NOTE BY COUNSEL TO THE INQUIRY REGARDING APPLICATIONS FOR RESTRICTED REPORTING OF INQUIRY HEARINGS

For Hearing on 12 April 2024

Introduction

1. At a hearing on 12 April 2024 the Chairman will hear submissions regarding whether or not, and if so, how, he should exercise his power under section 19 of the Inquiries Act 2005 to make orders restricting the publication (by the media, and/or any other person) of private information about individuals which is expected to appear in the hearing bundle for 'Tranche 2' of the Inquiry, and any consequential restrictions necessary to give effect to any such order (for example, restrictions on attendance at parts of the 'Tranche 2' evidential hearings).

2. The purpose of this note is to:

   2.1. Set out the legal and procedural context relevant to the exercise of that power in the present circumstances;

   2.2. Explain the background giving rise to the need to consider exercising the power at this stage of the Inquiry; and

   2.3. Provide a summary of the nature of the applications received to date, what the primary effects would be of granting them, and consider the principles relevant to responding to them, on behalf of the Inquiry.

Relevant law and procedure

3. Section 18 of the Inquiries Act 2005 ('the Act') provides, insofar as relevant:

18 Public access to inquiry proceedings and information

(1) Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able–

(a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;

(b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.

(2) No recording or broadcast of proceedings at an inquiry may be made except–

(a) at the request of the chairman, or

(b) with the permission of the chairman and in accordance with any terms on which permission is given.

Any such request or permission must be framed so as not to enable a person to see or hear by means of a recording or broadcast anything that he is prohibited by a notice under section 19 from seeing or hearing.

4. Section 19 provides the Chair of an inquiry constituted under the Act with the power to restrict attendance at inquiry hearings and/or the publication of evidence heard at those hearings. It provides as follows:

19 Restrictions on public access etc

(1) Restrictions may, in accordance with this section, be imposed on–

(a) attendance at an inquiry, or at any particular part of an inquiry;

(b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.

5. Section 19(2) provides the Chair with the power to make a 'restriction order' specifying the restrictions that are to apply.

6. Section 19(3) limits the nature of the restrictions that may be included in any such order as follows:

> (3) A restriction notice or restriction order must specify only such restrictions–
>
> (a) as are required by any statutory provision, assimilated enforceable obligation or rule of law, or
>
> (b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).

7. The matters mentioned in subsection (4) include:

> (a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
>
> (b) any risk of harm or damage that could be avoided or reduced by any such restriction;
>
> (c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;
>
> (d) the extent to which not imposing any particular restriction would be likely–
>
> (i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or
>
> (ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).

8. Section 20 of the Act provides that orders made pursuant to s.19 continue indefinitely unless otherwise specified within the order, or in the event that the order is varied or revoked.

9. Breach (or threatened breach) of an order made under s.19 may be certified by the Chair to the High Court.

10. The exercise of any power by the Chair of a public inquiry is always subject to section 17(3) of the Act, which provides that the Chair must, in making any decision as to the procedure or conduct of an inquiry, act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).

11. The 'Restriction Orders: Legal Principles and Approach Ruling' dated 3 May 2016[1] considered in detail the interplay between the applicable statutory provisions and legal principles relevant to the making of a restriction order, and so we do not repeat that analysis here.

12. The Inquiry set out its intended approach to privacy, including by reference to Article 8 of the European Convention on Human Rights, in its Restriction Protocol[2]. The Protocol should be read alongside the 'Chairman's Second Statement on Data Protection and Privacy Disclosure to Non-Police, Non-State Core Participants and Civilian Witnesses' dated 21 August 2019[3], and Counsel to

[1] https://www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf
[2] Protocol as revised and reissued 22 July 2020 - https://www.ucpi.org.uk/wp-content/uploads/2020/07/20200722_restriction_protocol.pdf at §§26-49.
[3] https://www.ucpi.org.uk/wp-content/uploads/2019/08/20190821-chairmans_second_statement_on_data_protection_and_privacy_san.pdf

the Inquiry's note regarding disclosure to Non-Police, Non-State Core Participants and Civilian Witnesses dated 18 November 2019[4].

13. The Inquiry has also published its 'Internal Guidance For The Application Of Public Eyes Privacy Restrictions'[5], which sets out how the Inquiry legal team applies redactions or gists to private information in documents which it proposes to include in a hearing bundle and/or to publish. Although the document is primarily concerned with redaction of private information about individuals who are *not* core participants or witnesses, and therefore is not of direct relevance to the resolution of the applications now made by the Inquiry's core participants and witnesses, it nonetheless forms part of the necessary background to those applications.

Background

14. Evidential hearings for 'Tranche 2'[6] of the Inquiry are listed to commence on 1 July 2024. A hearing bundle – containing those documents which the Inquiry has identified as both relevant and necessary to resolving its Terms of Reference insofar as the 'Tranche 2' period is concerned – is currently being prepared for circulation amongst the Inquiry's core participants in advance of that date. Broadly, the bundle will be made up of individual sections – one each for the undercover officers whose deployments are being considered as part of 'Tranche 2', and for each manager whose tenure within the SDS falls wholly within the 'Tranche 2' time period; and one each for the NSCPs who have been affected by

[4] https://www.ucpi.org.uk/wp-content/uploads/2019/11/20191118-counsel_note-privacy_and_data_protection-npnscps_and_civilian_witnesses_san.pdf
[5] 20200911-Internal_Privacy_Guidance.pdf (ucpi.org.uk)
[6] 'Tranche 2' will consider the deployments of undercover police officers by the Special Demonstration Squad (SDS) which commenced between 1983 and 1992, along with a small number of deployments commencing between 1978 and 1982 which were not considered during 'Tranche 1', and the conduct of those who managed the undercover officers within the SDS during that period, where their management had concluded by the end of1992.

the deployments of 'Tranche 2' undercover officers and invited to provide a witness statement as part of 'Tranche 2'. There will be in addition a small number of miscellaneous sections containing, for example, relevant SDS Annual Reports and other management records recovered by the Inquiry and considered relevant and necessary for the 'Tranche 2' hearings.

15. As it has done previously, the Inquiry proposes to circulate the hearing bundle to its core participants subject to a restriction order limiting use of the documents and information contained within them to preparing for the Inquiry's hearings; in particular, any onward dissemination or publication will be prohibited, save and insofar as the information may later be published by the Inquiry itself.

16. Disclosure of the documents which will form part of the 'Tranche 2' hearing bundle to the Inquiry's non-police non state core participants (and witnesses[7]) ('NSCPs') began in earnest in the spring of 2023, and at the time of drafting is almost complete. Disclosure to each NSCP was accompanied by a request that the NSCP consider whether they wished to seek the redaction of any private information about themselves within the documents disclosed[8], prior to their inclusion in the hearing bundle.

17. On 27 September 2023, the Inquiry Legal Team met with a number of the NSCPs and their Recognised Legal Representatives ('RLRs'), who had expressed concern about – amongst other things - the very personal and private

[7] Although witnesses to an Inquiry do not have the same entitlements under the Inquiry Rules 2006 as its core participants, for the purposes of receiving disclosure from the Inquiry and seeking redaction or other restriction of private information, the Inquiry treats non-police non-state witnesses in the same manner a NSCPs, and therefore in this regard references to NSCPs in this note should be understood to incorporate reference to non-police non-state witnesses as well.

[8] As a starting point, all NSCPs received relevant documents which named them, and which were capable of being disclosed following the application of public interest redactions, subject to limited caveats; additional documents were identified and disclosed where to do so was considered necessary to enable the NSCP to respond to a r9 request issued by the Inquiry. In some cases, individual NSCPs also received disclosure of documents naming group CPs with which they were/are associated.

nature of some of the information contained within the documents they had by-then received, and what the Inquiry intended should be done with that information in terms of its further dissemination and/or publication. Although no firm proposals were discussed, the NSCP suggestions at that stage ranged from inviting the inquiry to consider redaction of all names from all documents in the hearing bundle, to be unredacted only if and when a NSCP indicated that they were content for their name to be unredacted, to asking whether the inquiry would be willing to consider applications to restrict publication of certain information.

18. At the start of 2024, and linked to its ongoing consideration of how best to approach the handling of personal and private information within the hearing bundle, the Inquiry concluded that it had the time and resource available to it to prepare and circulate only one bundle for use at its OPEN hearings; that is, a single bundle containing all documents necessary for exploring all officer deployments in the 'Tranche 2' period[9] including the impact of those deployments, and the management of them.

19. Accordingly, on 15 January 2024 the Inquiry asked the NSCPs to say whether they wished to seek redaction of any private information about them in the documents naming them which had been disclosed to them, and which would appear in that hearing bundle. The Inquiry expressed its view that any more than minimal redaction to the documents in the bundle was likely to have a detrimental effect on its ability fully and fairly to explore all relevant issues arising from the evidence in public and asked that such applications were therefore kept to a minimum (for example, redaction of personal data of little relevance to the Terms of Reference). A deadline of 29 January 2024 was set for applications relating

[9] Insofar as it is possible to explore those deployments in OPEN; for officers with Restriction Orders covering both their real and cover names, most of the evidence touching upon their deployments will be heard instead at CLOSED hearings. For each such officer who was alive and deemed well enough to give a witness statement, the Inquiry will include that witness statement in the OPEN hearing bundle, however.

to all documents which had been disclosed on or before 15 January, with a rolling deadline of 14 days after receipt for documents disclosed thereafter.

20. The Inquiry recognised that this approach would mean that relevant private information about some NSCPs would appear in the hearing bundle and that reference to it at a public hearing would have the potential to interfere with the Article 8 rights of those affected. It invited NSCPs to consider applying for any restrictions on the further dissemination and/or publication of such information by 19 February 2024 – that is, to apply for any order restricting reporting ('RRO') that they wished to seek.

21. A hearing has been listed on 12 April 2024. The applications received from NSCPs will not be published in advance of, at, or following the hearing, because to do so would undermine the measures they seek. Rather, the purpose of the hearing will be to consider the principles that should be taken into account when determining such applications. The Chair will reach decisions on individual applications on or soon after 12 April.

Scope of applications received

22. At the time of drafting, the Inquiry has received applications for RROs from nine of its NSCPs[10]. The Inquiry has received submissions concerning privacy redactions to the hearing bundle from a larger number of NSCPs, further to which the Inquiry has in some cases sought clarification of whether, in the event that the Inquiry does not agree to redact the information, restricted reporting is sought in the alternative. We anticipate that, with the addition of applications made in the alternative to redaction, the final number of NSCPs seeking restricted reporting of

[10] To permit an understanding of what proportion of its NSCPs (including witnesses) this represents, 'Tranche 2' of the Inquiry expects to have disclosed documents to 104 individuals and groups (i.e. to representatives of the group core participants) by the time its disclosure is complete.

private information about them may be higher than nine, but that the final number will nonetheless represent a minority of the NSCPs engaged in 'Tranche 2'. They are, however, a significant minority, in terms of the extent to which they are mentioned in the contemporaneous documents, and for some, in connection with events of particular evidential significance in 'Tranche 2'.

23. All of the applicants for RROs to date were reported on and/or otherwise affected by undercover officers whose deployments were predominantly concerned with the activities of anarchist and/or animal rights activists, and (necessarily, since this issue has arisen for the first time in 'Tranche 2') active from the mid-1980s to the mid-1990s. At least one applicant for a RRO is a Category H core participant – that is, an individual who was involved in a relationship with an undercover officer.

24. Were the applications to be granted, reporting and/or publication of evidence linked to the deployments of the following undercover officers whose deployments will be considered in 'Tranche 2' would be restricted, at least in part:

24.1. Mike Chitty/ 'Mike Blake'/HN11

24.2. Robert Lambert/ 'Bob Robinson'/HN10

24.3. 'John Lipscomb'/HN87

24.4. John Dines/ 'John Barker'/HN5

24.5. Andrew Coles/ 'Andy Davey'/HN2

24.6. 'Matthew Rayner'/HN1

25. Restriction would, if the orders sought were made, cover not only contemporaneous documentary evidence relating to those deployments insofar

as it contained private information the subject of the orders, but also any written or oral witness evidence which included reference to the information – whether evidence given by a former undercover officer, their managers, or a person affected by their conduct. No reporting or other transmission of that evidence outside of the hearing room would be permitted, whether by officially recognised media representatives or otherwise. In some cases, the applications seek restrictions on attendance at hearings at which the information will or may be referred to, so as to give effect to the reporting restriction sought.

26. Insofar as the documents are concerned, restriction would mean either that the document would never be published by the Inquiry on its website (and so could not be referred to in an open inquiry report), or that information within the document would have to be redacted prior to publication of the document (and that information could not be referred to in an open inquiry report).

27. The Inquiry does not have the resource available to it to conduct any further redaction of the hearing bundle documents in advance of or concurrently with the 'Tranche 2' evidential hearings; rather, a RRO would have the effect of delaying the publication on the Inquiry's website of a quantity of documents referred to during the 'Tranche 2' hearings. In practice, that is likely to mean delaying the publication of some or all of the documents from identified sections of the hearing bundle (for example, the sections for the affected NSCP(s) and the associated undercover officer(s)), even if they are the subject of questioning at open hearings, until sometime after the 'Tranche 2' evidential hearings have concluded. If orders restricting attendance at the open hearings are made such that affect other CPs (e.g. those not involved in the events in question) then the relevant parts of the Hearing Bundle would need to be withheld from them.

28. Depending upon their precise terms, RROs are likely also to limit what can be said publicly in opening and closing statements.

29. To facilitate consideration of specific issues that may arise from the applications received, they can be divided into two categories:

29.1. Applications by those who have previously applied for and been granted anonymity, and so are known within the Inquiry by a cypher.

29.2. Applications by those who have no cypher, and who seek a restriction on the reporting or other publication of information contained within identified documents that are to be included in the hearing bundle OR of broad categories of information about them which appears in documents that are to be included in the hearing bundle.

RROs for NSCPs with anonymity

30. Three of the applications for a RRO received come from NSCPs who have been granted anonymity in the Inquiry.

31. The grant of anonymity to a NSCP means that they will be known by a cypher, and not their real name. In order to uphold the restriction order already made in relation to their real identity the Inquiry will, as a matter of course, redact from the hearing bundle information which would tend to identify them, such as their date and place of birth, as well as irrelevant personal data about them (as for any other NSCP) such as their national insurance or passport number. The aim is to prevent an ordinary member of the public who does not have prior knowledge of the individual from discerning their identity from what is published by the Inquiry[11].

32. The three applications for RROs from these NSCPs all seek restriction of "information which may lead, directly or indirectly, to the identification of the

[11] Restriction Protocol §49

witness referred to as [cypher]". To that extent, the applications appear to be otiose, in that they overlap entirely with the protection already afforded to the applicant's private information by virtue of the restriction orders made in relation to their identities. The Inquiry Legal Team's view is that the grant of anonymity provides a sufficient safeguard to the individual for what might otherwise amount to an unjustified interference with their Article 8 rights insofar as private information about them appears in the open hearing bundle, and that no further restriction is necessary.

33. These applications also seek restrictions on the reporting of unproven allegations of serious criminality, in order to avert the negative impact publication of such information could have on the individual's private life, in particular their reputation and/or employment, and in circumstances in which they had no opportunity at the time to contest the allegations. They propose that live evidence from the individual NSCP should be given in private (in some cases acknowledging the need for the attendance of other directly affected NSCPs), and any documents published in connection with that evidence (including the individual's witness statement and any transcript of evidence) should be published with redactions and/or be gisted.

34. We consider that the same principle applies in relation to these three applicants: the protection sought is already afforded by the grant of anonymity. However, restricted reporting of the same sort of information is also sought by NSCPs who are not anonymous, and therefore we consider the likely impact of such restrictions below.

RROs for NSCPs with no anonymity

35. Two types of application have been received from NSCPs without anonymity: one application relates to specified information within identified documents, the remainder set out categories of information over which the applicants seek a RRO.

The categories vary somewhat as between the applicants, but (for both types of application) can be summarised as follows:

35.1. Restriction of unproven allegations of involvement in criminal activity or other misconduct or reprehensible behaviour akin to criminality, in particular where those allegations will be disputed[12];

35.2. Restriction of proven allegations of involvement in criminal activity (not all applicants to whom this could apply seek such a restriction);

35.3. Restriction of sensitive personal information, such as that relating to physical and/or mental health, and personal and private (including intimate) relationships with others;

35.4. Restriction of slurs or other negative comment on personal characteristics and private behaviours.

36. The applicants cite in support of their applications concerns about the following:

36.1. Damage to reputation, particularly where their current lives are far removed from their activities in the 1980s and 1990s, and/or where the information amounts to slurs or other negative comments on personal characteristics and private behaviours;

36.2. Risk to current employment, and consequential negative impact on the applicant's financial situation;

36.3. Harm to mental health.

[12] None of the applicants for RROs have so far provided a witness statement to the Inquiry (two have yet to receive a rule 9 request); the fact that allegations will be disputed is averred within the applications themselves.

37. Some of the applicants also aver that were they to be called to give evidence about the private information at a public hearing without any restriction in place, fears about the impact of the evidence on their private life would diminish the quality of their evidence and may cause them to feel unable to answer questions fully and openly.

38. Finally, some applicants suggest that were a RRO not to be granted, they would seek de-designation as core participants, or would no longer cooperate by providing evidence to the Inquiry. The Inquiry has, through correspondence, reminded the NSCPs that in accordance with its published internal guidance[13], personal information about an individual who is not a core participant or witness may be published, for example where the Inquiry considers that the need to publish the information outweighs competing considerations; such instances are likely to arise in relation to the most significant and factually controversial deployments[14]. Accordingly, the Inquiry considers that the continued engagement in this exercise of those who have applied for RROs remains necessary, whether or not they ultimately seek de-designation or refuse to provide a response to a rule 9 request issued, because some of the information the subject of the applications will have to be considered for publication in any event.

Discussion

39. It will be a matter for the Chair to decide, having heard submissions, whether, and if so, how best to give effect to the RROs sought, in whole or in part. What follows is a consideration of the issues that seem to us to arise from the point of view of the Inquiry.

[13] See §16 of that guidance
[14] Guidance §16.5

40. First, the four categories of information the subject of the applications (paragraphs 33.1-33.4 above) do engage Article 8, and publication of such information in connection with the real identity of any NSCP[15] would amount to interference with their Article 8 rights, such that the Inquiry must go on to consider whether that interference would be necessary and proportionate in the case of any individual applicant, and in relation to any category (or if specified, piece) of information of which restriction is sought.

41. Second, we accept that the consequential harms identified are capable of arising from publication of the categories of information identified in the applications. It is, we consider, self-evident, that publication of allegations of involvement in criminal activity is capable of causing harm to reputation, and/or to an individual's current or future employment, although the weight to be given to such risks will have to be assessed on a case-by-case basis and may, importantly, be affected by what is already in the public domain.

42. The duties on the Chair set out in section 18 of the Act – to take reasonable steps to secure the attendance of members of the public (including reporters) or to enable them to see and hear a simultaneous transmission of proceedings, and to obtain or to view a record of the evidence and documents – are relevant to the balancing exercise which must be entered into in this regard. The significance of the information to the Inquiry's work in meeting the Terms of Reference will be a relevant factor here. We anticipate that the Chair may also be invited to consider Article 10 ECHR, alongside Article 8.

43. Third, as a matter of general principle we consider that the use of the powers given to the Chair under s.19 of the Act to impose restrictions on what can be

[15] As set out above, we consider that where a restriction order granting anonymity has already been made, the application of the individual's cypher and concomitant redaction of identifying information will suffice to prevent any unjustified interference with their privacy.

reported or otherwise published of the evidence received by the Inquiry, whether written or oral, is a permissible way for this inquiry to proceed in order to limit any interference with the Article 8 rights of its NSCPs to that which is necessary and proportionate in order to permit the Inquiry to fulfil its Terms of Reference.

44. Turning to the applications themselves, there is private information about all of the NSCPs who have applied for RROs within documents which will form part of the hearing bundle, which it will be necessary to explore to ensure the effective examination of evidence – such as by ascertaining its accuracy and/or truthfulness, and/or the truthfulness and accuracy of evidence given about it by the undercover officer who reported the information. Primarily, by reference to the categories advanced in the applications, that is likely to be the case where there are allegations (proven and unproven) of involvement in criminal activity. Whilst it is police conduct which remains the focus of the Inquiry, the conduct of some of the individuals reported on by the officers may inform the Chair's assessment of whether the undercover deployment was justified[16]; this is particularly likely to be the case where what was alleged amounted to serious criminality (or would have if proven). There are also allegations of officer involvement in criminal activity and/or of giving evidence on behalf of those reported on in an officer's cover identity which the Inquiry will need to explore.

45. Similarly, we consider that it may be necessary to explore with officers the use of what the applicants refer to as slurs - language and terms used which explicitly or otherwise express criticism of private attitudes, behaviours and the physical appearance of those reported on – in order fully to assess the culture that prevailed within the unit and the Metropolitan Police Service.

---

[16] This was recognised on behalf of the NSCPs in 2016 when the Inquiry was considering what undertaking(s) to seek from the Attorney-General – see, for example, the NSCP submissions dated 13 April 2016 on the topic. For the avoidance of doubt, we do not suggest that there could have been any justification for sexual deception by undercover police officers. It is common ground that there was not. It is the justification for the choice of target and maintenance of a deployment that is in issue.

46. In such cases, the imposition of a RRO may be the most appropriate method by which to limit interference with a NSCP's Article 8 rights - restricting publication of the information beyond the Inquiry's hearing room, and beyond those who are permitted to attend. We recognise that restrictions on attendance may also need to be considered, and that restrictions on attendance would probably lead to restrictions on what could be live-streamed from the Inquiry's hearings. We consider that such restrictions would effectively limit the risk of unjustified interference with the Article 8 rights of those NSCPs affected, whilst safeguarding the effectiveness of the Inquiry by assisting it to get to the truth via the questioning of witnesses at evidential hearings.

Conclusion

47. Save insofar as the documents selected for inclusion in the hearing bundle are redacted or otherwise restricted for public interest reasons further to the Inquiry's Restriction Order process, it is the Inquiry's intention that they, and any witness evidence touching upon them, should be considered insofar as possible and insofar as would be consistent with the Article 8 rights of those whose personal information appears in the documents, at hearings in relation to which no restrictions are imposed upon attendance; that is, hearings which members of the public and representatives of the media would be permitted to attend. However, we recognise that there is a balance to be struck between the desirability of exploring the evidence which the Inquiry hears in full public view, and the need to ensure that the private information of individuals contained in the documents, and which may be referred to by witnesses during their oral evidence, is disseminated no further than necessary.

DAVID BARR KC

EMMA GARGITTER

13 March 2024