IN THE MATTER OF THE UNDERCOVERING POLICING INQUIRY
AND
IN THE MATTER OF THE GDPR & THE DATA PROTECTION ACT 2018

FURTHER SUBMISSIONS FOR PRIVACY
ON BEHALF OF THE INFORMATION COMMISSIONER

1. These submissions are made on behalf of the Information Commissioner ('the Commissioner') following the hearing held on 25 March 2019 and in particular the submissions made at that hearing by Mr Pitt-Payne QC on behalf of the Inquiry. Further, the Commissioner has now received the 'Chairman's statement on Data Protection and Privacy' dated 11 April 2019 ('the Chairman's statement').

2. The Commissioner has already set out in her submissions dated 12 March 2019 her position in relation to the applicability of the exemption provided by paragraph 7 of Schedule 2 to the Data Protection Act 2018 ('the paragraph 7 exemption') and the other exemptions considered at the hearing. The Chairman's statement indicates that he considers that he can claim the benefit of the paragraph 7 exemption. These submissions engage with the discrete issues of the proper application of the paragraph 7 exemption, the restriction that the exemption can only be applied 'to the extent' that the application of the 'listed GDPR provisions' to which the exemption applies 'would be likely to prejudice the proper discharge of' the Inquiry's function, and whether the omission of the words 'in any case' found in section 31 of the Data Protection Act 1998 ('the DPA 1998) materially affects the way in which the exemption ought to be applied.

3. In summary, the Commissioner considers that the paragraph 7 exemption does require the data controller seeking to rely upon its provisions to conduct a balancing exercise between the application of the listed GDPR provisions as against the proper discharge of the function pursued, in relation to particular personal data under consideration rather than personal data in general.

4. It is clear from the Chairman's statement that he considers that it is unnecessary for the purposes of the paragraph 7 exemption to consider the particular personal data when seeking to relying upon it (emphasis added):

"13. For the reasons explained above, the application of articles 14(1) - (4) and 15 of the GDPR would certainly prejudice the fulfilment of the terms of reference of the Inquiry and so the discharge of its function. If it were to be contended that, notwithstanding that conclusion, the Inquiry was obliged to address the issue in relation to one or a limited number of identified data subjects, I would reject the contention. Article 14 cannot be applied in that way for the reasons explained at paragraphs 6 - 8 above. Nor is there any basis in the language of the statutory exemption for treating one request under article 15 in a manner different from any other request or number of requests. It is the application of article 15 which will cause prejudice to the proper discharge of the function of the Inquiry. If it applies, the Inquiry will have to establish arrangements for requests to be met within the timescale set by article 12.3.

14. For the reasons explained above, this cannot be done on an ad hoc basis. I accept the observation of Green J in *Zaw Lin and another v Commissioner of Police for the Metropolis* [2015] EWHC 2484 (QB) under the differently worded predecessor legislation that a "classic proportionality balancing exercise" is required between the rights of data subjects to access and the right of the Inquiry to refuse access; but it is the rights of the data subjects whose data the Inquiry holds, taken together, and the prejudice which will be caused to the discharge of its function, which must be balanced. What the data subjects will gain is the early disclosure to them of their personal data - a timing issue but also in less informative, more redacted form."

5. The Commissioner set out her position on this issue at §§12-14 of her submissions dated 12 March 2019.

6. In its submissions to the Inquiry dated 8 March 2019, the Metropolitan Police Service contended as follows:

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

7. That submission was developed in the MPS's supplementary submissions dated 19 March 2019. In those submission the MPS relied upon the decision in *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 for the proposition that it is unnecessary to 'consider and weigh the question of prejudice against each data subject individually, and it is in principle open to the Chairman to justify a blanket policy'.

8. To the extent that that proposition is material, the Commissioner contends that the MPS is wrong in its reading of R(*Lord)*. The Commissioner contends that when the decision is properly understood, Munby J held that 'a blanket policy' was incompatible with the exemption found at section 29 of the DPA 1998 save to the extent that the application of the exemption, as properly applied on a case by case basis, yielded the same result in every case. Munby J held that the Claimant's argument (set out at §108 of the judgment) was 'formidable and compelling' (§110) and he went on hold that before the Secretary of State could rely upon section 29, he had to evidence that it applied to the particular circumstances of the Claimant's case (§§124-125).

9. At the hearing on 25 March 2019, Mr Pitt-Payne QC on behalf of Inquiry articulated the same argument, albeit on a different basis (pp222-223):

> "… one has to consider prejudice to the proper discharge of the Inquiry's function. That has to be considered on a case specific basis in this sense: it has to be considered by reference to the specific circumstances of this Inquiry, including the objectives it is seeking to deliver its resources, the nature and the volume of the information that it is handling. What is required is an examination of how compliance with articles 14 and 15 would affect this specific Inquiry, rather than some abstract consideration of how those matters might affect public inquiries generally."

10. To the extent that that submission advocates against consideration of particular data personal data in favour of personal data generally when applying the paragraph 7 exemption, the Commissioner considers that that would lead to a contradictory approach: the submissions identified that the application of the crime and taxation exemption (Schedule 2, Paragraph 2) 'depend[s] on an assessment of the nature of the information' (p219). Further, absent an exemption, the Article 15 right of access would 'inevitably need to be considered on a case by case basis' (p222) i.e. rights must be applied on a 'case by case basis', but (according to subsequent submissions) their abrogation need not be.

11. The Commissioner respectfully submits that it <u>is</u> necessary to consider particular personal data when seeking to rely on any exemption under the DPA 2018.

12. The Commissioner submits that the data controller must consider which of the listed provisions are engaged in relation to the particular personal data under consideration and how the application of the listed provisions would cause prejudice to the function of the Inquiry.

13. It may be, as was contemplated by Munby J in *R(Lord)*, that homogeneity of circumstances leads to a homogeneity of outcome and that the decision-making process becomes a familiar one to a data controller, but that is a result of the homogeneity, not because a 'blanket' policy has pre-determined the outcome.

14. The absence of the words 'in any case' in the paragraph 7 exemption is not material to the proper application of the exemption. The following exemptions under the DPA 2018 all appeared in the DPA 1998 and all have removed the same words from their formulation:

    - Crime & taxation: section 29(1) DPA 1998 vs Schedule 2 paragraph 2 DPA 2018
    - Armed forces: Schedule 7 paragraph 2 DPA 1998 vs Schedule 11 paragraph 7 DPA 2018
    - Management forecasts: Schedule 7 paragraph 5 DPA 1998 vs Schedule 2 paragraph 22 DPA 2018
    - Corporate finance: Schedule 7 paragraph 6 DPA 1998 vs Schedule 2 paragraph 21 DPA 2018
    - Negotiations: Schedule 7 paragraph 7 DPA 1998 vs Schedule 2 paragraph 23 DPA 2018

15. Although the words were not ubiquitous in the DPA 1998 exemptions, it is respectfully submitted that they connoted that the relevant exemption could only apply in particular circumstances and was not a 'blanket' exemption that would apply whatever the circumstances once the predicate grounds were established. Indeed, this was the interpretation of section 29(1) by Munby J in *R(Lord)* (at §94).

16. The omission of the words from the DPA 2018 exemptions is not, in the Commissioner's submission, an indication that the approach to exemptions generally has materially changed. Rather, because the exemptions are applied in the case of each exemption to 'personal data', which by definition relates to an identifiable individual, the application can only be considered in those particular circumstances and the words 'in any case' are redundant.

17. The enabling provisions for the exemption provisions of the DPA 1998 and the DPA 2018 respectively have not materially changed (emphasis added):

- Article 13(1) of Directive 95/46 (enabling exemptions under DPA 1998) provided that 'Member States may adopt legislative measures to restrict the scope of the obligations and rights …'.
- Article 23(1) GDPR (enabling exemption under DPA 2018) provides that 'Union or Member State law to which the data controller or processor is subject may restrict by way of legislative measure the scope of the obligations and rights …'.

18. However, as a result of the different European framework, the way in which exemptions are implemented as part of UK domestic legislation has changed.

19. Under the DPA 1998 exemptions were structured around the circumstances in which the exemption would apply; the circumstances in which the exempted provisions would otherwise apply were determined by the DPA 1998 itself, not by Directive 95/46. Thus, section 27(1) DPA 1998 removed certain circumstances from the regime the Act would otherwise impose:

> '(1) References in any of the data protection principles or any provision of Parts II and III to personal data or to the processing of personal data do not include references to data or processing which by virtue of this Part are exempt from that principle or other provision.'

20. In contrast, section 15(1) DPA 2018, provides that Schedules 2, 3 and 4 to the Act 'make provision for exemptions from, and restrictions and adaptations of the application of, rules of the GDPR.' This scheme reflects that the primary source for the regime that would apply but for the exemption is the GDPR, rather than being contained within the domestic legislation. Put another way, the approach to exemptions under the DPA 2018 is to disapply GDPR requirements, rather than to remove particular circumstances from the regime altogether (the approach under the DPA 1998).

21. In the Commissioner's submission, the omission of the words 'in any case' reflects this different approach to exemptions, which is a product of the new European framework (i.e. Regulation versus Directive) rather than a material change to the way in which exemptions should be applied.

22. An approach which considers particular personal data, rather than personal data generally, is consistent with the European authorities, conveniently summarised at §§12-16 of the NPNSCP submissions dated 8 March 2019 (that approach being agreed by the MPS in its oral submissions, albeit interpreted in a 'broad and purposive way': see Transcript of 25 March 2019 at p166).

23. It is also consistent with the guidance issued by the Article 29 Data Protection Working Party on the GDPR (published 11 April 2018 prior to the coming into force of GDPR) in particular its 'Guidelines on transparency' (https://ec.europa.eu/newsroom/article29/news.cfm?item_type=1360).

24. Further, such an approach is consistent with the guidance on exemptions which the Commissioner has published at ico.org.uk:

> 'Whether or not you can rely on an exemption generally depends on your purposes for processing personal data.
>
> Some exemptions apply simply because you have a particular purpose. But others only apply to the extent that complying with the GDPR would:
>
> - be likely to prejudice your purpose (e.g. have a damaging or detrimental effect on what you are doing); or
> - prevent or seriously impair you from processing personal data in a way that is required or necessary for your purpose.
>
> Exemptions should not routinely be relied upon or applied in a blanket fashion. You must consider each exemption on a case-by-case basis.
>
> If an exemption does apply, sometimes you will be obliged to rely on it (for instance, if complying with GDPR would break another law), but sometimes you can choose whether or not to rely on it.
>
> In line with the accountability principle, you should justify and document your reasons for relying on an exemption so you can demonstrate your compliance.
>
> If you cannot identify an exemption that covers what you are doing with personal data, you must comply with the GDPR as normal.'

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