit functions yet, I'll come on to
15 that.

16 THE CHAIR: That was at a time when the wording was the same
17 as before?

18 MR FACENNA: Well, not quite, because the words, for
19 example, "in any case", which were the words that you
20 directed my attention to, had already been taken out,
21 both in this exemption and in other exemptions.

22 THE CHAIR: Subject to that, the wording was the same?

23 MR FACENNA: No, the wording wasn't the same.

24 THE CHAIR: Well it included the provision about --

25 MR FACENNA: Sorry, the provision that we're talking about.

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1 THE CHAIR: -- profession and other activity.

2 MR FACENNA: Exactly, yes, that's as set out in the annex to
3 our submissions.

4 THE CHAIR: By the time we get to the debate, things have
5 changed.

6 MR FACENNA: Yes, so there were, as we describe at
7 paragraph 10 of our submissions onwards, there were
8 a series of technical amendments made. We've given --
9 all the links to Hansard and the relevant documents are
10 in the note. They were made to paragraph 7, and were
11 intended to make it clear that dishonesty and
12 malpractice and so on didn't have to relate to financial
13 services, by splitting what was the original one into
14 two, and so you then end up with the language which is
15 set out in paragraph 10 of our annex, which refers to
16 "functions designed to protect members of the public
17 against", and you see the same words there, but there's
18 reference to carrying on any activity that brings them
19 into contact with members of the public.

20 THE CHAIR: Now, they were in the Bill as represented to the
21 Commons after it had been to the Lords.

22 MR FACENNA: Yes.

23 THE CHAIR: And I've seen what's said about them in the
24 Lords. Do you want to say anything about that?

25 MR FACENNA: Yes. When you say you've seen what's said

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1 about them, are you referring to ...

2 THE CHAIR: What the Commissioner has helpfully cited in the
3 annex to her submissions.

4 MR FACENNA: You mean as to why it wasn't sufficiently wide
5 and why that wording had to be removed about the contact
6 with members of the public?

7 THE CHAIR: Well, that goes, because that was something that
8 was introduced subsequently and was then withdrawn. I'm
9 talking about what Lord Ashton said at column 1904.

10 MR FACENNA: Where are you in the bundle?

11 THE CHAIR: I'm behind the annex to the Commissioner's
12 submissions.

13 MR FACENNA: Yes.

14 THE CHAIR: In the third sitting, House of Lords,
15 13 November 2017, so this is before it goes back to the
16 Commons.

17 MR FACENNA: Yes. (Pause).

18 Yes. So it refers to "those carrying out functions
19 to protect the public include bodies and watchdogs
20 concerned with the protection" --

21 THE CHAIR: Yes, which is based on current section 31,
22 ensures that important investigations can continue
23 without interference. Now, we are, as a statutory
24 Inquiry, the last thing that the state can do when there
25 is a suggestion of improper et cetera activity, in

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1 particular on behalf of the state, it's the last thing
2 it can do in the regulatory, investigatory, inspection
3 monitoring scheme.

4 MR FACENNA: Yes, in a sense this goes to the heart of the
5 issue, which is: is it correct to describe this Inquiry
6 and its functions as in a sense regulatory in nature?
7 Are you a body or a watchdog concerned with protecting
8 the public from incompetence, dishonesty, malpractice or
9 seriously improper conduct?

10 THE CHAIR: No, we're more in the nature of a monitoring and
11 inspecting body. We are investigating for the purpose
12 of satisfying the public about what has gone wrong and
13 about how to put right, how things should be done in the
14 future. We are in other words doing exactly what
15 ordinary regulatory bodies do, like for example the
16 Independent Office of Police Conduct.

17 MR FACENNA: Well, sir, I'm not sure I can accept that. The
18 word "regulatory" implies the making of and enforcement
19 of rules in relation to the conduct and activity of
20 another person. This Inquiry is not doing that, this
21 Inquiry is satisfying its terms of reference, it will
22 provide a report. The question of what steps are to be
23 taken, regulatory steps or other similar steps, are for
24 other bodies, not for this Inquiry. This Inquiry does
25 not regulate the activities of the Metropolitan Police.

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1 THE CHAIR: We are the state's last shot at dealing with
2 where things have gone wrong.

3 MR FACENNA: You are a part of it, namely, for the reasons
4 set out in the original -- when the current Prime
5 Minister set up the Inquiry, decided to set up the
6 Inquiry, you are I suppose the preliminary investigative
7 step which is taken to find out what happened and what
8 went wrong.

9 THE CHAIR: No, there are all sorts of other bodies set up
10 to deal with regulating and investigating the police,
11 police conduct.

12 MR FACENNA: Yes.

13 THE CHAIR: To deal with miscarriages of justice. All of
14 these are things for which there are specific
15 "regulatory" bodies. We are the state's last shot at it
16 when they've not worked. To say that we therefore are,
17 as they are not, required to comply with all sorts of
18 detailed obligations in relation to individuals, strikes
19 me as utterly peculiar.

20 MR FACENNA: Well, I'm left in no doubt about your attitude
21 towards it. The question is whether this is
22 an exemption which applies to the data processing which
23 is carried out by the Inquiry.

24 THE CHAIR: Yes, and the language suggests that the answer
25 to that is yes.

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1 MR FACENNA: Yes, and my submission to you is when one looks
2 at the legislative history, there is no indication at
3 all that there was an intention to expand the scope of
4 this exemption beyond its scope in section 31.

5 THE CHAIR: Where is the legislative intention to be
6 discerned that the ability of the Inquiry to carry out
7 its tasks should be restricted?

8 MR FACENNA: Sir, I don't accept the premise of that
9 question, it's not for me to demonstrate there's any
10 such legislative intention. The burden is on the
11 Inquiry, who seeks to rely on this exemption, to
12 demonstrate that it applies.

13 THE CHAIR: We're not at the moment in a court case. There
14 is no burden on the Inquiry. If ever it does come to
15 litigation, I accept that there will be a burden of
16 proof on the Inquiry which it will discharge.

17 MR FACENNA: So you are a data controller exercising public
18 functions and processing personal data, so the question
19 is what's the legal framework which applies to the
20 processing of your personal data? The submission that
21 we've made, which we say is supported by a close
22 analysis of the legislative process, is that the
23 exemption which is now found in row 2 of paragraph 7 is
24 simply a successor to section 31 of the old Act, and
25 there is nothing in the legislative process anywhere to

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1 indicate that they were intending to extend the scope.

2 And at the last hearing you observed to me that you
3 thought it would be difficult to suggest that this
4 Inquiry was covered by the wording of section 31, and
5 I agree with that. The submission I'm making now is
6 that there's nothing which has changed.

7 THE CHAIR: No, a lot has changed. In the statutory scheme
8 as it then existed, there was a let-out in section 8(2),
9 if fulfilling data protection rights had
10 a disproportionate impact. As an experiment, when we
11 got the 200 requests in, we at that time only had
12 personal data on four of those who had made requests.
13 We undertook a detailed trawl to find out what they
14 specifically wanted, which was rather more limited than
15 the whole of their data, and it took 130 hours to do it.
16 If you multiply that by 200, you would have arrived at
17 a year or two.

18 MR FACENNA: Sir, I'm not in a position to dispute the
19 difficulty for you or this Inquiry of the application of
20 this law. This law has been in force since May of last
21 year, and the question is how does it apply. It's also
22 certainly not my personal intention, and I don't believe
23 it's the intention of those who I speak for today, to
24 make the Inquiry's life difficult. The Inquiry asked
25 the question, "Do we need to adjust our processes to

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1 comply with this new data protection legislation?", to
2 which our answer is yes you do, because it is no longer
3 permissible to say on a class based prejudice approach
4 that you're not going to comply with subject access
5 requests and there are also notification obligations and
6 other obligations which need to be complied with, and if
7 that's the starting point, and it may be that we're
8 right or wrong about that, and the Inquiry can take
9 a particular view and it would be unfortunate if that
10 means that there's unresolved matters which need to be
11 litigated somewhere else, but if that's the case so be
12 it.

13 THE CHAIR: I agree.

14 MR FACENNA: But at the moment our starting position is if
15 we're right about the legal framework, we're supported
16 in that by the Information Commissioner, and where that
17 leaves us is trying to find a pragmatic way in which the
18 processes and the timetable can be adjusted in order to
19 accommodate those rights. And as it happens, we think
20 that that will both address what are serious and
21 longstanding concerns on the part of the non-state
22 participants about the fact that this Inquiry's been
23 going on for so long and no-one has yet seen a single
24 piece of information about them, and secondly it will in
25 fact have efficiency benefits on a longer term for the

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1 Inquiry overall and will begin to address that aspect of
2 the Inquiry's terms of reference, as well as building in
3 broad compliance with data protection rights. So --

4 THE CHAIR: Where is the statutory requirement that data is
5 provided to a class of people before they request it?

6 MR FACENNA: We haven't made that submission, so there is no
7 statutory requirement.

8 THE CHAIR: Right.

9 MR FACENNA: Just to understand, in case there's any lack of
10 clarity, you have on the one hand the General Data
11 Protection Regulation rights, and those include the
12 subject access rights. And so if the discrete question
13 is, is this Inquiry subject to compliance with article
14 15, we and the Information Commissioner say yes you are.
15 There's then a separate question as to the processes --

16 THE CHAIR: I don't think the Information Commissioner does
17 say that. We'll see what Mr Summers says in due course.

18 MR FACENNA: Yes, I shouldn't speak for Mr Summers, we'll
19 hear what he says. I'll leave that there. Our position
20 is that you are subject to compliance with it, and even
21 if we're wrong about the exemption, and it does apply,
22 our position is that it must, and the Commissioner does
23 agree with us on this, that it must be applied on a case
24 by case basis. So it doesn't give a complete get-out.

25 THE CHAIR: Let's go through what the Inquiry is doing.

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1 Under articles 5 and 6 of the Regulation and section 8
2 of the Act, the Inquiry is entitled to process personal
3 data held by it about others by showing it to officers
4 to get them to provide a witness statement, provided
5 that the showing to the officers is done for the
6 purposes of fulfilling the functions of the Inquiry,
7 which it is, it is to remind them of what they did and
8 to get from them an explanation as to why they did it,
9 and a statement of what they did. That's right, isn't
10 it?

11 MR FACENNA: Well, if you were cross-examining me, that's a
12 rather long question, but in principle yes.

13 THE CHAIR: All right, let me break it down.

14 MR FACENNA: No, in principle, yes. Sir, the Inquiry is
15 entitled to process personal data and you must obviously
16 do it in a proportionate way, and I don't think we would
17 dispute, apart from possibly in some exceptional cases,
18 that it's proportionate and lawful for you to be
19 providing the police documents back to state witnesses
20 who are expected to give evidence on them. I don't
21 think we take issue with that.

22 THE CHAIR: Notwithstanding that it contains a raft of
23 personal data about others?

24 MR FACENNA: Well, I think as I made clear at the last
25 hearing, without any data subjects having had the

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1 opportunity to see the personal data, one cannot rule
2 out exceptional cases in which an individual might say
3 "this information is so misleading" or "so damaging", or
4 "I'm a high profile person" that there is some different
5 approach has to be taken.

6 If the state witness for example is no longer
7 a serving police officer and no longer resident in the
8 United Kingdom and you were talking about highly
9 sensitive potentially very damaging data about
10 an individual, one cannot rule out that there is at
11 least an argument that that data subject might wish to
12 make that they are an exemption on this.

13 THE CHAIR: I am aware, and those working for me are aware,
14 of the need to handle material sent outside the European
15 Union under a discrete regime.

16 MR FACENNA: I don't no doubt that, I'm simply saying
17 I cannot -- you're asking me to agree whether as a broad
18 universal position it's lawful for you to be processing
19 data in the manner in which you described, essentially
20 handing over large amounts of sensitive personal data
21 back to state witnesses who may be serving or former
22 police officers.

23 THE CHAIR: Yes, more specifically giving to them the
24 reports which they have produced about others and giving
25 to their managers such of the reports as they have

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1 produced about others as are necessary to understand the
2 managers' reasons for deployment and what they did about
3 deployment.

4 MR FACENNA: Yes, again in principle in relation to the
5 former, so giving it to those who actually produced the
6 data and would have known about it, again, as a matter
7 of generality, leaving aside exceptional cases, I don't
8 think we would take issue with that.

9 THE CHAIR: Of course. I appreciate all these things are
10 subject to there may be exceptions, but I'm talking
11 about the generality at the moment.

12 MR FACENNA: Sir, we haven't sought to make submissions on
13 the lawfulness, as a matter of data protection law, of
14 the current evidence gathering process that the Inquiry
15 is carrying out. Those are not where our submissions
16 have been directed at. Our submissions are directed at
17 what General Data Protection Regulation rights apply
18 in relation to non-state individuals and how can those
19 rights be respected by the Inquiry in a way which
20 doesn't derail the entire process?

21 THE CHAIR: I don't want to take a false point, but that
22 concession, that you do not submit that the Inquiry's
23 evidence gathering process is unlawful, is one I intend
24 to note, because it is not quite what was said in the
25 written submission.

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1 MR FACENNA: Yes, well I'm not making a concession beyond
2 what's beyond our written submissions.

3 THE CHAIR: Well then we have to look at the written
4 submissions, I'm afraid.

5 MR FACENNA: Yes. Are we talking about the previous written
6 submissions?

7 THE CHAIR: We are.

8 MR FACENNA: Yes.

9 Well, I suppose we may be at cross-purposes, I mean
10 we obviously have taken the position that there hasn't
11 been compliance with the notification obligations, so in
12 principle, unless and until there's compliance with
13 those obligations, all of the processing is, in one
14 sense, unlawful. So there's that point. And obviously
15 we took the position --

16 THE CHAIR: Forgive me, I'm just trying to turn up your
17 original submissions.

18 MR FACENNA: Yes, I'm so sorry, it's in bundle B, there's
19 a second lot of documents at tab 1.

20 THE CHAIR: This is where my weekend reading disrupted the
21 bundle.

22 MR FACENNA: Part B2, tab 1.

23 THE CHAIR: B2.

24 MR FACENNA: Our submissions start at page 13, paragraph 53.

25 So at paragraph 65 we deal with the question of

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1 notification and redaction, and so we say, for example,
2 at 71, current notification proposals are not ...

3 I think we go on to say, yes, 75, actually, the existing
4 approach on notification don't apply.

5 THE CHAIR: I'm looking at paragraph 5(c) on page 2, which
6 sets out as your third headline point:

7 "The Inquiry's decision not to disclose any personal
8 data to Non-police, Non-state Core Participants until
9 after it has obtained evidence from state witnesses,
10 coupled with an indication that the Inquiry will not
11 process subject access requests, is unlawful."

12 MR FACENNA: Yes.

13 THE CHAIR: As I read that, I thought it was unlawful in
14 both of its aspects, but not in the first, as
15 I understand your submissions.

16 MR FACENNA: I think when one goes to the actual
17 submissions, which start at paragraph 94, the two points
18 which we make, the point at (ii), beginning at
19 paragraph 97, and then (iii), beginning at 107, are that
20 the Inquiry's approach to subject access requests --
21 this was, remember, at that time, essentially as we
22 understood it the Inquiry was saying we're not complying
23 with any more subject access requests. You'll get your
24 data once we're ready to give it to you, once we've had
25 the state witness'. And then 107 is the related point,

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1 that by taking that position, so 108, the combined
2 impact of the approach to evidence gathering and its
3 denial of subject access rights is that non-state
4 participants are to be kept in the dark and it is only
5 at some later stage that disclosure based on necessity
6 analysis be provided and it is that approach which is
7 not consistent with fundamental data protection rights.

8 THE CHAIR: So your submission then I think needs to be
9 broken down into two. One, you do not submit that it is
10 unlawful to show personal data of others to former
11 undercover officers and their managers for the purpose
12 of fulfilling the terms of reference of the Inquiry, but
13 you submit that the advance notice, as it were, of
14 a disinclination to respond to article 15 requests by
15 providing data and/or prior notification under article
16 14 is unlawful?

17 MR FACENNA: Well, no, they're not separate submissions.

18 The question that actually arises in relation to the
19 provision of the data back to state witnesses is: is
20 that processing which is lawful? Is it permissible?

21 Our answer to that is that processing, indeed any
22 processing the Inquiry is carrying out is not lawful if
23 you're not complying with the obligations under articles
24 14 and 15 of the General Data Protection Regulation. So
25 the two go together. Provided you are complying with

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1 your obligations, then I don't think in principle we
2 would say there's anything wrong, in the generality of
3 cases, with the evidence gathering process which has
4 been adopted, but of course that's in a world where it's
5 accepted that non-state participants are entitled to
6 make a request and understand what personal data is
7 being processed by the Inquiry and, as a result of that,
8 are then able to exercise any rights they might wish to
9 exercise under the Regulation.

10 THE CHAIR: So your submission is that it is not lawful for
11 the Inquiry to seek evidence from former undercover
12 officers and their managers by providing them with
13 packages of documents, including personal data of
14 others, until those whose data is contained in such
15 documents have been notified?

16 MR FACENNA: Yes. It's not lawful for the Inquiry to be
17 processing that data, even internally, until you've
18 complied with the notification obligations.

19 THE CHAIR: Where is that to be found in the legislation?

20 MR FACENNA: It's in article 14 of the Regulation.

21 THE CHAIR: Right.

22 MR FACENNA: So the obligation under article 14(1):

23 "Where personal data have not been obtained from the
24 data subject ..." the controller has to provide all of
25 the information in article 14(1).

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1 And then in 14(2), you have to provide the
2 additional information to ensure fair and transparent
3 processing. And then 14(3)(a) provides that this
4 information has to be provided:

5 "... within a reasonable period after obtaining the
6 personal data, but at the latest within one month,
7 having regard to the specific circumstances in which the
8 data are processed."

9 And if it is to be used for communication, at the
10 latest at the time of the first communication to the
11 data subject.

12 And if disclosure to another recipient is envisaged,
13 at the latest when the personal data are first
14 disclosed.

15 And then of course all of that is subject then to
16 the built in derogation in article 14(5), which says
17 that those obligations simply do not arise if the data
18 subject already has the information, if the provision of
19 the information set out in (1) to (4) proves impossible,
20 or would involve a disproportionate effort, or is likely
21 to render impossible or seriously impair the achievement
22 of the objectives of the processing. And in those
23 cases, the controller has to take appropriate measures
24 to protect the data subjects' rights and freedoms and
25 interests, including making the information publicly

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1 available.

2 That's why we've said it's never been our case, in
3 our previous submissions or now, that there's
4 an obligation to notify everyone whose data has been
5 processed. Where people are readily contactable, where
6 it's straightforward to do so, there is an obligation to
7 do so. It's not impossible, it wouldn't be
8 disproportionate, it wouldn't in our submission
9 seriously prejudice or impair the achievement of the
10 Inquiry's processing, and in circumstances where the
11 derogation in (5)(b) does arise, your obligation is to
12 take appropriate measures.

13 Which takes me back to the proposals which we've
14 made, which are that provided you have an all-singing
15 all-dancing website that's regularly updated, that has
16 information of the groups that were infiltrated and
17 reported on, that you take appropriate steps to
18 publicise that, not just on your website but in the
19 mainstream and social media and so on, it will be
20 permissible, I think we accept, for the Inquiry to say
21 we have taken appropriate measures to notify those whose
22 data has been processed in these documents that the data
23 has been processed.

24 So you don't have to go out and carry out a manhunt
25 or womanhunt for anyone who's mentioned in these

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1 documents. There is a margin of discretion, an element
2 of judgment on the part of the Inquiry as to the
3 circumstances in which it is either possible and
4 straightforward and proportionate to notify individuals,
5 or it is impossible, or would be disproportionate or
6 would seriously impair your objectives. And if you're
7 in the latter category, the question is what appropriate
8 measures have been taken.

9 In a sense it's why I think at the last hearing we
10 started with this element, and the indications you gave
11 at that time were relatively welcome to us, I don't
12 think anyone disputed --

13 THE CHAIR: No, this is something that we intend to do.
14 Whether or not we're obliged to do it, we intend to do
15 it.

16 MR FACENNA: Something you intend to do, because it
17 obviously is going to help the Inquiry get the evidence
18 it needs and get to the truth. And no-one's objected to
19 you doing that on a chronological or iterative basis,
20 there was an issue as to whether it covers groups which
21 are reported on as well as infiltrated, and our position
22 is it covers everyone whose data is being processed.

23 THE CHAIR: Yes, I think that's, relatively speaking, a side
24 issue, and we'll come back to it if need be, but it
25 seems to me that you are submitting that we're not

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1 entitled to undertake evidence gathering from former
2 officers and their managers before we have done the step
3 of publishing the infiltrated groups, the dates of
4 infiltration, where known or where permissible, the
5 cover name of the officer?

6 MR FACENNA: Yes, that is the effect of article 14. If
7 you're going to process data, you're required to either
8 notify data subjects or take appropriate measures.

9 THE CHAIR: You obviously don't know what's going on in the
10 engine room of the Inquiry, but it is not always
11 straightforward to discern which officers have
12 infiltrated which groups, or which branches of which
13 groups; there are many things that need to be done
14 before even reasonable certainty can be arrived at in
15 some cases. Not in others, in others it's
16 straightforward. But in some it isn't.

17 One of the reasons for doing it in the way that we
18 are is to try to achieve a degree of certainty so that
19 we can then go to the right people for their evidence.

20 MR FACENNA: I understand that. I think we accept we're not
21 in a perfect world, and I think we've heard loud and
22 clear what you said about the difficulties in the
23 documents, and we've obviously seen what counsel to the
24 Inquiry say. No-one can expect 100 per cent perfection
25 in every case, but the question is what's proportionate

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1 and appropriate. And you're right, I don't know what
2 the Inquiry's doing behind the scenes, nor does anyone
3 whom I represent, but it seems unlikely that there
4 aren't at least some cases, perhaps the majority,
5 perhaps not, where it is already possible, or will
6 relatively easily be possible, to identify groups who
7 were reported on or were infiltrated at the relevant
8 periods of time, whether that includes personal data of
9 people who are already known to the Inquiry and can be
10 notified that their personal data has been processed for
11 the Inquiry's purposes, and indeed whether there are
12 other appropriate measures that can be taken.

13 THE CHAIR: We must pause in a moment, because I think the
14 shorthand writers need a break.

15 MR FACENNA: Yes, I'm conscious of that.

16 THE CHAIR: But in the end, if it only comes down to
17 a question of timing, then it is much more orderly, it
18 is much more likely to achieve a reasonable degree of
19 certainty, if the process that we are now adopting is
20 undertaken rather than an approach of doing our best to
21 start with, then seeing what happens, and only then
22 approaching the officers. Perhaps you'd like to reflect
23 on that over the short break.

24 MR FACENNA: I will.

25 THE CHAIR: Ten minutes.

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1 (11.51 am)

2 (A short break)

3 (12.03 pm)

4 MR FACENNA: Sir, I'm conscious that I've been on my feet
5 for longer than probably anyone else wanted me to be.

6 THE CHAIR: That was always going to be the case, no
7 criticism.

8 MR FACENNA: Yes, that's fine, it's not unexpected. Subject
9 to your views, one or two points I'd like to make on the
10 legislative scheme, particularly in response to the
11 point that you raised with me this morning, and then if
12 permissible I'll try and make some progress on what we
13 say about other parties' submissions on the law,
14 briefly, and then deal with some of the practicality
15 questions. In a sense we touched on some of those
16 practicality issues already, at least in relation to
17 notification.

18 THE CHAIR: Well the practicality issues matter a great deal
19 to me. I want to find a worthwhile way forward.

20 MR FACENNA: I can see that. Can I just make this
21 overarching observation: we've tried to identify how the
22 law applies and whether the Inquiry, and we say it is,
23 is subject to the notification obligations, subject
24 access request obligations and so on. The proposals
25 that we've made in relation in particular to the timing

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1 of disclosure are intended to allow the Inquiry to
2 adjust its processes and to proceed in an orderly way
3 without you having to deal with 200 or 10,000 subject
4 access requests.

5 To be clear, we're not saying that the subject
6 access right, when I come to it, means that you have to
7 adjust your process. What we're saying is that
8 individuals have the right to understand what data about
9 them is being processed, they have the right to ask for
10 it, and the Inquiry is, whether it likes it or not,
11 under an obligation to comply with that.

12 We can see that if we get into that situation, it's
13 not going to be any good for anyone, so that's why we've
14 put forward proposals which will both begin to address
15 those rights and achieve some compliance with data
16 protection rights within what the Inquiry is doing, and
17 also will address the wider concerns and issues and
18 psychological distress and harm and so on that you've
19 heard me talk about.

20 So that's I suppose an overarching approach, my
21 overarching observation, about why we've put forward the
22 proposals that we have put forward, and perhaps I'll
23 come back to that when we come to practicalities.

24 But on the question of the law, just having had
25 an opportunity to look at it, I want to make two points.

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1 The change in language that you put to me, so the
2 change, for example, in section 31(1), an exemption in
3 any case to the extent to which the application and so
4 on would be likely to prejudice, that's also a change
5 which is reflected in a large number of other
6 exemptions. So if there's been a change of approach in
7 relation to that exemption, that's also true, for
8 example, in relation to the crime and taxation exemption
9 in paragraph 2 and paragraph 3 of schedule 2.

10 So it would be -- if it's right that that change in
11 language is an indicator of a wholesale difference of
12 approach as to whether these are exemptions which have
13 to be applied in an individual case, and they've become
14 exemptions which can somehow be applied on a class based
15 approach, then that's a wholesale change of approach
16 which one sees across the board, a number of exemptions,
17 and of course our position is there's simply no
18 indication in the legislative history that that was
19 intended.

20 Moreover, I think I referred at the last hearing to
21 there being ongoing litigation, where there is a direct
22 challenge, I think, by Liberty, or at least by a group
23 of NGOs -- the Open Rights Group -- to the immigration
24 exemption which you've seen is the new exemption in
25 paragraph 4 of schedule 2, and in the context of that

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1 litigation, the defendants to whom are the two
2 sponsoring departments, so the Secretary of State for
3 the Home Department and the Secretary of State for
4 Digital, Culture, Media and Sport, the Secretaries of
5 State themselves have accepted in both their skeleton
6 argument which has been referred to in open court and in
7 their summary grounds, also referred to in open court,
8 that the Guriev approach applies to the exemptions under
9 the General Data Protection Regulation.

10 Now we have hard copies and we can email copies
11 around after the hearing, but we do have hard copies if
12 either you want to see them now, or others do. But if
13 I could just read out what those documents say. One of
14 them is the skeleton argument used at the permission
15 hearing by junior counsel, the other is a set of summary
16 grounds which is signed by Sir James Eadie and junior
17 counsel. The government's position is expressed as
18 being as follows:

19 "The exemptions in schedule 2, including the
20 immigration exemption, are given effect by section 15 of
21 the Act."

22 And so if you turn up section 15 of the Act, what
23 the government says about that is that section 15(2)(a)
24 makes clear that those exemptions apply, and then
25 quoting from the legislation:

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1 "... in specified circumstances as allowed for by
2 article 6(3) and article 23(1) of the General Data
3 Protection Regulation. Further by section 4(2)(b) of
4 the Act, chapter 2 supplements and must be read with the
5 General Data Protection Regulation. The Data Protection
6 Act 2018 thus makes explicit provision encapsulating the
7 principle of interpretation identified for the purposes
8 of the Data Protection Act 1998 in *Guriev and others*
9 [2016] EWHC 643 QB at paragraphs 44 to 45
10 that an exemption from the data protection regime can
11 only be applied in any particular case if it is
12 'necessary to do so' and that 'the test of necessity is
13 a strict one requiring any interference with the
14 subject's rights to be proportionate to the gravity of
15 the threat to the public interest' and the exercise
16 therefore involves a classic proportionality analysis."

17 So we can provide that, but the short point is that
18 it is the sponsoring departments and the Secretary of
19 State's position, as expressed in that litigation in
20 open court, and the case reference, it's the Queen on
21 the application of the Open Rights Group and the 3
22 Million v Secretary of State for the Home Department and
23 Secretary of State for Digital, Culture, Media and
24 Sport, and the Crown Office case number is CO/3386/2018.

25 THE CHAIR: What's the issue in the case?

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1 MR FACENNA: It is a direct challenge to the lawfulness of
2 paragraph 4 as being inconsistent with article 23 of the
3 General Data Protection Regulation. So --

4 THE CHAIR: Ah, so the very issue that you disown in
5 relation to this paragraph. You were very keen to
6 assert that there was no question of your compliance
7 with the statute, with European law.

8 MR FACENNA: Yes, in a sense that's correct, that's not our
9 position, and indeed that's the Secretary of State's
10 defence in that case. They say actually it has to be
11 applied on a case by case basis, so the claimants have
12 misunderstood it insofar as they're suggesting, as they
13 apparently are in that claim, that this is a blanket
14 exemption for immigration.

15 So the Secretary of State's defence in that case
16 accords with the submission that I made, which is you
17 have to interpret it in a manner consistent with --

18 THE CHAIR: What does the Secretary of State say is meant in
19 those circumstances by a case by case basis?

20 MR FACENNA: Well, shall I hand it up and you can have
21 a look at it, if you want to have a look at it? I've
22 read out the relevant paragraph. What they say is that
23 the principles set out in Guriev apply to the
24 application of the exemptions. (Handed) We have copies
25 if others want to have them.

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1 So you have a skeleton argument. Actually, in the
2 summary grounds, which is the document signed by first
3 treasury counsel and junior counsel, the relevant
4 paragraph is paragraph 11.

5 (Pause).

6 THE CHAIR: It would be helpful, I think, to have the
7 grounds of claim, because then I could understand what
8 the defendant was responding to.

9 MR FACENNA: That may be clear if one looks at the skeleton
10 argument at paragraph 13, which is --

11 THE CHAIR: There's clearly an argument being advanced in
12 the grounds of claim which the defendant says doesn't
13 apply because you've misinterpreted --

14 MR FACENNA: Yes, so paragraph 13 of the skeleton argument,
15 the argument is characterised as concerns about the
16 proportionality balance struck by the exemption.

17 THE CHAIR: It would be helpful for me to know what it was
18 that was being contended.

19 MR FACENNA: We can get copies of that I'm sure over the
20 luncheon adjournment.

21 THE CHAIR: Fine.

22 MR FACENNA: That was the only point I wanted to make on the
23 interpretation of the legislation.

24 So I think technically I am still within -- our
25 position of course is that the exemption doesn't apply,

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1 so technically I'm within question 2 and the issues
2 identified in the Exemptions Note, ie what obligations
3 are imposed and with what practical implications if
4 there's no exemption which applies, and I think I've
5 dealt, I hope, with what the obligations are that arise
6 under article 14, notification.

7 Our broad point on that is those are not
8 insurmountable or extremely difficult or time-consuming
9 obligations to comply with, because in cases where it's
10 impossible or disproportionate, the only obligation is
11 to take appropriate measures.

12 That then begs the question as to what obligations
13 arise under article 15, the subject access rights, if
14 there's no exemption which applies, and I think --

15 THE CHAIR: Forgive me for a moment, I'm just thinking
16 through the article 14 requirement. Everyone knows what
17 the Inquiry is doing with intelligence reports. It's
18 said so publicly on a number of occasions. So everybody
19 who is mentioned in the intelligence reports will know
20 what the Inquiry is doing with their mention. The
21 problem is not in telling everybody what the Inquiry is
22 doing with it, but in telling people that the Inquiry
23 has their data. If we can do it by reference to, "We
24 have data of people who participated in the following
25 groups in the following years," and we give sufficient

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1 geographical breakdown where the groups are subdivided,
2 not all are but some are, then as I understand it, you
3 accept that that is generally sufficient?

4 MR FACENNA: Well, if there is a proper basis for concluding
5 that notification to the individuals is either
6 impossible or disproportionate or would seriously impair
7 the purposes of the process.

8 THE CHAIR: One thing we could do, to ensure that everybody
9 who's mentioned in these reports knows, it would be
10 a formidable task but it could be done, is to publish
11 all the names. But that obviously flies flatly in the
12 face of the right of the individuals to keep their names
13 private.

14 MR FACENNA: Yes, that obviously wouldn't be lawful
15 processing, it's an obligation to notify them, not to
16 notify the world.

17 THE CHAIR: Quite. So notifying them in the generality of
18 cases can be done by the means I've indicated. As
19 regards notifying them when we know and can contact them
20 as individuals, we first have to do the research, and we
21 intend to notify those that we are in contact with by,
22 I hope, showing them the documents in which they're
23 mentioned. But that will occur at a stage later than
24 they wish.

25 MR FACENNA: Yes.

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1 THE CHAIR: It's a question of timing.

2 MR FACENNA: Well, it's partly a question of timing, and
3 therefore compliance with the obligation, but it's
4 not -- and my understanding is not -- I mean, the
5 Inquiry doesn't intend to contact everyone whose data's
6 being processed.

7 THE CHAIR: No, we can't. By "contact", contact openly.

8 MR FACENNA: Invite them to give evidence when the time
9 comes. Of course you're not going to do that.

10 THE CHAIR: No possibility.

11 MR FACENNA: No-one would expect that, and as we understand
12 it, when the time comes, there will be a relevance and
13 necessity analysis which is applied and, broadly
14 speaking, the Inquiry will be approaching
15 existing non-state participants and possibly others who
16 are expected to have useful evidence to give. I mean
17 I'm paraphrasing broadly the indication that's been
18 given.

19 THE CHAIR: Well, that was certainly the original intention,
20 that's as it were plan A. Can we discuss practicalities
21 now?

22 MR FACENNA: Why not, yes, we have to make progress anyway.

23 THE CHAIR: Yes. My wish, if it is achievable, is that
24 those who are mentioned in intelligence reports should
25 see the intelligence reports that contain mention of

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1 them. That is, subject to exceptions, one where it is
2 not in the public interest that they should do so,
3 public interest protections, and the second is where to
4 do so would circumvent a restriction order already in
5 place. But subject to those two significant exceptions,
6 my intention, if I can fulfil it practically, is that
7 those who are mentioned in these reports should see
8 them.

9 That will require a number of practical steps.
10 First of all, they will be required to give
11 an undertaking, and will probably also be subject to
12 a restriction order preventing them from making any use
13 of the documents provided to them, and the information
14 contained in it, except to assist the Inquiry to fulfil
15 the terms of reference of the Inquiry. Of course they
16 can talk to their lawyers about it, that goes without
17 question. Any further use would require prior
18 permission of the Inquiry.

19 So for example if the undercover research group or
20 members of a confidentiality ring were able to say, "We
21 know this individual, we are on current amicable terms
22 with him or her or them, we believe that they would be
23 able to provide information to the Inquiry which would
24 assist it to fulfil its terms of reference, or they have
25 important information to provide," then the step would

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1 be you come to the Inquiry and say that, and we will
2 then see how we can get in touch with those individuals,
3 whether it's by informal approach by those who know
4 them, their friends, acquaintances, or a formal approach
5 by the Inquiry. Those are all sorts of things that can
6 be discussed further down the line and don't need to be
7 set as matter of principle now.

8 MR FACENNA: May I just pause you there, sir, sorry to
9 interrupt, in a sense you've put your finger on the real
10 problem from our point of view, which is the Inquiry
11 saying to these individuals, "We know you've been
12 waiting for four or five years, just wait a few years
13 more and at some point when we're ready we'll approach
14 some of you and you'll get to see the documents which
15 contain in some cases highly personal information about
16 you." The trouble with that is that is highly personal
17 information which is already being processed now,
18 internally in the Inquiry, it's being given back to the
19 officers who created it, and you heard the powerful
20 submissions that Ms Steel made on that at the last
21 hearing. People are fundamentally angry and distressed
22 about that, it's causing ongoing psychological harm
23 where there's proper evidence of that, and people
24 feel -- and they are in my submission right as a matter
25 of law -- that they are entitled to know what personal

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1 data about them and about their lives is being processed
2 by this Inquiry, is being given back to the police, and
3 they want to start the process of seeing that, they want
4 to start the process of getting to the truth, and --

5 THE CHAIR: Well I want them to be participants in that
6 process, but they have, from the start, made it clear
7 that they will not provide information to the Inquiry
8 until they have seen the witness statements of the
9 officers.

10 MR FACENNA: Just to clarify that, my understanding is that
11 what's been agreed is that non-state participants
12 witnesses will not be required or asked to give evidence
13 to the Inquiry until that point, but it's never been the
14 case as I understand it, and it's certainly not my
15 instructions now, that non-state witnesses are unwilling
16 to provide any assistance, or any indications to the
17 Inquiry, about lines of enquiry, about further documents
18 that might be examined, indeed that's part of our
19 submission, that if you were to adopt the proposals that
20 we have been suggesting, which are in a way what one
21 would expect in most forms of litigation --

22 THE CHAIR: Forgive me, they add in a step necessarily,
23 whether the process is, as you describe, it linear, or
24 non-linear. It requires a raft of documents to be
25 provided to those who will not at that stage provide

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1 evidence before they are provided to those who will
2 provide evidence, and who indeed will be required to.

3 MR FACENNA: Well, as I understand it, both will be
4 required, or will --

5 THE CHAIR: No, I am not threatening any non-state
6 participants with committal because they will not
7 provide evidence to the Inquiry.

8 MR FACENNA: I understand that.

9 THE CHAIR: It's a matter of free choice for them.

10 MR FACENNA: I understand that, and that's well established,
11 but the expectation, I think, is that at least some of
12 them will want to provide evidence, and the Inquiry will
13 want to hear from them.

14 THE CHAIR: They have flatly refused so far to say, I'm
15 afraid. That is the position. I've raised it with
16 counsel standing in your shoes, not you, and got
17 an answer, "We're not saying". So I'm therefore --

18 UNKNOWN SPEAKER (PUBLIC GALLERY): You've met us. You've met core
19 participants who've said that we're happy to help.

20 THE CHAIR: Forgive me, what you say is correct, I accept
21 that some non-state participants have indicated that
22 they wish to help, I'm delighted to hear it, I do want
23 your help, but those who claim to speak for non-state
24 participants in procedural hearings have flatly refused
25 to answer. At the moment I simply don't know.

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1 I believe and hope that some non-state participants will
2 provide evidence to the Inquiry. I do not know what the
3 generality of the position is.

4 But anyway, let's get back to details.

5 MR FACENNA: Let's get back to practicalities.

6 THE CHAIR: I want to provide the intelligence reports that
7 affect individuals who are core participants or who are
8 those from whom the Inquiry wishes to obtain evidence as
9 witnesses, I want to provide them with the intelligence
10 reports that affect them. To do so will necessarily
11 involve showing them a raft of data about lots of other
12 people.

13 If I can't do that, then I will have to revert to
14 the Inquiry's original plan A, which was to provide
15 a severe selection of documents before they are shown to
16 those from whom the Inquiry wishes to obtain
17 information, and to apply as it were the choke at that
18 stage rather than at the later stage of wider
19 publication. I do need assistance on this. Can I do it
20 lawfully? Will there be cooperation if I do it?

21 MR FACENNA: Are you asking me about disclosure into
22 confidentiality rings?

23 THE CHAIR: Or to individuals. There may well be problems
24 about confidentiality rings in some circumstances, there
25 may be some circumstances in which a confidentiality

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1 ring is not appropriate, but the basic principle is that
2 those to whom these documents will, I hope, be shown
3 will be shown documents which contain a raft of personal
4 data, including special category data, affecting other
5 people.

6 MR FACENNA: Can I refer you to our submissions for the last
7 hearing at paragraph 115. It's in the second part of
8 bundle B, I think it is, in tab 1. What we referred to
9 is our pragmatic proposals on disclosure and subject
10 access. It starts at paragraph 115.

11 THE CHAIR: Yes. I'm not asking you about the alternative
12 process that you've proposed at the moment, I'm asking
13 you about what may well happen, conducted by the
14 Inquiry.

15 MR FACENNA: Yes, well, if one looks at paragraph 120,
16 I think that is what you're asking me about, because the
17 reality is whether you do it at the stage where we say
18 you ought to do it, or whether you're doing it later, my
19 understanding from the last hearing is that there was
20 a broad agreement -- in fact we are proposing in
21 paragraph 120 that there can be disclosure into
22 confidentiality rings of mixed personal data subject to
23 redactions for particularly sensitive categories of data
24 which are those identified in paragraph 121(b) of our
25 submissions. That was a submission I put forward at the

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1 last hearing.

2 THE CHAIR: I'm afraid it imposes a burden on those doing
3 the work of the Inquiry which is not capable of being
4 discharged.

5 MR FACENNA: I'm afraid I find that difficult to understand.
6 As I understand it, there is a process which has been
7 going on already both by the police bodies, and
8 involving cooperation of the Inquiry, which involves
9 identification and redaction of particular bits of
10 documents which are regarded as subject to public
11 interest redactions. That process is going on. The
12 indication that I think was in the counsel to the
13 Inquiry's note, or in the previous document, was that
14 when documents are being provided back to state
15 witnesses, there is a possibility of further redactions
16 being made at that stage, but in practice that hasn't
17 happened, so essentially they're going back unredacted,
18 but it was accepted that, at any subsequent process,
19 there would have to be redactions for particularly
20 sensitive personal data of third parties who may not be
21 in contact with the Inquiry, for example, and who may
22 still be alive, and those documents would have to be
23 redacted when the documents are put into the bundle --
24 THE CHAIR: I'm not talking about exceptional circumstances,
25 I'm talking about the generality. At the moment there

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1 is a redaction process conducted by state bodies in
2 conjunction with the Inquiry. It deals with public
3 interest redactions and it deals with those redactions
4 that are necessary to give effect to restriction orders
5 already made. There are essentially two lots of people
6 who might have a say on that; broadly speaking, the
7 police, and sometimes the individual officer. That's
8 a straightforward task in principle. It is immensely
9 time consuming, and we are gradually getting to a point
10 where we're doing it more efficiently, but even so it's
11 very time consuming.

12 To do it in relation to documents that name scores
13 of people, and to look at the individual sensitivities
14 relevant to each of those individuals, is not possible.

15 MR FACENNA: Sir, have you looked at the examples? Because
16 we marked up the counsel to the Inquiry's annexes.

17 THE CHAIR: I know you did.

18 MR FACENNA: And it seemed to us that that was, at least in
19 respect of the document which was said to be a sample,
20 a relatively straightforward and frankly pretty
21 minimalist exercise in redaction. I think there were
22 half a dozen words that had to be taken out.

23 THE CHAIR: If that's the case, then why can't we simply
24 short circuit this? We can show you the documents on
25 confidential terms, it then only becomes a question of

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1 timing, we'll come back to that if need be in due
2 course. But is that what those for whom you appear are
3 willing to do?

4 MR FACENNA: What we're willing to do is what's set out at
5 paragraph 121, which is in principle, yes, disclose
6 documents, unredacted, into confidentiality rings.
7 A couple of caveats to that I'm going to come to. The
8 first is, as we say at 121(b), if it's information about
9 sexuality or criminality, or family or health, it is not
10 lawful. This isn't our position, we say, and I must
11 say, reading the transcript back, others stood up and
12 supported us, including police bodies.

13 THE CHAIR: The conclusion from that, then, is that we will
14 have to revert to plan A, and that is to show a small
15 number of highly redacted documents to a limited number
16 of people.

17 MR FACENNA: Well, we're talking about two ends of the
18 spectrum, and our submission, and our expectation, and
19 our proposal, is that it seems to us that there was
20 a middle ground, which is disclosure of broadly
21 unredacted documents into confidentiality rings, where
22 people would see each other's personal data,
23 particularly if it was information that would have been
24 known to them at the time anyway, but there would have
25 to be, at a relatively high level, a process which

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1 identifies particularly sensitive data, and that
2 incidentally was a process which was already reflected
3 in the existing restrictions note.

4 THE CHAIR: I know. Experience has taught me at any rate
5 that it's not practical.

6 MR FACENNA: Well then it begs the question as to whether it
7 is -- first of all, would it be lawful to do what you're
8 asking me to agree to, essentially, which is we don't
9 have a redaction process, we just put the documents into
10 a confidentiality ring? And the answer to that -- and
11 I wasn't the only one who gave this answer at the last
12 hearing -- is no, it wouldn't be lawful, because you're
13 talking about data which is special category data, about
14 sex life, about family circumstances and health.

15 THE CHAIR: And convictions and the circumstances of
16 convictions, and because a lot of the deployments, as
17 you will realise, I suspect, are concerned with a wish
18 to avoid public order problems, and part of routine
19 intelligence reporting on things which might cause
20 public order problems refers to what these people, upon
21 whom the reports are being made, have done in the past.

22 MR FACENNA: Yes.

23 THE CHAIR: Sometimes resulting in spent convictions,
24 sometimes not.

25 MR FACENNA: Yes.

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1 THE CHAIR: There are, as we get later into the story,
2 rather more serious criminal activity which is being
3 reported upon, both past and prospective, and the
4 majority -- not all, but the majority -- of convictions
5 in relation to that are spent, and therefore the
6 description of what the individuals are claimed to have
7 been up to, or what it is feared they might do, are
8 likewise special category material and highly
9 restricted.

10 Now, if I cannot lawfully disclose that to the
11 people affected on undertakings and restriction orders,
12 whether as individuals or in a confidentiality ring,
13 then I'm going to have to revert to plan A, which is
14 a highly limited and highly redacted number of documents
15 to show to individuals.

16 MR FACENNA: So the first question is what does the law
17 allow, then, and we're in article 9 and article 10
18 territory of the Regulation, and article 10 specifically
19 relates to data relating to criminal convictions and
20 offences. You've seen the relevant provisions in
21 schedule 1 to the Act. It boils down to again
22 a proportionality exercise which respects fundamental
23 rights and interests of the data subjects. So if you
24 have core participants who are already in contact with
25 the Inquiry, and you have a ream of documents, highly

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1 sensitive reference to their sex life, for example, you
2 only have to beg the question as to whether it would be
3 proportionate to disclose it into the confidentiality
4 ring without asking them first to know what the answer
5 to that is. Obviously it wouldn't be proportionate.
6 But if you can ask someone, and get their consent, you
7 need to do so, and if you can't, you have to take
8 a balanced approach to the impact on their rights.

9 THE CHAIR: We must address practicalities. What you
10 propose is not achievable.

11 MR FACENNA: Sir, it's what the law requires. These are not
12 my proposals, it's the requirement of the law.

13 THE CHAIR: In that event we won't disclose, we will have to
14 adopt the precautionary approach which I've indicated.
15 I regret that that will be so, but you leave me with no
16 alternative.

17 MR FACENNA: Well, if that is the position the Inquiry
18 adopts, then I'm not in a position to take the matter
19 any further, but our submission, and our proposals,
20 which broadly reflect the approach taken by other
21 inquiries -- in the Independent Inquiry into Child
22 Sexual Abuse, for example, there is again disclosure
23 into confidentiality rings, subject to redactions -- it
24 seemed to us that given you're going to have to get to
25 the process of redacting some documents anyway, if you

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1 have a group of documents, and the only categories of
2 information you need to redact them for are the half
3 a dozen -- not even half a dozen, five -- sensitive ones
4 we've identified, of course that involves resources, it
5 involves time, it involves a process which the Inquiry
6 doesn't have, but it didn't seem to us that that would
7 be impossible.

8 Indeed it seems to us it would be achievable if you
9 have the processes to do it; you require whoever it is,
10 the legal officers, you get external solicitors, which
11 is what the Independent Inquiry into Child Sexual Abuse
12 has who are doing this work for them, to redact the
13 documents, to identify special categories, and then
14 disclose them in that way.

15 THE CHAIR: So that, a document about a group that there were
16 concerns about, because of the public order record of its
17 members and affiliates, would have to have everything to
18 do with their past and feared prospective actions in
19 relation to public order removed?

20 MR FACENNA: No, I don't think so. Unless it fell into
21 those categories.

22 THE CHAIR: Why not?

23 MR FACENNA: Anything about feared prospective actions
24 wouldn't fall into any of the categories.

25 THE CHAIR: No, that's on the basis of what it's thought or

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1 they've been convicted of doing in the past.

2 MR FACENNA: If there's reference to criminality, then --

3 and it's not a conviction which is obviously spent, then

4 yes, that does fall into that category.

5 THE CHAIR: All these public order convictions are going to

6 be spent. Let me give you an oversimplified example.

7 There's going to be a demonstration on Wednesday

8 next week by 50 people from a particular group. A dozen

9 of them have prior convictions for public order. I've

10 heard several of them say to me that they hope this is

11 going to be an event that causes serious disruption to

12 either a particular group of people or generally. How

13 on earth am I going to be able to disclose that

14 document?

15 MR FACENNA: Well, you would have to -- the question is,

16 would it specifically identify an individual who has

17 been convicted of a criminal offence?

18 THE CHAIR: Yes, either by name or by implication from the

19 surrounding words, which is one of the means of

20 identification of personal data which must be protected

21 against.

22 MR FACENNA: Yes, so those words, on our approach, would be

23 redacted, if it identifies that there has been

24 a non-spent criminal conviction.

25 THE CHAIR: So in other words -- no, a spent criminal

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1 conviction, you mean.

2 MR FACENNA: Yes.

3 THE CHAIR: Not non-spent.

4 MR FACENNA: That's right.

5 I'm reminded of course that if they are already
6 a core participant, or someone the Inquiry's in contact
7 with, or is readily contactable, you would ask them.

8 THE CHAIR: Those who make that suggestion, no doubt in good
9 faith, do not understand the astonishing burden that
10 that imposes on those conducting this Inquiry. The very
11 simple example I've given you will contain the names of,
12 typically, one or two people who are core participants,
13 or who are readily contactable, and they will contain
14 lots of names of people who aren't. The convictions
15 will all be spent, because of the nature of public order
16 offences, they give rise to sentences well below the
17 four year threshold, and yet the justification for that
18 deployment will be well, these people were a threat to
19 public order. I can investigate it without telling
20 them, by reference to what I know generally about the
21 history of the group, but how am I to investigate it by
22 telling them?

23 MR FACENNA: Isn't this a process which would in any event
24 have to be gone through before those documents are
25 referred to in an open bundle or disclosed --

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1 THE CHAIR: Of course, but the answer to the open public
2 bundle is straightforward, it needn't be published. But
3 the answer to finding out from those who were involved
4 in this group is not as simple. If I'm to tell them
5 that their convictions, now spent long ago, were being
6 reported and the concerns were being expressed about
7 what in the light of their past history they would do on
8 the Wednesday event in the future, how am I to
9 investigate that with their assistance unless I show
10 them the document, unredacted?

11 MR FACENNA: Well, if it's their own personal data you can
12 show it to them.

13 THE CHAIR: But it's the whole group. The problem here is
14 I'm not dealing with one individual who it is said is
15 going to commit some public order offence on Wednesday.
16 It's a group of individuals who according to the
17 reporting officer have a history of this sort of thing,
18 and that is why it's necessary to report on it.

19 MR FACENNA: Yes. Well, sir, I think the answer I gave at
20 the last hearing is the answer I give again. The answer
21 to that is paragraph 16 of schedule 2 to the Act, which
22 relates to mixed personal data, and so the relevant
23 provision which would govern what you can do in those
24 circumstances, so in schedule 2 to the Act, paragraph 16
25 ...

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1 THE CHAIR: If this has to be done on a document by document
2 basis, it cannot be done practicably.

3 MR FACENNA: Sir, you're processing personal data, the
4 question is --

5 THE CHAIR: Fine, in which case the inexorable answer is
6 that the documents to be shown will have to be
7 rigorously pruned before they are shown to anybody.

8 MR FACENNA: Sir, before you jump to that conclusion, can I
9 just show you what the test is, because in
10 paragraph 16.2, and this relates to subject access
11 requests, but it reflects effectively the
12 proportionality analysis that would apply in relation to
13 processing, "If you are going to disclose personal data
14 of one data subject to another one," so that's the
15 premise, paragraph 16.1 prohibits that, or it says
16 there's no obligation to do so if there's mixed data
17 that's going to be disclosed, and then subparagraph 2
18 removes the effect of paragraph 1 in circumstances where
19 either the individual has consented to the
20 cross-disclosure, so if they're contactable, you ask
21 them, or, if not, it is reasonable to disclose the
22 information to the data subjects without the consent of
23 the other individual.

24 So there is, again, an element of discretion and
25 judgment, ultimately, even in relation to special

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1 category data, as to what would be proportionate and
2 reasonable. So you could -- if you can ask them, you
3 should ask them, and if you can't ask them, then you
4 need to do frankly what was already set out in the
5 Inquiry's restriction protocol at paragraph 33, which
6 is:

7 "In cases where they are not readily contactable,
8 the Inquiry legal team will decide whether or not the
9 information should be provisionally restricted, having
10 regard to the relevant fundamental rights and the risk
11 of intrusion into private lives which would arise if the
12 documents are disclosed."

13 THE CHAIR: That protocol was drafted before we got the tens
14 of thousands of documents which we now have.

15 MR FACENNA: I understand that.

16 THE CHAIR: There's a real problem here, and I don't want to
17 address it by reference to theory. If the application
18 of paragraph 16 or similar principles is required on
19 a case by case basis in relation to each document, then
20 the answer is there will be a choke on documents applied
21 before they are shown to anybody.

22 MR FACENNA: Well, there will have to be a process of
23 identifying -- either seeking consent in relation to
24 this --

25 THE CHAIR: No, we can't do that.

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1 MR FACENNA: Sir, what you seem to be saying is either we
2 have a process where there is no editing, no redaction,
3 no consideration given to the possible intrusion into
4 privacy or fundamental rights before we disclose into
5 confidentiality rings, or we do nothing. Then the only
6 answer that leaves is that you must do nothing, because
7 it's obviously not lawful to disclose special category
8 personal data without any consideration whatsoever as to
9 the effect on the individual.

10 THE CHAIR: Right.

11 MR FACENNA: Our position is that there is a middle ground.

12 THE CHAIR: I don't accept there's a middle ground.

13 MR FACENNA: I understand that.

14 THE CHAIR: But if it is a binary choice, then the choice
15 must come down to applying a rigorous choke to the
16 documents that are shown to others before they are shown
17 to anybody on whatever terms.

18 MR FACENNA: Well obviously the submissions I'm making today
19 are mainly concerned with data protection law, but it
20 does beg a question as to your ability to fulfil the
21 terms of reference if there is not going to be a process
22 by which --

23 THE CHAIR: I can do it. The documents that I have, the
24 intelligence reports to which the Inquiry has access
25 tell me all I need to know about the as it were official

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1 part of the business. What none of them will tell me,
2 generally -- I know there may be exceptions to this,
3 what none of them will tell me generally -- is what was
4 going on that was not reported upon, and there the
5 non-states have a vital role to play.

6 MR FACENNA: It's more than that, sir, if I may, it's not
7 just what was not reported on, there will be aspects of
8 what was reported on, the relevance and materiality of
9 which will simply not be obvious to the Inquiry on the
10 face of the document.

11 THE CHAIR: I disagree with you. I've now read over
12 40,000 pages of these documents, or looked at them, and
13 it's perfectly obvious to me what was going on at the
14 official level. What was going on by way of private
15 misdemeanours is not revealed in the documents I've read
16 so far.

17 MR FACENNA: No, the only point I was making was that there
18 might be, for example, an individual officer reports on
19 attending a particular place, and it's not obvious on
20 the face of the document that that was a place that was
21 targeted because it was a rock climbing centre where
22 individuals were known to pursue that particular hobby,
23 or because it was a nightclub where they played
24 a particular kind of music which had been identified as
25 the preference of particular data subjects.

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1 Without the evidence from the other side, you might
2 have a document which appears to contain relatively
3 anodyne information, but where the relevance of what was
4 actually going on, and being reported, isn't apparent to
5 you without hearing from the persons who were being
6 spied on by that officer.

7 THE CHAIR: Well, I don't need to be told that officers were
8 spying on, to use your phrase, the Socialist Workers'
9 Party, and its previous incarnation International
10 Socialists, extensively in London, both at branch and
11 central level. I don't need to know anything about the
12 nature of social events, money raising for the Socialist
13 Workers' Party, which did occur, beyond the fact that it
14 did occur.

15 MR FACENNA: Why don't you need to know that? Don't you
16 need to know, for example, if there were family members
17 or children at that event who police officers might have
18 targeted as a way of infiltrating the organisation?

19 THE CHAIR: There were no children at the branch meetings or
20 the central committee meetings of the Socialist Workers'
21 Party.

22 MR FACENNA: Our position --

23 THE CHAIR: All right, I take the point. Let us suppose
24 that -- at the central committee meeting, I would be
25 very surprised indeed if there were any children

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1 present. There may well have been at branch meetings,
2 I accept I shouldn't have said that.

3 Bluntly, what difference does it make to an analysis
4 of the reporting?

5 MR FACENNA: Well, it may make considerable difference, is
6 our position. Could I refer you to paragraph 94 of our
7 written submissions, because I think there we've set out
8 the submissions that have previously been made on this
9 point.

10 We've set out again at paragraph 94 submissions that
11 were made in May 2017, which explain exactly some of the
12 examples that I've given in (b). The point, (c), that
13 actually some of the information might simply be untrue
14 or false. So it is, if I may say so, a fundamentally
15 misconceived approach to say that one can fulfil the
16 terms of reference of this Inquiry and get to the truth
17 on the basis of sitting down and reading the documents
18 and hearing what the police have to say about them.
19 Those I represent simply could not accept that as
20 an exercise in getting to the truth.

21 THE CHAIR: Well I'm offering them an opportunity of saying
22 what they want to about the reports, and you tell me
23 it's not lawful.

24 MR FACENNA: No, I'm not saying that, I'm saying that our
25 proposals are that --

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1 THE CHAIR: I know you've made proposals. They're not
2 practicable.

3 MR FACENNA: -- you can do it. Well perhaps you ought to
4 I suppose hear what others say about that, including the
5 regulator, because as I understand it there was broad
6 support at the last hearing from everyone who touched on
7 the issue to say that you could not do what you were
8 proposing to do, which was disclose completely
9 unredacted sensitive personal data into
10 a confidentiality ring. I understood that that was
11 a universal --

12 THE CHAIR: If that's the position then that's the position,
13 and I will act upon it, and I will act upon it in the
14 only manner in which the Inquiry can practicably do,
15 which is to apply a choke to the documents before
16 they're shown to anybody at all.

17 MR FACENNA: Can I just, to be clear, just ask you to
18 explain, with respect, quite what you mean by "a choke"?

19 THE CHAIR: I mean a rigorous selection of only those
20 documents which it is necessary for the purpose of the
21 Inquiry's investigation to show to a limited number of
22 individuals, having had redactions of the kind for which
23 you contend applied to them. It's that or the wider
24 disclosure without prior redaction. There isn't
25 a halfway house.

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1 MR FACENNA: In a sense, something would be better than
2 nothing, I suppose.

3 Our position is that when one looks at the approach
4 that other Inquiries are taking, and when one has regard
5 to the legal obligations, if the Inquiry is under
6 an obligation anyway, as we say it is, to comply with
7 subject access requests, so that when individuals ask to
8 see these documents, that exercise would have to be gone
9 through anyway, including paragraph 16 on mixed personal
10 data, then the suggestion we're making -- and I take the
11 point that it's not a welcome suggestion at this point,
12 that it would involve considerable additional resources
13 for the Inquiry to do it -- but the reason we've put it
14 forward is that it addresses the broader concerns about
15 the nature of the Inquiry and the delay in there being
16 any disclosure, and it would, we hope, avoid the
17 situation which you're anxious to avoid of having to
18 deal with individual subject access requests, if that's
19 the only alternative way of individuals finding out what
20 information the police gathered about them and what the
21 Inquiry is processing about them.

22 So I can see that what is being proposed would
23 involve additional work and additional steps. I don't
24 think I can accept that it's black or white, and it's
25 all or nothing, because there simply must be some way,

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1 with appropriate resources, and thinking about how it's
2 done, to have a high level review of documents before
3 they're disclosed into confidentiality rings. That
4 would have to happen in relation to anything which is
5 already covered by a restriction order anyway.

6 THE CHAIR: Can we at the moment suppose that a subject
7 access request is made with which the Inquiry will
8 attempt to comply. All of these problems would then
9 arise.

10 MR FACENNA: Yes.

11 THE CHAIR: And depending upon the number of subject access
12 requests that are made, if the Inquiry decides, or is
13 required to accept, that it must comply with them, then
14 everything that we have been discussing has to be done
15 in relation to every document to be disclosed to the
16 data subject.

17 The effect of that would I think, if conducted on
18 other than a tiny handful of cases, be to require the
19 Inquiry to take on a very large additional head count
20 and more offices, and to take on people who would need
21 to know a lot of what happened during the years that
22 were being investigated. It would convert a difficult
23 but manageable task into an astonishingly lengthy and
24 unmanageable task.

25 If that is what the non-state participants require of

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1 the Inquiry, then the Secretary of State might well
2 consider whether or not it should continue.

3 MR FACENNA: The question is not what we require, sir, it's
4 what the law requires in this instance.

5 THE CHAIR: Fine. You've told me what the law requires.
6 I've given you my response to that. If my understanding
7 of the exception is right, then what will happen will be
8 that a relatively small number of documents, highly
9 redacted, will be shown to a select group of
10 individuals, full stop.

11 MR FACENNA: Just to understand, with what you're proposing
12 as the alternative, which is disclosure without any
13 redactions, there would as I understand it at least have
14 to be a process for redacting material which is covered
15 by restriction orders, is that right?

16 THE CHAIR: Yes, that's in place, and that as I've explained
17 is, by comparison with the task which you urge upon me,
18 straightforward, even though it has proved immensely
19 time consuming and problematic.

20 MR FACENNA: Yes. Again, if I may, those behind me
21 I suppose will want to know the answer, why is it
22 necessarily the case that that process is more
23 straightforward than a process which would be
24 identifying information about sex, for example?

25 THE CHAIR: Because there are people in the police forces

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1 and representatives of the officers who are able to say
2 what redactions they want to those documents. They then
3 put them to the Inquiry, the Inquiry says yes or no.
4 Your proposal requires not a single individual or body
5 saying, "You must take this out for these reasons", but
6 for us to consider independently in relation to each
7 document individually, tens of thousands of them,
8 individually, what should come out relating to person A
9 so as to be able to show it to person B, what should
10 come out in relation to person C so it can be shown to
11 person B, person D, and so on and so on and so on. It
12 is simply not a task that can be undertaken.

13 MR FACENNA: I'm not sure I can advance the point further.
14 We've made proposals which we thought it would be
15 possible to adopt, and are adopted in other contexts.
16 We do so from the point of view that the Inquiry is
17 subject to data protection obligations in any event, and
18 on the basis that there would be a very real
19 psychological benefit and other benefits to non-state
20 participants seeing whatever they can as soon as
21 possible, and that will also enable them to begin
22 thinking about their evidence, and gathering documents
23 and tracing witnesses, and indeed informing the Inquiry
24 if they think there are particular lines that ought to
25 be pursued.

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1 So we think there are benefits in it, and I've
2 acknowledged the resource implications if you have to
3 apply a filter for special category data. But my
4 position, which I think has been shared by others, is
5 that if you're going to adopt that process, there's no
6 getting around having to have some process which ensures
7 you don't have a disproportionate interference with
8 fundamental rights.

9 THE CHAIR: This debate at least has served a useful
10 clarificatory purpose. If, as I'm minded to, I do not
11 accept your submission about how we should set about it,
12 then it's a binary choice, and the answer is it is only
13 lawful to adopt the more restrictive of the two choices?

14 MR FACENNA: Well, to be clear, if it's not lawful to
15 disclose personal data of data subjects into
16 a confidentiality ring, ie to other data subjects,
17 without first taking a proportionate approach to special
18 category data, then you can't do that. That is not to
19 say, and I am not accepting, that the proposal which
20 you, sir, have put forward as the only alternative to
21 that would be a lawful one.

22 THE CHAIR: So even the alternative course is not lawful?
23 Why is it not lawful?

24 MR FACENNA: Particularly for the reasons I've given, which
25 is that it would raise serious questions as to whether

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1 that was actually consistent with fulfilment of the
2 Inquiry's terms of reference.

3 THE CHAIR: So that's not lawful under data protection law,
4 that is lawful by reference to the Inquiries Act?

5 MR FACENNA: It may be unlawful by reference to the
6 Inquiries Act. It would incidentally also be unlawful
7 in relation to the Data Protection Act, as I've said, if
8 there's not otherwise compliance with subject access
9 rights anyway, assuming that they apply. So the simple
10 fact is if the Inquiry is subject to articles 14 on
11 notification and 15 on subject access rights, unless
12 there are proper processes in place to satisfy those
13 obligations, you are currently processing personal data
14 unlawfully, both internally within the Inquiry and if it
15 were to be provided back to state witnesses or any other
16 third parties.

17 If we're right that there is no blanket exemption
18 from those obligations, then the Inquiry is going to
19 have to grapple with how it's going to satisfy those
20 obligations, and our position fundamentally is one way
21 in which -- the notification obligations are relatively
22 straightforward to satisfy, you can get considerable
23 benefit for relatively little effort.

24 You then are left with subject access, and either
25 you're in a world where individuals have the right to

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1 ask for it, and that will give rise to a great deal of
2 work in order to respond to those individual requests,
3 or you find some other way to build in a process which
4 starts to provide disclosure to non-state participants
5 which starts to allow them to understand what happened
6 to them, what was done with their personal information,
7 and how they can actively take part in the Inquiry.

8 THE CHAIR: I've made that proposal. I know the timing is
9 not accepted, but I have made that proposal, and
10 whenever it is timed, your answer is it would not be
11 lawful. That, I'm afraid, is the hard choice that has
12 to be made.

13 We will resume at 2 o'clock.

14 (1.00 pm)

15 (The short adjournment)

16 (2.00 pm)

17 THE CHAIR: Before you start again, I would like to correct
18 something that I said, which was there was no reporting
19 on children in the Socialist Workers' Party. That is
20 not right. There was reporting on some people who would
21 I think be colloquially classified as teenagers.

22 MR FACENNA: Sir I know that others are anxious to have
23 their say, so what I propose to do was spend no longer
24 than five or ten minutes just dealing with one or two
25 final points I need to pick up, and then I will sit

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1 down.

2 Picking up the discussion that we were having just
3 before the adjournment, can I make three points about
4 what you said as to the alternative approach which you
5 indicated would be the only approach if we are right
6 about the effect of the General Data Protection
7 Regulation, and that was namely that there would
8 effectively be a choke on documents with only, if any,
9 very limited disclosure.

10 So I made the point first of all about compliance
11 with the Inquiry's terms of reference. To apply
12 specific reference to those, they include of course
13 examining the motivation for and the scope of undercover
14 police operations in practice and their effect upon
15 individuals in particular, including also to identify
16 and assess the adequacy of the justification,
17 authorisation, governance and oversight of undercover
18 policing.

19 It would be the position of those I represent that
20 if, for the reasons essentially set out in those
21 submissions which you saw cut and pasted at
22 paragraph 94, and the ability, or the inability rather
23 of the Inquiry really to get to the truth simply on
24 a kind of document review and evidence from the police,
25 we would say that would not enable you to get to the

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1 truth of what happened or indeed to reach credible
2 conclusions on those issues, most obviously the effect
3 on individuals, but also the motivation and
4 justification for it, because you simply will have not
5 a full picture based only on evidence from the state.

6 Secondly, the approach which you suggested would be
7 the only alternative we say would not be compatible with
8 the Data Protection Act if it involves processing of
9 data without you simultaneously having either consent or
10 having complied with the notification obligations or
11 having a process for dealing with subject access
12 requests.

13 Just leaving aside the Data Protection Act, you
14 would also, we say, be interfering with article 8 rights
15 and indeed article 7 of the Charter.

16 Then leaving aside the lawfulness of it there is
17 then the simple point, which is the point essentially
18 made at those submissions in paragraph 94, that
19 a process which is based only on state documents and
20 state evidence is not one which can fairly be described
21 as an effective way of getting to the truth of what
22 happened here.

23 THE CHAIR: Yes, there are undoubtedly individual cases in
24 which it will be necessary to do more than that which
25 I canvassed as the alternative, the lawful alternative

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1 in the binary equation but they will have to be dealt
2 with on a basis which considers the factors relevant to
3 each such case, but they will not be the run of the mill
4 and they will not be the great majority of deployments.

5 MR FACENNA: Finally on the same point, almost finally,
6 perhaps penultimately, I wish to reiterate that there is
7 a proportionality and reasonableness approach that can
8 be taken. So before reaching the conclusion that it is
9 not possible to do anything if it involves any kind of
10 evaluation of the content of the documents, it is open
11 to you, would be open to you in accordance with
12 paragraph 16 of schedule 2 to reach the view that it is
13 reasonable to disclose other people's personal data
14 within a confidentiality ring having regard to all the
15 circumstances, but in particular, if they are
16 individuals who are capable of being contacted for their
17 consent, then the first part of the relevant paragraph
18 in paragraph 16 in schedule 2 would apply, so you would
19 need to seek consent first.

20 Just as a matter of common sense, I mean the effect
21 of what you are suggesting seems to be that you would be
22 inviting non-state core participants to say that they do
23 not mind their personal data, which they have not seen,
24 they do not know what it is, they know that in some
25 cases at least it will be very intimate, it will deal

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1 with their sex lives, with opinions that they have
2 expressed privately, with things that they may have
3 admitted to police officers that they have not admitted
4 to anyone else, and you are asking them to say that it
5 would be acceptable for that to be disclosed to people
6 who they do know, some people who they do not know, and
7 without knowing what that information is, it simply
8 cannot be fair to ask them to give that indication.

9 THE CHAIR: Well, the conclusion that I draw from that
10 suggestion is that it is not possible.

11 MR FACENNA: Yes, well I cannot accept that because if you
12 are dealing with those who are already in contact with
13 the Inquiry who are already represented or are core
14 participants, why cannot they simply be asked, is the
15 first point.

16 Secondly, you can --

17 THE CHAIR: I can send a round robin letter saying do you
18 agree to this procedure in relation to your data.

19 MR FACENNA: No, it's quite right that you cannot do that
20 without some indication of what the data is. What's
21 unreasonable is to ask them to do it when they do not
22 know what the information is.

23 THE CHAIR: But to show it to them I then have to redact it
24 from every -- to remove all other personal data. It
25 cannot be done.

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1 MR FACENNA: There could be some process by which there is
2 a description. I simply make the point that if I was
3 asked or if you were asked, would you mind if I disclose
4 a whole bunch of personal information about you, which
5 you've never seen, to all of your friends and people who
6 know you, the obvious answer would be no, because
7 I would want to know what that is.

8 THE CHAIR: The answer is in principle no. The conclusion
9 to be drawn from that has to be then we will revert to
10 plan A. It is a limited selection of documents which
11 will be the subject of individual scrutiny before they
12 are disclosed to anybody.

13 MR FACENNA: You have my submissions on why we say that in
14 itself would not be lawful.

15 THE CHAIRWOMAN: Forgive me, I do not think you submit it
16 would not be lawful, you say under article 14 we have to
17 notify and under article 15 if an access request is made
18 we have to comply what it. That is dependent upon the
19 overarching scheme in the first place. But if there is
20 not such an obligation, the overarching scheme entitles
21 us to say we cannot, we will not do it.

22 MR FACENNA: Sorry, I meant it would not be lawful by
23 reference to the terms of reference in the Inquiries
24 Act, and the obligations on you. But quite right.

25 THE CHAIR: That is ultimately a matter of judgment for me.

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1 MR FACENNA: If you are separately complying with your data
2 protection obligations, whatever they may be, then there
3 is a separate issue that arises under article 15 or 14.

4 THE CHAIR: The answer may be that the General Data
5 Protection Regulation, such of its provisions as are
6 applicable, interfere with the fulfillment of the terms
7 of reference. If they do, then I can only fulfill the
8 terms of reference lawfully and I must therefore
9 exercise a degree of restraint.

10 MR FACENNA: Well --

11 THE CHAIR: That is the conclusion, is it not? If I cannot
12 do that which I have said I would like to do, which will
13 give information to people, then I have to fulfil the
14 terms of reference in such lawful manner as I can and
15 the lawful manner imposes upon me a restriction as
16 a matter of law.

17 MR FACENNA: If one accepts the premise, and I am not --
18 when you assert to me it is not possible to do, I am not
19 in a position to take issue with that, if that is the
20 assertion, that is the assertion, we doubt that and we
21 draw attention to what other inquiries are doing.

22 THE CHAIR: I'm trying to reduce it to core principles now.

23 MR FACENNA: Yes, if your starting premise is there is
24 simply no way for me -- well, I mean the bottom line is
25 you have to act lawfully, so if there is a way in which

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1 you can conduct the Inquiry lawfully, you have to do it
2 in that way.

3 THE CHAIR: I am also required to have regard to the
4 expenditure of public money and time considerations,
5 so --

6 MR FACENNA: I understand that. I suppose I ought to say,
7 because others will say it if I do not, I mean we have
8 spent three, four years dealing with state redactions,
9 it's never been suggested that the redactions which the
10 Inquiry has been dealing with for the last three years
11 can simply be dealt with by chucking it all into
12 a confidentiality ring and that would be an outrageous
13 suggestion. What is being suggested is that others'
14 fundamental rights and the interest in their rights
15 being upheld can be dealt with in that way.

16 THE CHAIR: Yet again I am going to have to contradict you
17 I fear on the question of fact. Of course I cannot
18 speak from personal knowledge what happened before I was
19 appointed to at least a panel member in May 2017, but
20 I do know for a fact that the volume of material then
21 available to the Inquiry was far less than it now is.
22 Further, the redaction exercise in relation to
23 individual intelligence reports and such like has only
24 been underway since we have substantially broken the
25 back of the anonymity applications and dealt with

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1 redaction exercises on generic documents. There was an
2 enormous amount of trouble spent on generic documents.
3 But that is all in the past. We have not spent four
4 years doing redaction exercises on individual
5 intelligence reports.

6 MR FACENNA: No. I suppose the point does not go any
7 further than this: some time and some money, a
8 considerable amount of time and money has been spent on
9 state interests, and I use that term broadly to cover
10 anonymity applications as well as public interest
11 redactions. To now say we have got to this stage and
12 there is simply no process which can be adopted for any
13 kind of evaluation of proposed interference with the
14 rights of non-state participants is in my submission
15 neither a fair nor a reasonable position to adopt.

16 On the question of, just to draw your attention
17 because you ought to see it, in article 21 of the
18 General Data Protection Regulation there is the right to
19 object and I simply wanted to make the point that if
20 there is processing of personal data based on point (e)
21 of article 6(1) and that is the basis on which we agree
22 the Inquiry is processing personal data, then there is
23 an automatic right under article 21 to object to that
24 and the controller is obliged no longer to process it
25 unless the controller demonstrates compelling legitimate

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1 grounds which overwrite the interests, rights and
2 freedoms of the data subject, or for the establishment,
3 exercise or defence of legal claims. So that --

4 THE CHAIR: The answer is that is fulfilling the terms of
5 reference of the Inquiry conducting the investigation.

6 MR FACENNA: Yes, simply --

7 THE CHAIR: That is an instance in which at least
8 potentially the requirement that the Inquiry fulfils its
9 terms of reference trumps a particular General Data
10 Protection Regulation right.

11 MR FACENNA: That might depend on a proper application of
12 the principle of proportionately.

13 THE CHAIR: What are you anticipating? That I will get
14 a request from an individual or a group of individuals
15 who are non-state core participants saying you must
16 process any personal data relating to me, by either
17 putting it onto your own computers, reading it, or
18 collating it and sending it to undercover officers to
19 remind them of what they did and to ask them why they
20 did it.

21 MR FACENNA: Without first at least giving me an opportunity
22 to make subject access requests or have a general -- at
23 least under article 14 would be the last part of that.

24 THE CHAIR: Right, but that involves importing an
25 additional --

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1 MR FACENNA: No --

2 THE CHAIR: -- General Data Protection Regulation obligation
3 to a particular one under article 21.

4 MR FACENNA: No, article 21 is simply the right to object,
5 and in order to trump the individual rights which give
6 rise to that right to object, it follows that the
7 processing which is taking place is lawful and
8 proportionate. So you would have to satisfy
9 a proportionality test which, in the clear jurisprudence
10 of the Supreme Court and the Court of Justice, requires
11 the Inquiry to demonstrate there is no other effective
12 and less restrictive way of proceeding. I take that
13 from paragraph 50 and following of the Supreme Court's
14 judgment in Lumsdon which sets out the relevant European
15 Union test.

16 So, in order to demonstrate that what was being done
17 was proportionate and therefore lawful, the Inquiry
18 would need to be able to demonstrate with evidence --

19 THE CHAIR: I do hope we are not going to get into debates
20 about what is meant by proportionality, because there
21 are different tests and they go from everything from
22 Lord Clyde's test of can it be done in any other way, to
23 is it a reasonable approach to adopt that particular
24 requirement.

25 MR FACENNA: Sir, with respect, there is now a much more

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1 recent judgment in the Supreme Court in the form of
2 Lumsdon, which expressly says that the Supreme Court is
3 setting out the principles and the approach to be
4 applied in an European Union law context, and either in
5 paragraph 50 itself or shortly afterwards it quotes
6 directly from the opinion of Advocate General Sharpston
7 who identifies the relevant test as being that there is
8 effectively no other effective way which is less
9 restrictive of the rights concerned.

10 THE CHAIR: In which case the Grand Chamber and the Turkish
11 Airlines case, the Bosphorus case, has got it wrong.

12 MR FACENNA: I can hand up copies of Lumsdon if you'd like
13 to see it, because for some reason although it is cited
14 in our submissions is not in the bundle, but my
15 submission, and perhaps for the sake of time you can
16 take my submission and look at it, in our original
17 submissions for the January hearing we deal with it at
18 paragraphs 47 and 48.

19 So at 48 of those submissions we refer to the test
20 for strict necessity and say that for a measure to be
21 strictly necessary, no other measure or measures should
22 exist that would be equally appropriate -- I think that
23 should be equally effective -- and less restrictive.
24 The footnote reference is to Lumsdon and a series of
25 European Court of Justice cases which are in the bundle.

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1 THE CHAIR: Once you introduce the phrase "equally
2 appropriate" then you come back to rather looser
3 definition of proportionality than Lord Clyde's test.

4 MR FACENNA: That is what the Supreme Court says, or those
5 paragraphs of Lumsdon which I cited --

6 THE CHAIR: Fine, but once you introduce the word
7 "appropriate", then you open the issue up.

8 MR FACENNA: I think the test that -- my recollection is
9 that the test in Advocate General Sharpston's opinion
10 which is endorsed by the Supreme Court in that case is
11 that as regards proportionality, it is necessary to
12 establish that no other measures could have been equally
13 effective but less restrictive of the freedom in
14 question.

15 So that in my submission, and this is the submission
16 we make there, you would need to demonstrate that there
17 is no other equally effective method which would be less
18 restrictive of the freedom in question. I simply make
19 the point that if it is effectively possible to seek
20 consent or adopt some other process which is not black
21 or white, then --

22 THE CHAIR: All right, let us do this in practice. I get
23 a request from somebody saying "I object to you
24 processing my data by showing it to a police officer to
25 obtain a witness statement from him, former police

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1 officer". The data I know, but he or she does not know,
2 contains a raft of personal data about lots of other
3 people.

4 MR FACENNA: Yes.

5 THE CHAIR: I need to ask the officer about all of that to
6 find out what he was doing and why he was doing it.

7 What then do I do?

8 MR FACENNA: Insofar as it is personal data of others, the
9 data subject has no sale with that at all. So someone
10 could only object in relation to processing of their own
11 personal data. So you would identify -- if there is an
12 objection and you identify that you are processing that
13 person's data, you need to satisfy yourself that the
14 basis on which you are processing overrides their rights
15 and interests in accordance with the language in article
16 21.

17 So ideally you would be able to identify their
18 personal data, you might disclose it to them and seek
19 their consent or you have a discussion with them which
20 says this is the personal data we have got and these are
21 the reasons why we are processing it, do you still
22 object, and if they do object then you need to be able
23 to demonstrate that your legitimate rights and interests
24 override theirs. But the question of mixed personal
25 data doesn't really come into the response to the right

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1 to object.

2 THE CHAIR: No, that is a fair -- I mean it is going to be
3 one that arises in practice, but as a matter of strict
4 law --

5 MR FACENNA: It certainly arises in relation to subject
6 access requests or disclosure into confidentiality
7 rings.

8 Sir, can I make my last few points on --

9 THE CHAIR: I'm trying to think through, if I get something
10 in saying "I object to you processing my data by showing
11 it to a police officer for the purposes of obtaining
12 a witness statement from him to tell me, the Inquiry,
13 what it is he was up to in relation to you amongst
14 others", what do I do then?

15 MR FACENNA: Well, your obligation under article 21 is to no
16 longer process the data unless you demonstrate
17 compelling legitimate grounds for the processing which
18 override the interests, rights and freedoms of the data
19 subject.

20 THE CHAIR: Where the data subject objects, the personal
21 data shall no longer be processed.

22 MR FACENNA: Yes. Unless.

23 THE CHAIR: Where does the "unless" come?

24 MR FACENNA: No, I am reading from article 21(1). Where are
25 you reading from? Article (2) and (3) do not apply

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1 because they relate to direct marketing.

2 THE CHAIR: It's only 21(1), it's not (3). Right.

3 MR FACENNA: No, (2) and (3) refer to direct marketing. In
4 direct marketing you have an absolute right to object
5 but 21(1) again incorporates the balancing exercise, so
6 you would have to -- in one sense it is a sort of
7 classic article 8(2) European Convention on Human Rights
8 balancing exercise. The Inquiry is obviously pursuing
9 legitimate interests, the question is whether the
10 processing you would be doing, which amounts to an
11 interference in privacy rights, is necessary in
12 a democratic society and is proportionate, and in order
13 to assess proportionality you have to take into account
14 all the relevant circumstances.

15 THE CHAIR: The answer I would give then, if asked, if an
16 objection was made, is that I cannot fulfil my terms of
17 reference unless I obtain information from police
18 officers about their deployments, including the
19 deployment which affects you.

20 MR FACENNA: Yes, to which the data subject might well say,
21 "Why cannot I see it before you give it to the police
22 officer".

23 THE CHAIR: That's not a right under article 21.

24 MR FACENNA: No, but it's a relevant circumstance in
25 relation to whether what you are doing is legitimate and

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1 proportionate.

2 THE CHAIR: I do not see at the moment why I cannot answer
3 the question in terms of the last sentence of the
4 paragraph, if it applies.

5 MR FACENNA: Because it's unlawful -- any kind of processing
6 is unlawful under European Union law if it is
7 disproportionate. It's a general principle of European
8 Union law --

9 THE CHAIR: Hold on. There is no obligation, no obligation
10 here on me to demonstrate compelling legitimate grounds
11 by showing the material to the data subject.

12 MR FACENNA: No, but the question is: is it proportionate not
13 to do so? I.e would it be possible to do so and still
14 effectively achieve your legitimate aim of obtaining
15 relevant evidence from the state witness?

16 The answer to that question would have to be no in
17 order to satisfy the proportionality test. So if it is
18 possible to do it, and that is why we propose something
19 which we accept involves work and resources and so on --

20 THE CHAIR: Let us carry this through. Suppose I do what
21 you say and say to the data subject, "This is the
22 material, I want to show it to the officer to find out
23 what he was doing", and you say no. What then?

24 MR FACENNA: There is no absolute right to object, as you
25 see in article 21(1). So it would be open to you in

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1 those circumstances to say, well, if you are
2 unreasonably refusing consent, you have seen it, I have
3 listened to your objections as to why you do not want me
4 to process it, and I take the view that the legitimate
5 interests of the Inquiry override those interests.

6 THE CHAIR: The right to object is premised, isn't it, on
7 the right under Article 14 to be notified, and
8 furthermore --

9 MR FACENNA: To have access.

10 THE CHAIR: -- the right to see it. So the right to object
11 adds nothing of value to those rights.

12 MR FACENNA: Well, that is simply not right. Those rights
13 are gateway rights which then enable you to exercise
14 control over your personal data.

15 THE CHAIR: I know, but before you can object other than in
16 general terms which can be met by a general answer, you
17 need to know what it is that you are objecting to.

18 MR FACENNA: In theory yes, but as a matter of law you could
19 exercise -- if there is a core participant who has good
20 reason to think that the Inquiry is processing their
21 data, they do not need to see it before they are able to
22 exercise the right to object.

23 THE CHAIR: If I were to receive an objection based, as it
24 were, on the off-chance that the target might have been
25 hit, the answer is I would reply no, I cannot do it

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1 because it would interfere with the process of the
2 Inquiry.

3 MR FACENNA: Yes, well that would beg the question as to
4 whether that was lawful under article 21. I am not
5 trying to -- we cannot determine these issues in the
6 abstract, all I want to do is to highlight the fact that
7 this is -- simply assuming we are right about the law,
8 or even if an exemption applies and we are wrong about
9 it, it's simply not going to be possible for the Inquiry
10 to say, "To hell with data protection rights, we are
11 carrying on in this way and if anyone raises an
12 objection then good luck, we will see you in Luxemburg".
13 Because that is not the way that the legislations work.

14 You would have to stop processing and then satisfy
15 the requirements under article 21, that could be the
16 subject of complaint to the Information Commissioner,
17 and I am not making these submissions to suggest that
18 this is something that any core participant wants to do
19 or to make life difficult, in a sense it supports my
20 main submission, which is we have tried to come up with
21 proposals which from our point of view, and to some
22 extent we are shooting in the dark of course, would be
23 proposals which could be adopted at least some form, and
24 would start to address our concerns as well as enable
25 you to avoid this kind of dispute because you would

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1 actually have fairer, parallel, more open evidence
2 gathering processes which would involve the non-state
3 participants as well as simply the state.

4 THE CHAIR: If the evidence-gathering process had been
5 the Inquiry shows the documents, possibly subject to
6 redactions for privacy reasons, to those from whom it
7 wishes to obtain evidence and they then provide the
8 evidence and then that is provided to the officers, then
9 that might be, although I have raised this as
10 a possibility and been told it will not work, that might
11 be a more attractive proposition than the one which is
12 being advanced, which is you must show us the documents,
13 we are not going to give you any evidence at that stage,
14 we may or may not make your task more difficult by
15 objecting to disclosing the documents to officers, but
16 only when we have got the officer's statement will we
17 consider providing you with anything.

18 MR FACENNA: The process of disclosure is quite different
19 from the process of giving evidence. In any normal
20 litigation you would have disclosure to the parties, you
21 would not necessarily say you only get disclosure when
22 you are ready to give evidence, you only get disclosure
23 when you are ready to give your evidence.

24 THE CHAIR: Yes, but we do not have pleadings, which normal
25 litigation has, in which the cases of each party are set

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1 out.

2 MR FACENNA: I beg the question why that is relevant. There
3 are I suppose two points. First of all, even
4 the Inquiry has accepted I think that there are cases in
5 which -- I think they are described as unusual cases --
6 in which there may well be a legitimate basis for a data
7 subject to make an application to withhold personal data
8 from an officer. So that being the case, it is at least
9 acknowledged that there will be some cases where you
10 would need some input from data subjects before you --

11 THE CHAIR: I have not acknowledged that that is the case.
12 I have said that I can in theory think of circumstances
13 in which that might arise, but we cannot deal with the
14 bulk of the Inquiry process by reference to hypothetical
15 situations that might arise in a handful of cases.

16 MR FACENNA: I simply make the point that if it's
17 acknowledged that it arises in at least one case, then
18 there is not a basis for saying there should be
19 a blanket denial of any opportunity.

20 My second point is, as I said this morning and as
21 perhaps others might say, there is a difference between
22 when non-state witnesses will be willing to give their
23 evidence and actually beginning the process of engaging,
24 including engaging cooperatively with the Inquiry, to
25 say look, I can help you hunt down these witnesses,

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1 these are other documents you should be asking, you must
2 ask the state to address these aspects because this is
3 highly misleading or false information in these
4 documents, this kind of thing.

5 That as I understand it, as far as I know, is
6 a process in which those I represent are willing to
7 engage and wish to engage, they are desperate to see the
8 documents and start that process.

9 So I do not think I accept the premise that
10 disclosure to a party must only go hand in hand with the
11 time at which they are willing to give their evidence.

12 THE CHAIR: I was merely pointing out that if that were done
13 that way round, not has to, but if it were done that way,
14 if they had been willing to do it that way round or
15 proposed that it be done that way round, then it might
16 have been possible to devise a scheme to fit it in.

17 I have raised this internally in the Inquiry and been
18 told it is not workable in fact, but --

19 MR FACENNA: Again if you do not mind me asking the
20 question, why is that not possible?

21 THE CHAIR: First because they have not suggested it.

22 MR FACENNA: Sorry, I mean obviously state witnesses are
23 not -- it has been agreed non-state witnesses are not
24 going to give their evidence before the state witnesses,
25 so take that as read.

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1 THE CHAIR: Not give, provide.

2 MR FACENNA: Provide their evidence.

3 THE CHAIR: Take that as the premise. That inevitability
4 introduces a further step into the evidence gathering
5 process. Now, you will say no doubt well it is only
6 a short step and it can all be done in two weeks, but
7 the plain fact is it cannot, it is not a short step.
8 The requirements that you seek to impose on the Inquiry,
9 for perfectly understandable reasons, of redacting
10 documents individually before they are shown to anybody
11 makes that step not merely a fortnight, but possibly two
12 years.

13 MR FACENNA: That is, as I understand it, a process which
14 would have to be undertaken at the stage at which you
15 would be taking evidence from the state witnesses. As
16 we understood it, we were only proposing essentially to
17 bring forward a process which was going to happen anyway
18 because the indication --

19 THE CHAIR: The public interest and the restriction order
20 applications have got to be made before they are shown
21 to the non-states.

22 MR FACENNA: Everyone has accepted that, and as we
23 understand it that process is largely underway and may
24 not be completed. No one has questioned that. But once
25 the public interest restriction and anonymity order

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1 redactions are made, we understood the indication at the
2 last hearing to be that the current thinking was that
3 the pack of evidence that goes to a state witness would
4 essentially go in pretty much the same form to a
5 relevant non-state witness whose personal data is within
6 those documents.

7 THE CHAIR: That's what I want to do but you tell me
8 I cannot do it lawfully without an immense redaction
9 exercise being conducted for privacy reasons beforehand.

10 MR FACENNA: Yes, so I have made my submissions on that, you
11 will hear others on it. Whether we are right or wrong
12 about that, if it is a process which you are going to be
13 undertaking in one form or another with the greatest
14 amount of disclosure or less disclosure, effectively
15 what we propose is that that disclosure aspect of it can
16 be brought forward.

17 THE CHAIR: You are driving me to the conclusion that there
18 will have to be a prior selection of documents to be
19 shown to non-state core participants, individually
20 redacted and limited in number. There is no other
21 method for proceeding.

22 MR FACENNA: With respect I am certainly -- it is not my
23 intention to drive you there because you have heard my
24 submissions as to why that would not be lawful. My
25 submission is that the Inquiry needs to find a way

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1 through the obligations which are imposed on it by the
2 law, both data protection law and the other relevant
3 legal requirements.

4 THE CHAIR: I am inviting you at the moment to accept
5 a premise, which is that the paragraph 7(2) schedule 2
6 exemption applies and therefore the obligation on
7 the Inquiry to conduct line by line redaction of
8 individual documents before all of them are shown to
9 those named in them does not exist. And so my
10 obligation is not to infringe the rights of data
11 subjects by disclosing their data to others beyond the
12 limit necessary to permit the Inquiry to fulfil its
13 terms of reference. On that premise, we are back to the
14 binary choice.

15 MR FACENNA: Well, as you know, sir, I do not accept the
16 premise either that the exemption applies or on
17 appropriate analysis of Guriev and the case law that it
18 entitles an Inquiry, even if it does apply, to take
19 a blanket approach. So we disagree on that.

20 THE CHAIR: We do.

21 MR FACENNA: Let us say you are right about that, that the
22 exemption creates a new effectively blanket exemption,
23 where the Inquiry can say articles 14 and 15 and 13 and
24 so on do not effectively do not apply. You are still
25 subject to obligations under article 8 of the European

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1 Convention on Human Rights and indeed article 7 of the
2 European Union Charter, given that we're within scope of
3 the European Union law.

4 THE CHAIR: I am subject to the important requirements under
5 articles 5 and 6 of the Data Protection Regulation which
6 apply. I must process it lawfully.

7 MR FACENNA: Yes.

8 THE CHAIR: They must be on the basis of a UK or European
9 Union law. We are concerned with UK law.

10 MR FACENNA: So the exemption, in other words the exemption
11 does not, even if you are right about the interpretation
12 of it, it does not help with the problem you are
13 grappling with at the moment, which is how do you
14 process, how do you disclose mixed personal data amongst
15 a group of data subjects without carrying out any
16 evaluation at all of the likely intrusion on privacy
17 rights, and that is simply not possible to do it.

18 THE CHAIR: Thank you for that word. I agree it is
19 impossible to do it.

20 MR FACENNA: Not lawfully possible to do it.

21 THE CHAIR: In which case we are driven back on the binary
22 equation to the first solution.

23 MR FACENNA: That is your assertion. I don't accept that.
24 That is your assertion, I am not in a position, beyond
25 what I have said, which is --

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1 THE CHAIR: If I can't do it lawfully without conducting
2 a line by line redaction of individual documents for
3 privacy purposes, then I cannot do it except by limiting
4 the number of documents that are disclosed. That is the
5 reality that has to be faced.

6 MR FACENNA: Yes, from my point of view, in fairness to us,
7 we had disclosed to us, what were described as being
8 samples of the documents which were to inform this
9 debate. We examined those, that was the basis on which
10 we took instructions and considered our proposals, and
11 we put forward proposals which involved a relatively
12 light touch, a very light touch redaction exercise of
13 those documents.

14 If that is not in fact reflective of the process
15 which would be involved, then we have made submissions
16 on a misunderstanding, but in a sense I am not sure we
17 can really be blamed for that.

18 But, sir, I am very conscious of the time. I think
19 I have probably dealt with the points on -- I mean the
20 two objections to our proposals on disclosure really are
21 mixed personal data, which I think we've debated at
22 length, and timing. And we were just dealing with
23 timing.

24 There are effectively, as we understood it, four
25 points that were taken against us on timing.

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1 One is that the redactions cannot be finalised until
2 there has been full disclosure to state witnesses and we
3 accept that might be true in some cases but it certainly
4 cannot be true in all of them in circumstances where the
5 Metropolitan Police Commissioners have had several years
6 to identify material that ought to be redacted.

7 The second point is in a sense a point I have agreed
8 with you on, that it is necessary to show the officers
9 personal data in order to get full evidence from them,
10 and we accept that, save perhaps in exceptional cases,
11 but it does not answer the other considerable benefit to
12 the data subjects of prior disclosure to them including
13 the psychological benefit of finally knowing what was
14 recorded about them and is being processed.

15 On the question of delay, our essential point is it
16 is only right that we are introducing an additional
17 lengthy delaying step if one starts from the premise
18 that when you get to the end and carry out the
19 disclosure exercise you're not likely to get anything
20 useful from non-state witnesses, and we do not accept
21 that premise for the reasons set out in the submissions
22 cut and pasted into paragraph 94 of our submissions.

23 THE CHAIR: I very much do not want be driven into that
24 position, which is why I have canvassed the suggestion
25 I have. I am afraid if it is not lawful to do it that

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1 way I cannot do it that way.

2 MR FACENNA: We do not want to drive you into that position
3 either. Our position is there ought to be a lawful and
4 proportionate way through that having regard to what
5 other inquiries and other public authorities do.

6 THE CHAIR: Which is? What is it?

7 MR FACENNA: Which is the proposals we set out in about 120
8 of our submissions, which is you disclose
9 into confidentiality rings subject only to relatively
10 light touch redactions for extremely sensitive
11 information.

12 THE CHAIR: Each document must be individually reviewed by
13 a member of the team for likely privacy objections.

14 MR FACENNA: Yes, in more or less the same way, as
15 I understand it, as the documents that have been
16 reviewed for public interest and anonymity interests.

17 THE CHAIR: That has been a process that was very difficult
18 to get going, but now it has got going, especially in
19 relation to the ancient history where it was always
20 going to be obvious that there could not be much in the
21 way of redactions, it is now underway, but it has taken
22 an enormous effort to get it underway and we still have
23 not got the IT to enable it to be done with perfect
24 convenience.

25 MR FACENNA: Yes, well I can repeat the submissions that we

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1 made before. At least at presently advised, the
2 non-state core participants wish to be cooperative, they
3 wish to work with the Inquiry in order to enable it to
4 get on with its task and to fulfill its terms of
5 reference, and we understood that our proposed approach
6 was proposing a proportionate balance between the
7 fundamental rights of those whose data has been
8 processed and the interests of the Inquiry and building
9 any rights-based approach to the Inquiry's processes.

10 I think you will see that we have referred in
11 particular to article 25 of the General Data Protection
12 Regulation which does require data control as to engage
13 in data protection by design and by default.

14 THE CHAIR: But forgive me, the bottom line is if your
15 submission is to be accepted, there has to be a line by
16 line redaction by a member of the Inquiry staff, or
17 rather by numerous members of the Inquiry staff, of
18 individual intelligence reports on large numbers of
19 people.

20 MR FACENNA: Well, if I may say so, with respect, it is
21 a somewhat tendentious description of the exercise
22 because if the samples are indeed accurate, it does not
23 take very long and it is not line by line in -- if that
24 suggests it would be hours and hours on each document
25 then we do not accept that.

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1 To be frank, that kind of disclosure exercise is
2 precisely what happens in large commercial cases, in the
3 Competition Appeal Tribunal, in the Investigatory Powers
4 Tribunal, and in other public inquiries, and there are
5 resource implications undoubtedly, very considerable
6 resource implications.

7 THE CHAIR: I am spending taxpayers' money and am under
8 a statutory duty to have regard to that and to attempt
9 to save it. I am not a multi-national corporation with
10 limitless resources and a personal interest in the
11 outcome. My interest is only to get to the truth.

12 MR FACENNA: I was not suggesting that sir. I am simply
13 saying it is important not to exaggerate the nature of
14 the challenge or the unique aspects of it, because the
15 truth is that this kind of exercise, it does involve
16 resources, which is why the Independent Inquiry into
17 Child Sexual Abuse has a separate law firm who does its
18 data protection work for it, which is why other public
19 inquiries and other bodies outsource some of this work.
20 There are resource implications.

21 But in circumstances where the documents are already
22 in some form being reviewed for state redactions,
23 whether for anonymity or public interest, it does not
24 seem to us to be unreasonable to say that where you are
25 dealing with particularly sensitive data of individuals

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1 relating to their sex life, that there can be an
2 exercise which seeks to identify that information rather
3 than have blanket disclosure into confidentiality rings.

4 My final two points, and perhaps I can take them as
5 read given the time. I am not sure -- we are obviously
6 not going to have much time to deal with them today.
7 There were issues both about the confidentiality rings
8 and an issue was raised about professional conduct
9 issues. You may recall this.

10 THE CHAIR: Yes.

11 MR FACENNA: My instructions on that are first of all as
12 a general principle it's obviously a matter for
13 individual lawyers to decide whether there are
14 professional conduct issues and how to deal with them.
15 This is a problem that does not arise just on the
16 non-state side, obviously those lawyers who are acting
17 for individual officers or more than one individual
18 officer may well have the same issue. Those --

19 THE CHAIR: They do occasionally, yes.

20 MR FACENNA: Those lawyers, as well as those acting for
21 non-state individuals, are very experienced, they
22 frequent act in multi-handed cases where information is
23 divulged or obtained in relation to one defendant that
24 is confidential to them. That could include medical
25 records. And they would be obliged not to pass on the

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1 contents or detail to other defendants for whom they
2 act.

3 So if a lawyer became aware that there was in
4 a sense information within the ring that was relevant to
5 another core participant, an application could be made
6 to the Inquiry presumably to include that person within
7 the ring. And if it actually gave rise to a direct
8 conflict of interest then it would be a matter for the
9 individual lawyer to determine whether they would have
10 to cease acting for one or more of the relevant
11 participants. But again it is not a unique or novel
12 problem, it arises in the criminal context and other
13 contexts.

14 THE CHAIR: No. I was merely -- the Inquiry was merely
15 trying to flag up a possible problem which the lawyers
16 needed to think about.

17 MR FACENNA: Yes, and that was helpful and I think there was
18 general satisfaction that that could be addressed.

19 THE CHAIR: I am not suggesting it is insoluble, it merely
20 may in individual cases prove problematic.

21 MR FACENNA: No. The only other points were there were
22 various points on hearing bundles and perhaps I could
23 just take those as read. We made five points,
24 relatively detailed submissions on the issue of the
25 hearing bundles, which are paragraph 92 onwards of our

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1 submissions. Then there is also an issue about conduct
2 of hearings issues and live streaming. Broadly we think
3 it is premature to be trying to sort those out now,
4 although we can see there is some relevance to the
5 issues.

6 THE CHAIR: Live streaming is irrelevant to this issue.
7 What is put into the public domain by way of documents
8 and how evidence is to be dealt with which concerns
9 private data of individuals does arise.

10 MR FACENNA: Yes. Well, and rather than take up everyone
11 else's time, our submissions on that, which are
12 relatively detailed, are at paragraphs 108 to -- well,
13 the bundles are paragraphs 92 to 107 and then the
14 conduct of hearings is at 108 to 111.

15 Sir, unless I can assist you further, I feel like
16 I have had than my fair share of today's time.

17 THE CHAIR: Do not worry because you have -- or between us
18 we have the most difficult of the problems to deal with
19 I think, but we shall see where we go from here on.
20 I am grateful to you for your submissions. If something
21 surprising occurs I will give you the opportunity of
22 responding, but otherwise it is not my intention that
23 you should have another bite at the cherry.

24 MR FACENNA: I am grateful.

25 THE CHAIR: Thank you very much indeed.

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1 Now, who from the non-states is next?

2 Mr O'Driscoll?

3 Submissions by MR O'DRISCOLL

4 MR O'DRISCOLL: Thank you sir. Now, I have just got two
5 points focusing on the practicality of the regime and
6 then a more general observation, and in this I am
7 speaking from some experience of working with people
8 to document their stories and their accounts and also
9 somebody who has sight of some sort of the material we
10 have been discussing. I will not go into details on
11 that to respect people's confidentiality there. But in
12 that I come from the other side of the process, so to
13 speak.

14 The first point was to address the reasonableness of
15 the Inquiry's assumption that it could survive on a diet of
16 material from the police to get to the truth. Something
17 which really goes to our concern over the Inquiry's
18 belief that it can identify the relevant documents to
19 give to the non-state core participants.

20 There are quite a few reasons why we believe this is
21 misplaced. The headlines will be that, with all due
22 respect to the Inquiry, it is not experienced in the
23 life of campaign groups and organisations. Reading
24 a large set of position documents and many papers don't
25 get to the core of the day-to-day life and the social

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1 experiences. As a result, I think the non-state core
2 participants are far better placed to spot errors and
3 recognise material of significance.

4 I think the important bit I would emphasise, we can
5 deal with that much quicker and therefore save time
6 further down the line.

7 Two examples of that is that, experience shows that
8 it is the small details that quite often indicate the
9 most important things, which doors they open. That
10 comes from our experience researching. People can quite
11 often focus on the larger issues they remember, but it
12 is only when they see small materials that those
13 memories are triggered and you suddenly get to the key
14 bits.

15 THE CHAIR: Mr O'Driscoll, as far as I am personally
16 concerned you are pushing at an open door, but if
17 I cannot do it lawfully I am stuck.

18 MR O'DRISCOLL: We appreciate the argument has been gone
19 through this morning.

20 I just -- these are practicalities and the facts of
21 that that I want to make sure are fed into the Inquiry.

22 The second example relating to that point is the
23 sheer numbers of errors we have spotted in the material
24 that we have encountered ourselves. For example, in
25 police files on myself quite a number of years back it

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1 associated me with certain groups that I have never gone
2 to meetings on. If you were to read those files I will
3 be a member of the Socialist Workers' Party, which I can
4 assure you was never the case.

5 THE CHAIR: I have not encountered your name in those that I
6 have read, but I have only got as far as at the latest
7 about 1990 and I have not completed the gap between 1985
8 and 1990 yet.

9 MR O'DRISCOLL: I appreciate that sir. At some point my
10 subject access requests were associated with the
11 Socialist Workers' Party and I immediately recognised it
12 was the wrong information. But I raise that because
13 there is a point where an arrow could send you down the
14 wrong route altogether.

15 Other issues my learned friend has mentioned. The
16 issue of children at parties and stuff, I know from my
17 own experience of how many undercovers have been close
18 to children at events on undercovers. They are not
19 necessarily recorded in the documents I've seen but I've
20 known that is the case.

21 THE CHAIR: I am aware from what I have read outside the
22 police files that it is incontrovertible that undercover
23 officers came into contact with the children of those
24 whom they purported to befriend and we all know of cases
25 where children were produced as a result of liaison

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1 between undercover officers and activists.

2 I corrected immediately before we restarted the
3 assertion there was not any reporting on children.

4 I was reminded, and I readily accept the reminder, that
5 there was even in the Socialist Workers' Party an
6 occasion when an undercover officer reported on
7 teenagers who were participating in some political
8 activity.

9 MR O'DRISCOLL: I'm thinking just more of stuff that would
10 not necessarily be reported but where an individual was
11 saying that the date on which that undercover was
12 baby-sitting my children.

13 THE CHAIR: Unquestionably that is so, but I don't think
14 anybody is going to be reminded about that as a result
15 of seeing intelligence files about the political
16 activity.

17 MR O'DRISCOLL: I would beg to differ on that, knowing and
18 having gone through with people on how their memories
19 are triggered, that things were said, wait a second,
20 that was that event, things all immediately start to --

21 THE CHAIR: Are you in a position to give me an unattributed
22 example of that so I can understand the point?

23 MR O'DRISCOLL: I would not want to do it in open court.

24 THE CHAIR: Would you be willing to send me something, again
25 I am not asking for attribution or names or anything

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1 like that, but would you be willing to send me a letter
2 giving an instance of that?

3 MR O'DRISCOLL: I will need to confirm with the one thing
4 I would have in mind but I will endeavour to do that,
5 yes.

6 THE CHAIR: Of course. I am not insisting that you do at
7 all. But if you would wish to do so, could you do it
8 within the next day or two.

9 MR O'DRISCOLL: Yes.

10 THE CHAIR: Thank you.

11 MR O'DRISCOLL: That concludes the first practicality. The
12 second practicality is the end of the process. Again,
13 this is where our experience feeds in in the sheer
14 amount of time and effort it takes from the non-state
15 core participant side to actually examine material, to
16 understand what it is, but also to build up their own
17 supporting materials. Being given a document does not
18 necessarily follow chronologically, understanding
19 references might not be obvious, and actually what
20 needed to go back is the build-up of a proper time line
21 so you can unpick that document.

22 Depending on the complexity and also the age of the
23 material, that can be a long and lengthy process. I can
24 think of at least one example in the 1970s where it was
25 required to go back and go through all the material from

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1 that era, newspaper page by page in each newspaper, to
2 identify the events that were being referred to in order
3 to create and correct memories.

4 I do not think we should underestimate the amount of
5 work and time that will take, and by stacking that end
6 part of the process at the end of the proposal actually
7 increases the stress on the non-state core participant.
8 We will then become the obstacle by having to do so much
9 work in order to prepare our material.

10 A key reason for having the material in advance is
11 to start actually working out what it is we could
12 provide and what it is we can understand that we can
13 find to provide, and also find those third parties that
14 maybe have incredible usefulness to help with
15 the Inquiry. So it is not so much about witness
16 statements per se, it is the supporting material, and
17 you should not underestimate how much effort the time
18 that takes.

19 THE CHAIR: I assure you I don't underestimate it. I am
20 aware -- if, as I hope can be case, you get a flood of
21 material coming out in the fairly near future, I do not
22 underestimate the amount of work that it will involve
23 for you and for other non-state core participants.

24 First of all I have got to deal with this question
25 of lawfulness which is not at all straightforward. It

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1 is quite often the case that without going to an
2 officer, it is not obvious which reports originate from
3 that officer and not obvious what public interest
4 redactions and redactions made to support the
5 restriction orders need to be made.

6 If that process is done, then the documents are
7 disclosed to you and only then do we get a statement
8 from the officer. You are going to have to look at the
9 same stuff twice, whereas under the current dispensation
10 you look at the whole package once.

11 Now, you ask, you will I have little doubt say, we
12 must have enough time to consider this before we can
13 produce our response. But if I have got to do it -- if
14 you've got to do the same process twice, or a similar
15 process twice, are you not going to be subjected to
16 a great deal of unnecessary work?

17 MR O'DRISCOLL: I think we would say twice is better than
18 not at all. If we have to do it then that's what we
19 will do. We would rather that regime than --

20 THE CHAIR: I wholeheartedly agree with you, twice rather
21 than not at all. The idea of not permitting you to do
22 it at all is not something I have in mind. The argument
23 that, or the debate that I have had with Mr Facenna has
24 been on what you must be shown and in what circumstances
25 you must be shown it whenever that might be. Because

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1 I am sure you can appreciate that if the Inquiry has to
2 make privacy redactions before any documents are shown
3 to anybody, then we may have an impossible task.

4 I will reflect upon it and consult about it with my
5 team, to see whether it is possible. But if the answer
6 is no, it is not, in practical terms, then you will be
7 getting less than I would wish to show you and you would
8 wish to see.

9 MR O'DRISCOLL: Just in terms of the practicalities just
10 going over documents, then it is very rare in my
11 experience that a document is only ever reviewed once.
12 It is generally returned to multiple times because it
13 is about putting the documents together. So I would say
14 this, rather than this is a discrete process, this is
15 very much important. Every document will be part of an
16 ongoing process and review in any case, so ...

17 THE CHAIR: You and I are on the same task then, I think,
18 because I agree you, you cannot just read a document,
19 put it in the bin and forget about it; you have to go
20 back to it.

21 MR O'DRISCOLL: There is always going to be
22 cross-referencing. This is where it is not -- some of
23 the arguments have been about how as a discrete process
24 we experienced this very, very different from that. So
25 that is that side.

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1 On the general view, the general observation
2 I wanted to finish with is that I think it is fair to
3 say we came away from this morning's discussion with
4 a sense of hostility towards the core participants, that
5 we are the least in the process, we are second to it, we
6 will always be at the bottom. It felt very much like
7 that we will be held over a barrel with this all or
8 nothing approach.

9 I just wanted to say that, you know, we are here, we
10 are staying here, we have constantly said we are willing
11 to be engaged with the Inquiry and work within pragmatic
12 frameworks. We appreciate the context is very
13 difficult, we have looked at those documents ourselves
14 and understood, but what we cannot be is at the bottom
15 of the pile every time. It is hard to hear discussion
16 of resources when we have just spent three years on
17 police resources and we're only now addressing how to
18 handle non-state core participants.

19 I would finish with the point that it is not too
20 late to actually revise the whole process and add a more
21 root and branch examination of how the Inquiry has
22 interacted with the non-state core participants. It
23 could turn us more from just a secondary aspect of
24 the Inquiry but actually consider us as a useful
25 resource able to, as one of the centres of the Inquiry,

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1 contribute a lot more than we've been given the
2 opportunity so far. And I think there is scope for
3 further exploration by the Inquiry going forward on
4 that.

5 THE CHAIR: Do you mind my asking you in a public forum what
6 it is that if I were to come to you and say "Help" you
7 could do?

8 MR O'DRISCOLL: Are you asking me as a core participant or
9 in my other role?

10 THE CHAIR: I was listening with interest and respect to
11 what you said and I do not mind in what capacity you
12 answer my question.

13 MR O'DRISCOLL: As a core participant covered by a number of
14 undercovers, understanding of the basic material of the
15 events that went around, and where best there are
16 actually direct questions regarding particularly in my
17 own case the more nebulous networks which I have spent
18 most of my political career in, where what is on the
19 surface and what is published is not necessarily how it
20 could have been organised.

21 As an example, where the networks of contacts and
22 communication, the history of people, where they might
23 be found, identified.

24 On a wider level of it in terms of my work as
25 a researcher, it is the sheer network of contacts who

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1 are talking to each other and how those third parties
2 can be quickly found. And within that the sensitivities
3 that often come with that sort of work. This is an
4 emotional topic for a lot of people. How people are
5 approached, especially if it comes out of the blue, is
6 a big issue which we have struggle with and it's taken
7 us a while to develop protocols ourselves on how to
8 introduce people to the fact that they've been spied on,
9 and we were suggesting to you as part of the Inquiry
10 what does it mean?

11 So I think there is a broad range of things from the
12 practicalities of reaching out to people when bringing
13 them into the Inquiry, or just consider the amount of
14 background knowledge on how these groups were -- how
15 they were structured. The difference between what you
16 will see on the surface and what you will see
17 underneath.

18 THE CHAIR: Would you be willing to provide that as it were
19 blind to the Inquiry?

20 MR O'DRISCOLL: I think there would have to be some provisos
21 regarding not being -- regarding confidentiality to
22 other people. But in theory, yes. I can see situations
23 where I have privileged information that I couldn't --

24 THE CHAIR: Of course. I would not wish to put you in
25 a position where you thought you were being made to

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1 betray a confidence. I was not thinking of anything
2 along those lines. But are you able, in a public forum,
3 to give me an example of a group about which you could
4 provide, as it were, pre-emptive information to the
5 Inquiry so as to steer us in the right direction?

6 MR O'DRISCOLL: Yes, I would probably -- groups I would be
7 involved with such as Earth First!, I could probably say
8 that.

9 THE CHAIR: Right. As you will appreciate, doing things in
10 chronological order, and I can see no alternative but to
11 attempt to do it in chronological order, I have not
12 reached Earth First! yet, but before I do, it would be,
13 I anticipate, immensely helpful to have prior
14 information on what I should be looking for, and if you
15 are willing to provide it, I will welcome it with open
16 arms. I make it clear I am not going to impose upon you
17 any obligation to breach confidence or anything with
18 which you are uncomfortable. But if you are in
19 a position to do that, my answer is yes please.

20 MR O'DRISCOLL: We will be glad to assist.

21 THE CHAIR: Thank you. Do you require a pre-emptive step
22 from me coming to you to say what can you do, or are you
23 willing to take it on board and in your own time to let
24 me know?

25 MR O'DRISCOLL: I will have to consider that one. I suspect

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1 that you coming to us will be fine in the initial --

2 THE CHAIR: Yes, the difficulty with that though is I have
3 then -- the only stage at which I can claim to have
4 sufficient knowledge about it to be able to know I must
5 come to you about it is when I have read the underlying
6 documents, which in the case of deployments like Earth
7 First! will not come for some time.

8 MR O'DRISCOLL: I could think of groups going back into the
9 1970s where we have established healthy strong contacts
10 that would potentially be able to assist us.

11 THE CHAIR: That I have read about and I would personally
12 find it immensely helpful if you would be willing to
13 share your information with us at this stage. Do you
14 require a formal letter from the Inquiry asking you to
15 do it? Clearly your direct costs of providing that to
16 the Inquiry are those which are in principle
17 reimbursable by the Inquiry and I cannot require you to
18 pay for the stamps, or whatever means you send it to us.
19 Do you want a formal letter from the Inquiry to that
20 effect?

21 MR O'DRISCOLL: I think it would be helpful just to costs.

22 THE CHAIR: As soon as I know what period I am looking at in
23 the first instance, are we talking about the 1970s and
24 1980s?

25 MR O'DRISCOLL: Yes.

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1 THE CHAIR: Then expect to receive a letter in early course
2 asking you to let the Inquiry know what you can properly
3 do about the groups which you have researched. It will
4 be immensely helpful.

5 MR O'DRISCOLL: Indeed.

6 THE CHAIR: Thank you very much indeed. Is there anything
7 else you want to say?

8 MR O'DRISCOLL: No.

9 THE CHAIR: Thank you.

10 Ms Steel do you want to say something at this stage?

11 Submissions by MS STEEL

12 MS STEEL: Yes, I just wanted to pick up on a few things
13 that were said this morning. You said this morning that
14 the Inquiry intends to provide disclosure to core
15 participants at some stage later down the line. One of
16 the things that we will have to look at later on is how
17 we are going to do that.

18 I would submit that actually the time to look at
19 this is actually now and that disclosure to the victims
20 of this secret political policing early on, as in as
21 soon as possible, is both just and the most efficient
22 process.

23 It is just because we are the victims of these
24 significant human rights abuses and, despite the police
25 admitting that they committed these serious human rights

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1 abuses, we still have not seen any documentation about
2 them, or any information that is held on file about us.
3 This is a form of torment. Compounding the abuse and
4 the invasion of our privacy that has already happened
5 there is an endless worry of what is in there, what was
6 said, who knew what, who authorised it, and ultimately
7 why, why did all of this happen.

8 For many of us, this has a very significant effect on
9 our mental well-being and on our ability to trust other
10 people and for being able to process the trauma that has
11 been inflicted by us by these police officers and these
12 units.

13 I wanted to remind everyone that this is an Inquiry
14 into police conduct after significant numbers of police
15 officers committed serious human rights abuses. You
16 referred this morning to non-state core participants as
17 refusing to cooperate or refusing to commit to
18 cooperating. You said something about the process
19 requires the Inquiry to provide a raft of documents to
20 those who will not provide evidence to the Inquiry.

21 The clear indication of all of this is that the
22 victims of undercover police spying are being
23 uncooperative with the Inquiry. I want to remind you
24 that the victims are -- those who were spied on are
25 victims of serious state misconduct. So for you to just

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1 expect us to jump up and enthusiastically give you
2 everything we have when we are not getting anything in
3 return and not seeing our rights being treated with any
4 degree of respect is a very big ask.

5 The reason -- also because I think you probably came
6 on the scene after we made this, we took this initial
7 decision, I wanted to explain a bit of the background.

8 What you are referring to as us being uncooperative
9 is actually a form of self-defence. I and seven other
10 women brought a case against the police over these
11 deceitful relationships. We went through four or five
12 years of legal battles in which we gained absolutely no
13 documents whatsoever from the police or the state and
14 yet we had to divulge yet more information about
15 ourselves. We had to hand over personal letters about
16 things that had happened to us that we really had no
17 wish to share with other people. We had to go through
18 psychological interviews with psychologists and then
19 have those reports handed to the people who carried out
20 the abuse on us.

21 If you cannot see how distressing all of that is,
22 then really I do think you should take a step back and
23 think about why we might be wanting to protect ourselves
24 further from just engaging in a process which feels like
25 it is tormenting us more.

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1 We have received absolutely nothing in return for
2 the information that we have handed out, handed over to
3 the state, to the police, to those whose abused us, we
4 have received absolutely nothing in return. We have no
5 information answering a multitude of questions that we
6 had been left with about who did what, when, who knew
7 what was reported, who authorised it. It is a total
8 imbalance of power. We can see, we could see the same
9 thing happening again with this Inquiry if we were to
10 just say, yes, we will give you everything.

11 We need to see good faith from this Inquiry before
12 we want to know exactly how much we are prepared to
13 divulge to you. If you are not prepared to share
14 information with us in a timely way, and that respects
15 our human rights that have already been breached, then
16 I do not know why you expect us to throw ourselves at
17 your feet and offer up all of our private information,
18 and to everybody else around as well, to the
19 confidentiality circles that we have no way of knowing
20 who will be in and no way of knowing what will be --
21 what information will be included within those. Because
22 we have no idea what is in these reports that you are
23 talking about. You are asking us to go in blind.

24 We are committed to ensuring that the truth comes
25 out at this Inquiry but I have to say that the way that

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1 we have been treated, and it felt the same again this
2 morning, it is actually taking huge restraint not to
3 walk away. It really is. Because when you see three
4 years being given to every concern that the police have
5 got about their privacy, and then, oh, it is too much
6 time to take any concern with our privacy, that just
7 feels like rubbing our faces in the dirt. It really
8 does.

9 Just on some, I am losing ... yes, you said
10 something about writing to the core participants to ask
11 do you mind if disclosure is made of unknown data, and
12 if they do mind, the conclusion from that -- to be drawn
13 from that has to be there is plan A, that we only get to
14 see a limited selection of documents. I mean I have to
15 ask why you are taking this approach. It feels utterly
16 insulting to me and to the others who were spied on that
17 this Inquiry has spent three years going through
18 applications for police privacy, why exactly does the
19 Inquiry think it cannot afford to spend time on
20 protecting our privacy? You are effectively saying that
21 it is too great a burden to protect the privacy of those
22 who were spied on. It does not matter if sensitive data
23 about us is shared.

24 This whole Inquiry is about the invasion of our
25 privacy. Can you not see just how insulting this is?

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1 With reference to the line by line redactions, more
2 thought is needed about this but one possible solution
3 might be to disclose documents with all the names
4 redacted and then ask those who are named in them by way
5 of a letter if they object to the release of the names
6 and then they can -- they will probably recognise which
7 of the data might be about them.

8 There may be things in there and it may be with
9 public order, you know minor public order convictions
10 that you were talking about earlier, that everybody that
11 is in that confidentiality circle will be able to say
12 no, I do not mind. If there is something in there that
13 is significant about their private life, their health or
14 something like that, they may say yes I do mind, but the
15 point is that we have to be given that opportunity.

16 We basically need to be allowed to make the
17 submissions in relation to any deeply personal
18 information about us, such as medical and health issues,
19 sexuality, relationships, which the state should not
20 even have collected in the first place or stored and
21 should certainly not just be handed back to individual
22 police officers who abused us, or to those who
23 controlled them and directed them, without us even
24 knowing what was recorded and worrying what is in those
25 files about us.

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1 You also said something about we are the -- that
2 the Inquiry is the state's last shot at dealing with
3 where things have gone wrong. On that point I would
4 just like to emphasise that it is absolutely critical
5 that you get it right and for you to get it right that
6 requires the maximum participation of those who were
7 spied on to help you find the evidence that you need to
8 reach the truth. That is the only way of ensuring that
9 these significant human rights abuses are fully
10 understood and can be prevented from happening again.

11 There is no way you can do that without us. If you
12 proceed without us, this Inquiry will be a whitewash of
13 only what is in the police files and what the police
14 tell you.

15 You have to provide us with the information that
16 enables us to be able to tell you what you need to be
17 looking at and what the police are hiding from you.

18 I think that is it. Thank you.

19 THE CHAIR: I would like to explore, to the extent that
20 I can in an open forum, with you possible ways forward.
21 I have now read a fair amount of reporting about you
22 personally. Not all of it complementary, some of it not
23 disparaging of you. As usual with human affairs, things
24 are not all black and white, there are sometimes shades
25 of grey. The reporting about you contains a whole lot

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1 of references to other people as well. Some of them
2 might object to you being shown what is in the documents
3 relevant to you about them.

4 How am I to set about telling you what I want to
5 tell you about, which is to show you the documents that
6 relate to you, without doing two things. One, mangling
7 the documents by heavy redactions which there would have
8 to be; and secondly, embarking on a task which with the
9 best will in the world is not likely to be easily
10 practicable, by which I mean will gum up the Inquiry by
11 volume and detail. How am I to do that?

12 MS STEEL: Well the most obvious way to start with would be
13 to disclose the documents with those other people's
14 names redacted if they are not people who are already
15 core participants in the Inquiry. If they are core
16 participants in the Inquiry, the simplest way would to
17 be write to them and ask them if they mind if their name
18 is disclosed to me. If they are not already core
19 participants, then disclose the documents with the names
20 redacted and in the course of time if those people come
21 forward having seen notices on the Inquiry website
22 saying that this was investigated, then they can be
23 asked at that point when they come forward whether they
24 object to their name being shared with me.

25 THE CHAIR: It is not a question of name. The name is

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1 likely to be the least of the problems. Before I come
2 back to that, the assumption that documents can be
3 redacted for one purpose, then de-redacted and then
4 redacted differently for another purpose, my
5 understanding of the process that we can do, our IT does
6 not permit that to be done. But once you burn in
7 a redaction then you've got a copy of a document with
8 a burned-in redaction and any other copy of the same
9 document with different redactions or with none is
10 a separate document. So we end up with sometimes
11 a dozen separate versions of the same document and we
12 really cannot do that. It is not, it would not --

13 MS STEEL: Can I just clarify because I assume that the
14 original copy is scanned. The whole thing is scanned.

15 THE CHAIR: Where it is originally hard copy it goes on to
16 a computer system, and on the basis of that computer
17 system redactions with the police forces can be debated
18 and then resolved and then the version of the document
19 is produced with the eventually agreed redactions on it.

20 Now, that produces an original document, unredacted,
21 and a redacted document. But the process of redaction
22 for privacy reasons is going to produce multiple copies
23 of the same document which in turn will become
24 a different document. My understanding of the IT is
25 insufficient to enable me to explain this with clarity

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1 to those who do not know what they are talking about and
2 I do not know whether you are the same position as me in
3 that respect. But I have explored all sorts of
4 possibilities and I am told that the idea of doing
5 different redactions on the same document does not work.

6 MS STEEL: The point is though if you redact all the names,
7 you do not have to have whole load of different --

8 THE CHAIR: Then your name ends up redacted too.

9 MS STEEL: Well, perhaps it is possible to give within
10 a document, much like the police have N numbers, give us
11 core participant numbers, or not individual core
12 participant numbers but core participant numbers
13 within -- or numbers within a specific document by which
14 method you can then say to, as each individual, you can
15 say: you are person one in this, do you object to your
16 data being released?

17 THE CHAIR: Forgive me. It must be my fault, I have not
18 explained myself properly, but the process of putting in
19 nominals in place of names is even more time consuming
20 than the process of simply blanking them out. If we
21 have to do this on an industrial scale multiple times to
22 reflect multiple legitimate privacy interests of
23 individuals, it will overwhelm us. We just cannot do
24 it.

25 MS STEEL: I think to be fair you have just said you have

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1 come up with seven different copies of a document for
2 the sake of the police applications.

3 THE CHAIR: I did not.

4 MS STEEL: Seven different --

5 THE CHAIR: No, you misheard me or I expressed myself badly.
6 It does not matter which. What happens is, we end up
7 with two. We have the original document unredacted and
8 then the final document with the redactions that have
9 been determined as a result of a process between the
10 Inquiry and the police. So we have two.

11 MS STEEL: Okay, so we have two. Right, I am not a computer
12 expert, I am not going to pretend to be.

13 THE CHAIR: I am glad to hear it.

14 MS STEEL: But surely it must be possible for each redaction
15 to be numbered in sequential order and then for a key of
16 the redactions to say what has been redacted, and so
17 easy to put that information about what -- the number of
18 the redaction reflects XYZ information, name, whatever,
19 so you do not have to produce hundreds of copies.

20 THE CHAIR: I am afraid the process that you have described
21 just imposes an impossible burden on the Inquiry staff.
22 The headcount of the Inquiry. It is a computer system
23 which is creaking.

24 MS STEEL: I think you said something about taking a couple
25 of years but we have just had three years on police

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1 privacy.

2 THE CHAIR: No we have not. That may be the public
3 impression. I have spent a good part of the last 15
4 months dealing with anonymity applications but I have
5 also been doing a lot of other work. The anonymity
6 applications have taken that long to deal with but they
7 have not taken the whole of that time to deal with.
8 I made the point clear. If they have taken 15 months,
9 I have personally spent and the Inquiry staff have spent
10 no more than a small number of those months on doing it.
11 We have been doing other things as well.

12 For example, I have now read or looked at over
13 40,000 pages of original intelligence reporting and
14 I have done that in the last few months. A lot has been
15 going on beneath the surface. It is always the case
16 with these inquiries that a lot goes on beneath the
17 surface before it suddenly spouts to life and everybody
18 realises what has been done. We have not spent three
19 years on police anonymity applications.

20 MS STEEL: From our point of view we have been waiting three
21 years for answers and we have learnt absolutely nothing.

22 THE CHAIR: I agree.

23 MS STEEL: Wherever we are going, to me it makes sense to
24 address this issue now, because it is going to have to
25 be addressed at some point in the future and if you do

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1 it now then as you are reading through the documents --

2 I presume they are being logged?

3 THE CHAIR: Yes they are all recorded.

4 MS STEEL: I presume that as you're reading through the
5 documents you are carefully collating a list of who is
6 referred to in that document and what particular
7 significant events happened.

8 THE CHAIR: I am using steam methods which you wouldn't be
9 familiar with, namely writing things in a notebook. But
10 those with access to the computers who know what they
11 are doing are loading them onto them and tagging or
12 logging them. Not every single item can be tagged or
13 logged because we would have an index that was utterly
14 enormous if we did that and might find it difficult to
15 use, but significant features are tagged.

16 MS STEEL: There is a danger if you don't log all the
17 references to names that when you get a year down the
18 line and you think, oh, I remember that name before, you
19 then cannot find the document where you saw it.

20 THE CHAIR: I express my understanding of what is going on
21 with warning that it might not be quite right. My
22 understanding is that documents are tagged for officers
23 and core participants and groups. We are going to have
24 an adjournment shortly; if I have got that wrong I will
25 be put right. But not for every name that ever appears.

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1 It does not work like that.

2 MS STEEL: Well, one thing is clear. You are surely keeping
3 a log of all the core participants and the groups that
4 are core participants.

5 THE CHAIR: Yes.

6 MS STEEL: And the logical thing to do as the Inquiry goes
7 through the documents is to make the disclosure as and
8 when the documents are -- is to make the decisions about
9 who needs to be -- who the documents need to be
10 disclosed to, as and when things are being read the first
11 time round, and to notify the core participants that
12 these documents exist and to make disclosure as soon as
13 possible. Because as Donal said -- sorry,
14 Mr O'Driscoll said --

15 THE CHAIR: Do not worry.

16 MS STEEL: -- it takes time for the core participants to be
17 able to go through the records that we have and to speak
18 to the people that we knew 20 or 30 years ago and to go
19 through the photograph albums that we had, you know, all
20 of that takes time, and if you just decide: I am leaving
21 this for now because I want to get on with getting the
22 police witness statements, it is just going to create
23 delay later on. It makes sense to do it now.

24 THE CHAIR: This is part of the reason I wanted to raise
25 this issue and to debate it in a formal setting so that

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1 everybody could have their say on it and not just do it
2 privately behind closed doors. I do want to try and get
3 this resolved now so we know where we go. I am
4 genuinely not persuaded that there is any virtue in
5 coming to the non-state core participants first but I do
6 want to see that the non-state core participants get the
7 information relating to them as fully and as soon as
8 I can and that is why I want to explore with you, I have
9 started to explore with you how I might do that.

10 You have made a suggestion, which I need to go back
11 and consider, about notifying everybody else who is
12 named in documents which you would wish to see because
13 they refer to you and vice versa. That may or may not
14 be possible. You will have to let me ask the team about
15 that. But if it were to be possible, would you be
16 content that I should do that in relation to you, that
17 I should say to you there are these documents, they
18 cover this period, they relate to this group or
19 organisation, can I show it to other named -- other
20 individuals? I probably cannot name them without asking
21 their permission to name them. Do you see we end up in
22 an unbreakable conundrum?

23 MS STEEL: I think that it would probably need to have more
24 detail with that. I mean, for example I think we would
25 need to list the meetings and events that are being

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1 reported on so that I am not -- I have no idea what is
2 in those files. Having had a relationship with an
3 undercover policeman and having lived with him over
4 a year, you know, there are hundreds of conversations,
5 thousands of conversations that I had with him.
6 I cannot possibly say, yeah, I am fine with all of those
7 conversations being shared to anybody, but if you came
8 to me and said "I have got the note of this meeting and
9 at this meeting you are recorded as being present",
10 I can have a reasonable expectation that I probably did
11 not make any deeply personal announcements at that
12 meeting. I do not know. I mean it is very difficult
13 to go into this blind.

14 THE CHAIR: I know it is. I have not yet read any document
15 to do with your relationship with Dines. I have not got
16 that far in the documents yet. I have read reports
17 about you, and as I have said, they are sometimes
18 unflattering and sometimes not unflattering. Sometimes
19 they merely report what the officer says you did or
20 proposed.

21 MS STEEL: And whether they are accurate or not. I do know
22 that the limited amount that the Inquiry gave to me did
23 contain several inaccuracies.

24 THE CHAIR: I do not for one moment doubt that. It would be
25 amazing if reporting at the time was fully accurate. It

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1 is highly unlikely.

2 MS STEEL: People have to justify or seek to justify what
3 they were doing in those groups so they may say all
4 sorts of things.

5 THE CHAIR: This is contemporaneous reporting, this is not
6 after the event statements.

7 MS STEEL: Yes, but they want to preserve their jobs.

8 THE CHAIR: Most of them have long since retired.

9 MS STEEL: No, but at the time they wanted to preserve their
10 jobs.

11 THE CHAIR: Then, yes, I see what you mean, yes. That all
12 depends upon a number of things, including the nature of
13 the management that was in place and what the views of
14 the managers were. I am aware of undercover officers
15 whose time in the Special Demonstration Squad was
16 terminated prematurely and what the reason for that was
17 said to be. But they are a handful. But anyway, we are
18 getting further into the detail than I think I would
19 like to at this point.

20 MS STEEL: The other issue is that -- I mean one of the
21 things you raised this morning was about convictions for
22 minor public order offences. Now, for example if you
23 include information about the categories of sensitive
24 data when you write to people, that may help them to
25 make a decision. People may be happy to have their

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1 convictions for minor public order offences disclosed to
2 everybody that was in that confidentiality circle, that
3 group at the time. They may not be happy to have their
4 medical information or their sexual history disclosed.

5 So I think that -- it is very hard to go into this
6 without knowing what is in there and just say yes it is
7 all fine. There has to be a level of information that
8 enables people to make a --

9 THE CHAIR: If the Inquiry were to say to you -- I am not
10 now talking about your relationship with Dines but what
11 happened before that started. If the Inquiry were to
12 say to you, in relation to -- and I name the group
13 because I think it will come as no surprise to
14 anybody -- wait a minute, perhaps I have got to be
15 careful so as not make a statement which you might not
16 wish to me to make. We'll have to call it a group that
17 you will readily recognise and containing individual --

18 MS STEEL: I have been in a lot of groups.

19 THE CHAIR: I am well aware of that. But I am trying to
20 test your suggestion, which is helpful, by reference to
21 a particular event that is recently in mind. But I will
22 not name the group because that may cause problems. If,
23 as I have, I have got documents which mention you and
24 other core participants in relation to a particular
25 group at a particular time -- I am talking about the

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1 mid-to late 1980s at the moment -- would you mind if
2 your name and the details of what was reported upon you
3 were disclosed to other named members of that group,
4 without naming them, because I cannot, for their own
5 privacy reasons, what would your answer be?

6 MS STEEL: If we are all said to have been reported as being
7 part of a group, then in principle I would have no
8 objection to the other people who are named in those
9 reports as being in that group, having my name disclosed
10 to them. But if there is a whole lot of personal
11 information in there about either my health or, I do not
12 know, I really do not know what might be in there.

13 THE CHAIR: I know. In a public forum it is very difficult
14 for me to describe it to you. My understanding of what
15 you said is if it concerns intimate personal
16 relationships, you would wish to have those disclosed to
17 you beforehand.

18 MS STEEL: Yes.

19 THE CHAIR: Before you were invited to consent. But
20 anything short of that -- I am leaving aside health for
21 a moment, I do not know whether you suffered any health
22 problems, I have not encountered any yet and I hope
23 there were not any, but leaving that aside, if it is
24 politics and minor convictions, your answer would be you
25 do not mind others in the same group who are core

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1 participants being shown the documents. Because that is
2 the only way ahead as far as I am concerned which does
3 not impose a burden that cannot be discharged on
4 the Inquiry.

5 MS STEEL: In principle I think so far, I think I would
6 probably prefer to see it in writing. I will be able to
7 think about it and -- yes --

8 THE CHAIR: Yes.

9 MS STEEL: -- before moving on.

10 THE CHAIR: Of course. Forgive me for putting you on the
11 spot but I often find that exchanging views across
12 a courtroom actually gets people closer to what their
13 bottom line is than doing it in correspondence, which
14 tends to produce rather short and acerbic responses.
15 But I will think about what you said and I will discuss
16 with my team whether it is practicable or not. If it
17 is, it is a course I would like to adopt. I still have
18 this problem about privacy rights though which might
19 impose an unmoveable obstruction.

20 MS STEEL: It does seem right that the first step is to list
21 all the -- list all the events and certainly in terms of
22 the core participants notify the core participants which
23 events they are recorded as having been present at, and
24 then they may be quite happy to write back to me and
25 say, "Yes, I am happy for you to disclose that I was at

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1 that event" to everybody else, I am happy.

2 THE CHAIR: Events I am afraid is a level of detail which is
3 too great to be practicable. I mean, if you were
4 involved in the activities of a group in a period, then
5 that ought in principle to refresh your memory about
6 what events occurred during that time. You will find
7 them described in detail accurately or inaccurately in
8 the reporting.

9 MS STEEL: I do not know. I could give you an example from
10 the McLibel trial where we had private investigators
11 infiltrating under Greenpeace meetings and one of the
12 private investigators actually came into court and gave
13 evidence that I had said XYZ on a particular date.
14 I then looked up that date and discovered, because
15 I found a postcard from the time, that I was actually in
16 Scotland, not at the meeting at all. So sometimes
17 particular dates enable you to say this is a total load
18 of rubbish, I wasn't even there.

19 THE CHAIR: You are I think addressing a later stage in it,
20 which is how accurate are the reports. It is whether
21 they can be shown to others that I am concerned with.
22 Whether you can see everything that relates to you with
23 the names and details of a lot of other people in it,
24 and whether they can see, or the core participants can
25 see reports about you with a whole lot of details about

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1 you in it.

2 MS STEEL: Yeah, I mean it may be that you just want to list
3 the names of the groups. I am not actually sure why it
4 would be so difficult to list the dates of the meetings,
5 because presumably you are keeping a log of them, and
6 all it is, is doing a cut and paste from this list of
7 meetings that we have got in this here into this letter
8 that we are writing to these people here.

9 THE CHAIR: I am afraid that dates of meetings and things
10 are not tabbed as I understand it on the computer.

11 MS STEEL: They are not?

12 THE CHAIR: The documents are there and I personally make
13 notes of them, but if I am to be a sort of superior
14 notifier of these things it is going to take me rather
15 a long time and I will not have any day time for the day
16 job.

17 MS STEEL: I would have thought that without having the
18 dates listed, how on earth do you then go back to find
19 the meeting when XYZ was discussed?

20 THE CHAIR: Because we have got the documents, that shows
21 what was reported about the meeting. These are problems
22 down the line as to what you can say about an immense
23 mass of detail which I very much hope can be disclosed
24 to you.

25 Would you like -- I know the shorthand writers are

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1 MS STEEL: Right.

2 THE CHAIR: Exactly how we do it does require discussion.

3 MS STEEL: Yes.

4 THE CHAIR: I really do want to show everybody as much as

5 I can and I am searching for a practicable and lawful

6 method of doing that. Your suggestion as a first step

7 is very helpful. I am grateful for that.

8 MS STEEL: I am grateful, thanks.

9 THE CHAIR: Thank you. Who is next? Mr Hall?

10 Submissions on behalf of the Metropolitan Police Service by

11 MR HALL

12 MR HALL: Sir, the focus of my submissions is going to be

13 the judicial capacity exemption. The reason for making

14 the argument is, firstly, in case you are minded to go

15 with the regulatory exemption that that's overturned,

16 for example by way of Judicial Review. Secondly, that

17 you might be against us on the way in which to the

18 extent that exemption applies, in other words the case

19 by case point, and thirdly and in any event most

20 importantly, our submission is that that judicial

21 capacity exemption is the best fit for what you are

22 doing and we submit that there must be scope within the

23 Data Protection Act for effective public inquiries

24 remaining possibly after the advent of the Data

25 Protection Act.

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1 Our invitation to you, and I will come to the
2 detailed language of the relevant part of schedule 2 in
3 a moment, is that you can take a broad and non-technical
4 approach to the language of the Data Protection Act, of
5 course we accept there is very strong public interest
6 and personal interest in the correct handling of
7 personal data, but just as in the journalism cases that
8 we cite in our skeleton arguments, there is no principal
9 reason why data subject rights should not give way in
10 favour of effective and timely inquiries into matters of
11 real public concern.

12 That is of course not to minimise any of the
13 concerns that have been articulated by non-states and
14 others. One can deal with those under the umbrella of
15 fairness and article 8. This is simply directed at: are
16 you subject to those data subject rights?

17 In our submission when one steps back and considers
18 the broader public interest, it is both clear first of
19 all that an exemption of some sort must apply, simply
20 must apply, otherwise public inquiries of this sort are
21 going to be impossible to run; and secondly, it must be
22 a complete exemption rather than a "to the extent that"
23 exemption, and that is what leads us ultimately to
24 submit that the best fit is the judicial capacity one.

25 This is, we submit, a pure matter of interpreting

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1 domestic law. Obviously, one is informed by the
2 principles that apply when one is looking at a domestic
3 instrument that is implementing an international, an
4 European Union instrument. But there is nothing in the
5 General Data Protection Regulation itself which prevents
6 a member state creating an exemption which covers public
7 inquiries if they so choose and doing so under the
8 umbrella of judicial capacity.

9 In terms of the general approach, then I will come
10 to the detailed words in a moment, our general approach
11 is that, making the concession, it is right when one is
12 looking at data protection, one is dealing with
13 fundamental rights and that will guide the correct
14 interpretation of the statutory language. So a narrow
15 scope of the exemptions only derogating to the amount
16 actually necessary.

17 But there is also a fundamental interest in the
18 state having effective inquiries and that too allows
19 you, sir, to take a broad and purposive approach when
20 interpreting the Data Protection Act. It would not be
21 right to take a narrow or over-technical view of the
22 words "judicial", and in headline form, and I will come
23 to it in more detail in a moment, we say you cannot read
24 judicial as simply meaning the judicial power of the
25 state as vested in Her Majesty's judges. It means we

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1 say more than that.

2 The issue is a stark point. Although one can to
3 some extent reconcile the work of the Inquiry and the
4 interests of data subjects, they obviously do not always
5 pull in the same direction. So one has a good example
6 of that when one looks at data which is not necessary
7 and relevant to your task but is nonetheless personal
8 data. That might require, if you are a data processor
9 subject to all of these rights, you would spend a lot of
10 time processing potentially unnecessary data, for
11 example literature created by groups which happens to
12 name individuals, that could be personal data, you would
13 have to look at that in conscientious detail first of
14 all to determine is it personal data, and then do I have
15 to give effect to these rights or not.

16 That would divert an inquiry away from its task of
17 relevant and necessary. Of course it can be argued that
18 from time to time, and the point has been made, that the
19 data protection rights of individuals may march in sync
20 with your task. But that will not always be the case
21 and this is a matter of principle. One has got to
22 approach this head-on and assume that they may be
23 pulling in completely separate directions.

24 We also by way of general proposition invite the
25 Inquiry to face up to the impact in a slightly deeper

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1 level of what the application of full data subject
2 rights would mean. It would in effect require the
3 Inquiry to be treated as a repository of personal data
4 over which data subjects were able to exercise their
5 rights despite the fact that the vast majority of that
6 data derived from bodies, such as, the Commissioner, who
7 are already repository is of that data, and the Inquiry
8 would become a secondary holder of information, in effect
9 standing in place of the primary holder.

10 THE CHAIR: Apart from that which we know about our staff
11 and contractors and that which we have been provided by
12 data subjects, all our data comes from third parties and
13 we only hold it for one purpose, which is to fulfil the
14 terms of reference of the Inquiry.

15 There has been and will in the future no doubt in
16 some cases be a subsidiary purpose of determining
17 people's rights for example to family life or to
18 physical integrity or even in extreme case to life, and
19 there I readily concede I may well be acting in
20 a judicial capacity. But in relation to the rest of it
21 I am simply dealing with a whole lot of information
22 provided by third parties to try to get to the truth of
23 what happened and make recommendations about the future.

24 MR HALL: Yes, and it is because you are repository of so
25 much data that one might have the situation arising,

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1 unless we are right about the exemptions as arose in
2 July of 2017, when one had the slightly odd situation of
3 the Inquiry being asked to provide, subject to access
4 request information, within a 14-day timetable, the
5 Metropolitan Police, whose information it originally was,
6 being given incredibly short notice to come and explain
7 why we thought that certain information either was not
8 personal data or that the exemptions applied, and that
9 situation which was not a tenable situation.

10 THE CHAIR: We undertook that exercise in essence as
11 a learning exercise. We knew that we only had data on
12 four people at that stage of the 200 who made requests
13 and we wanted to see what was involved. It took us
14 130 hours to deal with four requests.

15 MR HALL: The effect on your task, your, we would suggest
16 judicial task, would be extraordinary if that was to be
17 repeated. No doubt if one had one's time again one
18 would say simply to the Met, well give me less data,
19 because of the risk your task would be derailed by
20 having to consider hundreds of subject access requests,
21 which cannot be right.

22 THE CHAIR: I am not willing to reduce the amount of
23 information that I receive to avoid data protection
24 requests. If, having got what I need, the data
25 protection requests overwhelm the function of

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1 the Inquiry then the Secretary of State will have to
2 make a decision about its continuance.

3 MR HALL: Well, that possibility should not be the case
4 because you are exempt. As simple as that. Like
5 a court or a tribunal. It is worth facing up to the
6 alternative.

7 THE CHAIR: Let me understand your argument because it is
8 not one that I at the moment share.

9 MR HALL: Well, first of all nothing in the European Union
10 instruments which prevents a state saying that judicial
11 can include inquiries.

12 THE CHAIR: Our legislation could provide that there will be
13 a judicial inquiry into these events.

14 MR HALL: And it could lawfully provide under one of the
15 Data Protection Act exemptions that inquiries are exempt
16 and it could do that expressly or it could do that by
17 a reasonable interpretation of the words that Parliament
18 has in fact chosen to use. There is nothing in the
19 General Data Protection Regulation that would prevent
20 that from being the case, as far as we mean it.

21 This is a supranational instrument. The Commission,
22 when they proposed the instrument, would have understood
23 that Member States would have lots of different ways of
24 dealing with judicial type inquiries, or public
25 inquiries. They would not have said well if you make

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1 actual findings and determine rights you fall on one
2 side of the line; if you make findings but only make
3 recommendations you fall on the other.

4 So the General Data Protection Regulation is
5 entirely neutral as to whether or not my argument is
6 right or wrong. The argument turns on the construction
7 of the Data Protection Act, in other words those
8 exemptions that Parliament decided to create under the
9 authority of article 23 of the General Data Protection
10 Regulation.

11 THE CHAIR: Yes.

12 MR HALL: So, it's a matter of domestic statutory
13 interpretation and as I headlined, our simple point is
14 you cannot read judicial capacity in the narrow way that
15 suggests it is limited to the judicial power of the
16 state or the sovereign. I think some of the arguments
17 have now been fairly well ventilated. Of course we
18 recognise under section 2 of your Act that you cannot
19 determine liability, but that is not an end to the
20 matter.

21 The only substantive argument that has been against
22 our proposition of that capacity exemption applies is
23 the Australian case referred to by the Information
24 Commissioner's office, so if you've had a chance to read
25 that case, you will appreciate that was a case about

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1 a prohibition in the Australian Constitution that
2 prevented judicial power being conferred on bodies other
3 than courts. That was the context in which those dicta
4 from the Chief Justice of Australia were made. To say
5 nothing about judicial capacity under the Data
6 Protection Act.

7 Now, we submit the best way into this issue is by
8 reference to coroners. Coroners are judicial
9 officeholders, so you have the Jewish burial case in the
10 bundle, paragraph 71.

11 THE CHAIR: I accept that proposition, certainly in the
12 context of a judicial review it is accepted as an
13 established proposition.

14 MR HALL: I am grateful. Again, sir, you have the point that
15 under section 10 of the 2009 Act a jury may not frame
16 its verdict in a way that appears to determine civil or
17 criminal liability. So pretty close to section 2 of the
18 2005 Act.

19 THE CHAIR: Yes.

20 MR HALL: Secondly, despite not being as it were ordinary
21 judges, or certainly not judges who determine rights and
22 liabilities, coroners have, we hear, signed up to the
23 judicial data panel. Our submission is you should not
24 read too much into how other bodies at this early stage
25 of adoption of the Data Protection Act have decided to

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1 act, but it is interesting that the coroners have
2 decided that they can fall within the judicial palette.

3 Thirdly, in our written submissions and Mr Sanders
4 has made similar points as well, there are a huge number
5 of similarities between the tasks conducted by public
6 inquiries and coroners. And same touch and feel point,
7 it's obvious, one only look around today's courtroom
8 hearing to see the similarities between what you are
9 doing and what the judge are doing.

10 The point we have not made in our written
11 submissions but I would like to develop it is simply
12 impossible to draw a sharp distinction between coroners
13 and public inquiries because of the effect of schedule 1
14 of the 2009 Act. So schedule 1 of the 2009 Act deals
15 with a situation in which an inquest is started but it
16 is suspended and in effect -- my words -- taken over by
17 the chairman of a public inquiry in the 2005 Act. We
18 can all think of those type of situations. At the end
19 of the inquiry, either the inquest is never resumed or
20 if it is resumed, see paragraph 9, subparagraph 11, the
21 findings of the inquiry are, again my words, in effect
22 incorporated into the inquest.

23 This demonstrates that, at least, in respect of
24 inquiries into death there is no material distinction
25 between a chairman of a public inquiry and a coroner.

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1 And if a coroner is a judicial officer, it simply makes
2 no sense to say that the chairman of an inquiry in that
3 category of case is not also a judicial officer. If we
4 are right about that, then we say we must be right about
5 every public inquiry.

6 THE CHAIR: That is arguing from the particular to the
7 general.

8 MR HALL: Yes.

9 THE CHAIR: I find it a little difficult to understand that,
10 for example, the inquiry into contaminated blood fits
11 neatly into that analogy.

12 MR HALL: I would not argue from that particular analogy,
13 but if I am right about coroners then I must be right
14 equally about contaminated blood. There is no need to
15 be frightened about accepting that judicial capacity
16 exemptions apply. The policy reasons why I invite you
17 to apply the exemptions in this Inquiry would probably
18 equally apply for the contaminated blood inquiry which
19 would obviously also deal with large numbers of
20 individuals' personal health details.

21 So I do not shy away from that. But it does
22 illustrate that it is quite hard to draw a sharp
23 distinction, as I think the Information Commissioner
24 seeks to do, between one set of proceedings and others.

25 THE CHAIR: Or under the predecessor act, the Franks

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1 Inquiry. That was a public inquiry and it is difficult
2 to see how that was judicial even in the loosest of
3 senses.

4 MR HALL: I cannot remember off the top of my head what the
5 Franks Inquiry was.

6 THE CHAIR: How we got into the Falklands War. The Chilcot
7 Inquiry, how we got into the Iraq invasion.

8 MR HALL: The answer is not to worry too much about the
9 ambience of the word judicial, but, and this is the
10 Official Receiver case, the decision of
11 Mr Justice Stadlen we can cite it, but to ask first of
12 all what is the purpose of the exemption contained in
13 the Data Protection Act and work out what the policy
14 behind that exemption is likely to have been, and then
15 having done that, having identified the policy, to work
16 out whether or not that is a fit to the function that
17 you are performing.

18 The policy reason for the judicial capacity
19 exemption appears to have been to allow certain
20 individuals to get on with their jobs. It is not an
21 exemption that existed under the 1998 Act, but it does
22 exist in 2018. We have referred I think in our written
23 submissions to one of the explanatory notes. If I can
24 just -- and it is paragraph 5 of our second set of
25 written submissions.

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1 We refer to explanatory note 608 on the Data
2 Protection Act which refers to one of the exemptions
3 stating this is to ensure the administration of justice
4 is not undermined by the application of the General Data
5 Protection Regulation.

6 In our submission, it is very hard to read the words
7 administration of justice as simply being limited to
8 judges who exercise judicial power of a state, but would
9 also encompass that broad range of individuals who carry
10 out vital public functions with this independent
11 capacity who are doing so driven by the conclusions that
12 they reach, not by the demands of data subjects, not
13 hedged in by concern about whether we have to comply
14 with this data right or that data right, but with a free
15 hand to carry out a rational inquiry.

16 So that is what we say is the function. So if
17 I could perhaps refer you to one passage, it is the only
18 case I need to take you to. It is in the Official
19 Receiver case, Howard, which is tab 25. Sir, the
20 context of this was to decide whether or not one of the
21 duties under the Equality Act applied to the Official
22 Receiver and the Official Receiver relied upon
23 a judicial exemption within the Equality Act, not
24 exactly the same terms but a similar issue, and if I can
25 take you to paragraph 153, we submit this is a rather

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1 helpful approach.

2 What the judge said was:

3 "In my judgment it is important to focus on the
4 particular function exercised by the OR which is alleged
5 to attract the public sector equality duty, what would
6 be the consequences of it being held to attract that
7 duty and whether such consequences are likely to have
8 been intended by Parliament. This in turn involves
9 considering the nature and policy of the public sector
10 equality duty and the policy or principle underlying the
11 Parliamentary intention to exclude it in the case of the
12 exercise of a judicial function including a judicial
13 function conferred on a person other than a court or
14 tribunal."

15 So going through those four considerations in turn,
16 what is the function exercised by the Inquiry which is
17 said to attract the Data Protection Act duties? It is
18 the function to carry out an investigation of public
19 interest. What would the consequences be of attracting
20 those duties? Massive cost, massive delay, massive
21 frustration for the Inquiry. And what is the nature and
22 policy of the excluding those exercising a judicial
23 capacity from the Data Protection Act? It is to ensure
24 those independent bodies are not diverted from their
25 task by extraneous considerations and obligations.

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1 Our submission is it's really impossible to see why,
2 given that general policy which is reflected in
3 section 32 of FOIA for example, exempting inquiries
4 expressly, why would Parliament have chosen to
5 distinguish between the position of you, sir, as a
6 chairman of a public inquiry and the position of an
7 employment judge?

8 There is no real rational basis for why Parliament
9 would say let us exempt in one but make the job of the
10 other incredibly hard, if not impossible.

11 THE CHAIR: That is unless the qualified exemption afforded
12 by paragraph 7.2 applies, and if it does whether it
13 applies only on a case by case basis or applies,
14 according to its ordinary words, to applications or the
15 application of the provision.

16 MR HALL: Yes I will come briefly to that in a moment but
17 I mean --

18 THE CHAIR: If it does apply then this argument rather falls
19 by the wayside, I think. You cannot say you have to
20 have it because if you do not it is chaotic and you
21 cannot fulfil your function.

22 MR HALL: I agree. In a way whatever exemption applies is
23 great as long as it works, but I do reiterate the
24 broader point, which is: why would Parliament have
25 decided -- I made the point.

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1 THE CHAIR: Yes you did. A great deal has been made about
2 why should Parliament have changed the qualified
3 exception in the way that it did and did it intend to
4 include public inquiries in it? With the opposite
5 proposition which you and I have both made, which is why
6 on earth can it be suggested that Parliament did
7 something to make the life of public inquiries more
8 difficult?

9 MR HALL: Yes. The only other things on the judicial
10 capacity point is just to refer to one of the rulings in
11 the Bloody Sunday case which is in bundle D. It is one
12 of those compendious rulings that Lord Saville made. We
13 can see from the title the range of issues that he was
14 looking at, but I wanted to draw attention to the words
15 that Lord Saville used about his exercise which are on
16 in internal page 70.

17 THE CHAIR: Which tab reference is this? Part D, right.

18 MR HALL: D5.

19 THE CHAIR: Thank you. Got it. Yes. And it is page?

20 MR HALL: Page 70.

21 THE CHAIR: 70, right.

22 MR HALL: If I can invite you to read the second paragraph
23 where Lord Saville starts off by saying:

24 "Few would quarrel with the proposition that a
25 tribunal when exercising in its powers or discretion on

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1 any matter must do so judicially and in accordance with
2 proper principles."

3 Then the second sentence says:

4 "It seems to us this arises from the very nature of
5 a tribunal of inquiry and general principles of
6 justice."

7 Then the end of that paragraph:

8 "For example, the fact that Parliament said nothing
9 about tribunals acting judicially in accordance with
10 proper principles could hardly mean that Parliament did
11 not intend tribunals to act in this way."

12 When one is thinking about interpretation of
13 a statute, I think one has to recognise that there is --
14 and here one has a very distinguished former chairman of
15 an inquiry -- there is a breadth of the use of the word
16 judicial and one cannot confine it to those narrow
17 examples of courts determining issues between
18 individuals. It is undoubtedly a sense that the task
19 that you are doing is a judicial task and therefore when
20 you are performing your task you are acting in
21 a judicial capacity.

22 THE CHAIR: I do not doubt that I do act in a judicial
23 capacity in limited instances and for limited purposes.
24 I am determining people's rights and I must do so in
25 a manner which is fair to them and gives them an

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1 opportunity of make representations about them.

2 Anonymity for example. In that respect, I am acting in
3 a judicial capacity, I agree. But when I am inquiring
4 into what happened, I query whether I am.

5 MR HALL: If you are in a judicial capacity, I mean, after
6 all, when you've got an anonymity order which determines
7 rights, you have to keep it under review. It is rather
8 artificial to suggest that you take that judicial
9 capacity hat off at any stage of the Inquiry.

10 THE CHAIR: I do not think it is. I am entitled subject to
11 statutory principles set out in the principal Act, the
12 2005 Act, to go where I choose to go, in an effort to
13 find out what happened and to make worthwhile
14 recommendations for the future. In doing that, I very
15 much doubt I am acting in a judicial capacity. If
16 I discover things that are relevant I am not, I think,
17 under an obligation, as a quasi judge, to let everybody
18 who may have any input into it have their say.

19 MR HALL: There is no need to apply the paradigm of a judge
20 under the Civil Procedure Rules and ask yourself do
21 I measure up to that in every respect. Of course you do
22 not. It is sufficient that you are independent, that
23 you are acting under a bespoke statute that deals with
24 information, very much the way the Civil Procedure Rules
25 deal with disclosure, so you have sections 17, 18 and

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1 19. It is sufficient you do so fairly, that you have
2 many of the characteristics of a judge, the fact that
3 you are investigating ought not to be the end of it.
4 Because after all some courts and tribunals do have an
5 invested function.

6 Baroness Hale has talked about this in certain of
7 her judgments where she said that tribunals, proper
8 tribunals, first tier tax tribunals for example, may act
9 inquisitorially. And one should not be frightened of
10 being both in a judicial capacity and also following
11 one's nose where one wants.

12 Ms Mannion makes a point which I ought to make. The
13 reason why our exemption is the better fit for
14 the Inquiry than paragraph 7 is that it is much more
15 likely that Parliament would want an inquiry to be
16 absolutely fair in the same way as the judge is
17 absolutely exempt, because then you are so much less
18 subject to the pressures of thinking about compliance
19 with the General Data Protection Regulation or Data
20 Protection Act. You don't have to worry and you can act
21 rigorously, independently, simply looking at the truth,
22 which is your function, absolute exemption is exactly
23 the right fit, whereas we will come on to it, but to the
24 extent that exemption is less of a fit and will require
25 some diversion and maybe some defensive thinking in the

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1 Inquiry: did we ought go through this battle. We say it
2 is the best fit and those are our submissions on that.

3 THE CHAIR: Yes. I would be delighted if you are right but
4 I fear you are not.

5 MR HALL: Well, can I turn then to the Lord point. You have
6 our written submissions and I am not going to repeat
7 them. If I can just make four points.

8 First of all, there is nothing in article 23 of the
9 General Data Protection Regulation that rules out the
10 approach that we suggest. In other words, what is the
11 function of the Inquiry? Will the function of
12 the Inquiry be damaged by having to look at any -- by
13 complying with any of the subject rights? You have to
14 look at Mr AA and Mr BB and so forth. There is nothing
15 in the European Union instrument that prevents that
16 approach.

17 Secondly, you are under a duty to treat individuals
18 equally and fairly so it is quite hard to see how you
19 could arbitrarily say I am going to accord full rights
20 to these ones and these ones but not then to everybody
21 else.

22 So by a matter of logic, if you know you've got
23 a thousand data subjects it is an all or nothing
24 situation. You could not accord rights to some but not
25 others. So you can say here are a thousand people,

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1 I cannot possibly in the time available and with the
2 resources available to me comply with all one thousand
3 people's data subject rights, therefore it is open to me
4 to find that the exemption applies. We say there is no
5 reason why you cannot take that approach.

6 Thirdly, it may be the case, I do not know if I have
7 understand what Mr Facenna was saying, that the
8 non-state core participants do accept that some sort of
9 generalised approach is acceptable because they have set
10 out what they call their pragmatic proposals, which as
11 we understand them is inviting you to say in every case
12 bar none: I will approach it in this particular
13 qualified way. In other words I am not proposing to
14 apply the full measure of the exemptions to every
15 individual.

16 So it seems to us there may be an element of common
17 ground between us. Of course we have set out in the
18 case of Lord there is no support for the proposition
19 that one cannot have an inquiry by inquiry broader case
20 by case approach to the exemption.

21 We note that certain references have been made in
22 submissions to the volume of documents that you have and
23 the practical impact that complying with subject access
24 requests would have. If this matter is going to result
25 in a judicial review, and if the Inquiry is against us

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1 on the question of judicial capacity, we do suggest
2 respectfully it would be sensible for the Inquiry to try
3 and estimate in concrete terms what the impact would be
4 of compliance in terms of cost and time as far as is
5 possible to do so.

6 THE CHAIR: Yes, I mean that is something I suspect we would
7 have to do were there to be litigation about this,
8 whether my present view about the scope of the exemption
9 is right or not.

10 MR HALL: I am grateful. So sir, that is all I was going to
11 say about how one approaches the exemption under
12 paragraph 7. Then I have got some short minor points,
13 then I will be done. Can I deal with the crime and
14 taxation exemption, paragraph 2 of schedule 1.

15 THE CHAIR: That depends upon whether you've got them for
16 the purpose of crime, prosecuting, investigating
17 et cetera, prevention. If you have, then as controller
18 two I am in effect in the same situation as you are.
19 But the problem is that that can only apply to those
20 situations where you have got them for that purpose.
21 You could hardly maintain that you got them from the
22 1970s for that purpose now.

23 MR HALL: I agree it's not a cure-all, but we do take issue
24 with the submissions of the non-state core participants
25 and the Information Commissioner, who say that the

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1 exemption applying to controller two cannot possibly
2 apply because the Inquiry does not have as its purposes
3 one of those matters set out in paragraph 1 --

4 THE CHAIR: We are secondary and we are secondary upon your
5 purpose and we cannot always know what your purpose is.
6 We have to make a judgment about it when you tell us.
7 But I will be surprised to hear from you that your 1970s
8 documents have anything to do with the prevention,
9 detection or prosecution of crime.

10 MR HALL: That is not the point I am addressing at all.

11 It's just to do with a point of detail which is your
12 statutory purpose of processing is under the Inquiries
13 Act, but if by processing in a particular way it would
14 in fact damage one of those matters set out at
15 paragraph 1, then the exemption in principal would be
16 open too but I accept the point it may not be available
17 very much in practice.

18 Two final points, then that is it from me. The
19 first is to address the slant in the non-state core
20 participants' written submissions that officers are
21 poring over the data of non-state core participants.
22 The word poring is used. In reality it's likely most
23 officers would rather not be poring over --

24 THE CHAIR: I mean seeing some of the investigation packs,
25 I would be dismayed to receive one and asked to remember

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1 what happened all those years ago.

2 MR HALL: Exactly. They are being asked to account for
3 their actions in a way that is not very pleasant for
4 them, and the implication that the consideration of data
5 by officers aggravates the original obtaining of data is
6 with respect misplaced.

7 Then the final observation is to invite caution
8 about any compromise or pragmatic solution. It is
9 a great idea to explore lots of different possibilities,
10 but one will bear in mind that those that are being
11 articulated either on behalf of the non-state core
12 participants or on behalf of those individuals who spoke
13 just now in court are only being articulated on behalf
14 of certain individuals and even for non-state core
15 participants there is quite a broad range of views and
16 not all even non-state core participants necessarily
17 agree with the proposals in the submissions of my
18 learned friends.

19 THE CHAIR: That may be right, but I want to have their
20 information and cooperation if they are willing to give
21 it to me and I am willing to do what is practicable and
22 lawful to encourage that to happen. And bluntly I am
23 not bothered if there are minor technical problems on
24 the side. I will address them if they arise and hope to
25 find a lawful way round them. But my objective is to

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1 find out what happened and to that end what the
2 non-states can tell me who were intimately involved in
3 all of these deployments is of immense value. I want it
4 if I can get it.

5 MR HALL: Indeed, you will do that by deploying your powers
6 under the 2005 Act and, we invite, without having to be
7 too worried about the provisions of the Data Protection
8 Act.

9 THE CHAIR: I hope to goodness that that is right. Because
10 if it is not I am in very, very great trouble unless
11 there is a further statutory amendment.

12 MR HALL: Those are our submissions.

13 THE CHAIR: Thank you. Who goes next? Mr Sanders?
14 Submissions on behalf of the Designated Lawyer Officers by

15 MR SANDERS

16 MR SANDERS: Thank you sir. I just want to address you very
17 briefly on the two exemptions which we have said are
18 engaged in this case. Before doing so, just to make the
19 general point that we make in our written submissions
20 which is that the Inquiry being exempt from the subject
21 access provisions in the General Data Protection
22 Regulation is not inconsistent with and does not in any
23 way frustrate the purpose of the General Data Protection
24 Regulation. So it is not inapplicable to the principles
25 of the General Data Protection Regulation for

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1 the Inquiry to be exempt from the subject access
2 provisions.

3 The main concern pressed by the non-state,
4 non-police core participants is in relation to Special
5 Branch files. The main interest here is in what
6 information, what personal data about individuals was
7 processed by the Met. The Metropolitan Police of course
8 is a data controller and those individuals can make
9 subject access requests to the Metropolitan Police.

10 THE CHAIR: Making them to the Inquiry is actually unlikely
11 to produce the results they want because the Inquiry
12 does not have a set of Special Branch files. It has
13 a great deal of intelligence that was originally
14 contained in those files, but it does not have Special
15 Branch files. It asks for and receives bits from them
16 from the repository IMOS, but it does not have them. So
17 asking us for file RF400 number, done by year, let us
18 say 83, 404, will not produce a sensible answer. We
19 will not have it.

20 MR SANDERS: No, our point is that insofar as the
21 General Data Protection Regulation confers an
22 entitlement to access to that information or an
23 entitlement to have it rectified or erased or what have
24 you, that right can be exercised and enforced as against
25 the data controller that collected the data and is

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1 processing it.

2 If, for any reason, an exemption applies and it
3 cannot be obtained from the Met, the General Data
4 Protection Regulation has been satisfied and there is no
5 reason of principle why the General Data Protection
6 Regulation should apply in this way to the Inquiry so as
7 to make information obtained from another data
8 controller available indirectly.

9 Likewise exercising a right in relation to -- an
10 objection in relation to processing, or seeking to have
11 you erase or correct data that you are processing is
12 pointless if the original data, the original copy
13 remains in the hands of the Metropolitan Police in its
14 original form.

15 THE CHAIR: I would have, I think, an unanswerable response
16 to an application to erase or correct data, namely that
17 I cannot do my job without the data in its original
18 form. If it should not have been there, if it is wrong,
19 if it matters, then I may need to ask why it is wrong
20 and why it was there. If it is not there I cannot ask
21 those questions.

22 MR SANDERS: Precisely so. That is why it makes no sense
23 for the General Data Protection Regulation to bite upon
24 you because the rights of the General Data Protection
25 Regulation confers and their application in this context

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1 is just nonsensical. The idea that you will be
2 correcting, erasing and rectifying and so on makes no
3 sense. In our submission that fits with your exemption
4 as a judicial authority acting in a judicial capacity.

5 So that is the general point we make by way of
6 a good way to test the logic of the outcome that you are
7 exempt is to ask whether that is in any way inconsistent
8 with the purpose of the General Data Protection
9 Regulation.

10 Turning to the first of the two exemptions, the
11 paragraph 7 public protection.

12 THE CHAIR: I am inclined to think that there is a reason
13 why the General Data Protection Regulation should in
14 qualified form apply to us. A court can name
15 individuals, all sorts of activities they have been up
16 to, including discreditable activity, whether or not it
17 is directly the subject of litigation or criminal
18 proceedings, a judge is free to say what he wants about
19 the evidence that he has heard and the facts as he
20 believes them to be.

21 Now, I can readily understand why people might be
22 concerned that I might say something about their
23 activities of 40 years ago which they would say is
24 inaccurate and in any event should not be made public.
25 I do think there is a purpose behind the General Data

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1 Protection Regulation applying in a qualified way.

2 MR SANDERS: There is a purpose there. What I am focusing
3 on is the purpose of the subject access right
4 provisions, so article 13 through to 21, the purpose of
5 those applying, because of course you are still a data
6 controller and you must have a lawful basis for processing
7 and all the rest of it. But in terms of the subject
8 access provisions, which is what these exemptions
9 disapply, in our submission, there is not a purpose
10 particularly when the focus is on Special Branch files.

11 THE CHAIR: The judicial exclusion is not even subject to
12 articles 5 and 6, is it? Articles 5 and 6 do not apply
13 to court proceedings.

14 MR SANDERS: No, they do. It is the listed provisions which
15 are disapplied which are exempted and --

16 THE CHAIR: Sorry, this is something that I have not
17 researched but I thought the judicial exemption was in
18 effect absolute, that you could -- in a court exercising
19 a traditional court function the General Data Protection
20 Regulation did not apply to you.

21 MR SANDERS: So a court, say, for example, as one looks at the
22 Investigatory Powers Tribunal's privacy notice, it is
23 a data controller, it has to have a basis for its
24 processing and so on. Even the judiciaries' privacy
25 notice. But in paragraph 14 it is the listed

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1 provisions, so the provisions that are listed I think in
2 paragraph 6 of the schedule, which are the ones that are
3 disapplied. There are separate General Data Protection
4 Regulation provisions on publication of judgments and so
5 on that reinforce that. So it is not an absolute
6 institutional exclusion.

7 THE CHAIR: The exemption in article 23(1) is the protection
8 of judicial independence and judicial proceedings. So
9 Union and Member State law can restrict the scope of the
10 General Data Protection Regulation to them. We do that
11 in the 2018 Act by what means?

12 MR SANDERS: It is part 2 of schedule 2 and paragraph 14
13 which refers back to the listed General Data Protection
14 Regulation provisions in paragraph 6.

15 THE CHAIR: Certain categories of data, like criminal
16 convictions, are excluded for all purposes where a court
17 or tribunal is acting in a judicial capacity.

18 MR SANDERS: There are other exemptions and there is
19 specific reference made I think to publication of
20 judgments and so on.

21 THE CHAIR: Yes. The exemptions for judicial capacity are
22 wider than those under paragraph 7.2.

23 MR SANDERS: It is the same set of listed General Data
24 Protection Regulation provisions, the exemption operates
25 in a different way because it does not have the "to the

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1 extent that" qualification.

2 THE CHAIR: It is the listed General Data Protection
3 Regulation provisions, this is paragraph 14. In
4 practice the obligations under 5 and 6 are merely to
5 process lawfully and that is done by the law of the
6 United Kingdom which permits judges to consider any
7 information that is derived from whatever source in
8 whatever manner seems to them to be right.

9 MR SANDERS: Yes. Can I take you to the relevant recital in
10 the General Data Protection Regulation?

11 THE CHAIR: It is 20, is it not?

12 MR SANDERS: It is 20. Which sets out the rationale for the
13 exemption:

14 "While the Regulation applies to the activities of
15 courts and other judicial authorities, Union or Member
16 State law could specify the processing operations and
17 processing procedures in relation to the processing of
18 personal data by courts and other judicial authorities.
19 The competence of the supervisory authority should not
20 cover the processing of personal data when courts are
21 acting in their judicial capacity in order to safeguard
22 the independence of the judiciary in the performance of
23 its judicial tasks, including decision-making."

24 That is the purpose, the ultimate purpose of the
25 exemption is to protect judicial independence.

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1 THE CHAIR: The Commissioner has nothing to say about
2 judicial decisions properly so-called.

3 MR SANDERS: Correct, and there is a separate exemption as
4 well in relation to that, but in our submission one has
5 to start with recital 20 and the reference to judicial
6 authorities and then use that in construing article 23
7 and in --

8 THE CHAIR: Courts and other judicial authorities, that
9 includes tribunals, query what else it includes.

10 MR SANDERS: We have included in our written witness
11 submissions a reference to the Julian Assange case in
12 the Supreme Court and the observations of Lord Phillips.

13 THE CHAIR: That is in a specific European Union context,
14 the European arrest warrants, and the prosecuting
15 authorities of countries are deemed to be judicial
16 authorities.

17 MR SANDERS: Absolutely sir. We made this clear in our
18 written submissions. We are not saying that is decisive
19 or directly relevant, but when one looks at what Lord
20 Phillips says about judicial authority and the French,
21 because obviously the General Data Protection Regulation
22 is a bilingual text, and because it applies across the
23 European Union, one has to bear in mind the different
24 legal systems the Member States have and different
25 notions of the separation of powers between legislature,

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1 executive and judiciary, and that it is a term which is
2 capable of bearing a broader meaning than simply courts
3 and tribunals.

4 It is a question of what is the function of the body
5 in question. How independent of the executive is it?
6 And what is the nature of its status and the nature of
7 its functions? In my submission, looked at from that
8 perspective, it can be seen that you are four square
9 a classic judicial authority and that the rationale for
10 exempting you, for exempting other courts and tribunals
11 from the subject access provisions of the General Data
12 Protection Regulation applies to you in exactly the same
13 way.

14 Also in relation specifically to the recital 20
15 point, about it not being appropriate for the Information
16 Commissioner to be called upon to determine the
17 lawfulness of your procedures and the way in which you
18 are conducting the Inquiry, it will be completely
19 inappropriate in our submission for that to happen.

20 THE CHAIR: The Information Commissioner has certainly been
21 of the view in relation to inquiries that she has
22 jurisdiction to correct errors of approach and errors of
23 occurrence.

24 MR SANDERS: Well sir, I have seen a reference to I think
25 the Independent Inquiry into Child Sexual Abuse paying

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1 a penalty last summer. I would be surprised if that was
2 under the General Data Protection Regulation for it to
3 have been processed back quickly. I do not know whether
4 the point was taken by that Inquiry that it is
5 a judicial authority. In our submission you are
6 a judicial authority, you have all the hallmarks of
7 a judicial authority. From the perspective of the
8 General Data Protection Regulation, the policy reasons
9 underpinning that, the exemption applied to you.

10 THE CHAIR: Where is the difference in either the old
11 directive or the old substitute?

12 MR SANDERS: There was nothing akin to this. So for example
13 the Investigatory Powers Tribunal, up until the General
14 Data Protection Regulation coming in, used to answer
15 subject access requests.

16 THE CHAIR: Yes and I think has since the General Data
17 Protection Regulation came in directed others to produce
18 documents. Admittedly not in the form of a subject
19 access request but to produce documents of a kind that
20 would have been capable of being produced under
21 a subject access request. It perhaps begs rather than
22 answers the question.

23 MR SANDERS: I know from my experience that the
24 Investigatory Powers Tribunal does not now answer
25 subject access requests. You can see that from its

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1 privacy notice. It considers itself a judicial
2 authority acting in a judicial capacity.

3 THE CHAIR: I do not think there is any doubt about that.

4 It is precisely that, because apart from anything else, it
5 is the sole body capable of determining convention
6 rights in relation to --

7 MR SANDERS: The services.

8 THE CHAIR: -- the Security Service and the other agencies.

9 MR SANDERS: Yes and also, sir, it has its other functions
10 under section 65 so including it may be called upon to
11 look at issues of appropriateness in relation to
12 warranty and so on. So in our submission it does not
13 have a judicial capacity simply because it is
14 determining in some cases the claim under section 7 of
15 the Human Rights Act.

16 THE CHAIR: I doubt the Judicial Commissioners are acting in
17 a judicial capacity, they might be I suppose, but not
18 that the question is likely to arise, but it is the
19 nature of their task.

20 MR SANDERS: I will not answer that on the hoof.

21 THE CHAIR: No.

22 MR SANDERS: So in relation to the Information
23 Commissioner's position and the reference to the
24 Rola case, the Australian case about the Women's
25 Employment Board, in my submission that is simply not

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1 relevant to the question before you and we certainly
2 agree with Mr Hall that coroners are a very good example
3 of a judicial authority, again they were referred to in
4 the Judicial Data Protection Panel in terms of reference
5 as being a body that can sign up with that panel, and
6 they are very, very similar to your function in terms of
7 what they do.

8 If one thinks of larger scale inquests held in this
9 court or the floor above or the floor below, for example
10 the 77 inquest, the Diana inquest, Hillsborough, the
11 Birmingham pub bombings, these are all bodies,
12 inquisitorial bodies, they have solicitors, they have
13 counsel, exactly the same way as you do sir, and they
14 are recognised as judicial authorities and it is not
15 appropriate for them to be subject to the subject access
16 provisions in the General Data Protection Regulation or
17 to oversight of the Information Commissioner.

18 As you do, inquests have freestanding rules on
19 access to materials and so on, disclosure provisions,
20 which again make application of the General Data
21 Protection Regulation unnecessary and in our submission
22 inappropriate.

23 THE CHAIR: There is though then the rather curious example
24 of the Hillsborough inquest requiring permission under
25 the 1998 Act to do something.

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1 MR SANDERS: That was not the inquest, that was the panel
2 that was convened in advance of the inquest being
3 resumed, the inquest being resumed. So I think it was
4 under the Bishop of Liverpool and a panel of individuals
5 reviewed the materials dating back to the disaster.
6 Nothing to do with -- the inquest was in fact resumed
7 subsequent to 2010.

8 THE CHAIR: The strongest analogy of your examples is the
9 inquiry into Litvinenko where an inquest was adjourned
10 because of lack of power to hear evidence in secret. So
11 a public inquiry had to be convened to permit that to
12 happen.

13 MR SANDERS: Yes, that is the point that Mr Hall makes about
14 schedule 1 to the Coroners and Justices Act 2009, that
15 there is this recognised statutory interrelationship
16 between inquests and inquiries, not a 2005 Act inquiry
17 but Lord Hutton's Inquiry into David Kelly stood in lieu
18 of an inquest, and it's a common occurrence that
19 inquests can also take into account the findings of
20 inquiries, rather than revisit the same matters.

21 THE CHAIR: Little difficult to think that Sir Brian
22 Leveson's inquiry, that he was acting in the judicial
23 capacity. I know it is before the current changes but
24 ...

25 MR SANDERS: It may well be that one can have a 2005 Act

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1 Inquiry constituted or operating in such a way as not to
2 be judicial. I do not rule that out. But in terms of
3 your Inquiry and the way you are conducting it and the
4 way in which the recognised legal representatives appear
5 in front of you and funded by you and all of your
6 functions, it is for all of us standing here, as Mr Hall
7 says, it has the touch and feel of it. We are in court
8 73, you have referred to yourself as a court or tribunal
9 in the judicial review.

10 THE CHAIR: That was because there was not an appropriate
11 box to tick and that was the nearest one we could get
12 to. You should not read anything at all into that,
13 beyond the fact that seemed the closest we could get.

14 MR SANDERS: Because of the analogy and the way in which you
15 are so akin to a court or tribunal. Again with the
16 Rehabilitation of Offenders Act ruling.

17 THE CHAIR: Ditto, the answer to that is the same, except
18 there I am determining people's rights, and therefore
19 may well be acting in a judicial capacity. Or as
20 a judicial authority but that is because I will be
21 determining rights.

22 MR SANDERS: In our submission it is not simply when you are
23 determining rights or obligations that you are in
24 a judicial capacity. The whole Inquiry is a judicial
25 Inquiry as generally referred to.

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1 THE CHAIR: Yes.

2 MR SANDERS: And from the perspective of the policy of
3 recital 20 and article 23 you should be exempt from the
4 subject access provisions of the General Data Protection
5 Regulation. You have mentioned the point about well: are
6 you acting in a judicial capacity when you are looking
7 at material that is not going to be shown to anyone? In
8 our submission it's the same with a coroner who will
9 receive more material than then is disclosed to the
10 interested persons in an inquest. A Crown Court judge
11 looking at public interest immunity material that is not
12 going to be seen by the accused or even the jury is
13 still acting in a judicial capacity. So it is not
14 a question of --

15 THE CHAIR: There are all sorts of situations but that
16 particular one is because it is incidental to the
17 conduct of a trial where he is unquestionably acting in
18 a judicial capacity. Or she.

19 MR SANDERS: We would say your investigative evidence
20 gathering is incidental and is part of the discharge of
21 your function as an Inquiry. And it is all done by you
22 judicially. So you are independent, separate from the
23 executive. Impartial. The statutory requirements are
24 of fairness and openness and so on.

25 Bearing in mind that the General Data Protection

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1 Regulation does not impose requirements about judicial
2 oaths or more formal matters of that, it is a question
3 of what in a constitutional setting you are doing
4 relative to the other organs of government, the other
5 organs of the state and whether or not you should be
6 recognised as a judicial authority so that you can be
7 exempt from subject access provisions which, as we all
8 recognise, would have a disastrous effect on your
9 ability to function.

10 You mentioned the Franks Inquiry and the Chilcot
11 Inquiry. My understanding, and Mr McAllister has
12 verified it as much as he can, they were not statutory
13 inquiries, they were committees of Privy Counsellors
14 conducting inquiries on a more informal basis. The
15 reason for that being, one of the reasons being that
16 they could be shown secret intelligence on "Privy
17 Counsellor terms" which include the oath of the Privy
18 Council.

19 THE CHAIR: The members of the Chilcot Inquiry were not
20 Privacy Counsellors.

21 MR SANDERS: I believe they would have been made Privy
22 Counsellors for the purposes of the inquiry. But it
23 wasn't a statutory Inquiry. The limited coverage of its
24 hearing, one thinks of Tony Blair giving his evidence,
25 there were no lawyers there. It was deliberately

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1 structured not to have witnesses going through
2 representatives until it got to the Maxwellisation
3 stage.

4 THE CHAIR: Chilcot did go through the Maxwellisation, on of
5 the reasons it held things up.

6 MR SANDERS: The lawyers came in but they were not, and
7 deliberately so, were not there at the earlier point.
8 So we entirely accept one has to look at each inquiry
9 and ask the question: is this an inquiry which should
10 attract these exemptions by reference to the extent to
11 which what you are doing is akin to the work of
12 a classic paradigm judicial body? In our submission you
13 are undoubtedly are.

14 That is paragraph 14. Just very briefly on
15 paragraph 7 sir, which is the public functions for
16 public protection exemption. All we would very simply
17 say about this is that the words -- it is
18 a straightforward conventional exercise in statutory
19 construction. The intention of Parliament can only and
20 must be derived from the words used and that is it. It
21 is not a Pepper & Hart case, there is no basis for
22 looking at Parliamentary materials. There is no
23 conceivable basis for suggesting that a letter written
24 to members of the House of Lords during the passage of
25 the bill could be used as an exercise, as an aid to

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1 statutory construction.

2 THE CHAIR: Especially when it was said to be because there
3 wouldn't be a debate about it, but there was, or there
4 was a resolution, an amendment put down which was
5 designed to elicit a response and did.

6 MR SANDERS: Sir I take the point, but in our submission
7 even getting into that is crossing the line set by
8 article 9 of the Bill of Rights. You are questioning
9 proceedings in Parliament to try and discern what is the
10 intention of this legislation. The intention is and can
11 only be found, absent of the Pepper & Hart situation, in
12 the wording of the relevant enactment and in our
13 submission it is clear that that is different to
14 section 31 of the Data Protection Act 1998 and it is
15 clear what it says and it self-evidently applies in this
16 case.

17 THE CHAIR: It is the application of the provisions, not the
18 application of the provisions to a particular set of
19 facts.

20 MR SANDERS: Quite so.

21 THE CHAIR: The application of the provisions.

22 MR SANDERS: Quite so, yes. Unless I can assist you any
23 further, those are our submissions.

24 THE CHAIR: Thank you. Sir Robert.

25

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1 Submissions on behalf of the National Police Chiefs' Council

2 by SIR ROBERT FRANCIS

3 SIR ROBERT FRANCIS: I adopt Mr Hall's submissions with
4 regard to the exemption restrictions and so on but
5 perhaps I ought to adjust a word about judicial capacity
6 which is this:

7 Firstly, in relation to Europe, as far as I am aware,
8 the concept of a statutory public inquiry is unique to
9 this country. Elsewhere in Europe, there is a degree of
10 puzzlement about what it is. That's because they would
11 inquire into things in a different way. Some
12 jurisdictions, you will have a court dealing in
13 a combined way with an inquisitorial process that
14 combines all sorts of things. I think you have already
15 mentioned prosecutors are considered to be judicial
16 authorities in any countries. There is a whole range of
17 activity which --

18 THE CHAIR: Classically in the Napoleonic system the
19 prosecutor is part of the judiciary and sits on the same
20 level as the judge in court.

21 SIR ROBERT FRANCIS: Yes.

22 THE CHAIR: Rather dramatically.

23 SIR ROBERT FRANCIS: And no doubt would come entirely within
24 the rubric of the judicial authority. I don't know
25 whether the Crown Prosecution Service would here because

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1 they are not in that sense the judge. So the difference
2 between you and the Crown Prosecution Service is you
3 have -- you do have, regardless of whether you were
4 appointed as a judge or not, sitting as the chair of
5 a public inquiry, you have all the attributes required of
6 a judge. That is not meant to be undue flattery of
7 course. But first and foremost it is absolutely
8 essential that if you display no bias, either actual or
9 perceived, and indeed notoriously in the past chairs
10 have stopped being chairs of public inquiries when an
11 apparent bias might have occurred. You are required
12 to --

13 THE CHAIR: Yes, I am not sure had they been a bit more
14 rigorous about that that those assertions would have
15 produced the outcome.

16 SIR ROBERT FRANCIS: I could not agree more but the point
17 was then and I endorse entirely what has just been said
18 about the fact that what you accept as being your
19 judicial function in relation to the directions you make
20 in restriction orders and so on is ancillary to the main
21 purpose of your existence as chair of a Public Inquiry,
22 which is to conduct the Inquiry in accordance with the
23 terms of reference. There are consequences involved in
24 not following, not complying with your order.

25 The process you adopt, whether or not it is within

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1 one of those sections or not, but just part of your
2 procedure, is subject to judicial review. Your report
3 has to be fair, it has to comply no doubt with a number
4 of requirements which are akin to but of course not
5 identical to those performing a judgment. While your --

6 THE CHAIR: There the obligations on the person conducting
7 a public inquiry are different from those imposed on
8 judge. A judge is under no obligation at all to say to
9 somebody against whom he is minded to make an adverse
10 finding, having heard all the evidence, that he is going
11 to do so. I am.

12 SIR ROBERT FRANCIS: The reason for that, sir, is that it
13 will be obvious in either criminal or civil proceedings
14 that an allegation has been made and someone had been
15 given the opportunity of answering, answering those
16 allegations because of the various codes and indeed
17 articles of the Human Rights Convention which require
18 that --

19 THE CHAIR: I am still obliged to do it even if it is
20 blindingly obvious to everybody that there is criticism
21 which is likely to be the subject of comment in the
22 report.

23 SIR ROBERT FRANCIS: Yes. It is though an inherent part of
24 the requirement of fairness that is so.

25 THE CHAIR: It is a statutory requirement. Without it

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1 I would anticipate I would be permitted to report in
2 such terms as I wished. If I were a judge that is what
3 I would be allowed to do.

4 SIR ROBERT FRANCIS: If, absent the statutory requirement,
5 but within the act of requirement to be fair, you would
6 have to undertake some process which would be the
7 equivalent.

8 THE CHAIR: Anyway this is academic. I do not -- I happen
9 not to agree. I think having now sat in two capacities
10 or having attempted to sit in two capacities, I have no
11 doubt at all that I was under no obligation to tell
12 anyone in advance that I was minded to make an adverse
13 finding against them in a judgment in a civil case. It
14 would have been perfectly obvious if I was, if the issue
15 arose, but here I am obliged to, even if it is perfectly
16 obvious the issue has arisen.

17 SIR ROBERT FRANCIS: The fact there are additional
18 requirements -- it's not a requirement that in any way
19 impinges upon your judicial employment, it is a form of
20 procedure just as any other form of procedure that binds
21 a judge would be. It is just a different procedure.

22 But the final point I make on this, I do not want to
23 take up time on it, is that insofar as your function,
24 your principal function is not determinative of rights
25 and liabilities, no-one can deny that your findings can

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1 have immense and very serious consequences for those in
2 respect of whom you make findings. And that is
3 different of course from a standard issue where rights
4 and liabilities and parties are entirely at liberty to
5 say after the event they disagree with your findings,
6 but that does not mean that extremely serious
7 consequences cannot flow from them.

8 Indeed one of the purposes of an inquiry is to
9 establish accountability where, as you have already
10 indicated sir, there is perceived to have been a failure
11 of governance on the part of the state which the inquiry
12 is entitled to fill. In other words, your Inquiry fills
13 a gap in the law and the governance of the country which
14 is in many respects frankly more important than that of
15 the functions of many judicial activities.

16 THE CHAIR: Or regulators. It seemed to me to fit more
17 naturally into the regulatory basket than the judicial
18 basket.

19 SIR ROBERT FRANCIS: That is all I want to say about that.
20 We appreciate what you say, but we would say whatever
21 doubt there may be about the judicial capacity, there is
22 much less doubt about the 152 that we have already
23 looked at, and very sophisticated and eloquent arguments
24 have been put forward about the legislative history but
25 we would respectfully submit you start by looking at the

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1 legislation which applies today, not the legislation
2 that applied before, firstly.

3 Secondly, headings in statutes are well-known to be
4 guides and not necessarily accurate guides to what
5 follows.

6 But thirdly, in this case, insofar as headings are
7 relevant at all, Parliament chose to give this part of
8 the schedule the heading that it did, which was not
9 regulatory activity, it is different.

10 THE CHAIR: Quite.

11 SIR ROBERT FRANCIS: We would respectfully submit whatever
12 may be said about other exemptions, you are on safe
13 ground with regard to that one. Of course it carries
14 with it the sting in the tail which is that you are only
15 not bound by the obligations of Article 14 and so on to
16 the extent that it prejudices your function enabling the
17 running of the Inquiry.

18 Now sir, you have been perfectly clear that you
19 consider that the sort of things that are contained in
20 those articles would prejudice the function of this
21 Inquiry. We do not seek to dissuade you from that view.
22 We also accept that you are entitled to take not a
23 case -- you are entitled to take a case by case view but
24 you are also entitled to look at things more in the
25 round. Firstly because of the words of the schedule.

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1 But secondly because it is common sense.

2 If the very thing which prejudices your function is
3 the task of having to look at things on a case by case
4 or page by page basis, then it must follow that you are
5 entitled to look at things on a more global basis.

6 But we would add this word of caution. It's a word
7 of caution due to what is coming down the line which you
8 have not got to yet, namely the records and material
9 that relate to the National Public Order Intelligence
10 view.

11 THE CHAIR: You don't need to tell me there is a stone which
12 once turned over will reveal a great deal underneath,
13 some of which I may find difficult and surprising.

14 SIR ROBERT FRANCIS: It is not simply that, but it is a matter of
15 the volume and the scale of it.

16 THE CHAIR: I know, and the way in which it is ordered.
17 I am well aware of all these problems and I am afraid
18 they will have to be addressed when we reach them rather
19 than beforehand, in theory.

20 SIR ROBERT FRANCIS: I do not wish to take up time with that
21 today. What I was going to end with, just to remind you
22 that, the fact that you are not, as we would submit you
23 are not bound by the notification obligation by way of
24 example does not mean, and I know you do not intend it
25 to mean, that conclusion to mean that you do not have to

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1 have regard to the privacy rights of those whose records
2 you are minded to disclose. We can suggest to you, sir,
3 that in some cases the sensitivities around the
4 information contained in some of this documentation
5 about individuals could potentially have serious
6 consequences for them were it to be disclosed even
7 within the confidentiality agreement.

8 For there to be no consideration at all of such
9 matters we would suggest would be unfortunate. Indeed,
10 what you maybe are not exempted from, and this is why it
11 is not exempted from, are the data processing principles
12 which apply generally even if they don't apply to --
13 because the disapplication of article 5 for instance is
14 in only in respect of its application by way of articles
15 14 and 15 and so on, in other words the listed
16 provisions.

17 We have listed the data protection principles in our
18 submissions and I will not go there but the theme of
19 them is that the processing should only be the minimum
20 required to achieve the objective of the statutory, or
21 whatever other purpose it is.

22 That requires we would suggest at least
23 consideration of a focused approach to what needs to be
24 disclosed to individuals where there is a risk that that
25 will impinge on the privacy rights or other rights of

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1 third parties, and that has we submit to be considered.

2 THE CHAIR: No disclosure exercise can be free of risks.

3 SIR ROBERT FRANCIS: No, but some -- of course not but those
4 risks are increased firstly by the volume of material
5 which is disclosed, because the more information there
6 is out there the more people can put things together, we
7 have already been through that in relation to the mosaic
8 effect. But there is a danger then of obvious issues
9 being overlooked and just to disregard that in its
10 entirety, we submit, there might be a danger that you
11 would not be complying with the data principle.

12 But that does not necessarily mean -- that means you
13 have to notify people, it simply means we would
14 respectfully submit that you ought to consider the
15 degree to which you should be selective in what it is
16 necessary -- and the word comes up time and time
17 again -- and proportionate to actually share with
18 individuals, whether they be police officers or others,
19 in order to obtain their evidence.

20 Sometimes we would respectfully submit it would be
21 adequate for you to simply ask the individual the
22 question. In order to produce a bundle of documents at
23 all to show to anyone, someone has to undertake an
24 analysis of whether it is relevant to do so and
25 therefore some consideration has to be given to the

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1 contents of those documents and the relevance of them.
2 If it is not strictly relevant then one way of
3 protecting the rights of others is not to use that
4 document. I just put that there.

5 THE CHAIR: I am conscious of the submissions which have
6 been made to me not only today but on other occasions,
7 that I cannot know in advance of hearing evidence or
8 information provided by others what is relevant in any
9 particular set of documents. It is a fair point and
10 I would be terribly reluctant to be driven into the
11 option of making a selection of a limited number of
12 documents showing only redacted copies of those
13 documents to individuals to obtain information from
14 them.

15 It is really not my preferred solution if I can
16 possibly avoid it and I am slightly surprised to find
17 myself driven into that position by counsel for the
18 non-state core participants.

19 SIR ROBERT FRANCIS: Absolutely, we accept what you say.
20 I won't refer to it again because I've mentioned it
21 before and it is again in our written submissions that
22 we would respectfully submit that getting evidence by
23 showing people documents before you have their evidence
24 is not necessarily the best way of obtaining that
25 evidence.

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1 THE CHAIR: We have got to get a production line going or we
2 will never finish and I am afraid that involves taking a
3 really fairly hard edged view about things, about how we
4 should set about doing them.

5 SIR ROBERT FRANCIS: Well, you have our submissions on that
6 point more than once, but I do reserve if I may the
7 right to return to that as and when we get to our
8 mountain of documents as opposed to the --

9 THE CHAIR: Do not worry, I will give you every opportunity.

10 SIR ROBERT FRANCIS: -- foothills of the Special
11 Demonstration Squad.

12 THE CHAIR: Mr Payne [On behalf of eight NPOIU officers].

13 MR PAYNE: Sir, I am really almost at the bottom of the
14 list, so having listened to everybody else make their
15 submissions I have been ticking off the points I could
16 usefully make and I got to zero. So I will just
17 re-endorse the submissions made by Mr Hall and
18 Mr Sanders and so on, otherwise we are just going to
19 rely on our written submissions.

20 THE CHAIR: That is extremely helpful, yes.

21 Submissions on behalf of the National Crime Agency by MR O'BRIEN

22 MR O'BRIEN: Sir, I am in the same position as Mr Payne.

23 THE CHAIR: Yes.

24 MR O'BRIEN: Except I endorse slightly different submissions
25 because we have focused on the paragraph 7 exemption

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1 which Mr Sanders and Sir Robert have covered today.

2 THE CHAIR: Yes.

3 MR O'BRIEN: So I echo what they say about that and what was
4 in our written submissions.

5 THE CHAIR: Yes, understood, thank you very much indeed.

6 Submissions on behalf of the Secretary of State

7 for the Home Department by MS BROWN

8 MS BROWN: You will have seen from our written submissions
9 that we also endorse the paragraph 7 exemption.

10 THE CHAIR: Yes.

11 MS BROWN: And also the proposed changes to the restriction
12 protocol. Just in respect of the two documents that
13 came up during the course of the submissions this
14 morning from the Open Rights Group litigation, I am
15 afraid I am not in a position to comment on how counsel,
16 instructed by the Secretary of State in other cases in
17 which I am not involved, why they put their submissions
18 in a certain way.

19 THE CHAIR: Yes.

20 MS BROWN: Anything that arises in those documents that
21 you would like the Secretary of State to comment upon
22 and of course we can go back and respond.

23 THE CHAIR: I am hoping to have a copy of the grounds of
24 claim to which they responded because I would then be
25 able to understand what the issues are. Having only

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1 glimpsed at the opening paragraphs of the grounds of
2 defence it is not clear to me precisely what the issue
3 was and I think I do need to know what it was. This is
4 not straightforward legislation and it requires an
5 understanding of factual background to understand what
6 everybody is talking about.

7 MS BROWN: Sir, yes.

8 THE CHAIR: But Mr Facenna, I think, is going to provide me
9 with that in due course. He nods.

10 MS BROWN: Yes, if anything arises from that of course we
11 will be happy to respond in writing.

12 THE CHAIR: Yes. My understanding of the Secretary of
13 State's position is that she thinks that the Inquiry has
14 identified the correct partial exemption.

15 MS BROWN: Yes.

16 THE CHAIR: And you have no view to express about judicial
17 authority.

18 MS BROWN: No, thank you.

19 THE CHAIR: Thank you. Yes, Mr Pitt-Payne?

20 Submissions on behalf of the Inquiry by MR

21 PITT-PAYNE

22 MR PITT-PAYNE: So, firstly, dealing with the question of
23 which exemptions apply, in brief outline I shall address
24 you on the footing that the protective functions
25 exemption does apply, schedule 2, part 2, paragraph 7.

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1 THE CHAIR: Yes.

2 MR PITT-PAYNE: The crime and tax exemption may apply to
3 some information in the circumstances in which
4 the Inquiry is controller 2 and the provider is
5 controller 1, but the Inquiry is not in a position to
6 say that everything that it has received from police
7 sources is covered by the crime and tax exemption. That
8 would depend on an assessment of the nature of the
9 information.

10 THE CHAIR: It could not possibly be.

11 MR PITT-PAYNE: Indeed.

12 THE CHAIR: The great majority of information, which I have
13 so far looked at originating in police sources, could
14 not conceivably fall under that exemption.

15 MR PITT-PAYNE: Indeed. As far as the legal proceedings
16 exemption and the judicial capacity and judicial
17 independence exemptions, I am addressing you on the
18 footing that those are not engaged. Sir, of course,
19 submissions to the contrary have been made this
20 afternoon.

21 As far as the rights of others exemption is
22 concerned, in relation to subject access requests,
23 everybody agrees that that would be in play when you
24 were dealing with subject access requests, when you were
25 considering disclosure of mixed personal data.

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1 As far as how Article 14 interacts with those
2 various exemptions, it is certainly open to the Inquiry
3 to proceed in this way: to consider first whether and to
4 what extent article 14(1) to (4) is disapplied by any
5 exemption and then, to the extent that it is not so
6 disapplied, how far is its operation limited by
7 article 14(5)? Even if you do consider that
8 article 14(1) to (4) is disapplied or disapplied to some
9 extent by exemptions it would still, I suggest, be
10 desirable to then go on consider a legal alternative,
11 how article 14(5) would operate, just in case you were
12 subsequently found to be wrong in relation to the
13 application of the exemption.

14 THE CHAIR: Quite. My current thinking is that the statute
15 expressly exempts in a qualified way articles 14(1) to
16 (4) and says nothing about article 14(5).

17 MR PITT-PAYNE: Yes.

18 THE CHAIR: Therefore, I am looking at a freestanding
19 qualification prejudice to the proper discharge of my
20 functions.

21 MR PITT-PAYNE: Yes. Then to the extent that there are no
22 exemptions that apply what then? Nobody has suggested
23 that article 13 gives rise to any practical
24 difficulties. Article 14, clearly there are potentially
25 immense practical difficulties in contacting all the

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1 very many individuals who you would need to contact if
2 article 14 (1) to (4) applied in their entirety, however
3 nobody seems to be suggesting that articles 14(1) to (4)
4 would apply in full because even Mr Facenna, as
5 I understand his submissions, accepts that to some
6 extent compliance would be limited by reference to
7 14(5).

8 What his pragmatic proposals come down to is that he
9 is saying the Inquiry should be doing more, both by way
10 of putting information on the website and by way of
11 investigating whether it is feasible to contact
12 individuals. The point I would make in relation to
13 14(5) is that the Inquiry's current and proposed
14 approach involves taking very significant appropriate
15 measures -- to use the language of 14(5) -- to protect
16 data subjects by making information publicly available.
17 That is done by means of the cover names table and that
18 will be done by reference to the further information
19 that will be made publicly available at step 3 of the
20 evidence gathering process.

21 THE CHAIR: Yes, that is the intention.

22 MR PITT-PAYNE: It would be quite wrong to suggest that the
23 current and proposed approach disregards article 14, it
24 involves significant steps in compliance with the
25 appropriate measures limb of article 14.

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1 As far as article 15 is concerned, well if there are
2 no exemptions in play other than the rights of others
3 exemption then subject access requests would inevitably
4 need to be considered on a case by case basis.

5 To the extent that exemptions do apply, how do they
6 work? Mr Facenna has said repeatedly that exemptions
7 must be applied on a case by case basis and should not
8 be applied in a blanket way. In my submission on those
9 terms is that they require quite careful scrutiny. So
10 focusing on the protective functions exemption. Now,
11 that does not automatically disapply articles 14 and 15
12 in their entirety whenever any protective function
13 falling within the scope of that exemption has been
14 carried out.

15 THE CHAIR: No.

16 MR PITT-PAYNE: Nobody has suggested that that is how they
17 work.

18 THE CHAIRMAN: It would be impossible in the teeth of the
19 statutory language.

20 MR PITT-PAYNE: Indeed. So one has to consider prejudice to
21 the proper discharge of the Inquiry's function. That
22 has to be considered on a case specific basis in this
23 sense: it has to be considered by reference to the
24 specific circumstances of this Inquiry, including the
25 objectives it is seeking to deliver its resources, the

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1 nature and the volume of the information that it is
2 handling. What is required is an examination of how
3 compliance with articles 14 and 15 would affect this
4 specific Inquiry, rather than some abstract
5 consideration of how those matters might affect public
6 inquiries generally.

7 I accept that that will involve a proportionality
8 assessment, balancing the General Data Protection
9 Regulation to data subjects against the impact on
10 the Inquiry. When one is making that proportionality
11 assessment I would suggest that there are among the
12 variety of relevant considerations two matters.
13 Firstly, that delay to the Inquiry or disruption of its
14 processes is not just a matter of administrative
15 inconvenience. It is clearly going to delay achieving
16 the objective of finding out the truth of the matters
17 being considered and it will delay the point at which
18 any recommendations made by the Inquiry will be acted
19 on. Secondly, an issue that may require consideration
20 in this regard is the Inquiry's role as part of the
21 means whereby the State fulfills its own investigative
22 obligations, including as to breaches of article 3 of
23 the Convention.

24 What does not follow, in my submission, from any of
25 the above is that the only way that the Inquiry can

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1 apply the protective functions exemption in relation to
2 article 14 is by a person by person assessment as to
3 whether it should contact each one of the hundreds or
4 thousands of individuals whose personal data is included
5 in its evidential material. So in principle, in my
6 submission, it will be open to the Inquiry to take this
7 approach, already taking various steps to comply with
8 article 14, and to go further than this would be likely
9 to prejudice the proper discharge of the Inquiry's
10 functions and therefore it should not go further. In
11 reaching that consideration, the Inquiry could consider
12 such matters as the overall circumstances of the class
13 or classes of individuals about whom it holds
14 information; the nature of the information; the nature
15 of the task contacting the individuals; work already
16 being done to put that information to the public domain;
17 the work that will be involved in making public any
18 additional information; the impact on the Inquiry's work
19 of doing anything further. Likewise in relation to
20 subject access, in my submission, the Inquiry would be
21 entitled to have a general policy about the impact of
22 providing evidential material in relation to subject
23 access requests and about the difficulties for
24 the Inquiry's functions that doing so would pose.

25 Finally, if I can say something in relation to

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1 disclosure and to confidentiality rings. So disclosure
2 of unredacted special category personal data or
3 conviction information into a confidentiality ring. The
4 issue there is not really an article 13, 14 or 15 issue,
5 it is really an issue as to: is there a lawful basis of
6 processing for that disclosure? Potentially, it comes
7 within the lawful basis of processing by reference to
8 the Inquiry's statutory function. The difficulty then
9 is whether what is being done is disproportionate so
10 that one could not rely on that lawful basis of
11 processing.

12 Now, there is no doubt that disclosure of, for
13 instance, special category personal data to people who
14 do not already know, it is a significant incursion on
15 individual privacy rights. There are controls built in
16 by the proposal of the disclosure being to a limited
17 group and subject to duties of confidence. The
18 discussion that you had with Ms Steel this afternoon
19 suggested that it may be possible to go further by way
20 of avoiding or mitigating any interference with
21 individual privacy by way of a process of describing two
22 individuals in general terms, the sorts of information
23 that you are wishing to disclose and to
24 a confidentiality ring and asking if they agree to that.
25 Now, I would not suggest that process would enable you

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1 to rely on explicit consent as a processing condition
2 and as I understand it that is not what is envisaged.
3 What is envisaged is that that would assist in any
4 reliance on the statutory functions processing condition
5 by mitigating any impact on individual privacy from the
6 disclosure process. I understand from the exchanges
7 this afternoon that you will be exploring with
8 the Inquiry team the practicality of the process that
9 you were discussing with Ms Steel.

10 THE CHAIR: And with her.

11 MR PITT-PAYNE: Indeed.

12 THE CHAIR: And with any one --

13 MR PITT-PAYNE: Indeed.

14 THE CHAIR: -- of the non-states who wish to contribute to
15 the discussion.

16 MR PITT-PAYNE: Indeed, with the Inquiry team and more
17 widely. If it turns out that that course of action for
18 whatever reason is not practicable then one is left with
19 the antithesis that you were putting to Mr Facenna this
20 morning, whereby either you would follow the approach
21 that the Inquiry has previously indicated or you would
22 need to apply what I think you refer to as a choke,
23 a substantial limitation on the documents that could be
24 disclosed to individuals.

25 THE CHAIR: At the moment I can see no alternative to that

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1 whatever speed it was. I think on behalf of
2 the Commissioner we would welcome the opportunity to
3 reflect on them, perhaps make something by way of
4 written further submission, not necessarily a long one,
5 because of the particular position that
6 the Commissioner is in.

7 THE CHAIR: I am entirely content to go along with that.
8 I hope I have not misunderstood and so misrepresented
9 the position of the Commissioner in the observations
10 I made about paragraph 8.

11 MR SUMMERS: No, I have to confess I did not quite follow
12 the exchange, but if I can set out perhaps a little more
13 clearly than the written word managed to, what we were
14 seeking to convey really, it is a simple point, that
15 this is not the forum to resolve whether any particular
16 provision, but obviously in the context of this
17 discussion paragraph 7, meets the requirements of
18 article 23(1).

19 THE CHAIR: Yes.

20 MR SUMMERS: That is for another forum entirely. Really all
21 it did was pick up on a comment, sir, that you made at
22 the hearing I think in January --

23 THE CHAIR: Yes.

24 MR SUMMERS: -- where you reflected that it is the necessity
25 requirement of the provision rather than the law. We

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1 would agree with that to an extent. Obviously that is
2 not the end of the matter as we set out in the
3 submissions. You then have to go on and reflect that
4 backdrop, as it were, framework and then the application
5 of the particular exemption and that is where the
6 authorities Lord, Zaw Lin and Guriev come in.

7 THE CHAIR: Yes, I find Zaw Lin easier to apply to modern
8 statute than Guriev. If the words used there by
9 Mr Justice Warby were entitled to be, as it were, of
10 wider application, ie a person in doubt that they can be
11 applied to the modern statute. He was considering on
12 its facts, a particular revocation by an individual, and
13 he rejected the defence argument for two reasons. One
14 of which was that they were not processing for the
15 purpose of crime and taxation and/or at any rate not
16 mainly and they would have to show that they were in
17 relation to particular items which does not arise in
18 relation to the Inquiry. I am processing the
19 information for one purpose only which is to fulfill my
20 statutory function.

21 The second point was that it was necessary to look
22 on a case by case basis at individual items of data and
23 see whether or not the answer produced was proportionate
24 and justified and I do not think that applies to us.

25 MR SUMMERS: In what sense? I mean in applying paragraph 7

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1 then I think the answer is it does.

2 THE CHAIR: This is something upon which I would, if you do
3 not mind, welcome a minute or two's exchange. I think
4 everybody accepts that the Inquiry's functions are
5 within, or at least capable of being within the
6 monitoring inspection or regulatory function spoken of
7 in the Regulation. That is, if I have understood it
8 correctly, your submission, it is certainly my
9 understanding.

10 MR SUMMERS: We certainly concede it is arguable.

11 THE CHAIR: Yes, arguable only, right, okay. In which case
12 this issue may have to be resolved elsewhere and after
13 a certain amount of legal effort and time.

14 The second point upon which I would welcome your
15 submission, if you are able to make it, is the case by
16 case approach. As I read the legislation it does not,
17 as did the previous provision, refer to a case. It
18 simply refers to the application of the provisions. It
19 seems to me that what Mr Pitt-Payne said, namely what
20 I must look at is what impact will the application of
21 the provisions have on the discharge of the Inquiry's
22 function, that is the question I must answer. That is
23 the case, if there is a case to address, the case which
24 I must address. There is no requirement to address
25 individual facts on each occasion that they arise by

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1 reference to documents that relate to those individual
2 facts. I say that partly because that is my reading of
3 the words and partly, I readily acknowledge, because to
4 do it on that basis would render the function of
5 the Inquiry at best extremely problematic, more likely
6 impossible.

7 MR SUMMERS: Dealing with the last point first. That may
8 not necessarily be the case because there may be a third
9 way. I am not saying there is a third way but there may
10 be a third way. That is, with respect, one of those
11 matters that could do with more mature reflection than
12 the time now allows, but to give some assistance now it
13 may be the submission that we make in due course, if we
14 are given that opportunity, that a focus on the omission
15 of the words "in any case" is something of a red herring
16 given that the European source of -- in effect there are
17 two ways that the derogation, to try and use a neutral
18 word, it is not strictly a derogation, but for the
19 purposes of this submission is constructed. In the 1998
20 Act it was in terms of an exemption from, whereas under
21 the 2018 Act it is a disapplication of the principles
22 or, rather, the obligations. The consequence of that,
23 for the parliamentary draftsman, is the way you
24 structure the provision itself. Therefore, it may be
25 unnecessary -- and we would probably submit it is

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1 unnecessary in the second format -- where you are
2 disapplying certain provisions of the Act to talk about
3 in any case because it is only going to bite in any
4 particular set of circumstances. Rather than carving
5 out a category and saying, "these are a category of
6 cases in which the obligations do not apply", you simply
7 talk about the obligations not applying in certain
8 circumstances and therefore it will look different. The
9 fact that particular words are omitted is not the key to
10 the problem, not least of which because the European
11 source remains the same, both the 1995 Directive and the
12 General Data Protection Regulation refer to restrictions
13 of the same word in both. Neither of them appear in our
14 domestic legislation, so the point might be made that
15 that ultimate source has not changed. There is not
16 a key difference between the way in which the 1995
17 Directive thinks about these provisions as against the
18 General Data Protection Regulation, it is the way they
19 have been implemented domestically.

20 THE CHAIR: I accept that the course or enabling provision,
21 as I would prefer to call it, has not changed materially
22 because there are additional things in it now which were
23 not there before, but the wording which applies to
24 paragraph 7.2 is exactly the same as applied to
25 section 31.

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1 MR SUMMERS: Yes.

2 THE CHAIR: If the Commissioner thinks there might be
3 a third way and/or if she wishes to have further
4 reflection before making the final written submission
5 about it, I am more than happy to do that. I have asked
6 you to come here as part of your advisory role and you
7 have graciously agreed to do so. If I may therefore
8 seek your advice in relation to that particular problem
9 I will be grateful to receive it.

10 MR SUMMERS: We will do so. I can sum it up perhaps in one
11 sentence to sort of pre-figure for others where we might
12 be going, is that the homogeneity of outcome of any
13 decision may be a product of the homogeneity of the
14 circumstances in which a particular issue arises. That
15 is not to say there is a predetermined policy that is
16 predicting and, indeed, requiring that outcome, but it
17 may be that the issue is so narrow that you will always,
18 save the most extreme edge case, arrive at the same
19 position. The example that was used, I think in the
20 submissions on behalf of the MPS by Mr Hall, of
21 identifying the destruction obligation is a good one
22 because it is hard to see how you would ever arrive in
23 a position whereby individual rights will require
24 absolute destruction of the material within the context
25 of this inquiry. Of course, there might be other

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1 circumstances in which there would be different
2 circumstances.

3 THE CHAIR: Governing rules require us to preserve a record
4 of and the underlying material --

5 MR SUMMERS: Exactly.

6 THE CHAIR: -- on which the conclusions are founded. So we
7 come up against a hard difficulty there.

8 MR SUMMERS: Exactly, so that is why it is impossible really
9 to think of a case in which you would reach a different
10 result, but like all thinking one has to leave that
11 slight escape route available if extreme circumstances
12 arose.

13 As you move away from those more hard edged and less
14 nuanced questions then it may be that every different
15 case is different. In between, there may be just general
16 rules, as it were, with a small 'r', general propositions
17 that are going to hold true the majority of the time,
18 but allowing for different conclusions being reached
19 depending on the particular circumstances. How granular
20 that becomes is perhaps a point I will develop in
21 written submissions.

22 THE CHAIR: Quite. A final point upon which I would welcome
23 your thoughts. As you have seen in the vigorous
24 exchange of views between myself and Mr Facenna, and the
25 rather quieter and more reflective exchange between

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1 myself and Ms Steel, I am conscious, if at all possible,
2 to show people the documents about the deployments which
3 affect them, but I cannot do it if I have to adopt
4 a line by line redaction basis or even a document by
5 document topic basis.

6 Is it your view -- please say if you are not able to
7 express it -- that the statutory provisions drive me
8 into a position where I cannot do what I want to do?

9 MR SUMMERS: Without wishing to appear like a sphinx I think
10 the answer is no. I don't think you are driven to that
11 position.

12 THE CHAIR: Right.

13 MR SUMMERS: How you resolve that is not something that we
14 can necessarily tell you not because we know but we are
15 not going to tell you.

16 THE CHAIR: Of course you cannot, no.

17 MR SUMMERS: But it is one of those intractable problems
18 that will just have to be worked out through the
19 process.

20 THE CHAIR: There is nothing wrong in principle with
21 attempting to resolve it by showing material to
22 individuals within a confidentiality circle, sometimes
23 as individuals at others, subject to obligations of
24 confidence which are enforceable. There is nothing
25 wrong in principle in doing that, but it may require

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1 additional refinement along the lines that Ms Steel
2 advanced and I agreed to consider.

3 MR SUMMERS: I think I can say, and I cannot even helpfully
4 say. All I can say is that it has to be done in a way
5 that is consistent with all your obligations and
6 respecting individual data subject rights. That is as
7 far as, I am afraid, I can take it on behalf of the
8 Commissioner.

9 THE CHAIR: In other words, I quite understand the reasons
10 for reticence, but in other words there is not a hard
11 edged answer to which the Commissioner can give me.
12 I quite understand the reasons for that. Right, okay,
13 thank you very much.

14 MR SUMMERS: Sir, the only other matter, and it may be that
15 if it is not going to detain you very long. One thought
16 about the judicial capacity --

17 THE CHAIR: Yes.

18 MR SUMMERS: -- of course the immunity from suit provisions
19 in section 37 [Inquiries Act] which rather suggests that you do not
20 attract the immunities that would, otherwise you would
21 be able to take advantage of in a judicial capacity.

22 THE CHAIR: I would not need that if I was acting in
23 a judicial capacity, I would rather agree.

24 MR SUMMERS: It is like all these things. If you allow the
25 tail to wag the dog, you will get to the answer you

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1 want. What is rather more difficult is to stand back
2 and think, well what are the consequences of
3 categorising these proceedings as a judicial set of
4 proceedings? That is just one example, it seems to me.

5 THE CHAIR: Yes. I will reflect upon the submissions I have
6 heard, but in the end that may be an argument for
7 another day for others to advance but I will certainly
8 reflect upon those.

9 Okay, thank you very much indeed, I am grateful to
10 you. Thank you everybody, I am sorry for the long day
11 but I hope that everybody appreciates the need to get
12 through these matters in the time that we are allowed.
13 Thank you.

14 MR FACENNA: Can I make one request, sir, before you rise?

15 THE CHAIR: Yes.

16 MR FACENNA: In relation to the IT issues which you have
17 heard discussed briefly today and the last hearing --

18 THE CHAIR: Yes.

19 MR FACENNA: -- there is a certain amount of consternation
20 on our part because we do not -- I am not sure we fully
21 understand what the problems are and those who are
22 lawyers in these proceedings and also in the Independent
23 Inquiry into Child Sexual Abuse are aware that that
24 Inquiry at least seems to have no difficulty producing
25 multiple different versions of redactions.

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1 So it might be helpful to us, either if this could
2 be discussed at a meeting or if we could have some
3 further explanation of what the IT issues are in order
4 that we can try and understand what the difficulties are
5 that they The Inquiry -- the constraints that
6 The Inquiry seems to be working within.

7 On behalf of the other Core Participants that
8 I represent, they would also, like Ms Steel, to be very
9 well into -- enter into further discussions and the
10 pragmatic proposals we put forward were meant to be, to
11 some extent, amended.

12 THE CHAIR: I appreciate that, but you will possibly have
13 gathered from the reaction that you got, I do not think
14 that your pragmatic solution, your preferred pragmatic
15 solution is a viable way forward. I do not think we can
16 pre-empt the initial evidence gathering phase. It is
17 what we do then that I am principally concerned about.

18 MR FACENNA: I understand that. I suppose all I would say
19 is that if you go back and look at them they were to
20 some extent open-ended in terms of the discussions and
21 the consent that might be achieved. So what you were
22 discussing with Ms Steel was in a sense encompassed
23 within what we were actually proposing.

24 THE CHAIR: It was indeed. I think if one puts your
25 proposals at a different time in the process then they

