

<p>1 Tuesday, 22 March 2016 2 (10.31 am) 3 Opening remarks 4 THE CHAIR: Good morning, everyone. 5 Before we commence today's business, I am afraid 6 I need to remind you of some of the house rules. You 7 have probably seen this already on a notice. I'm only 8 repeating it now so that those who haven't read it are 9 aware of it. 10 First of all, cameras and recording equipment are 11 not allowed in the building. There must be no recording 12 of the proceedings in this room, except by the Inquiry. 13 A transcript of the proceedings will be prepared and 14 will be placed on the Inquiry's website. 15 Secondly, could I ask you all, please, to make sure 16 that your mobile phones are either switched off or on 17 silent. Thirdly, no telephone calls from this room, 18 please, except during any breaks. 19 Finally, text and Twitter are allowed, but I need to 20 remind you of a rule that was imposed at the opening of 21 the Inquiry and will apply at every hearing. No 22 statement made in the hearing can be transmitted until 23 at least 60 seconds has elapsed since the statement was 24 made. The reason for that is that it will enable anyone 25 who wishes to interrupt in order to object to the</p> <p style="text-align: center;">Page 1</p>	<p>1 a restriction order. 2 Several applications for anonymity have now been 3 notified to the Inquiry, both by police officers or 4 former police officers and by core participants who have 5 been affected by undercover policing, and I expect to 6 receive, during the course of the Inquiry, many more 7 applications not just to treat witnesses anonymously, 8 but also to prevent other sensitive evidence, documents 9 and information from being made public. 10 The Inquiry has deliberately approached this problem 11 incrementally. The purpose of doing that is to make 12 sure that the Inquiry receives submissions from 13 everybody involved so that, before I embark on making 14 individual decisions, I am fully aware of the arguments 15 presented by all different interests in the Inquiry. 16 What has happened so far is that I have invited 17 written submissions from core participants as to the law 18 that I must apply and as to the factors that I should 19 take into account when considering whether to make 20 a restriction order and, if so, in what terms. The 21 written submissions that I have received have been 22 admirable, but having received them, I decided that the 23 Inquiry should hold this oral hearing in order to 24 discuss the issues further and so that any one range of 25 interests can comment on the submissions of another.</p> <p style="text-align: center;">Page 3</p>
<p>1 transmission of that statement. To give you an obvious 2 example, if somebody mentions a name and the Inquiry has 3 made an order that that person should be anonymous, then 4 someone can get up and object to its transmission. 5 Those are the house rules, as it were. I come next 6 to the purpose of today's hearing. As you know, so far 7 the Inquiry has been considering preliminary issues that 8 relate to the way in which the Inquiry is going to 9 approach its task of investigating undercover policing. 10 The issue with which we are concerned today is 11 restriction orders. 12 As you know, I am sure, core participants and 13 witnesses can apply to the Inquiry for an order that 14 evidence, documents or information that is provided to 15 the Inquiry should not be disclosed to anyone outside 16 the Inquiry team. They can apply for restrictions on 17 the way in which oral evidence is received; for example, 18 by the exclusion of the public or indeed the exclusion 19 of everybody but the Inquiry team. 20 As a result of a ruling that I made at the outset, 21 some of our core participants are already known by 22 ciphers, rather than by their real names. That was in 23 order to maintain their confidentiality for the time 24 being, until they were able to make a formal application 25 under section 19 of the Inquiries Act 2005 for</p> <p style="text-align: center;">Page 2</p>	<p>1 When this hearing is over, probably tomorrow, I will 2 prepare a written ruling and in that ruling I will 3 explain the legal principles on which I will act and in 4 general terms the approach that I will take to the task 5 of considering applications for restriction orders. But 6 I will not at that stage be making any restriction 7 orders. Before I can consider making restriction 8 orders, I will need evidence from the applicants, 9 further written submissions as to the reasons why such 10 an order should be made in the circumstances of any 11 particular case, and I will need to consider the 12 objections to such an order. It is possible that when 13 I start to consider these applications, I will need 14 a further hearing with further oral submissions on the 15 merits of particular applications. 16 Although this is very much a preliminary hearing, 17 therefore, it seems to me that it is also a very 18 important one and it has not escaped many of you that it 19 is a very important one. It is clear to me that the 20 decisions I have to make about the terms of any 21 restriction orders are going to determine how the 22 Inquiry goes about its business of investigation. 23 There is a stark difference of opinion between the 24 police service core participants and the non-police 25 non-state core participants as to whether any and, if</p> <p style="text-align: center;">Page 4</p>

<p>1 so, how much information about undercover policemen and 2 their operations should be put into the public domain. 3 If I can distil the dilemma that will face the 4 Inquiry, it is in saying that part of my task will be to 5 assess on the one hand the weight of the public interest 6 in the openness of the proceedings of this Inquiry and 7 the harm that might be done if much of it was held in 8 private and, on the other, the public interest in 9 keeping sensitive information private and the harm that 10 might be done if it were to be disclosed. 11 So I want to make sure, before I get down to making 12 decisions, that I have as much assistance as possible 13 from those whose interests are represented at the 14 Inquiry and that is why we are here today. I have asked 15 today's speakers to concentrate primarily on the factors 16 that they say represent the public interest that should 17 prevail, but of course I'm prepared to hear submissions 18 on anything that is relevant to the issue of restriction 19 orders. 20 In a moment I'm going to hand over to Mr Barr, who 21 is leading Counsel to the Inquiry, but before I do, 22 can I just tell you what the timetable will be today? 23 We will break at about 11.45 for 15 minutes in order to 24 give the transcribers a rest and no doubt ourselves, we 25 will take a lunch-break between 1 and 2, we will break</p> <p style="text-align: center;">Page 5</p>	<p>1 website. 2 I propose, therefore, only to deal with the main 3 points which we have raised in that further note orally 4 today in summary form in order to leave the other 5 advocates with as much time as possible to address you. 6 We observed at the outset that the differences 7 between the core participants as to the correct legal 8 tests under section 19 of the Inquiries Act are much 9 narrower than the differences between them as to the 10 results which they contend should flow from the 11 application of those tests. 12 Turning first to the right to life enshrined in 13 article 2 of the European Convention of Human Rights, 14 read with the Human Rights Act, the question has arisen 15 as to what the proper test is once that right is 16 engaged; in other words, once you are satisfied that 17 there is a real and immediate risk to life. The 18 question is whether you can then take all circumstances 19 into account in deciding what protective measures are 20 reasonable or whether you are limited simply to 21 considering questions of practicality. We consider that 22 the answer is the former wider interpretation and we've 23 set out in our further note authority for that 24 proposition from the case of Rabone v Pennine Care 25 National Health Foundation Trust.</p> <p style="text-align: center;">Page 7</p>
<p>1 again in the afternoon at 3.15 for 15 minutes and we 2 will finish as close as we can to 4.30. That's enough 3 from me for the time being. 4 Mr Barr? 5 MR BARR: Thank you, sir. 6 Submissions by COUNSEL TO THE INQUIRY 7 MR BARR: All of the advocates who have made written 8 submissions are here this morning and I know that at 9 least one of the unrepresented core participants wishes 10 in due course to address you. 11 THE CHAIR: Who is that, Mr Barr? 12 MR BARR: Helen Steel, sir. 13 THE CHAIR: Thank you. 14 MR BARR: If any others wish to address you in due course, 15 if they could notify me, I would be grateful. 16 THE CHAIR: Thank you. 17 MR BARR: Since circulating our note on the legal tests 18 applicable for applications for restriction orders dated 19 29 January this year, we have had the benefit of sight 20 of the legal submissions made on behalf of various core 21 participants and on behalf of a number of media 22 organisations. Those submissions raise a number of 23 issues which we have explored further in a supplementary 24 note which has been circulated to the advocates this 25 morning and which is being posted on the Inquiry's</p> <p style="text-align: center;">Page 6</p>	<p>1 In relation to article 8 of the Convention which 2 deals with private life, we note that in a number of 3 submissions core participants have asked that they be 4 informed if a document contains a reference to them 5 before the document is circulated to ensure that their 6 rights under article 8 of the Convention are 7 safeguarded. 8 We acknowledge that it will be for the Inquiry to 9 ensure in its work that it does not violate the rights 10 to privacy of those who participate or who are referred 11 to in evidence. However, article 8 is a qualified 12 right. There will undoubtedly be instances where it is 13 necessary to put personal information into the public 14 domain and there will be other instances where it is 15 equally clear that it is unnecessary to do so. 16 The procedure for dealing with this issue has been 17 written into paragraph 15 of the draft redaction 18 protocol, however it is not envisaged that every 19 reference to a third party in a document will give rise 20 to the need to consult the third party affected. We 21 anticipate that in most cases the Inquiry team will be 22 able to make the necessary judgment. In those cases 23 where we think it is necessary to consult, we will do 24 so. 25 We would point out that a process which required</p> <p style="text-align: center;">Page 8</p>

<p>1 consultation in respect of every reference to personal 2 information would be unworkable and it would in itself 3 become an argument tending in favour of private 4 hearings. We wish to avoid such an outcome. 5 Turning now to the question of the public interest. 6 We have appended to our further note our provisional 7 list of the public interest factors which are likely to 8 arise in relation to public interest applications. We 9 have deliberately described the list as "provisional" 10 because we consider that it will only be when 11 considering a specific application that all of the 12 relevant factors in relation to that application will be 13 capable of conclusive identification. We would like to 14 emphasise to those who read our list that the weight to 15 be attached to the relevant factors is the important 16 factor, not the number of factors which we have listed. 17 Ms Kaufmann and Ms Brander in their submissions have 18 carefully analysed the public interest in openness. To 19 this we have added references in our note to cases which 20 discuss the importance of openness in public inquiries, 21 Wagstaff and Persey. We set out various quotations in 22 our further note which explain the approach the court 23 took there. It is clear that the thrust of those cases 24 is that in an inquiry like this, with a strong forensic 25 role, there is a particular importance in openness.</p> <p style="text-align: center;">Page 9</p>	<p>1 these cases, the more publicly police conduct is 2 examined, the better. 3 Moving now to the investigative obligations under 4 articles 3 and 8 of the European Convention on Human 5 Rights -- that is article 3, the prohibition on torture, 6 inhuman and degrading treatment, and article 8, the 7 right to privacy -- it is clear to us that both rights 8 can give rise to an investigative obligation. However, 9 both rights are qualified in this sense: article 3 is 10 absolute in its non-investigative aspects, but there are 11 qualifications on the investigative duty. There have 12 been numerous public inquiries in which the article 3 13 investigative obligation has been engaged and in which 14 witnesses have been granted anonymity. They include the 15 Baha Mousa Public Inquiry by way of example. 16 We have summarised in the further note the objects 17 and the parameters of those obligations. I do not go 18 into the detail here because it is the view of the 19 Counsel to the Inquiry team that the qualifications on 20 these investigative obligations are such that in reality 21 they are unlikely to make any difference substantively 22 to the outcome of applications for restriction orders. 23 This is because, in any event, you, Sir, will be 24 striking the balance between competing interests and, 25 after all, striking a fair balance between competing</p> <p style="text-align: center;">Page 11</p>
<p>1 Some of the reasons for that referred to in that 2 case law include the need for communal catharsis and an 3 opportunity for those in authority to be held to 4 account; public venting of anger, distress and 5 frustration; a public stage. 6 Mr Squires QC and Mr Stoate, in their written 7 submission, emphasise the gravity of the allegations 8 which relate to the elected representative core 9 participants and which the Inquiry will be 10 investigating. Those allegations are indeed grave. We 11 respectfully agree with them that it is important to 12 investigate those issues as publicly as possible. 13 It is also important to recognise that theirs are 14 not the only matters of fundamental importance which the 15 Inquiry will be investigating. There are many others. 16 Investigating the impact of undercover policing on 17 protest movements calls into question whether basic 18 democratic freedoms have been undermined. Investigating 19 the impact of undercover policing on people from ethnic 20 minorities gives rise once again in a public inquiry to 21 profoundly important questions of racial equality. The 22 particular adverse impact of undercover policing on 23 women who were the subject of deceitful relationships 24 means that attitudes towards women in the context of 25 undercover policing also fall to be examined. In all of</p> <p style="text-align: center;">Page 10</p>	<p>1 interests also lies at the heart of the Convention. 2 That is not to say that these obligations can be 3 ignored. You, of course, Sir, have to act in compliance 4 with Convention obligations. Our point is simply that, 5 in an inquiry which is going to be as public as 6 possible, these obligations are in practice unlikely to 7 add. 8 Those, sir, are the summary observations that 9 I would like to make orally. Those who wish to read the 10 full details can do so by looking at the note and 11 attached schedule on the website. 12 THE CHAIR: Thank you very much for the time being. 13 Mr Hall? 14 Submissions on behalf of the Metropolitan Police Service by 15 MR HALL 16 MR HALL: Sir, on behalf of the Metropolitan Police Service 17 I intend to deal directly and in turn with the matters 18 raised in your issues for consideration document of 17 19 March. 20 THE CHAIR: Thank you. 21 MR HALL: Subject to correcting two references, I don't 22 intend to refer to our submissions, but we adopt them. 23 Those references -- there are two corrections to make -- 24 paragraph 1.52 -- I don't know if you want me to do that 25 now, Sir, or just give you the references. That should</p> <p style="text-align: center;">Page 12</p>

<p>1 refer to section 20(4), rather than 19(4) --</p> <p>2 THE CHAIR: Thank you.</p> <p>3 MR HALL: -- and paragraph 3.3 should refer to paragraph 7.7</p> <p>4 of the code -- that's the written code -- not 7.6.</p> <p>5 Sir, the only thing I want to say before turning to</p> <p>6 the questions raised is to reiterate at the outset the</p> <p>7 Metropolitan Police Service's commitment to give your</p> <p>8 inquiry the fullest possible assistance. What will not</p> <p>9 be generally appreciated is the amount of time,</p> <p>10 personnel and resources that the Metropolitan Police is</p> <p>11 deploying in order to respond to the demands of your</p> <p>12 inquiry. I know that in due course a protocol will be</p> <p>13 published showing the extent of access that the Inquiry</p> <p>14 team have to Metropolitan Police information, including,</p> <p>15 if the Inquiry wishes it, embedding someone at the</p> <p>16 Metropolitan Police Service.</p> <p>17 That commitment to allow you, as chairman, to get to</p> <p>18 the truth of the matters that has led to the institution</p> <p>19 of the Inquiry in the first place should not be</p> <p>20 underestimated and I appreciate there will be those who</p> <p>21 are either unwilling or unable to believe that the</p> <p>22 Metropolitan Police wishes to cooperate and of course it</p> <p>23 may not be possible to persuade everybody that that is</p> <p>24 the case.</p> <p>25 I should put publicly on record before you and your</p> <p style="text-align: center;">Page 13</p>	<p>1 public interest, you do that as an independent judge,</p> <p>2 not driven by perceptions of what other people's</p> <p>3 concerns are.</p> <p>4 So we say it would be wrong to try to decide in</p> <p>5 a general way whether to make a restriction order or not</p> <p>6 on the basis of your or indeed anybody else's perception</p> <p>7 of public, ministerial or parliamentary concern. It</p> <p>8 simply requires an independent and fair approach to the</p> <p>9 criteria laid down in the Act.</p> <p>10 There is a further objection to taking account of</p> <p>11 "widespread public, ministerial and parliamentary</p> <p>12 concern". There is no precise way of measuring such</p> <p>13 concern or how widely such concern is shared. Public</p> <p>14 concern, as we know, fluctuates and indeed the Inquiry</p> <p>15 may not know the full picture. Some parts of the public</p> <p>16 will be very concerned about identifying what went</p> <p>17 wrong; another part of the public, perhaps the majority,</p> <p>18 may be most interested in ensuring that the undercover</p> <p>19 policing tactic is not put in jeopardy. Indeed, there</p> <p>20 may be members of the public concerned to see that</p> <p>21 officers and their families are not put at risk by the</p> <p>22 Inquiry process.</p> <p>23 So we say that public concern is a factor in the</p> <p>24 section 19(4)(a) limited sense, but with the caveat that</p> <p>25 it is not a very safe guide as to whether or not it is</p> <p style="text-align: center;">Page 15</p>
<p>1 Inquiry team how committed the Metropolitan Police</p> <p>2 Service is, from the commissioner down, to ensuring that</p> <p>3 you get at the truth and I submit it would be unfair and</p> <p>4 inaccurate to invite you to proceed on any other basis.</p> <p>5 So, Sir, turning to the questions: the first</p> <p>6 question raised is the relevance of widespread public,</p> <p>7 ministerial and parliamentary concern. Sir, concern</p> <p>8 comes in, as you know, at the beginning of the Act under</p> <p>9 section 1.1. It is concern that will lead a minister to</p> <p>10 instituting a public inquiry; in other words, that fires</p> <p>11 the starting gun. But when it comes to the making of</p> <p>12 restriction orders, concern is only mentioned once and</p> <p>13 that's section 19(4).</p> <p>14 Sir, if I can take you directly to it, it's at</p> <p>15 tab 14 of your first volume and 19(4)(a) tells you that</p> <p>16 one of the matters that you should take into account is</p> <p>17 "... the extent to which any restriction order,</p> <p>18 attendance, disclosure or publication might inhibit the</p> <p>19 allaying of public concern".</p> <p>20 No reference there to allaying of wider concern,</p> <p>21 such as ministerial or parliamentary concern. We say</p> <p>22 that's unsurprising because this is an independent</p> <p>23 judicial process which must decide all matters</p> <p>24 independently and fairly. It's a hallmark of</p> <p>25 a judge-led inquiry that when you come to determine the</p> <p style="text-align: center;">Page 14</p>	<p>1 fair to make a restriction order or not.</p> <p>2 Sir, can I turn then to the second issue, which is</p> <p>3 the presumption of openness. Can I start by saying</p> <p>4 that, whatever ruling you ultimately make on restriction</p> <p>5 orders, this will not be a secret inquiry and we would</p> <p>6 not wish that phrase to gain any currency.</p> <p>7 It is important, we submit, not to exaggerate the</p> <p>8 consequence of restriction orders. There will be</p> <p>9 a public inquiry. We submit that it is likely that the</p> <p>10 Inquiry will be able to examine a great deal openly, not</p> <p>11 just the evidence of the non-state core participants,</p> <p>12 but a good deal of police evidence.</p> <p>13 By way of illustration only, there are four</p> <p>14 officers, that is three former SDS officers and one</p> <p>15 former NPOIU officer, for whom the Metropolitan Police</p> <p>16 accept NCND is not an option. It seems to us that the</p> <p>17 Inquiry will be able to explore in considerable openness</p> <p>18 their role; the rationale for what they did or did not</p> <p>19 do; their management and supervision; their welfare;</p> <p>20 their interactions; the policy documents that governed</p> <p>21 their actions; the awareness of their superiors, both in</p> <p>22 the police and in the Home Office. Even where officers</p> <p>23 are granted measures of anonymity, you will be able to</p> <p>24 explore in public documents, the culture, the</p> <p>25 supervision and the accountability of the organisation.</p> <p style="text-align: center;">Page 16</p>

<p>1 Indeed it is quite possible to go through your terms 2 of reference -- and it is an exercise that we have been 3 doing already -- to identify just how much, on every 4 part of your terms of reference, can be heard in public, 5 both from the core participants and from the police. 6 That's not to underestimate the extent of restrictions 7 we may be seeking, but also to emphasise that this is 8 not by a long shot any request for a secret inquiry. 9 Can I turn then, against that background, to the 10 presumption? Our submission is that there is no 11 presumption of openness for the type of information that 12 concerns the identities of covert human intelligence 13 sources. Sir, I will refer to them as "CHIS" by the 14 acronym. Sir, as you know, an undercover police officer 15 is a type of CHIS. The submission really is based upon 16 the interplay between the statutory regime that governs 17 CHIS -- that is the Regulation of Investigatory Powers 18 Act or RIPA -- and the Inquiries Act of 2005. 19 So you will recall that RIPA creates an 20 architecture, effectively, for the deployment of a CHIS, 21 and there must be arrangements for records which 22 identify that person to be kept and the Act provides 23 that that must be kept confidential and the code -- and 24 I will take you to it in a moment -- made by Parliament 25 by affirmative resolution says that disclosure is an Page 17</p>	<p>1 would be unfair and contrary to section 17(3): 2 "If undercover officers, their superiors and the 3 organisation for which they serve are bound to act 4 according to a particular regime which values 5 confidentiality above openness, it would be unfair and 6 therefore unlawful to approach disclosure on the basis 7 that there is a presumption of openness." 8 Now I understand and will pass over the factual 9 question about what the individual officers expected. 10 I understand that you will need to receive evidence 11 about that and you indeed will receive evidence about 12 that, including, for example, the fact that 13 confidentiality is one of the ways in which the police 14 satisfy their statutory duty under the health and safety 15 legislation to protect their officers. 16 Sir, there are two further points and then I would 17 just like to take you briefly to the Act, if I may. The 18 first point is it is important to avoid a circularity 19 argument which has been raised by some of the non-state 20 participants. That argument says this: there is public 21 concern, therefore you need a public inquiry. In order 22 to fulfil the terms of reference, it must be held in 23 public. Only restriction orders that are conducive to 24 fulfilling the terms of reference are permitted and 25 therefore restriction orders are not permissible. Page 19</p>
<p>1 exception; in other words, there is a presumption of 2 confidentiality for the identity of CHISs. 3 In case it is objected that this argument only 4 applies to undercover police officers who were 5 authorised after the coming into force of RIPA, we 6 disagree. The common law which set up the architecture 7 before RIPA again shows a presumption that source 8 identity will not be revealed. Our submission is that 9 the passing of the Inquiries Act nor indeed the decision 10 by the Home Secretary to hold an inquiry did not 11 override RIPA. It is not the case that the Metropolitan 12 Police Service, undercover police officers and CHISs 13 operated under a statutory regime of confidentiality one 14 day and then suddenly, when the Inquiries Act was passed 15 or when the Home Secretary announced the Inquiry, that 16 architecture and presumption fell away. 17 Section 18 of the Inquiries Act, which talks about 18 a general presumption of openness, is not expressed to 19 be in overriding terms, it is not expressed to be of 20 paramount interest and we submit it doesn't override 21 RIPA. 22 How does one approach the matter? What is the 23 resolution between the two Acts? We say this: if you 24 were to take a starting point of openness for this 25 category of information, it would be unlawful because it Page 18</p>	<p>1 That's the circular argument at paragraph 91 of 2 Ms Kaufmann's submission and that actually follows from 3 a misreading of the Act. I will take you to section 19 4 in a moment. 5 Secondly, some of the non-state participants have 6 drawn on authorities dealing with openness, but those 7 are often drawn from adversarial case law; for example, 8 in the context of control orders, where the state is 9 taking some sort of executive action against 10 an individual and the individual wants to know why that 11 action is be taken. That raises the question about 12 whether an inquiry process should be more or less open 13 than an adversarial process. We say that those 14 authorities do not give you a huge amount of guidance 15 because an inquiry is -- of its own kind it is 16 sui generis. 17 It is sufficient to refer -- and I will in a 18 moment -- to what Lord Bingham considered in the case of 19 Davis. He drew a distinction between the openness that 20 is required in an inquisitorial setting and the openness 21 required in a criminal setting. 22 Sir, can I start by taking you to RIPA itself? It 23 is in the first volume of authorities at tab 25. Sir, 24 can I start by taking you to section 29 which is on 25 internal page 56. Page 20</p>

<p>1 THE CHAIR: Yes.</p> <p>2 MR HALL: Section 29 falls within part 2 of RIPA, which is</p> <p>3 the part of RIPA dealing with a number of covert powers</p> <p>4 that are used by the police and others.</p> <p>5 Subsection 2 of section 29 says that:</p> <p>6 "A person shall not grant an authorisation for the</p> <p>7 conduct or the use of a covert human intelligence source</p> <p>8 unless he believes ..."</p> <p>9 And I'm going to refer to (c):</p> <p>10 "... that arrangements exist for the source's</p> <p>11 case that satisfactory (iii) the requirements of</p> <p>12 subsection 5 ..."</p> <p>13 So that's what applies here. We are not dealing</p> <p>14 with a relevant collaborative unit.</p> <p>15 "... and satisfies such other requirements as may be</p> <p>16 imposed by an order made by the Secretary of State."</p> <p>17 Turning to subsection 5:</p> <p>18 "For the purposes of this part, there are</p> <p>19 arrangements for the sources case that satisfy the</p> <p>20 requirements of this subsection if such arrangements are</p> <p>21 in force as are necessary for ensuring ..."</p> <p>22 Then there's a host of welfare requirements that are</p> <p>23 spelt out, that a person deals day-to day with the</p> <p>24 source's welfare, that there is a person with oversight.</p> <p>25 At (d) there is a requirement that:</p> <p style="text-align: center;">Page 21</p>	<p>1 I'm sorry, I have given you the wrong reference.</p> <p>2 I'm sorry, 74, in volume 3. Sir, at tab 74, you have</p> <p>3 the covert human intelligence sources code of practice.</p> <p>4 The one in the bundle is dated December 2014. The</p> <p>5 relevant part of that is at page 49.</p> <p>6 Sir, this is within chapter 7, which deals with</p> <p>7 keeping of records. Paragraph 7.7 states that:</p> <p>8 "The records kept by public authority should be</p> <p>9 maintained in such a way as to preserve the</p> <p>10 confidentiality or prevent disclosure of the identity of</p> <p>11 the CHIS and the information provided by that CHIS."</p> <p>12 So that is the statutory presumption of</p> <p>13 confidentiality that protects people authorised under</p> <p>14 RIPA.</p> <p>15 Can I deal then with the position pre-RIPA by</p> <p>16 reference to the common law?</p> <p>17 THE CHAIR: Does the code of practice at tab 74 say anything</p> <p>18 about the terms in which confidentiality should be</p> <p>19 offered to a CHIS?</p> <p>20 MR HALL: No, but it recognises that the court may need to</p> <p>21 have it disclosed to it. So I recognise that one could</p> <p>22 not give an absolute cast-iron guarantee to a CHIS that</p> <p>23 their identity would never be disclosed, for example, to</p> <p>24 a judge or if the judge ordered to a third person.</p> <p>25 THE CHAIR: Right. Thank you.</p> <p style="text-align: center;">Page 23</p>
<p>1 "... records relating to the source are maintained</p> <p>2 by the relevant investigating authority that contain</p> <p>3 particulars of all such matters as may be specified for</p> <p>4 the purposes of this paragraph and regulations made by</p> <p>5 the Secretary of State."</p> <p>6 Sir, I don't need to take you to that, but the order</p> <p>7 made under that provision is at tab 133, if you want to</p> <p>8 look at.</p> <p>9 Then (e):</p> <p>10 "Records maintained by the relevant investigating</p> <p>11 authority that disclose the identity of the source will</p> <p>12 not be made available to persons except to the extent</p> <p>13 that there is a need to access them to be made available</p> <p>14 to those persons."</p> <p>15 So there you have the presumption of</p> <p>16 confidentiality. It is not absolute, but the starting</p> <p>17 point is that they will not be disclosed except to the</p> <p>18 extent that there is a need.</p> <p>19 Sir, that's the part of RIPA I wanted to take you to</p> <p>20 in part 2. Can I also just refer to the code? Sir, the</p> <p>21 code of practice made under section 71, it's made using</p> <p>22 the affirmative resolution procedure, so, if you like,</p> <p>23 this is a powerful piece of secondary legislation. The</p> <p>24 code is at tab 79 which is in volume 4 of the</p> <p>25 authorities bundle.</p> <p style="text-align: center;">Page 22</p>	<p>1 MR HALL: So for the common law position, it's probably</p> <p>2 sufficient to refer to the decision of</p> <p>3 Lord Justice Thomas, as he was, in WV, which is at</p> <p>4 tab 68, which you will find again in volume 3.</p> <p>5 Sir, if I can pick it up at paragraph 18, this is,</p> <p>6 of course, the authority in which Lord Justice Thomas</p> <p>7 said that public authority should never reveal the</p> <p>8 identities of CHIS except by way of an order of the</p> <p>9 judge.</p> <p>10 Paragraph 18 summarises the position:</p> <p>11 "There is a long-established rule of the common law</p> <p>12 that the identity of informants is not normally revealed</p> <p>13 in the course of a criminal trial."</p> <p>14 There is reference there to the case of Hardy.</p> <p>15 Paragraph 19 recognising the rule is not an absolute</p> <p>16 rule; reference there to the Marks v Beyfus case and so</p> <p>17 on.</p> <p>18 It is sufficient for me to say that that establishes</p> <p>19 that before RIPA the common law accepted that the</p> <p>20 identities of CHISs would not normally be revealed; in</p> <p>21 other words, the presumption of confidentiality just as</p> <p>22 much as occurs after the coming into force of RIPA.</p> <p>23 THE CHAIR: That was to serve a specific aspect of the</p> <p>24 public interest --</p> <p>25 MR HALL: Yes.</p> <p style="text-align: center;">Page 24</p>

<p>1 THE CHAIR: -- namely that the flow of information relating 2 to the commission of crime should be kept open. And if 3 the identity of informants was general knowledge, the 4 likelihood is that informants would be much more 5 cautious about giving such information. 6 MR HALL: That may have been the purpose for the rule, but 7 all I'm seeking to establish is that the rule existed 8 and therefore those who became CHISs or undercover 9 police officers before RIPA were operating under the 10 same architecture of confidentiality as applied after 11 RIPA. 12 THE CHAIR: And the rule was subject to the overriding 13 public interest that the disclosure of even that 14 information might be required if it was necessary to 15 avoid a miscarriage of justice. 16 MR HALL: Absolutely, and the key word there is "overriding" 17 because it is overriding the presumption of 18 confidentiality. 19 THE CHAIR: There is a very early identification of 20 a balance to be struck between two apparently competing 21 public interests. 22 MR HALL: We say more than that. It is a recognition of the 23 presumption of confidentiality that may be overridden 24 where the public interest requires it. 25 THE CHAIR: Don't you accept that confidentiality offered to</p> <p style="text-align: center;">Page 25</p>	<p>1 confidentiality. 2 THE CHAIR: Absolutely. Thank you. 3 MR HALL: Sir, the two other authorities I want to refer to 4 briefly -- and it is going to be brief on this part of 5 my submissions -- can I take you again back to 6 the Inquiries Act, section 19(3)(b), tab 14 of volume 1. 7 Sir, "Restriction order": 8 "A notice or order must specify only such 9 restrictions ..." 10 Then we invite you to note the word "or", which 11 seems to have been insufficiently recognised in the 12 submissions of Ms Kaufmann. 13 "... as the minister or chairman considers to be 14 conducive to the Inquiry fulfilling its terms of 15 reference or to be necessary in the public interest, 16 having regard in particular to the matters mentioned in 17 subsection 4." 18 So there will be situations in which a restriction 19 is not going to be conducive to the Inquiry fulfilling 20 its purpose, but the public interest will demand it. 21 Then finally, sir, Davis, which is in tab 41 in 22 volume 2. Sir, Davis was, of course, the criminal case 23 dealing with anonymous evidence. It is sufficient for 24 me to refer to section 21 where, during the course of 25 his review of the circumstances in which one might have</p> <p style="text-align: center;">Page 27</p>
<p>1 and given to informers is an expression of the public 2 interest or is it a rule of the common law that 3 informers' identities will never be revealed? 4 MR HALL: At root it is a practical way to persuade people 5 to undertake a risky and difficult job. 6 THE CHAIR: Yes, which is an aspect of the public interest. 7 MR HALL: Yes, and it would not be fair to start from 8 a presumption that they have lost that. That is why 9 I say, although for perhaps other types of information 10 one could, looking at section 18 of the Inquiries Act, 11 start with a presumption of openness, when one is 12 dealing with this category of information, one must 13 start with the reverse, the presumption of 14 confidentiality. 15 THE CHAIR: The essence of Lord Justice Thomas' judgment is 16 at paragraph 29(v), is it not? 17 MR HALL: Yes. 18 THE CHAIR: Again an expression of the fact that the balance 19 has to be struck between the two interests at stake by 20 the judge or, in our case, by virtue of section 19 by 21 the chairman. 22 MR HALL: Yes. The terms in which Lord Justice Thomas 23 describes it again are interesting because he refers to 24 an express or implied undertaking of confidence having 25 to be broken; again reflecting the starting point of</p> <p style="text-align: center;">Page 26</p>	<p>1 anonymous evidence, Lord Bingham drew a distinction 2 between the requirements of open justice as they apply 3 in adversarial proceedings and here as apply in 4 inquisitorial proceedings. 5 THE CHAIR: Not everyone here, Mr Hall, are lawyers, let 6 alone criminal lawyers. This was a case in which 7 a judge had decided that witnesses could give evidence 8 anonymously in a criminal trial. 9 MR HALL: Yes. 10 THE CHAIR: This was in 2008. The House of Lords held that 11 at the common law of England and Wales a defendant was 12 entitled to confront his accuser, which meant he was 13 entitled to know who was accusing him. Subsequently, 14 Parliament decided that there were circumstances in 15 which the administration of criminal justice required 16 that the evidence must be received anonymously or not, 17 but they are very limited circumstances. 18 MR HALL: Indeed. 19 THE CHAIR: What Lord Bingham is dealing with in 20 paragraph 21 is the difference between a criminal trial, 21 where at that time there was no anonymity, and 22 proceedings such as an inquest. Do you want to read it? 23 MR HALL: "The House has approved the admission of anonymous 24 written statements by a coroner conducting an inquest, 25 see ex parte Devine, but as Lord Lane Chief Justice</p> <p style="text-align: center;">Page 28</p>

<p>1 pointed out in a transcript of his judgment to the court 2 in the ex parte Thompson case, an inquest is an 3 inquisitorial process of investigation quite unlike 4 a criminal trial. There is no indictments, no 5 prosecution, no defence, no trial. The procedures and 6 rules of evidence suitable for a trial are unsuitable 7 for an inquest; see ex parte Jamieson. Above all, there 8 is no accused liable to be convicted and punished in 9 that proceeding." 10 So we say that is a good encapsulation of the fact 11 that these are different from many of the authorities 12 that have been relied upon in favour of open justice. 13 That's not to say that open justice is not a significant 14 consideration, but this is not a criminal case. It's 15 not a control order case. It's not a case in which 16 private rights are being vindicated or where a person is 17 accused and one should have that squarely in mind. It 18 is interesting that Lord Bingham found it very easy to 19 distinguish the requirements of common law openness in 20 relation to investigating proceedings from those in 21 adversarial proceedings. 22 So, sir, those are my submissions on the second of 23 the issues that you have raised. 24 THE CHAIR: To be clear, Mr Hall, the observation that you 25 have just made applies to any applicant to anonymity in Page 29</p>	<p>1 therefore a suggestion that can be safely ignored and 2 indeed it should be ignored. It carries no weight in 3 determining the public interest balance and cannot be 4 a factor in your consideration. 5 Similarly, it is not correct that restriction orders 6 will prevent core participants being able to properly 7 participate as core participants. The rights that they 8 have are set out in the Act and the rules. Those rights 9 are, as you know, sir, to make opening and closing 10 statement and to apply -- subject to your discretion -- 11 to ask questions. The Act does not specify that they 12 are entitled to a particular degree of disclosure and 13 the Act contemplates that any participation by any core 14 participant may be subject to restriction orders that 15 may be made. 16 Sir, it is a point that I will come to later on 17 briefly. As you know, there is no prescribed way in 18 which even participants at an article 2 inquest -- that 19 is an inquest investigating a death potentially caused 20 by the state -- there is no minimum degree of 21 participation that is specified. 22 We say that underlying quite a lot of what has been 23 said by the non-state core participants is that mistaken 24 understanding about what an inquiry is. It's not 25 a process for satisfying certain rights. We make three Page 31</p>
<p>1 this Inquiry -- 2 MR HALL: Absolutely. 3 THE CHAIR: -- not just a policeman. 4 MR HALL: Absolutely. Thank you. 5 Sir, I now turn to the question of public 6 engagement. My submissions on this head will somewhat 7 overlap with the questions to do with fairness towards 8 non-state core participants. 9 Sir, can I deal firstly with the engagement by core 10 participants or other witnesses who we are told -- 11 although I have not seen the letter myself -- have 12 threatened to refuse to cooperate if the Inquiry does 13 not make certain decisions. 14 After I have done that, can I deal with whether the 15 Inquiry might be deprived of relevant evidence because 16 effective individuals who are not core participants may 17 not be aware that they have relevant evidence to give. 18 So starting with the suggestion that some core 19 participants might refuse to give evidence, we submit 20 that cannot be a factor in your consideration. Core 21 participants have relevant evidence to give, as is 22 apparent from their applications and their grant of 23 status by you. The Inquiry has powers to compel 24 evidence if individuals refuse to cooperate. The 25 suggestion that they will refuse to give evidence is Page 30</p>	<p>1 points on this. 2 Firstly, the Inquiries Act creates an investigative 3 regime which is to be contrasted with an adversarial 4 regime in which there are parties seeking to vindicate 5 rights. 6 Secondly, there is persuasive authority from 7 Northern Ireland that you cannot allow private interests 8 to drive a public investigation, especially before the 9 facts have even begun to be established. 10 Thirdly -- and I will need to come back to RIPA -- 11 Parliament has specified that private complaints 12 regarding part 2 of RIPA, that is CHIS or undercover 13 police officers, are dealt with by the Investigatory 14 Powers Tribunal. That is in a tribunal where the public 15 interest must be protected by closed proceedings. 16 So, sir, I don't need to take you to the Act in 17 relation to the investigative regime, but can I take you 18 to tab 83? This is the Northern Irish decision which is 19 in bundle 4. Sir, I think I can make the point fairly 20 that Northern Ireland has considerable experience of 21 dealing with hard-fought and contested investigations. 22 Sir, I'm going to pick it up, if I may, at paragraph 6. 23 THE CHAIR: Which tab are you at? 24 MR HALL: Tab 83. 25 THE CHAIR: Thank you. Page 32</p>

<p>1 MR HALL: I will pick it up at paragraph 6, if I may, in the 2 judgment of Lord Chief Justice -- 3 THE CHAIR: Could you just give me a moment, please, 4 Mr Hall? 5 MR HALL: Sorry, 83, I hope. 6 THE CHAIR: I go straight from 80 to 86, but I have noticed 7 that 81 and 82 are at the back of my volume 3. 8 I have it. Just give me a moment to rearrange my 9 folder. 10 Right. Sorry about that. Tab 83? 11 MR HALL: Yes. If I could pick it up straight at 12 paragraph 6 of the Lord Chief Justice's judgment. The 13 first sentence reiterates point we have already looked 14 at in the context of the Davis case, that: 15 "... an inquest differs from a criminal trial in 16 that it is an inquisitorial process, no one is facing a 17 criminal charge, no finding of guilt can be made and no 18 penalty can be imposed." 19 My Lord, the precise context of paragraph 6 was 20 looking at -- you can see from what follows -- the need 21 to avoid satellite litigation. But I'd like to draw 22 attention, if I may to, if you like, some of the 23 sensible guidance that the Lord Chief Justice gives. 24 I'm going to pick it up, if I may, without wishing to 25 skip anything, at line 8 beginning, "If one were to Page 33</p>	<p>1 can equally be said that until the inquest is underway 2 and it can be seen what the real issues are and what way 3 the interested parties are affected in their ability to 4 deal with the evidence affected by the anonymity orders, 5 there is no proper way in which that assessment can be 6 made. It must be for the coroner to evaluate the 7 fairness of the inquest as it proceeds. The coroner has 8 ample powers if he concludes that there is such 9 unfairness that he should intervene." 10 I pause there, recognising I'm not reading the whole 11 of the paragraph. 12 The point is that, in considering the fairness to 13 everyone, in particular the non-state participants, and 14 considering the question of public engagement, it may 15 not be obvious at the very outset to what extent people 16 would be really inhibited until one has started to look 17 at the evidence and seen the extent to which there 18 really is inhibition. This ties in somewhat with my 19 concern that the process should not be painted as 20 a request for a secret inquiry. 21 As I say, there is a considerable amount of police 22 evidence that can be heard in open, we recognise, and it 23 may be that the feared lack of participation will not 24 materialise to the same degree as is currently being 25 expressed. We say that that passage there in the Page 35</p>
<p>1 apply ..." 2 THE CHAIR: Which paragraph are you reading? 3 MR HALL: Paragraph 6, and it is line 8 I want to pick it up 4 at. 5 THE CHAIR: I'm not looking at the same authority, 6 obviously. What I have is the application by 7 officers C, D, H and R. 8 MR HALL: I'm sorry, my Lord. This is completely my fault. 9 Every judgment begins with new paragraph numbers. 10 THE CHAIR: I see. 11 MR HALL: So I am in fact looking at the judgment of 12 Lord Justice Girvan. 13 THE CHAIR: Right. Yes, I have it now. 14 MR HALL: Forgive me. You can see why I assumed it was the 15 Lord Chief Justice because I thought it was going to be 16 following through. But, no, it is paragraph 6 in the 17 judgment of Lord Justice Girvan. Thank you. 18 So the first sentence of paragraph 6 makes the point 19 about an inquest differing from a criminal trial. The 20 context here is the need to avoid satellite litigation. 21 I would like to pick up what the judge says at about 22 line 8, the sentence, "If one were to apply ...": 23 "If one were to apply the same rationale as applies 24 in the criminal context in relation to anonymity and 25 other procedural orders, such as screening orders, it Page 34</p>	<p>1 judge's judgment is a good, commonsensical and fair 2 approach to take matters in stages. 3 Then the next passage in the same judgment is over 4 the page at paragraph 7. We say, again, this is an 5 important reminder about the public and the private 6 interests. I'm going to pick it up at the bottom of 7 that page. The final paragraph begins: 8 "While the European Court of Human Rights recognises 9 the next of kin ..." 10 So we are dealing with an article 2 inquest here. 11 "... have a legitimate interest in the inquest 12 proceedings, this does not mean that the inquest is a 13 lis inter partes between the next of kin and the state. 14 There is a clear danger of this principle being lost 15 sight of in a contentious inquest such as the present 16 one which the parties may come to feel is adversarial 17 whereas in fact is inquisitorial. The interests of the 18 next of kin are legitimate, but not paramount. The 19 coroner's function is to ensure a full, fair and 20 dispassionate investigation. It is not the function of 21 the coroner and the jury [not] to resolve a dispute or 22 to determine the civil rights or criminal liability of 23 any participant." 24 I think I may have -- 25 THE CHAIR: There is a double negative there. Page 36</p>

<p>1 MR HALL: There is a double negative there, which may be why 2 I stumbled. 3 My Lord, we say the obvious common sense and wisdom 4 of that passage applies equally in the context of an 5 inquiry as a reminder that it is not a process for 6 resolving private interests, however important those 7 private interests may be. 8 Sir, the next authority on this topic is to take you 9 back, as I signalled, to RIPA and to make good the 10 submission that Parliament has expressly provided 11 a closed mechanism for dealing with complaints under 12 part 2. If you like, it is a slightly more technical 13 argument, but can I take you to tab 25 in volume 1? 14 Sir, can I pick it up at section 65, which is headed 15 "The tribunal"? 16 Sir, section 65(2) provides that: 17 "... the jurisdiction of the tribunal shall be ..." 18 Then under (a): 19 "... to be the only appropriate tribunal for the 20 purpose of section 7 of the Human Rights Act 1998 in 21 relation to any proceedings under subsection 1(a) of 22 that section [that is proceedings for actions 23 incompatible with Convention rights] which fall within 24 subsection 3 of this section." 25 Then I will take you to subsection 3:</p> <p style="text-align: center;">Page 37</p>	<p>1 That matter went up to into the Court of Appeal, 2 my Lord. The argument was made -- this was in the 3 context of sexual relationships by alleged undercover 4 officers -- that a sexual relationship cannot possibly 5 fall within this scheme, and the Court of Appeal said, 6 "No, it does". 7 So, my Lord, the point that I make is that 8 Parliament has expressly provided machinery for looking 9 at private complaints under the Human Rights Act. That 10 mechanism is that those should be heard in the 11 Investigatory Powers Tribunal, which protects 12 confidentiality. Sir, you will see that at 13 section 69(6). This is referring to the rules that are 14 made under the Investigatory Powers Tribunal rules: 15 "In making rules under this section, the Secretary 16 of State shall have regard in particular to (b), the 17 need to secure that information is not disclosed to an 18 extent or in a manner that is contrary to the public 19 interest or prejudicial to national security, the 20 prevention or detection of serious crime, the economic 21 wellbeing of the United Kingdom or the continued 22 discharge of the functions of any of the intelligence 23 services." 24 The rules reflect that. There is a presumption of 25 closedness; a presumption of protection of</p> <p style="text-align: center;">Page 39</p>
<p>1 "Proceedings fall within this subsection if ..." 2 It is (d): 3 "... they are proceedings relating to the taking 4 place in any challengeable circumstances of any conduct 5 falling within subsection 5." 6 Subsection 5 refers to other conduct to which part 2 7 applies. 8 Now, sir, "Challengeable circumstances", 9 subsection 7: 10 "For the purposes of this section, conduct takes 11 place in challengeable circumstances if it takes place 12 with the authority or purported authority of anything 13 falling within subsection 8." 14 Then subsection 8(c): 15 "The following fall within this subsection and 16 authorisation under part 2 of this Act." 17 That is quite a lot of subsections to look at. 18 Fortunately the High Court, in the case of AJA, which 19 I will not take you to, but you have it in tab 66 of 20 your authorities bundle, confirm the effect. 21 That is, if you are bringing a human rights claim in 22 relation to any conduct which has been authorised under 23 RIPA -- so this is a human rights claim, conduct 24 authorised under RIPA -- it must be brought in the 25 Investigatory Powers Tribunal.</p> <p style="text-align: center;">Page 38</p>	<p>1 confidentiality. 2 So, Sir, it is rather like the submission that 3 I made in relation to the expectation under section 29. 4 In that public context officers and CHIS have an 5 expectation of confidentiality. In the context of 6 private complaints by individuals, again there is an 7 expectation or a balance has been struck by Parliament 8 that those private matters would be dealt with in 9 private. 10 So we say, of course, that one needs to look at the 11 private interests that have been engaged by what 12 undercover officers may or may not have done -- of 13 course I accept that and I don't shy away from the 14 wrongdoing that is bound to be identified during the 15 course of the Inquiry -- but you should not be, we say, 16 too swayed by the need to vindicate private rights 17 because Parliament struck the balance that they should 18 be dealt with in private. 19 Sir, can I then turn to the lines of inquiry point? 20 Sir, it seems to us that this is a matter that will need 21 to be considered in stages. The Inquiry is having 22 everything disclosed to it. You will see and your team 23 will see documents; accounts given by undercover 24 officers to Herne and to Ellison. Your team, Sir, will 25 be able to interview any witness that they wish. You</p> <p style="text-align: center;">Page 40</p>

<p>1 and your team will know whether there are categories of 2 members of the public who are unaware that they may have 3 relevant evidence to give. 4 You and your team will know whether there are 5 individuals or groups who are currently unaware and who 6 need to be approached. You will probably need, for 7 example, to consider that in the context of the very 8 difficult issue over the parents of children whose 9 identities were used. Should they be approached or not? 10 But you will have a sense of whether or not there is 11 a section of the public whose relevant evidence is never 12 going to come before you by looking at the documents 13 that have been disclosed to you. 14 Of course, you will be able to form a view about 15 whether you are being hampered by a lack of engagement 16 by members of the public. It may be that, given the 17 engagement of such large numbers of core participants 18 who have expressed a willingness and a desire to assist 19 you, that this is not a factor. But what shouldn't be 20 done is to speculatively publish details of undercover 21 deployments in the hope that it might generate lines of 22 inquiry that are not currently apparent to you; in other 23 words, to publish, hoping to gather evidence that may 24 not be apparent to you. We say that would be 25 speculative and therefore unfair and contrary to</p> <p style="text-align: center;">Page 41</p>	<p>1 to make on this point. Shall I just make that and then 2 I can see the time for the shorthand writers? 3 THE CHAIR: Of course. 4 MR HALL: So the final point to make is just to say that you 5 have been referred to an article by a former special 6 advocate in the terrorism context at tab 119. I will 7 not take you to it. What we say is that you need to 8 look at the full context of the article. It was 9 concerned with a very different adversarial context and 10 it was dealing in quite special circumstances, where 11 a Security Service witness was called by the Secretary 12 of State -- 13 THE CHAIR: Which volume are you in? 14 MR HALL: Volume 6. I will take you to it. 15 THE CHAIR: Yes. 16 MR HALL: I will just take you to it then. I don't think 17 the pages are numbered, but if you turn to the eighth 18 page and go right to the bottom where it begins, "Such 19 reporting ..." 20 THE CHAIR: Yes. 21 MR HALL: "Such reporting may consist of snippets of 22 information whose reliability depends upon its source, 23 its reliability and its precise form. As to 24 reliability, it may not be clear to the special 25 advocates whether the information is direct or indirect</p> <p style="text-align: center;">Page 43</p>
<p>1 section 17(3). 2 So, Sir, that's what we say about the lines of 3 inquiry point. It is a difficult one, but cannot -- 4 THE CHAIR: Can I ask you to consider another aspect of the 5 lines of inquiry issue? At a practical level, as you 6 rightly say, the Inquiry will receive, frankly, a vast 7 quantity of information about undercover work. As you 8 say, if it comes across a document or category of 9 documents which leads us to think we should follow up 10 and find members of the public who were affected and we 11 find them, what do we say to them? 12 MR HALL: This is going to have to be grappled with in the 13 context of the parents. That's something that we have 14 been thinking long and hard about. 15 THE CHAIR: Do you want to deal with this at another section 16 of your submissions? Have I interrupted you? 17 MR HALL: I think the answer is that I was proposing to deal 18 with that when we come to the hearing of the preliminary 19 issue of what to do about children's identities because 20 it seems to me that that was a particularly good 21 concrete example of where one would need to address this 22 issue. 23 THE CHAIR: We will come back to it. 24 MR HALL: I will address it. 25 Sir, I can see the time. I have one short reference</p> <p style="text-align: center;">Page 42</p>	<p>1 evidence. The person called to give evidence on behalf 2 of the Security Service may not necessarily have been 3 involved in the intelligence-gathering process, so the 4 original format of the intelligence may also be a matter 5 of conjecture. The Government's assessment of the 6 reliability of the information may be presented at 7 a high level of generality. The result is that, save 8 for those cases where the material produced can be shown 9 to be unreliable by reference to other closed material, 10 the court's assessment of the reliability is necessarily 11 dependent on the Government's own assessment." 12 If I'm right, that's the paragraph that Mr Squires 13 cites a passage from. 14 The point is that here you and your team will have 15 access to the actual source. There is no question of 16 what this paragraph is referring to, which is a witness 17 giving secondhand evidence about intelligence which is 18 very difficult for the special advocate to test. Here 19 you are going to be hearing from the undercover officers 20 themselves. You and your team will be able to test 21 their reliability, their credibility. So the particular 22 issue that the special advocate Mr Chamberlain was 23 referring to in his article simply does not arise. 24 THE CHAIR: We will break there and I will return at ten 25 past 12.</p> <p style="text-align: center;">Page 44</p>

<p>1 (11.53 am) 2 (A short break) 3 (12.05 pm) 4 THE CHAIR: Yes, Mr Hall. 5 MR HALL: Sir, to respond to your question about lines of 6 inquiry, I think our answer is: wait and see. If it 7 turns out on analysis of the evidence that you think 8 that there is evidence from other people that you need, 9 then that would be a factor in favour of disclosure, but 10 it would be one factor and it wouldn't be determinative. 11 It is difficult to go beyond that because it is all 12 hypothetical at this stage. 13 THE CHAIR: Just to make sure that you and I are on the same 14 wavelength with this, what I have in mind is your 15 written submission that disclosure of anything should 16 not be made if, in combination with any other 17 information that might be available, it was capable of 18 identifying an undercover police officer. So that we 19 are not confused over our terminology, we know that an 20 undercover officer will have a true identity and an 21 undercover identity and, as I understood your written 22 submissions -- although I could have misunderstood -- 23 you were saying that even the disclosure to a potential 24 witness of an undercover identity would fall within that 25 category and therefore disclosure should not be made --</p> <p style="text-align: center;">Page 45</p>	<p>1 relevant evidence. Whether ultimately you decided to 2 require disclosure of the cover name or the dates or 3 anything about the deployment would depend upon all the 4 circumstances and it could be -- and we will likely 5 submit would be -- trumped by the interests of the 6 officer him or herself and the public interest in 7 safeguarding the undercover tactic. 8 THE CHAIR: That being so, how would the Inquiry be in 9 a position to form a judgment of whether there was 10 proper justification for the targeting if they only hear 11 one side of the story? 12 MR HALL: Again, one would have to wait and see. It may be 13 that the Inquiry could, because of all the disclosure 14 that it had, form a fairly good view. One is not 15 resolving, I suggest, whether or not a particular group 16 was or was not violent extremists. One is going to look 17 at what were the prior sources of information that the 18 police had before they decided to deploy and was it 19 reasonable to deploy in those circumstances. There will 20 be situations, no doubt, where information would have 21 suggested it was a good idea to deploy, and in the cold 22 light of day and with hindsight, it might appear that it 23 wasn't. 24 THE CHAIR: I don't think it is going to be fruitful for me 25 to follow up this exchange with you because we are here</p> <p style="text-align: center;">Page 47</p>
<p>1 MR HALL: Yes. 2 THE CHAIR: -- hence my question. If the Inquiry is to 3 function at all, if it does follow up a lead which it 4 has as a result of your full disclosure, how can we 5 follow it up if we are not able to inform an uninformed 6 member of the public that they were in fact the target 7 of undercover policing? 8 MR HALL: You may not be able to if the public interest in 9 keeping the identity of that officer confidential 10 requires it. It goes back to section 19(3)(b), 11 conduciveness to fulfilling the terms of your Inquiry is 12 one of the reasons for making a restriction order, but 13 you may have a situation in which, hypothetically, you 14 couldn't receive some relevant evidence because the 15 public interest in, say, protecting the interests of an 16 undercover officer trumped that, but it would depend on 17 the particular circumstances. 18 Just take an example: there is a violent group who 19 has been infiltrated by an officer. Members of that 20 violent group may say, "We were not at all violent. We 21 were simply a protest group", and they put a general 22 observation out, "We would like to know if we were 23 infiltrated". Of course, if you didn't hear from 24 members of that group, you could be -- but, again, it 25 would depend on the circumstances -- deprived of</p> <p style="text-align: center;">Page 46</p>	<p>1 for a limited purpose today, but I did want you to 2 understand some of the practical anxieties that I have 3 about the functioning of the Inquiry. 4 In that regard, I want to put to you another 5 scenario. Suppose that a member of the public does come 6 forward suspecting that they have been reported on by an 7 undercover officer and, by reason of information which 8 the Inquiry has but the witness does not, the Inquiry 9 decides to hear their evidence. If you are right, if 10 a decision has to be made to hold the proceedings partly 11 in private and partly in public, we would have 12 a situation, would we not, when there would be parallel 13 hearings; the undercover officer giving evidence in 14 private, with no one else there but the Inquiry and the 15 police services, and then a public hearing, in which the 16 witness is giving evidence when the Inquiry would know, 17 you would know, that they were talking about an 18 undercover officer, but the witness would not. 19 Any thinking member of the public at the back of the 20 court would draw the inference that this witness 21 wouldn't be giving evidence unless they were describing 22 an interaction with an undercover officer. Another 23 reasonable member of the public might say, "This is 24 demeaning to the witness". Why should the very person 25 affected not be told that they have been affected and</p> <p style="text-align: center;">Page 48</p>

<p>1 that the issue is what happened? 2 I raise this because it goes to the proceedings of 3 the Inquiry itself. To my mind, since I am in charge of 4 them, they are very important. 5 MR HALL: I understand. What is going to be interesting is 6 to see who is in that position; who says "I want to know 7 if I was infiltrated". One of the difficulties that the 8 Inquiry is going to have to grapple with, one suspects, 9 is that there would be people -- 10 THE CHAIR: It is not just those who come forward and say 11 "I want to know". 12 MR HALL: Yes. 13 THE CHAIR: This is the process of obtaining the material in 14 an inquisitorial way. 15 MR HALL: I understand that. The true answer to the 16 question that you posed is that every step that is taken 17 must be considered extremely carefully because of the 18 interests at stake. That's the first point. That 19 includes exactly the point that you raised, which is how 20 you hear from a witness without appearing to give away 21 whether or not a person is an undercover officer. 22 THE CHAIR: So that we understand one another, to use the 23 politicians' phrase, you don't rule anything in or 24 anything out. As a statement of principle, you say that 25 it all depends on the facts of every single application? Page 49</p>	<p>1 participants are not a homogeneous group. There are 2 very different interests at play here. The facts may be 3 very different and the interests of fairness for each 4 non-state core participant may differ from individual to 5 individual. In fact, it would be the hallmark of 6 unfairness to lump individuals together and one must be 7 discriminatory in the positive sense. One must look at 8 the particular facts that pertain in each case. 9 Secondly, it is clear -- and I do not shy away from 10 it -- that there has been wrongdoing towards some 11 core participants. But two wrongs do not make a right 12 or, to put it another way, if one concluded that 13 a particular officer had not acted properly, that does 14 not mean that they are not entitled to fairness. 15 Fairness applies to criminal defendants even after they 16 have been convicted and fairness certainly applies to 17 every person who comes before the Inquiry. 18 Thirdly, I need to put down a marker about something 19 which has been raised to do with psychological evidence, 20 and the suggestion -- I think in Ms Kaufmann's 21 submissions -- that there may be an overriding fairness 22 in names being named because of ongoing psychological 23 damage to core participants if they are not told of 24 those identities. 25 All I can do is express the hope that expert Page 51</p>
<p>1 MR HALL: Absolutely. 2 THE CHAIR: All right. 3 MR HALL: And it's worth making the fairness point, which is 4 that individual interests may or may not be legitimate. 5 There are -- and I will come on to this -- people who 6 disagree very fundamentally with undercover policing at 7 all. There are those who may not be entirely frank with 8 the Inquiry about what their activities were and why 9 they want -- 10 THE CHAIR: I think you are straying outside the strict 11 ambit of my questions -- 12 MR HALL: Forgive me. 13 THE CHAIR: -- which were entirely uncontroversial, as I see 14 it. 15 All right. 16 MR HALL: Can I turn then to category 4? I have already 17 begun to address this: fairness towards non-state core 18 participants. 19 So the starting point is obviously that 20 section 17(3) of the Act does not confine fairness to 21 any particular category of person at all. Fairness is 22 a general consideration that applies equally to state 23 participants and those who are witnesses. 24 Can I make three further short points? The first is 25 one I already mentioned, that non-state core Page 50</p>	<p>1 evidence on the need for disclosure is not going to be 2 advanced as a determinative factor. If it is advanced, 3 then we will need to make submissions at the relevant 4 time, but I do reiterate that fairness is in the context 5 of a public inquiry and public rights, not in the 6 context of vindicating private rights. That may be 7 a relevant consideration if that sort of evidence is 8 advanced. 9 Sir, the only authority I want to refer to now -- 10 I don't need to take you to section 17(3) of the Act, 11 but could I take you to the Azelle Rodney case, which 12 you will find at tab 38 in volume 2. The point that 13 I wish to draw from this is the position of the shooter, 14 E7, by contrast to the position of the other officers. 15 Now the Azelle Rodney decision, upheld by the 16 Divisional Court, is sometimes referred to to 17 demonstrate that anonymity may not be required in the 18 interests of openness. So at paragraph 26 you have the 19 pressing interest in openness on the facts of this case: 20 "It concerns, after all, a man sitting in a car with 21 no weapon in his hand who has eight shots fired at him 22 at close range causing his death." 23 Lord Justice Laws continued five lines in: 24 "It seems to me the Chairman was fully entitled to 25 put what he called a premium on achieving as public an Page 52</p>

<p>1 Inquiry as possible, 'so that at the least to counter or 2 neutralise the obvious alternative surmise, namely a 3 sustained "cover up". The witnesses whom we are 4 concerned with are central to the immediate 5 circumstances of the shooting." 6 Then, Sir, what you will have read from this 7 decision is that, at paragraph 29, the chairman's 8 decision was a reasonable one. There was no answer -- 9 second sentence of that paragraph -- to the Inquiry's 10 concern; 11 "... it was unclear why any officer would be at 12 risk, or perceive himself at risk, by giving evidence 13 with the protection of a cypher but without screens in 14 an environment where cameras, or phones with cameras 15 would be excluded." 16 So far so good. 17 But the interesting point is that counsel, of 18 course, made a distinction between the position of the 19 shooter and the non-shooters. At paragraph 30: 20 "As for any alleged inconsistency with a direction 21 made in favour of E7, as the officer who fired the 22 shots, he is surely likely to be the subject of special 23 attention. Making his a special case was, as it seems 24 to me, a reasonable judgment. Mr Beer, with 25 considerable skill, deploys a greater focus on E7 as a Page 53</p>	<p>1 Paragraph 17 sets out the chairman's ruling on 2 officer E7. As you can see from the internal 3 paragraph -- I'm just picking up five lines up: 4 "His article 8 ECHR case is markedly strong. His 5 subjective concerns for his subsequent safety and that 6 of his family command careful respect." 7 That is absolutely right. The fact that he had 8 article 8 interests -- strong article 8 interests -- was 9 not outweighed by some identification that he was 10 a wrongdoer and the chairman was conspicuously fair, 11 particularly fair, to that individual. 12 So, sir, that's all I have to say about fairness 13 towards non-state core participants. 14 Can I turn then to public accountability? Sir, this 15 raises a question of a process versus outcome, if I can 16 put it like that, and the question as to whether or not 17 there needs to be accountability through hearing of 18 evidence in open as opposed to findings. 19 We say that accountability can be satisfied through 20 your findings. We also say that public accountability 21 is not a significant factor in deciding on whether to 22 have restriction orders in the course of your hearing. 23 We make three points: 24 Firstly it is clear from authority that it's not 25 necessary for accountability purposes to hear evidence Page 55</p>
<p>1 reason to conclude that there is in fact less reason for 2 publicity in relation to the other officers. But I do 3 not think that E7's case conditions the scope of the 4 public interest issue relating to the screening of the 5 other firearms officers. The Chairman was entitled to 6 make his a special case." 7 What I draw from this is that where you have the 8 officer who, if you like, was most wrong because he was 9 the direct cause of the death, nonetheless the chairman 10 treated him with conspicuous fairness and granted in his 11 case, by contrast to the other officers where there was 12 less wrongdoing, anonymity. The grounds for that, sir, 13 are summarised at paragraph 17. 14 THE CHAIR: Is that not simply a reflection of an assessment 15 of possible harm? Greater protection may be need for 16 a witness who is more likely to suffer harm if exposed. 17 MR HALL: Yes, it is. Perhaps I can just say I respectfully 18 agree, and that concerns about, "Well, he was the 19 officer who did most wrong", if you like, didn't lead to 20 his exposure, because the argument that's been raised 21 is, well, where you have an officer where there is 22 a prima facie case of wrongdoing, effectively the 23 balance can only go one way. The Azelle Rodney case is 24 an obvious example of where that was not the case. 25 In fact, I will take you, if I may, to paragraph 17. Page 54</p>	<p>1 openly. 2 Sir, a good example of that is what happened in the 3 Litvinenko judicial review. You will recall that the 4 government said, "We don't think that it is worth having 5 an inquiry because it will all be closed anyway", and 6 the Divisional Court said, "That's just not right. (a), 7 quite a lot of it can be open and, secondly, there will 8 be accountability through the findings". 9 Secondly, Sir, accountability will be achieved 10 through delivery of the unredacted report to the 11 Secretary of State. She is ultimately responsible for 12 the police. She is responsible to Parliament and, 13 through Parliament, to the public at large. 14 Thirdly, the question about accountability does beg 15 the question of whether one is referring to individual 16 accountability or institutional accountability. If what 17 is meant by "accountability" is holding individual 18 officers to account for their wrongdoing and exposing 19 them in order to punish them, then we would strongly 20 resist that -- 21 THE CHAIR: That's not the use I make of those words. It is 22 the accountability of the Inquiry itself. 23 MR HALL: Ah, I misunderstood. I misunderstood. Perhaps 24 I will address that point after lunch. In that case, 25 can I just take you, though, to the accountability point Page 56</p>

<p>1 in the context of the Act? Back to tab 14 in volume 1, 2 if I may.</p> <p>3 Sir if I can pick it up at section 24. Section 24 4 requires that the chairman of an inquiry must deliver 5 a report to the minister, setting out the facts 6 determined by the Inquiry panel and the recommendation 7 and anything else that the panel considers to be 8 relevant to the terms of reference.</p> <p>9 Section 25(1), that it is the duty of the minister 10 or the chairman, if subsection 2 applies, to arrange for 11 reports of an inquiry to be published. Obviously that 12 publication may be completely open; it may be completely 13 closed; it may be half-open, half closed.</p> <p>14 Then section 26, that provides for: 15 "... the laying of reports before Parliament or 16 assembly and whatever is required to be published under 17 section 25 must be laid by the minister either at the 18 time of publication or as soon after as is reasonably 19 practicable before the relevant Parliament or assembly."</p> <p>20 So one, in our submission -- although this is not 21 a complete answer to the point that I will address -- 22 should not overlook that there is a mechanism in the Act 23 for accountability of whatever you report.</p> <p>24 So, Sir, I turn then to the question of -- this is 25 subparagraph 6, "Lesser risk of additional harm after</p> <p style="text-align: center;">Page 57</p>	<p>1 to look at in due course.</p> <p>2 So on this topic, Sir, I submit you cannot draw any 3 a priori conclusions. But we also need to look at the 4 harm that could be caused to another person if there has 5 been self-disclosure followed by official confirmation. 6 There may be harm to a family member; there may be harm 7 to someone that the undercover officer has worked with. 8 Of course those people who could be harmed have not 9 self-disclosed. The connection between the 10 self-disclosing officer and that third party may not 11 have been created by the self-disclosure, but official 12 confirmation could result in that link being drawn.</p> <p>13 One should not underestimate the potential interest 14 and attention that will flow from the Inquiry deciding 15 not to grant a restriction order and requiring the 16 police to officially confirm an individual.</p> <p>17 Then finally, Sir, there may also be knock-on 18 effects to the public interest more generally. It is 19 very important that individuals -- even undercover 20 officers who decide to self-disclose -- cannot force out 21 the disclosure of sensitive information simply by going 22 public about their own identities.</p> <p>23 Sir, that point is made good in the case of Savage]. 24 If I can take you to tab 64 in volume 3. Sir, you will 25 recall that Savage is the judgment of</p> <p style="text-align: center;">Page 59</p>
<p>1 self-disclosure". We say this issue needs to be 2 considered with considerable care. Firstly, there is 3 need to consider any harm to a self-disclosing 4 undercover officer, him or herself, and what is meant by 5 "self-disclosure". A hypothetical question: does it 6 include self-disclosure in response to doorstepping? 7 Does it include self-disclosure in response to someone 8 who threatens an officer that, if they don't admit who 9 they are, then their home address will be put in the 10 public domain?</p> <p>11 We submit that self-disclosure as considered here 12 cannot possibly apply to those sorts of situations. If 13 it did, it would obviously encourage dangerous steps to 14 be taken of people seeking to confront suspected 15 officers in order to secure some sort of self-disclosure 16 which could then play into your ruling on restriction 17 orders.</p> <p>18 Even if there was willing self-disclosure, whether 19 or not harm would be less or more will depend upon the 20 facts. There may be less harm if something that has 21 been self-disclosed is later officially confirmed; but 22 there may be a risk of more harm depending upon what has 23 previously been self-disclosed and what is now being put 24 into the public domain. That, Sir, is an application of 25 the mosaic effect which I know that we are going to need</p> <p style="text-align: center;">Page 58</p>	<p>1 Lord Justice Judge. It concerns a self-discloser. If 2 I can pick it up at page 1067 in tab 64 at letter F. 3 Having looked at the interests of the police informer, 4 Lord Justice Judge said: 5 "That, of course, is not an end of the matter. It 6 is possible that, notwithstanding the wishes of the 7 informer, there remains a significant public interest, 8 extraneous to him and his safety and not already in the 9 public domain, which would be damaged if he were allowed 10 to disclose his role. However, I am unable to 11 understand why the court should infer, for example, that 12 disclosure that might assist others involved in criminal 13 activities, or reveal police methods of investigation or 14 hamper their operations, or indicate the state of their 15 inquiries into any particular crime, or even that the 16 police are in possession of information which suggests 17 extreme and urgent danger to the informer if he were to 18 proceed. Considerations such as these might, in an 19 appropriate case, ultimately tip the balance in favour 20 of preserving the informer's anonymity against his 21 wishes in the public interest. There is no evidence 22 that any such consideration applies to the present 23 case."</p> <p>24 In due course, Sir, we will be putting forward, we 25 hope, fairly comprehensive evidence about the range of</p> <p style="text-align: center;">Page 60</p>

<p>1 interests that could be damaged by disclosure and that 2 includes by self-disclosure. 3 Sir, the next authority -- I don't even need to take 4 you to it because it is -- 5 THE CHAIR: Before we leave that passage, I had better ask 6 you, what did Lord Justice Judge mean by the words "and 7 not already in the public domain"? Don't forget that 8 the issue here was whether or not the claim could be 9 litigated at all and the court's anticipation that this 10 might not be the end of the matter was fully realised in 11 the later case of Carnduff v Rock -- 12 MR HALL: Yes. 13 THE CHAIR: -- in which the court was able to say that if 14 the case was going to be litigated at all, then the 15 whole of the very serious police investigation would 16 have to be filleted and made public in order to resolve 17 the question of whether the informer was entitled to 18 payment or not. 19 Here Lord Justice Judge could be meaning one of two 20 things by "not already in the public domain". He could 21 be meaning "not so far acknowledged", officially 22 acknowledged, or "not so far revealed by the informer 23 himself in his pleading", for example. To this point, 24 I read it as though "not already in the public domain" 25 refers not to official confirmation, but to what the</p> <p style="text-align: center;">Page 61</p>	<p>1 The question was, in part, whether there had been 2 official disclosure or there ought to be official 3 disclosure of the latter alleged status. 4 If I can pick it up at paragraph 43 in the judgment 5 of Lord Justice Richards, Lord Justice Richards does 6 really two things. First of all he explains why 7 official confirmation of Mr McGartland's role as 8 a police informer did not amount to official 9 confirmation that he was an agent of the 10 Security Services pleaded by him. 11 The passage I want to refer to is the final 12 sentence, if I may: 13 "Finally, the claimant's pleaded case as to breach 14 of duty takes one into areas of official methodology 15 that are not and could not be expected to be the subject 16 of any official confirmation." 17 So here's, if you like, the point that I don't think 18 Lord Justice Judge was dealing with. This is the 19 interest in even matters that have been alleged publicly 20 not having to be the subject of official confirmation. 21 That may, for example, include sensitive techniques as 22 well as identities. 23 Sir, I move then to issue 7: less risk of additional 24 harm after third-party disclosure. 25 Similarly, our submission is that you cannot decide</p> <p style="text-align: center;">Page 63</p>
<p>1 informer has himself made public. 2 MR HALL: Yes, I think that's how I read it as well. 3 THE CHAIR: All right. Thank you. I just wanted to make 4 sure. 5 MR HALL: I think it is worth following up that with the 6 observation that there is -- and we made it clear in our 7 submissions -- an important difference between something 8 that is in the public domain and something that is 9 officially confirmed. 10 THE CHAIR: Two different things? 11 MR HALL: Two different things. 12 Sir, the next authority that I would just give you 13 the reference to is DIL at paragraph 39(3). I am sure 14 you would have looked at that. It may not be necessary 15 for me to take you to it. It's the proposition that 16 self-disclosure is not determinative. I know you have 17 that well in mind. Paragraph 39(3). 18 The other passage I will take you to briefly is from 19 McGartland, which is in volume 2, again, at tab 50. 20 THE CHAIR: Sorry, which volume? 21 MR HALL: Sorry, my Lord, tab 50 in volume 2. 22 THE CHAIR: Thank you. 23 MR HALL: Sir, McGartland was the case of a man who had been 24 officially confirmed as a police informer, but who 25 alleged that he was an agent of the Security Service.</p> <p style="text-align: center;">Page 62</p>	<p>1 the relevance of this in the abstract. The fact that 2 some material is in the public domain may mean that 3 there is a greater need for a restriction order. For 4 example, it may be that the lack of official 5 confirmation is all that is holding individuals back 6 from taking aggressive action. It may be that they are 7 still in doubt, but that official confirmation would 8 provide them with the justification in their eyes for 9 taking some action against an officer. 10 Sir, official confirmation following third-party 11 disclosure could be used to confirm a raft of research. 12 There are undoubtedly people who are very interested to 13 see what official confirmation is going to come from the 14 Inquiry. They will no doubt use that as a springboard 15 or a stepping-stone to try and establish new matters, 16 researching deeper and deeper, with either no regard -- 17 perhaps that's unfair -- perhaps no understanding of the 18 risks that they expose individuals and the tactic to by 19 doing that. 20 So the next point is to perhaps attack the premise 21 of the question. The premise of the question is that 22 there has been no harm to date by virtue of there being 23 third-party disclosure, so-called. The question can be 24 asked: how significant is it in any case that harm has 25 not yet happened? That may depend upon how widely</p> <p style="text-align: center;">Page 64</p>

1 allegations have been publicised. Will individuals who
 2 might take violent steps have found out? One needs to
 3 be realistic about the distinction between allegations
 4 that are out there somewhere on the internet and the
 5 sort of widespread publicity that can come as a result
 6 of the Inquiry.
 7 Again, it will depend upon the particular facts and
 8 there is a question of definition here. What is meant
 9 by "third-party disclosure"? Does it mean disclosure to
 10 one person or on one web-page? Does it apply where an
 11 allegation has been made, but suspicions have been put
 12 to rest? Does it include any previous allegation that
 13 a person was an undercover officer?
 14 Sir, the third point is that the Inquiry should, we
 15 say, as a matter of fairness, not encourage those who
 16 wish to achieve confirmation by putting more into the
 17 public domain of their allegations --
 18 THE CHAIR: I do understand the contextual criticism, but
 19 the underlying point is this, is it not: is it
 20 a legitimate question that disclosure by the Inquiry
 21 would be unlikely to lead to any harm additional to that
 22 already the result of disclosure either by the officer
 23 himself or by a third party?
 24 I didn't mean by those observations that an answer
 25 in principle could be achieved. As you have already

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1 said, each case has to be looked at according to its
 2 very particular facts. The prompt for those questions
 3 is the case of McNally. I think it was the
 4 Chief Constable for the Greater Manchester Police v
 5 McNally, in which Lord Justice Auld, in upholding the
 6 decision of Mrs Justice Rafferty, as she then was, to
 7 order the Chief Constable to disclose whether the
 8 witness or whether an individual was an informer,
 9 included the observation that the man who would want to
 10 cause the informer harm, if he was an informer, already
 11 believed that the man was an informer. That can only
 12 have been relevant if it goes to the question of whether
 13 disclosure has the capacity to cause additional harm.
 14 That's what I had in mind.
 15 MR HALL: I see. The McNally case is an example of
 16 assessment on the particular facts.
 17 THE CHAIR: There it looked as though counsel for the Chief
 18 Constable may, by the form of his questions, even though
 19 the questions were not evidence, have led the jury to
 20 a misconception as to the effect of the evidence.
 21 That's why the judge said, "I can't leave the jury in
 22 this state of ignorance as to whether this man was an
 23 informer or not because, if he was, it is very unlikely
 24 that he would have done what you, the Chief Constable,
 25 are alleging he might have done".

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1 So you can see that it is a relevant consideration.
 2 The question is whether it is an effective consideration
 3 on the facts of each particular application.
 4 MR HALL: Absolutely.
 5 THE CHAIR: All right. Thank you.
 6 MR HALL: Sir, category 8, wrongdoing. I start by
 7 acknowledging again that wrongdoing is likely to be
 8 identified on the part of one or other undercover
 9 officer. We accept there has been wrongdoing on the
 10 part of some officers employed by the
 11 Metropolitan Police Service. I need to say that.
 12 What we do not accept, sir, is that wrongdoing is
 13 officers putting themselves at personal risk in order to
 14 report on certain groups. You will have to determine
 15 whether a deployment was justified or not, looking at
 16 the material that you have available to you, but I do
 17 need to deal -- because it underpins some of the
 18 submissions that are made by the non-state participants
 19 that all SDS operations were wholly unjustified.
 20 Sir, it is a matter of official confirmation by
 21 Herne that SDS officers reported on left-wing extremism,
 22 the far right, Irish terrorist groups and animal rights
 23 groups. This hearing cannot be -- and I am sure it
 24 won't be as far as you are concerned -- but equally the
 25 public should not be affected by the wholly false

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1 proposition that all these groups were peaceful and well
 2 meaning. The same can be said of certain environmental
 3 groups.
 4 To take one example of one of these groups, they
 5 were not made up of a bunch of eccentric, if
 6 well-meaning, hippy idealists -- and I'm quoting from
 7 one of their former members, who is a CP before you --
 8 but they supported violent resistance to oppression and
 9 they believed that in particular violence was needed to
 10 transform society and challenge the ruling classes".
 11 To take one other example, a judge who passed
 12 sentence on one of the members of one of these groups
 13 said, "You cloaked your activities with what, in my
 14 judgment, was a hypocritical sham, pretence, that you
 15 were a vehicle for lawful protest in an area of public
 16 concern. It was nothing of the sort".
 17 Sir, in due course you will undoubtedly need to see
 18 the sort of public disorder and rioting the police had
 19 to address, again, some of it caused or fermented by
 20 extremists, and the work the police did to uphold the
 21 democratic values of this country by avoiding influence
 22 by industrial or extremist means.
 23 It is vital, we say, that no rose-tinted spectacles
 24 are allowed to obscure the importance of what the police
 25 were doing. Whether they did it in the right way or not

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<p>1 and the mistakes they made on the way do need to be 2 examined, but it is entirely wrong to pretend that the 3 work of the SDS or any other undercover police officer 4 is in itself illegitimate or an example of wrongdoing. 5 THE CHAIR: That particular reference to wrongdoing is only 6 designed to reflect what Mr Justice Bean said in DIL and 7 others and, indeed even more controversially, in 8 Binyan Mohammed, the national security case that went 9 several hearings in the administrative court and the 10 Court of Appeal. 11 MR HALL: Yes. 12 THE CHAIR: Whether the fact that the investigation is about 13 wrongdoing is just one of the factors to be considered 14 in respect of any particular application. 15 MR HALL: Can I deal, then, with what weight we say 16 wrongdoing has? 17 THE CHAIR: Yes. 18 MR HALL: I'm going to turn now, if you like, to wrongdoing 19 by the authorities. 20 Sir, I have four points. The first point is that 21 there is no authority that, just because an allegation 22 of wrongdoing is made, the matter needs to be considered 23 openly. There is authority on that that I will take you 24 to. 25 The second point is that the fact that there has</p> <p style="text-align: center;">Page 69</p>	<p>1 your terms of reference in module 2. 2 Now a restriction order that effectively leapt to 3 judgment about wrongdoing and weighed it in the balance 4 before you had heard the evidence would, we say, be 5 unfair and therefore unlawful. We are also uneasy about 6 any attempt to turn the application for restriction 7 orders into some sort of witch-hunt, which is really 8 concerned with alleging wrongdoing in order to out 9 officers. A witch-hunt would not be fair. Indeed, it 10 would put off future covert human intelligence sources 11 and undercover officers and they would wonder why it was 12 ever worth signing up if they saw everything that they 13 did described in lurid terms which failed to distinguish 14 between individuals and gave them an opportunity to 15 answer serious allegations. 16 Sir, the authorities on this topic -- shall I deal 17 with the first one? I can see we are getting close to 18 1 o'clock. 19 THE CHAIR: Yes. 20 MR HALL: Can I take you to Marks v Beyfus, tab 62? 21 THE CHAIR: Is that volume 2 or 3? 22 MR HALL: I'm sorry, it is volume 3. Sir, Marks v Beyfus, 23 as you know, is the famous old authority about not 24 permitting questions as to whether a person was an 25 informer in the course of a criminal trial.</p> <p style="text-align: center;">Page 71</p>
<p>1 been wrongdoing by one officer does not mean that all 2 others within the same squad -- I'm thinking of the SDS, 3 for example -- should be considered part of a rotten 4 squad or guilty of wrongdoing by association. That sort 5 of collective approach would be undoubtedly unfair if 6 you were asked to forfeit the anonymity of officers 7 because of what one or two individuals had done. 8 Sir, the third point is that, even if you conclude, 9 as you are bound to in some cases, that there has been 10 wrongdoing on the part of individual officers or the 11 police institutionally, potentially, you cannot ignore 12 the effect on innocent third parties such as family 13 members when making your decision on restriction orders. 14 Fourthly, we say it would not be fair to leap to 15 judgment at the restriction order stage by prejudging 16 the nature or degree of the wrongdoing. Wrongdoing 17 could not be determined fairly against any particular 18 individual without evidence and without giving an 19 opportunity to that individual to have his or her 20 conduct considered and maybe any mitigating reasons also 21 considered. For example, even in the case of an officer 22 where there is wrongdoing, that officer might be able to 23 point to a lack of guidance, maybe psychological 24 reasons, for why he acted in that way. Obviously that's 25 a factor that you are going to have to consider under</p> <p style="text-align: center;">Page 70</p>	<p>1 The passage I would like to refer you to is on 2 page 499, at the end of the Master of the Rolls' 3 judgment. What the Master of the Rolls said was this: 4 "I may add that the rule as to non-disclosure of 5 informers applies in my opinion not only to the trial of 6 the prisoner, but also to a subsequent civil action 7 between the parties on the ground that the criminal 8 prosecution was maliciously instituted or brought 9 about." 10 From that I draw the proposition that the mere 11 allegation of wrongdoing does not mean that a matter has 12 to be dealt with openly. In this context, in the 13 context of informers, CHIS, undercover officers, simply 14 alleging wrongdoing by an officer does not mean that he 15 has forfeited his right to anonymity. 16 THE CHAIR: Thank you. 17 It may be that your point is a good one, but I'm not 18 sure that you can derive it from that passage of 19 Marks v Beyfus. The rule would be of no use at all if 20 you could avoid it by bringing civil proceedings. It 21 may be as simple as that. We don't know what was in the 22 mind of Lord Esher at the time when he said what he did. 23 MR HALL: It is a short passage. But if I have to rely upon 24 common sense for the proposition, then I will do that. 25 THE CHAIR: How are you doing for time, Mr Hall?</p> <p style="text-align: center;">Page 72</p>

<p>1 MR HALL: Sir, I have covered 12 out of 18 pages of my 2 notes. 3 THE CHAIR: I am only asking you so that everybody can bear 4 in mind what our time limit is. 5 Thank you very much. We meet again at 2. 6 (1.00 pm) 7 (The short adjournment) 8 (2.00 pm) 9 MR HALL: Sir, two final authorities on the wrongdoing 10 point. First of all, I will take you to section 20(4) 11 of the Inquiries Act because it is the wrong reference 12 in our submissions. So tab 14. 13 THE CHAIR: Yes. 14 MR HALL: This is the power that you have to vary or revoke 15 a restriction order by making a further order during the 16 course of the Inquiry. So if wrongdoing is a factor, 17 then it may be there is considerable utility in that 18 power; in other words, once you have determined the 19 facts to a satisfactory degree, rather than, as it were, 20 jumping the gun at the outset. 21 The final matter on the authorities -- I don't need 22 to take you to any particular one -- but it is to reply 23 to the submission that's made that there is a body of 24 authorities that says that wrongdoing is a reason for 25 disclosure. A good example of that would be</p> <p style="text-align: center;">Page 73</p>	<p>1 So dealing with question number 2, "What are the 2 possibly components of the public interest that tend in 3 favour of the making of a restriction order under 4 section 19(3)(a) and/or (b)?" 5 "One: the protection of unhindered functioning of 6 police investigation as represented by NCND. At what 7 level of non-disclosure; eg undercover named target, is 8 the public interest served? At what level of 9 disclosure; eg undercover named target, is the public 10 interest harmed?" 11 I will add into that the question which was raised, 12 the loss of blanket/absolute NCND protection. 13 I understand the question is to ask: what would the 14 position be in the absence of a ruling on NCND that had 15 blanket effect? 16 So the starting point for my submissions is that the 17 importance of being able to give a consistent response 18 is well established as something which the Inquiry 19 should take into account. We set it all out in our 20 submissions. I understand why this issue has been 21 raised in this way, but I think our response is it is 22 not possible to have any general ruling at this stage on 23 the levels of disclosure; in other words, where to pitch 24 NCND. That is because, as we have repeatedly said and 25 acknowledged, the effect of NCND involves consideration</p> <p style="text-align: center;">Page 75</p>
<p>1 Lord Clarke's speech in Al Rawi. You will recall the 2 passage. 3 THE CHAIR: Yes. 4 MR HALL: What I submit is that one has to be a bit cautious 5 about this because those observations and similar 6 observations -- although I should note that what 7 Lord Clarke said was not adopted by the remainder of the 8 judges of the Supreme Court. It was his own 9 observations -- one needs to be cautious because, in an 10 adversarial context, if you do not have disclosure of 11 state wrongdoing, then it will never be looked at by 12 a judge. 13 That is one of the reasons why the common law was so 14 adverse to a closed procedure in our role. Here, of 15 course, you have a statutory mechanism that will allow 16 you to address everything. So we say that one should be 17 cautious about that line of authorities and applying 18 them wholesale to this context. 19 So that's what I say about wrongdoing. 20 Question number 9 on the list is the loss of 21 blanket/absolute NCND protection. Can I deal with that 22 when I turn to part 2 of the list? 23 THE CHAIR: Yes. 24 MR HALL: As far as other factors are concerned, I will 25 reply if matters are raised by the other participants.</p> <p style="text-align: center;">Page 74</p>	<p>1 of the whole public interest balance and how that 2 balance turns out will depend upon the particular facts. 3 It may be that the first actual application that you 4 determine for a restriction order will look at targeting 5 information. When you look at the first real 6 restriction order and have to consider the value of NCND 7 in relation to targeting, that will be a good 8 opportunity to consider more generally what is the 9 effect on other operations if we were to reveal this 10 particular target. Can I give a concrete example of 11 this? Let's say that an undercover police officer was 12 targeted against X in a particular situation and against 13 Y in another operation and that other operation had 14 national security sensitivities. Let's say that both X 15 and Y become core participants. Saying that X was 16 targeted by the undercover officer but refusing to say 17 whether you were targeting Y, who will no doubt be 18 jumping up and down and saying, "Well I want to have 19 disclosure in my case, please", could well be damaging. 20 It will depend upon the facts, but that is a real 21 possibility. 22 We note that Ms Kaufmann has attempted in her 23 submissions to solve the issue. You will have in mind, 24 Sir, paragraph 49, I think, in her submissions. She 25 said there is another way round it. We think that is</p> <p style="text-align: center;">Page 76</p>

<p>1 unrealistic and that any question of NCND has to be 2 considered on the facts of the particular case. It's 3 a tricky issue, it's a difficult issue, it's an issue 4 which we say is a perfectly sensible approach, but's not 5 one that you can deal with in the abstract. 6 So in relation to this, I know that the question has 7 been asked and I don't mean to be disrespectful in not 8 answering it, but we do invite you not to try to draw 9 any a priori or general conclusions until we have seen 10 how a particular restriction order application works. 11 So, Sir, the next consideration in favour of 12 restriction orders is fairness to the individual, 13 eg confidentiality and fear. Of course I emphasise that 14 one has to take account of the range of individuals. 15 Can I deal with the officers themselves and say 16 this: those who put themselves at the service of society 17 as police officers, fulfilling a role of difficulty and 18 danger, will have organised their lives around the 19 principle that their role would be kept confidential. 20 As we said in our submissions, the question is not 21 whether the Inquiry should grant anonymity, but whether 22 it should take it away. 23 So fairness comes in two ways: fairness in 24 recognising that their identities are confidential as 25 a starting point to any consideration of the issue and</p> <p style="text-align: center;">Page 77</p>	<p>1 made in respect of an article 2 risk." 2 So having identified that he needs to identify the 3 principles, his Lordship then identified those 4 principles in the next sentence: 5 "They entail consideration of concerns other than 6 the risk to life, although as the Court of Appeal said 7 in paragraph 8 of its judgment in the Widgey Soldiers 8 case ... an allegation of unfairness which involves 9 a risk to the lives of witnesses is preeminently one 10 that the court must consider with the most anxious 11 scrutiny. Subjective fears, even if not well-founded, 12 can be taken into account, as the Court of Appeal said 13 in its earlier case of [Lord Saville]." 14 Then it is in that context that Lord Carswell says 15 this: 16 "It is unfair and wrong that witnesses should be 17 avoidably subjected to fears arising from giving 18 evidence, the more so if that has an adverse impact on 19 their health. It is possible to envisage a range of 20 other matters which could make for unfairness in 21 relation to witnesses. Whether it is necessary to 22 require witnesses to give evidence without anonymity is 23 to be determined, as the tribunal correctly apprehended, 24 by balancing a number of factors which need to be 25 weighed in order to reach a determination."</p> <p style="text-align: center;">Page 79</p>
<p>1 then fairness in recognising the impact of losing 2 something that has been built up for so many years. You 3 will obviously need to consider in due course any 4 evidence as to the impact upon them, the constant fear 5 to which those who are identified may be subjected and 6 the effect on their health. 7 Can I ask you just to look at one authority on this 8 topic? It is Re Officer L, which I know, Sir, you will 9 have well in mind. It's at tab 27 in volume 1. Sir, as 10 you know, Re Officer L was a case involving initially 11 a Northern Irish inquiry. The single speech with which 12 the rest of their lordships agreed -- and I emphasise 13 that -- was given by Lord Carswell. Paragraph 22 14 contains a passage which we say cannot be overlooked as 15 to its significance. 16 Part of it has been referred to, but we think that 17 it is important to look at the entirety of the passage 18 beginning at the foot of page 2144. Lord Carswell said: 19 "The principles which apply to a tribunal's 20 common law duty of fairness ..." 21 Pausing there, that must be imported into the 22 Inquiry Act under section 17(3): 23 "... towards the persons whom it proposes to call to 24 give evidence before it are distinct and in some 25 respects different from those which govern a decision</p> <p style="text-align: center;">Page 78</p>	<p>1 We say, quite simply, that that sentence by 2 Lord Carswell, in a judgment with which the rest of the 3 House agreed that it is unfair and wrong that witnesses 4 should be avoidably subjected to fears arising from 5 giving evidence, is a very important one for our 6 purposes because section 17(3) means that you have to 7 act fairly and not to act fairly would be to act 8 unlawfully. 9 Now, I appreciate that that sentence from 10 Lord Carswell's judgment is often cited in order to give 11 the tone. We say, actually, it does more than just give 12 the tone; it actually sets out what the House of Lords 13 said was unfair. We would invite you to consider that 14 not just as the starting point, but really as the key 15 approach. If in fact on the evidence -- and it is 16 always going to depend upon the evidence -- a witness is 17 subjected to fears arising from giving evidence, the 18 more so if it has an adverse impact upon their health, 19 the only question is whether it is avoidable to subject 20 them to those fears. 21 We say if the Inquiry concludes that there is a way 22 of avoiding that fear by granting a restriction order, 23 by granting some measures, the Inquiry really has little 24 choice in the matter in order to comply with its 25 statutory duty under section 17(3).</p> <p style="text-align: center;">Page 80</p>

<p>1 So, Sir, that's all we say about fairness to 2 individuals. Can I deal then quickly with harm to the 3 individual? 4 Sir, we recognise that harm will depend upon the 5 evidence. Can I simply identify the incorrectness of 6 what the non-state core participants have advocated? 7 They have asked you to apply effectively a blanket 8 approach. In Ms Kaufmann's submissions at paragraph 96, 9 she has invited you to conclude that if there has 10 already been disclosure, then a restriction order can 11 serve no purpose. 12 Paragraph 103, she's invited you to conclude that it 13 is inconceivable that article 8 interests of officers 14 will prevail. Well, I have already taken you to the 15 Azelle Rodney case where an article 8 interest did 16 prevail. We say that fairness requires looking at each 17 application on its own merits and not coming with any 18 blanket approach. 19 Question 4, "Harm to the institution". Sir, we 20 don't say this is a feature. Policing in this country 21 takes place by consent. If there is damage to the 22 institution, so be it. Our concern is harm to 23 individuals and harm to preventing and detecting crime, 24 but not harm specifically to the Metropolitan Police 25 Service.</p> <p style="text-align: center;">Page 81</p>	<p>1 officers -- or even some officers -- in this Inquiry 2 could have real and significant effects on the ability 3 to recruit and retain people who put themselves at risk, 4 to put it mildly. 5 Question 6 is the non-availability of alternative 6 measures. I understand that, Sir, you are seeking to 7 explore the significance of other means of protection 8 under the restriction orders. 9 Sir, the first obvious point to make is that, 10 whether there are other means or not will depend upon 11 the evidence, but it is worth saying right now that 12 re-housing an officer to avoid a danger of harm to him 13 and his family will not protect him or his family from 14 the heartbreak of having to leave their home, their 15 schools, perhaps their jobs, and effectively start their 16 entire lives again. So there is always going to be 17 a limit to what other mechanisms can do. 18 Next, can I tackle head-on, please, the argument 19 that, if there is a risk to life, the police should deal 20 with it by relocating that person and giving them a new 21 identity or requiring them to be accompanied at all 22 times by armed guards? We say that is a breathtaking 23 submission. It would be vastly disruptive for the 24 individual and their family; it would be vastly 25 expensive, which is obviously a relevant factor under</p> <p style="text-align: center;">Page 83</p>
<p>1 Question 5 is, "Harm to the function of preventing 2 and detecting crime". Again it is very much a question 3 of evidence. Can I make two points? One is the 4 question has been raised about whether or not deference 5 has any role in evaluating the evidence. It seems to us 6 that that is a question that you will need to address 7 when you look at the actual applications and the actual 8 evidence. 9 We will submit that deference does apply. 10 "Deference" is a controversial word, but the idea that 11 the Inquiry recognises the particular expertise of the 12 police in this field, we say that is something that you 13 can have regard to. So can I just put down a marker 14 that we will challenge that submission in due course. 15 The second point I wanted to address in this context 16 is the suggestion that's been made that there can be no 17 effect on the recruitment and retention of undercover 18 officers and CHIS by a mass, as it were, exposure of 19 past officers in the SDS and the MPORU, for example, 20 because this Inquiry is a one-off. We say that's a bold 21 submission. You will need to look at the evidence on 22 the impact of disclosure and it may be you will have to 23 look at what officers assess is the likely impact of 24 disclosure. But there can be no question, we say, of 25 ruling out that disclosure of a large number of</p> <p style="text-align: center;">Page 82</p>	<p>1 section 19; it would be vastly unfair because it would 2 be perceived as punishment by the Inquiry by prejudging 3 the behaviour of officers. In addition, of course, it 4 would entirely ignore the position of wives, husbands, 5 partners, children and parents. 6 I also make the point that no programme of 7 protection is 100 per cent effective. If exposing the 8 name of an officer raised the risk to life or limb even 9 by a small but material amount, that would be wrong and 10 unlawful. Even if it was possible to neutralise the 11 objective risk, it is unlikely to remove the constant 12 fear that the officer would feel. 13 Sir, I probably don't need to take you to 14 section 19(4), but at section 19(4)(ii) that deals with 15 cost as a relevant factor, obviously if the effect of 16 the Inquiry was vast amounts of public expenditure in 17 order to protect officers and their families, you would 18 need to have evidence of that, but it would be 19 a relevant factor to consider. 20 Then, sir, under 7 is the question of, "Are there 21 any other factors in favour of restriction orders?" 22 There may be circumstances in which restriction orders 23 are conducive to your inquiry. Getting to the bottom of 24 what happened in the early days of the SDS, which you 25 know, sir, Was instituted in 1968 -- and it may be</p> <p style="text-align: center;">Page 84</p>

<p>1 important to do that, to get to the bottom of why the 2 squad operated in the way that it did -- will depend on 3 witnesses who are no longer police officers. Some of 4 those will be old; some of them may be based abroad; 5 some may be in ill health. Plainly giving them a sense 6 of safety may be an important way of encouraging them to 7 cooperate with the Inquiry.</p> <p>8 Sir, the relevant authority on that is the Leveson 9 case in volume 1, if I may, in tab 17. Sir, it is 10 paragraphs 54 through to 56.</p> <p>11 Sir, paragraph 54, after Lord Justice Toulson 12 stresses that it is an inquiry, not the same as 13 a criminal trial or disciplinary proceedings, at 55 he 14 notes that:</p> <p>15 "In determining where fairness lies in a public 16 inquiry, there is always a balance to be struck. I am 17 not persuaded there is in principle something wrong in 18 allowing a witness to give evidence anonymously through 19 fear of career blight, rather than fear of something 20 worse. For a person's future life, it can be a powerful 21 gag."</p> <p>22 So his Lordship concluded that the chairman had not 23 acted unfairly in deciding to admit evidence because he 24 was satisfied -- this is the last sentence of that last 25 line:</p> <p style="text-align: center;">Page 85</p>	<p>1 They are not in the bundle, sir, but if I can just 2 give you the reference: IR Sri Lanka v Secretary of 3 State, 2011 EWCA Civ 704.</p> <p>4 Sir, the Court of Appeal upheld limitations on the 5 ability to see information that affects your article 8 6 rights and that was subsequently upheld by the 7 Strasbourg Court. But it seems to us that that is 8 a different issue from what you are concerned with here, 9 so I raise it if only to dismiss it.</p> <p>10 The second way in which article 3 or article 8 might 11 have an impact on information is whether there is 12 a positive right to information, as in the Gaskin case. 13 Sir, Gaskin was a decision where a person wanted to 14 access records about his own upbringing. What you will 15 see -- and I will take you to it shortly -- is that 16 whether or not there is a right to information depends 17 upon the concrete situation that is the particular facts 18 of the case and all the circumstances, including any 19 countervailing interests. In fact, Gaskin is, we say, 20 of limited effect.</p> <p>21 The third way in which article 3 or 8 could arise is 22 the investigative obligation. The leading case is the 23 case of D v The Commissioner of the Metropolitan Police. 24 Sir, it is referred to in your counsel's note that was 25 served this morning. So whether an article 3</p> <p style="text-align: center;">Page 87</p>
<p>1 "... being satisfied that journalists would not give 2 it otherwise than anonymously."</p> <p>3 Then at paragraph 56, it was emphasised that public 4 interest in the chairman being able to pursue his terms 5 of references as widely and deeply as he considers 6 necessary is of the utmost importance. So that is 7 a factor that could lead to the granting of 8 a restriction order in an appropriate case.</p> <p>9 Sir, can I then turn to question 3, which is:</p> <p>10 "The positive obligation to investigate under 11 articles 3 and/or 8. If so, what if any further impact 12 does the need for effective participation of core 13 participants and putative witnesses in the investigation 14 have upon the level of disclosure of information to 15 them?"</p> <p>16 Sir, there are three different ways in which 17 disclosure could come in. Can I just deal with them? 18 The first way that I say we are not concerned about is 19 the question of disclosure where a person's article 8 20 rights are being interfered with in adversarial 21 litigation. There is a line of cases, Sir, involving 22 control orders or people who have been excluded for 23 national security reasons from the country, where their 24 article 8 rights are being interfered with and they want 25 to know why.</p> <p style="text-align: center;">Page 86</p>	<p>1 investigative obligation arises will be a matter of 2 fact. Of course it would be an obligation on the state, 3 and how that obligation is fulfilled will require 4 consideration of what's been done to date.</p> <p>5 So, for example, if it is a question of identifying 6 someone who has caused article 3 harm, the state has to 7 make sure that there is a mechanism for identifying such 8 a person and punishing them if necessary. It may be 9 that a combination of disciplinary proceedings, any 10 investigation by the IPCC, investigation by 11 Operation Herne, consideration of criminal offences -- 12 it may be that a combination of what has been done to 13 date will already have satisfied that duty.</p> <p>14 You will need to consider, if this arises at all, 15 what has been done to date before answering questions as 16 to whether you, as the Inquiry, need to do something 17 more to avoid the United Kingdom being in breach of its 18 duties.</p> <p>19 Sir, in any event -- and this is why we agree with 20 the note that was sent this morning by your counsel -- 21 it is unlikely that any of these considerations are 22 going to make a huge amount of difference. Sir, you are 23 familiar with the Ramsahai case in the article 2 24 context. Can I give you reference to a domestic 25 authority? It is a speech of Lord Rodger in a case</p> <p style="text-align: center;">Page 88</p>

<p>1 called JL v The Secretary of State, 2009 1 Appeal Cases 2 588. 3 At paragraphs 77 to 83, Lord Rodger explains that, 4 even where the article 2 or article 3 investigative 5 obligation applies, how it is satisfied will very much 6 depend upon the particular facts and there are no 7 prescriptions above a general need to participate. 8 Sir, on this topic I just take you to Gaskin at 9 tab 135, which you will find in volume 6. This is the 10 applicant who is taken into the care of Liverpool City 11 Council and then wanted access to information about his 12 upbringing. At paragraph 37, the Strasbourg Court 13 agreed with the Commission: 14 "The records contained in the file undoubtedly do 15 relate to Mr Gaskin's private and family life in such 16 a way that the question of his access thereto falls 17 within the ambit of article 8. This finding is reached 18 without expressing any opinion on whether general rights 19 of access to personal data and information may be 20 derived from article 8(1) of the Convention. The court 21 is not called upon to decide in abstracto on questions 22 of general principle in this field, but rather has to 23 deal with the concrete case of Mr Gaskin's application." 24 We say similarly that it is only by looking at the 25 particular facts of any particular case would it ever be</p> <p style="text-align: center;">Page 89</p>	<p>1 or improperly refuses consent. Such system is only in 2 conformity with the principle of proportionality if it 3 provides that an independent authority finally decides 4 whether access has to be granted in cases where 5 a contributor fails to answer or withholds consent. No 6 such procedure was available to the applicant in the 7 present case." 8 Obviously, Sir, you, as the independent assessor of 9 where interests lie, will be able to carry out the role 10 which was lacking in Gaskin. So we say the result in 11 Gaskin does not, in fact, take one very far. 12 Can I then turn to the final question raised on your 13 list of issues, which is the question, "Is article 10 14 engaged in an application for a restriction order? If 15 so, what, if any, further impact does the interest of 16 the media have on the weight of arguments against 17 restriction?" 18 Sir, I have to now deal with the exam question that 19 was set by your counsel at 9.15 this morning. The 20 position must, we submit, be a little bit more nuanced 21 than the media appear to submit. At the moment you are 22 engaged, if you like, in the investigative side of your 23 role, so your counsel are calling for -- and requests 24 have been made -- information from the 25 Metropolitan Police. That is undoubtedly part of the</p> <p style="text-align: center;">Page 91</p>
<p>1 possible to identify that an article 8 right of access 2 to information arises. 3 Then going to paragraph 49, if I may, it is 4 important to look at what the court actually decided in 5 this case. The court concluded that there had been 6 a violation. 7 "In the court's opinion, persons in the situation of 8 the applicant have a vital interest, protected by the 9 Convention, in receiving the information necessary to 10 know and to understand their childhood and early 11 development. On the other hand, it must be borne in 12 mind that confidentiality of public records is of 13 importance for receiving objective and reliable 14 information and that such confidentiality can also be 15 necessary for the protection of third persons. 16 "Under the latter aspect, a system like the British 17 one, which makes access to records dependent on the 18 consent of the contributor, can in principle be 19 considered to be compatible with the obligations under 20 article 8, taking into account the state's margin of 21 appreciation. 22 "The court considers how, under such a system, the 23 interests of the individual seeking access to records 24 relating to his private and family life must be secured 25 when a contributor to the record either is not available</p> <p style="text-align: center;">Page 90</p>	<p>1 Inquiry's function. 2 It would be very odd to say that the media had 3 a right to access the material that is going from the 4 Metropolitan Police to the Inquiry as part of that 5 early-stage investigation. So we would say that, even 6 though you are an inquiry and a public inquiry, the 7 media's right cannot exist at this stage and what are 8 called the Leander line of cases that was considered in 9 Kennedy undoubtedly applies at this early stage. 10 On the other hand, without formally conceding the 11 point, we do recognise considerable force in the 12 proposition that if a witness is giving evidence openly 13 and that one part of his or her evidence is then held in 14 camera and the media and others are prevented from 15 seeing it and reporting it -- we can see considerable 16 force in the argument that article 10 does therefore 17 apply. 18 So, we see some merits in the approach that your 19 counsel have suggested in their notes, which is that 20 whether article 10 is engaged in relation to 21 a particular application for a restriction order will be 22 fact-sensitive. 23 Sir, on the assumption that article 10 does apply, 24 can I make these short points? Firstly, it is right to 25 note that article 10 is a qualified right. It is</p> <p style="text-align: center;">Page 92</p>

<p>1 qualified for crime prevention, for interests of the 2 rights and freedoms of others, and although it is 3 sometimes overlooked, article 10 is also qualified to 4 prevent the publication of confidential data, if you 5 look at the full text of article 10. You cannot ignore, 6 therefore, that article 10 is a qualified right which is 7 expressly drawn up to protect interests in a proper and 8 proportionate case.</p> <p>9 So, secondly, the question is: in almost all cases 10 what is proportionate if there is an interference? We 11 have set out the relevant passage from Bank Mellat. If 12 it is a question of article 8 rights versus article 10 13 rights, then neither has automatic precedence, and if it 14 is a question of unqualified rights, which is article 2 15 or article 3, then the rights under article 10 must give 16 way.</p> <p>17 Sir, the third comment is, in this particular 18 context, again looking at RIPA and the common-law rule 19 concerning the confidentiality of CHIS. It may well be 20 that convincing reasons for derogating from open justice 21 will be readily found. It is right that the common law 22 has always been very jealous to safeguard open justice, 23 but equally the same judges who have set down the rule 24 of open justice have been very concerned to protect 25 information about informers.</p> <p style="text-align: center;">Page 93</p>	<p>1 submitted several weeks ago. As was the position there, 2 the NCA today supports the position that has been 3 outlined on behalf of the Metropolitan Police by 4 Mr Hall.</p> <p>5 Sir, also as with the Metropolitan Police, may I say 6 right at the start that the NCA is fully committed to 7 supporting the work of this Inquiry. So, in the light 8 of the fact that you have our submissions and the fact 9 that we support the position adopted by the 10 Metropolitan Police, I propose only to make a few short 11 submissions to you today.</p> <p>12 Before doing so, though, may I simply introduce 13 those who I represent to those who are less familiar 14 with its position than others. Sir, the National Crime 15 Agency is a government agency whose core role is to 16 combat serious and organised crime. It operates in a 17 wide variety of fields, including drugs offences, fraud, 18 cyber crime and child exploitation.</p> <p>19 Although the NCA is not itself a police force, it 20 liaises closely with police forces throughout the 21 United Kingdom in carrying out its work. The NCA also 22 works with law enforcement bodies overseas, a point to 23 which I shall return.</p> <p>24 The role of the NCA that I have outlined is similar 25 to that of its predecessor organisations, the Serious</p> <p style="text-align: center;">Page 95</p>
<p>1 Fourthly, it is debatable how transformative 2 article 10 is. In the Leveson case, 3 Lord Justice Toulson thought that article 10 added 4 nothing to fairness.</p> <p>5 Fifthly and finally on this, the fact that the media 6 has an interest in reporting may itself be important 7 when looking at the risk of harm. Any disclosure is 8 likely to be widely reported and, the more widely 9 reported it is, the more likely it is that damage may be 10 caused.</p> <p>11 Sir, on the authorities I will give you -- if you 12 want to see the full text of article 10, it is in 13 tab 109 at paragraph 31. Quite often article 10 is just 14 summarised or bits are cut out.</p> <p>15 On the interplay between article 8 and article 10, 16 the relevant authority is the Guardian case at tab 82, 17 at paragraph 50. Again, I won't take you to it but 18 Lord Rodger sets out ... The Leveson case is at tab 17. 19 The relevant paragraph is 36.</p> <p>20 Sir, those are my submissions on the final question 21 and those are my submissions.</p> <p>22 THE CHAIR: Thank you very much.</p> <p>23 Mr O'Connor?</p> <p>24 Submissions on behalf of the NCA by MR O'CONNOR</p> <p>25 MR O'CONNOR: Sir, you have the written submissions that we</p> <p style="text-align: center;">Page 94</p>	<p>1 and Organised Crime Agency, also known as "SOCA", and 2 before that the National Crime Squad.</p> <p>3 Sir, the NCA applied for core participant status in 4 this Inquiry because it conducts undercover operations, 5 as have its predecessor organisations. The undercover 6 component of the NCA's work is substantial both in terms 7 of the volume and the complexity of the operations that 8 are conducted. In that context, Sir, I should make it 9 clear that neither the NCA nor its predecessor 10 organisations bore any responsibility for the activities 11 of the SDS or the NPOIU.</p> <p>12 Sir, the issues for consideration that your team 13 circulated identify a serious of issues that may be said 14 to militate in favour and against the granting of 15 restriction orders in the context of this Inquiry and 16 Mr Hall's submissions have addressed them in turn. So 17 I only propose at the outset to address one of those 18 issues and that is the issue that most concerns the 19 NCA's function, namely the issue at 2(v), the harm to 20 the function of preventing detection of crime that may 21 be caused by disclosure.</p> <p>22 Sir, we submit that this will be an important factor 23 for you to consider and to weigh in the balance when 24 deciding whether or not to grant restriction orders. So 25 I shall submit it operates on a number of different</p> <p style="text-align: center;">Page 96</p>

<p>1 levels. Put shortly, though, Sir, we submit that the 2 Inquiry is likely to obtain a large amount of evidence 3 that is relevant to its terms of reference which, if 4 made public, would harm that function. 5 So I wonder if I may start by asking you to look at 6 a particular paragraph of the submissions that have been 7 filed by my learned friend Ms Kaufmann. It is 8 paragraph 9 of her submissions. In the second sentence 9 of that paragraph she states: 10 "This Inquiry is not an inquiry into the use of 11 undercover policing in the context of serious and 12 organised crime, although much of the police submissions 13 and evidence erroneously adopt that focus." 14 Sir, we submit that that proposition is wrong on 15 a number of different levels. Perhaps I can expand on 16 that in this way: the first point relates to your terms 17 of reference. I imagine that you are very familiar with 18 them. If they need to be accessed, they are, in fact, 19 in the authorities bundles at tab 6, divider 124. Sir, 20 I don't think I need to ask you to go to them. 21 The short point I make is this: for entirely 22 understandable reasons, the focus of the submissions 23 that have been put in writing that you are hearing today 24 is on the factual issues concerning the activities of 25 the SDS and the NPOIU, but that is by no means all that</p> <p style="text-align: center;">Page 97</p>	<p>1 Sir, it may be that most of the people in the room 2 would accept that proposition, but we would argue that 3 the point goes further than that because precisely the 4 same sort of damage may be inflicted when you hear 5 evidence about matters that are more historical, 6 including the evidence that you hear about the SDS and 7 the NPOIU. 8 As Mr Hall has stressed, the question will in each 9 case be one of fact, but it cannot be excluded that 10 evidence you hear about events which took place some 11 years ago, possibly even decades ago, may cover 12 operational tactics or techniques that are still current 13 today. If that is the case, then hearing evidence about 14 those matters publicly will undermine the prevention and 15 detection of crime today. That is a factor that you 16 will need to take into account. 17 Sir, the whole question of NCND also arises in this 18 context. Like Mr Hall, I would submit that that is not 19 a matter that is suitable for discussion at the 20 principled level of the submissions that you are hearing 21 today, but what I would submit, as Mr Hall has already 22 done, is that the attempt that has been made by some 23 core participants to argue that the whole question of 24 NCND can simply be put to one side for the purposes of 25 this inquiry is unsustainable.</p> <p style="text-align: center;">Page 99</p>
<p>1 you will be considering within your term of reference. 2 The terms of reference are broad and require you to 3 examine undercover policing in this country from 1968 to 4 date. Although they direct you to consider the 5 activities of undercover police operations targeting 6 political and social justice campaigners, the terms of 7 reference expressly state that the investigation will 8 include but not be limited to those matters. 9 So, in that context, it seems to us inevitable that 10 this Inquiry will hear evidence going beyond those 11 matters, including, for example, undercover operations 12 that have taken place since the events relating to the 13 SDS and NPOIU. So, indeed, given the need for this 14 Inquiry to make recommendations regarding undercover 15 policing in the future, it seems likely to us that you 16 will need to hear evidence about undercover operations 17 that are taking place in the current time, including, 18 quite possibly, undercover operations that are still 19 going on at the time that you hear evidence about them. 20 So it is clear in that context, we would submit, 21 that evidence of that nature will need to be protected 22 by restriction orders. The reason perhaps is obvious: 23 if evidence were to be heard publicly about such current 24 operations, current techniques, tactics, capabilities 25 and targets would be prejudiced.</p> <p style="text-align: center;">Page 98</p>	<p>1 So you have seen the statement from Mr McGuinness, 2 served on behalf of the Cabinet Office. In our 3 submission that statement makes good the proposition 4 that the NCND policy is, in principle, an important tool 5 for maintaining and sustaining policing operations, in 6 particular undercover operations. For that reason alone 7 we would submit that it will be necessary for you to 8 consider that policy when you come to make your 9 decisions on restriction orders. We wouldn't propose to 10 say any more about it at this stage. 11 Sir, finally on this topic, there is the point that 12 we have flagged in our written submissions about the 13 impact of decisions that you make in this Inquiry on 14 existing operations and particularly existing operations 15 with foreign law enforcement agencies. 16 Sir, the submission that we have made and which we 17 maintain is that foreign law enforcement agencies with 18 whom the NCA have a close working relationship are 19 understandably concerned to protect the safety of their 20 officers who are engaged in undercover operations. So 21 were this Inquiry to name -- 22 THE CHAIR: This is a matter for evidence, isn't it, 23 Mr O'Connor? 24 MR O'CONNOR: Sir, I entirely accept it is a matter for 25 evidence. We don't have evidence before you and will be</p> <p style="text-align: center;">Page 100</p>

<p>1 providing you with that evidence. I simply wish to flag 2 the point, as we have done in our written submissions. 3 But if, Sir, you have the point, then I won't say any 4 more about at this stage. 5 So the point we make in summary on this whole issue 6 of the prevention and detection of crime is and is no 7 more than that this will be an important factor for you 8 to weigh in the balance. Of course there will be 9 factors on each side of the balance, but this will be an 10 important factor when you come to determine restriction 11 orders. 12 Sir, may I move on to another point which relates to 13 the statutory context of the 2005 Act? Again, these are 14 points that we have raised in our written submissions 15 and your counsel have referred to in the supplemental 16 note that they have served this morning. So the context 17 for this submission is the argument that has been raised 18 in some of the written submissions that you have 19 received, which is to the following effect: namely, that 20 the level of public concern about the activities of the 21 SDS is such that any form of closed process in this 22 Inquiry would be unacceptable because, if there were any 23 such form of closed process, this Inquiry would not be 24 able to discharge its responsibility to allay the public 25 concern which has been referred to.</p> <p style="text-align: center;">Page 101</p>	<p>1 submit it has already addressed the tension which has 2 been adverted to between, on the one hand, the need to 3 allay public concern through open procedures and, on the 4 other, holding closed procedures. So we would submit 5 that it simply cannot be said that closed procedures are 6 inimical to performing that function of allaying public 7 concern. 8 Sir, three final points which I hope to take quite 9 briefly. First of all, the point raised at item 3 of 10 your agenda relating to the investigative obligations 11 under articles 8 and 3. We have little to add to what 12 has been said by your counsel in their note and also 13 Mr Hall on this topic. 14 Clearly at least some of the factual issues that are 15 before you in this Inquiry will raise arguable breaches 16 certainly of article 8 and possibly also of article 3. 17 In those cases there will be an investigative obligation 18 and this Inquiry may be one of the means by which that 19 obligation is to be discharged. 20 Where that principle is in play, that is where there 21 is an investigative obligation. The desirability of the 22 individual or individuals in question participating 23 effectively in the investigation will be a factor 24 militating against the making of a restriction order. 25 Sir, we would respectfully agree with the submission</p> <p style="text-align: center;">Page 103</p>
<p>1 Sir, we respectfully submit that that argument is 2 inconsistent with the statutory context and so we make 3 the following points in that regard. Sir, first of all, 4 all 2005 Act inquiries are founded on public concern. 5 So that is a point which many have made relating to 6 section 1(1) of the Act. We would submit that it is 7 precisely that context, that common context, that gives 8 such significance to section 19, because what one sees 9 there is that, notwithstanding the fact that all public 10 inquiries will, by definition, be dealing with matters 11 of public concern, Parliament has chosen to legislate to 12 allow public inquiries to undertake what is an 13 exceptional procedure. 14 We make the point in our written submissions that 15 the court have regarded closed procedures as being 16 highly exceptional and indeed not procedures that the 17 courts themselves can decide to adopt. The ruling has 18 been that it is only Parliament that can provide for 19 closed procedures; for example, inquests where there is 20 a close corollary with this procedure, with the Inquiry 21 procedure, have never been allowed to conduct closed 22 procedures. 23 So the point is that, notwithstanding the context of 24 public concern, Parliament has chosen to allow inquiries 25 to adopt these procedures. In that sense, Sir, we would</p> <p style="text-align: center;">Page 102</p>	<p>1 made by your counsel that, given the array of other 2 factors, many of which will overlap with that 3 consideration, that particular consideration is unlikely 4 to be determinative when you make your decision. So we 5 would simply add this: it is only likely to make a real 6 difference if either article 8 or article 3 has some 7 sort of mandatory minimum level of disclosure that is 8 required to be made to an individual who is the subject 9 of that investigation. 10 You will be familiar with the article 6 case law, in 11 particular the case of AF number 3, which in a very 12 different context says precisely that, that there is 13 a minimum level of disclosure that needs to be made for 14 article 6 purposes. It is a principle that developed in 15 control order case law and has been applied in some 16 other situations. 17 That clearly does not apply directly here because 18 article 6 is not engaged in the proceedings. We would 19 simply flag up that we are aware of no case law that 20 sustains a point that there is any form of minimum 21 mandatory level of disclosure under either article 8 or 22 article 3, but we would submit that that is what would 23 need to be in play if this point was to make 24 a difference in the balancing exercise. 25 Sir, next a short point relating to a point made in</p> <p style="text-align: center;">Page 104</p>

<p>1 the submissions filed by my learned friend Mr Emmerson 2 in his written submissions. Perhaps I could just ask 3 you to turn to paragraph 8 of his submissions. 4 Sir, this relates to the issue about the amount of 5 closed evidence that may be deployed in any particular 6 set of proceedings, so this is an issue which has been 7 touched on by a number of parties. 8 Clearly, as Mr Emmerson's submissions accept, there 9 cannot be any "quota", as it were, of closed evidence 10 that is either permissible or not permissible in any 11 such proceedings. It is bound to be fact-specific. But 12 the short factual point here, towards the end of the 13 paragraph or at least towards the bottom of page 2 -- 14 the observation is made that in those inquiries where 15 closed material procedures have so far taken place, that 16 is Bloody Sunday, Hutton and Litvinenko, only a small 17 amount of highly sensitive material primarily affecting 18 national security was withheld from the public domain. 19 So I'm not in a position to assist in Bloody Sunday 20 and Hutton, but I do know something about the 21 Litvinenko Inquiry, and it was for that reason that 22 I asked for a short passage from the report to go into 23 the bundles. 24 It is, Sir, at bundle 4, tab 88. What you have 25 here, Sir, is just one chapter of the report or part of</p> <p style="text-align: center;">Page 105</p>	<p>1 The NPCC supports and adopts the comprehensive 2 submissions made on behalf of the Metropolitan Police 3 Service and those made by the NCA. So, Sir, I have very 4 little that I can usefully add, but if I may take just 5 a few moments to emphasise those matters which, from the 6 NPCC point of view, may be seen as being most important. 7 Firstly, Sir, we support and adopt the submission 8 that was made in respect of the non-police non-state 9 submissions at tab 8, paragraph 9, to the effect that 10 the terms of reference of this Inquiry are very much 11 wider than the SDS and NPOIU and, in particular, cover 12 national undercover policing issues that will inevitably 13 cover matters such as organised crime group activity and 14 counter-terrorism. That is why it is perhaps a little 15 naive to narrow the scope in order to be able to say 16 that some of these people are already self-declared and 17 therefore the issues are simpler than in fact they are. 18 Sir, the legislative framework, when looked at as 19 a whole, in our submission does support the submission 20 made by Mr Hall that there is a presumption of 21 confidentiality in relation to the identity of 22 undercover officers. We accept that that is 23 a presumption that is an aspect of public interest. It 24 is not a rule of law. Therefore to answer a question 25 that you asked earlier today of Mr Hall, it flows from</p> <p style="text-align: center;">Page 107</p>
<p>1 the report, part 7, which deals with closed evidence. 2 I simply direct your attention to paragraphs 7.4 3 and 7.5, where Sir Robert Owen describes the volume of 4 closed material that was in play in those proceedings. 5 Sir, thank you. The final point, the unfortunately 6 named principal of deference, you will have seen that we 7 did raise a point about this in our submissions. We 8 note it is not on the agenda. We assume and we 9 respectfully agree that this really will be a matter to 10 come to once you are considering evidence. Like 11 Mr Hall, therefore, we reserve our position until you 12 get to that stage of these proceedings. 13 Sir, I'm grateful. 14 THE CHAIR: Thank you very much. 15 Submissions on behalf of the National Police Chiefs' Council 16 by MS BARTON 17 MS BARTON: Sir, I represent the National Police Chiefs' 18 Council, the successor organisation to the better-known 19 ACPO. 20 Sir, we have core participant status in order to 21 present a national policing perspective in respect of 22 the terms of reference for this Inquiry. May I say, 23 Sir, that we are fully supportive of the aims of the 24 Inquiry and have taken steps to ensure the fullest 25 cooperation from all forces.</p> <p style="text-align: center;">Page 106</p>	<p>1 that acceptance that we do not rule anything in or 2 anything out. It is a balancing exercise, but it starts 3 not from a presumption of openness, but from 4 a presumption of confidentiality and one would weigh the 5 various factors from that starting point. 6 Sir, the nature of these proceedings is very 7 important. We, as lawyers, have used the terms 8 "adversarial" and "inquisitorial". They may not mean 9 very much to those who are sitting at the back of the 10 court, but one of the most important aspects of 11 inquisitorial proceedings is that you and your team, 12 Sir -- and you as a fact finder -- have access to all of 13 the material, unfettered access. 14 The difference when one looks at adversarial 15 proceedings is that, where a public interest attaches to 16 a document or a piece of information, that document or 17 piece of information must be removed from the 18 decision-making process completely and can form no part 19 of the conclusions. So the consequences of a public 20 interest immunity attaching are very much more serious 21 in the context of those proceedings and indeed sometimes 22 bring an end to those proceedings. 23 So it is a relevant consideration that any 24 disclosure by the Inquiry would be unlikely to lead to 25 any harm additional to that which is already the result</p> <p style="text-align: center;">Page 108</p>

<p>1 of disclosure. We fully agree with that and we agree 2 with the submissions with regard to the approach as to 3 wrongdoing. 4 So, Sir, against the background of those very short 5 submissions, that is the position of the NPCC. 6 THE CHAIR: Thank you very much. Mr Brandon? 7 Submissions on behalf of the separately represented police 8 officers by MR BRANDON 9 MR BRANDON: Mr Brandon. 10 Sir, I appear on behalf of the following core 11 participants: N10, Bob Lambert, self-disclosed and 12 officially confirmed; N14, Jim Boyling, officially 13 confirmed; N15; N16; N26; N58; N81; N123; and N519. 14 Sir, I can be even shorter than my learned friend 15 Ms Barton has been and say this: we adopt and support 16 the submissions made by my learned friend Mr Hall for 17 the Metropolitan Police very ably. He has covered all 18 the points of principle that we would wish to raise and 19 we have nothing to add. 20 Sir, we share the view expressed by Counsel to the 21 Inquiry that it is only when considering the particular 22 applications that all relevant factors are capable of 23 being identified. Sir, it is in making those 24 applications -- and we have started that process, as you 25 have seen, sir -- that I suspect we will be making</p> <p style="text-align: center;">Page 109</p>	<p>1 public concern and there is public concern that 2 particular events may have occurred. 3 Sir, there have been various statements by the 4 Home Secretary in the lead-up to this Inquiry and on 5 setting its terms of reference that make clear the 6 concern that she holds and that others hold. 7 May I deal very quickly with the point that Mr Hall 8 made, which is that what is particularly of concern is 9 public concern rather than ministerial or parliamentary 10 concern. The only response that I would make in 11 relation to that, apart from the type of submissions 12 that will be made specifically on the part of elected 13 representatives, is that concern from ministers or 14 arising within Parliament is clearly of itself 15 a manifestation or evidence of public concern and can be 16 taken into account in that way at the very least. 17 Sir, the Secretary of State has noted her shock and 18 the grave concern arising from the Ellison Review. She 19 has stated that there is the need for the greatest 20 possible scrutiny into what has taken place and the 21 imperative that public trust and confidence in the 22 police is maintained. She suggests that the public must 23 have confidence that the behaviour described in both the 24 Ellison Review and the Operation Herne reports is not 25 happening now and cannot happen in the future.</p> <p style="text-align: center;">Page 111</p>
<p>1 rather more fulsome submissions. But at the moment that 2 is all I have to say, unless there is anything, of 3 course, that I can assist you with, Sir. 4 THE CHAIR: Thank you very much. 5 Mr Griffin. 6 Submissions on behalf of the Secretary of State for the Home 7 Department by MR GRIFFIN 8 MR GRIFFIN: Sir, I represent the Secretary of State for the 9 Home Department and I, too, intend to be brief, focusing 10 on the first three of the issues under 1 on your items 11 for consideration. 12 Sir, it is our submission that fairness and balance 13 lie at the heart of the correct approach in this Inquiry 14 and you will have potentially significant matters that 15 you will need to weigh very carefully and on the basis 16 of a case-by-case approach. The decision whether or not 17 to make an order under section 19 will be of course 18 yours and you will be the person deciding where the 19 balance comes down correctly. 20 As far as item 1 is concerned, widespread public, 21 ministerial and parliamentary concern, it is right to 22 note, as Counsel to the Inquiry note in their first 23 approach to this, that both elements of section 1 are 24 correctly alive in the context of this Inquiry. This is 25 a situation both where particular events have caused</p> <p style="text-align: center;">Page 110</p>	<p>1 There is, I suggest, a very strong public interest 2 in this Inquiry being able to work in a way that is 3 thorough and effective. So far as openness is 4 concerned, section 18(1) -- I'm not sure I need to take 5 you to it, Sir. You will have seen it now several 6 times -- requires you to take reasonable steps to secure 7 public access to proceedings and information and, of 8 course, that requirement is subject to the imposition of 9 a section 19 order. 10 Your opening remarks in July, I suggest, correctly 11 state the situation with regard to openness and the 12 presumption of openness. You said that: 13 "This is a public inquiry to which, as the name 14 implies, the public will have access. I will therefore 15 start with the presumption that witnesses should give 16 evidence in public ..." 17 You then went on to say: 18 "The subject matter of the Inquiry means that there 19 may be circumstances, such as the national interest, 20 continuing police investigations or the rights of 21 individual witnesses, that require me to make an order 22 under section 19." 23 The Home Secretary is committed to restoring public 24 confidence in the police by uncovering the truth of 25 these allegations and in doing so in as open a way as is</p> <p style="text-align: center;">Page 112</p>

1 possible.
 2 Sir, as far as the third issue, public engagement
 3 and lines of inquiry, I want to deal with that just in
 4 one way: that is to acknowledge that the non-state and
 5 police submissions are at their strongest where they
 6 deal with the problems that would arise if large amounts
 7 of evidence concerning undercover officers and
 8 undercover operations was held in closed proceedings
 9 away from all other core participants. That would mean,
 10 as well, the Home Office would not be in attendance at
 11 those closed hearings, as I understand the suggestion.
 12 It is accepted that some of the core participants --
 13 non-state core participants -- would be very important
 14 witnesses for this Inquiry and there would be difficulty
 15 with them effectively participating were large tranches
 16 of the most significant evidence held in closed
 17 proceedings. So I acknowledge that there is a high
 18 public interest in favour of openness that goes on one
 19 side of the balance that you will need to consider.
 20 There will be also competing and potentially
 21 compelling public interest reasons that will go on the
 22 other side of the balance, as has been suggested by the
 23 police lawyers already. It will lead inevitably in many
 24 cases to a very difficult balancing exercise. All
 25 I would wish to add is that you will be able to deploy

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1 all of the various options that are open under
 2 the Inquiries Act. I think, as Counsel to the Inquiry
 3 put it, you will be able to calibrate potential
 4 restrictions from the very minor to the more major in
 5 any particular case that you are considering. It is the
 6 flexibility of the Inquiry model that will assist you in
 7 making these very difficult determinations.
 8 So that is all I want to say, other than to
 9 acknowledge the work that Counsel to the Inquiry have
 10 put in to the first note and also the note this morning
 11 and I'm grateful.
 12 THE CHAIR: Mr Griffin, before you sit down, can I ask you
 13 to address the last sentence of your written submissions
 14 of 12 February, which I think encapsulates what you have
 15 just been saying to me, but I want to ensure that what
 16 you have written there is exactly what you want to say.
 17 MR GRIFFIN: Yes. There is no prejudging any of the
 18 balancing exercises that you will be undertaking.
 19 THE CHAIR: What do you say: where these two competing
 20 factors, that is for and against disclosure, to put it
 21 shortly, directly oppose one another and subject to the
 22 overall requirement of fairness -- so you put that at
 23 the top of your tree --
 24 MR GRIFFIN: Yes.
 25 THE CHAIR: -- the public interest in ensuring that police

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1 techniques remain investigative should outweigh the
 2 interest in public access to information, given that the
 3 Inquiry will have access to all the relevant material.
 4 That's the way you would like it to remain, is it?
 5 MR GRIFFIN: Sir, subject to the overriding requirement of
 6 fairness and an approach on a case-by-case basis, where
 7 I acknowledge that there may be compelling interests in
 8 favour of holding things as openly as possible.
 9 THE CHAIR: Yes, thank you very much.
 10 Ms Kaufmann it is 10 past 3. Now seems to be a good
 11 time for a break.
 12 MS KAUFMANN: Very good.
 13 THE CHAIR: I will come back at 25 past.
 14 (3.10 pm)
 15 (A short break)
 16 (3.25 pm)
 17 Submissions on behalf of victims by MS KAUFMANN
 18 MS KAUFMANN: Sir, as you know, I represent -- together with
 19 Ms Brander and some 15 or so solicitors -- about between
 20 150 and 200 victims. I want to start by saying
 21 something about their need to know. I'm not going to
 22 dwell on it because, contrary to what Mr Hall has
 23 submitted this morning, the position we take on their
 24 being no room for a presumption of secrecy in the
 25 conduct of this Inquiry does not rest upon that private

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1 interest that they have in a right to know, but rests,
 2 as we shall see, on a panoply of public interests, which
 3 all compel this Inquiry towards a presumption of
 4 openness.
 5 Starting with their own need to know, some of those
 6 victims, those 150 to 200 victims, already know that
 7 they are victims of profound abuse of power by members
 8 of the SDS and the NPOIU, which has resulted in them
 9 being spied upon because of their political beliefs,
 10 spied upon because they were seeking to hold the police
 11 to account for racist policing, engaged -- the subject
 12 and victims of, as you know, long-term intimate
 13 relationships which were based upon a profound
 14 deception, in some cases involving the fathering of
 15 children, failing to disclose their roles in the course
 16 of criminal proceedings which resulted in miscarriages
 17 of justice. All profound, deeply concerning abuses of
 18 power, which some of them know about.
 19 Others are waiting still to find out whether they
 20 were the victims of similar abuses or the same abuses.
 21 Then there are others -- we don't know how many more --
 22 a whole panoply of others who don't even know at this
 23 stage whether they were victims.
 24 All those people, those who know, those who suspect,
 25 those who don't even know but they should suspect, have

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<p>1 or would have a pressing need to know what has happened 2 to them; to know how it could possibly have happened to 3 them, whether it was institutionally sanctioned or, if 4 it was not institutionally sanctioned, how on earth it 5 nonetheless happened. That need to know is readily 6 understandable to everybody. It takes just a second to 7 put ourselves in their shoes to feel the compulsion to 8 try to understand how this came about.</p> <p>9 It is readily understandable to the Home Secretary 10 because she, when she determined that this Inquiry 11 should be established, made it quite clear that one of 12 the purposes, one of the functions this Inquiry would 13 perform, would be to establish justice for the families 14 and for the victims.</p> <p>15 We can see that in volume 6, tab 123, the statement 16 the Home Secretary made in the House of Commons -- or, 17 rather, it was made on her behalf by Mike Penning, the 18 Minister for Policing, on 20 March 2015, in which it was 19 said, page 1:</p> <p>20 "The Inquiry will review practices and the use of 21 undercover policing to establish justice for the 22 families and victims and make recommendations for the 23 future so that we can learn from mistakes."</p> <p>24 That is important because what that shows -- again 25 contrary to Mr Hall's submissions -- is that even their</p> <p style="text-align: center;">Page 117</p>	<p>1 fundamental human rights.</p> <p>2 So, as you noted, Sir, at the beginning of today's 3 proceedings, this hearing is one which is extremely 4 important for some of the core participants and for my 5 clients it is of the utmost importance because today -- 6 and the outcome of today's proceedings is, in our 7 submission, going to come -- in the outcome will come 8 the determination by you of whether this Inquiry is 9 going to proceed on the basis of a presumption of 10 secrecy, whereby any disclosures of the identities of 11 any of the undercover officers engaged in targeting any 12 of the groups with which they were involved will be 13 a matter of secrecy, save in truly exceptional 14 circumstances, or whether this Inquiry will proceed on 15 a presumption of openness, whereby the identities of 16 officers who targeted groups and individuals will be 17 disclosed unless there are exceptional circumstances, 18 based upon objective evidence that justify on grounds of 19 necessity the withholding of their identities.</p> <p>20 As you know, Sir, if this proceeds on the basis of 21 a presumption of secrecy, this is the end for many of 22 the non-state core participants. As we made clear in 23 our submissions, that is not said as a matter of threat, 24 it is simply a statement of fact because they are not 25 prepared, some of them, to prise themselves open, to</p> <p style="text-align: center;">Page 119</p>
<p>1 own need to know is not a matter of private interest; it 2 is a matter of public interest and public concern, made 3 such by the Home Secretary deciding that this Inquiry 4 should in part serve their need for justice.</p> <p>5 The profound impact on their lives -- personal, 6 political, emotional, psychological -- those profound 7 impacts are also why, Sir, you have accorded them status 8 as core participants; not as mere witnesses, but as core 9 participants.</p> <p>10 The profound impact upon them is also the reason why 11 fairness requires that they have participatory rights in 12 the process of this Inquiry. It is why section 17 is 13 engaged, which requires you to ensure that fairness is 14 done to them. It is why what is accorded to them as 15 a matter of fairness runs far, far beyond simply giving 16 them the bare rights that a core participant has in the 17 process by virtue of their appointment as such.</p> <p>18 The fact that there are different interests that are 19 affected in relation to the different groups of victims, 20 yes, it is important that the Inquiry recognises that 21 there are different interests that are affected, but in 22 relation to each group of victims, what is abundantly 23 clear is the interests that are affected are ones of the 24 utmost importance. To each of them, they are important 25 in and of themselves in terms of democratic freedoms and</p> <p style="text-align: center;">Page 118</p>	<p>1 re-open wounds, wounds caused by police abuse, wounds 2 perpetrated under a veil of secrecy, in circumstances 3 where the police are again availing themselves of that 4 veil of secrecy, that veil of secrecy being one that has 5 kept them in the dark until now. In those circumstances 6 they simply cannot and will not be prepared to move 7 forward and involve themselves in this Inquiry.</p> <p>8 Sir, you raised the issue that there was an issue of 9 dignity that goes with a situation in which they are 10 forced to give evidence in open before everybody, where 11 the self-same evidence will be given by the police in 12 total secrecy. That's right. There is. There's 13 a major issue of dignity that arises in that situation. 14 So, for them, this is a make-or-break situation.</p> <p>15 But in our submission, there is no countervailing 16 reason why their profound need for the truth to come out 17 cannot be met by the process which the Inquiry adopts to 18 the police's evidence. On the contrary, their needs 19 coincidence entirely, as I have said, with a panoply of 20 fundamentally important public interest, all of which, 21 in a mutually reinforcing way, call for this Inquiry to 22 operate on a presumption of openness, with no room for 23 secrecy, save as I have said.</p> <p>24 What is more -- and this is incredibly important and 25 we will come in detail to it in time -- the particular</p> <p style="text-align: center;">Page 120</p>

<p>1 circumstances of this Inquiry are such that there is 2 actually no countervailing public interest that calls 3 for it to operate on the basis of a presumption of 4 secrecy. 5 So we have two factors which interplay: the first is 6 the Inquiry simply cannot function if it is going to 7 operate on a presumption of secrecy; the second is it 8 doesn't, on the basis of any countervailing public 9 interest, need to consider operating on a presumption of 10 secrecy. 11 Now the key to all of this is the place that NCND 12 should play, if any, in how the Inquiry proceeds. Now, 13 Mr Hall did not talk in great deal about NCND, but what 14 he did do, at the beginning of his submissions, was to 15 adopt the submissions that he made in writing. For the 16 reasons we are going to come to, it is our submission 17 that what he is asking the Inquiry to do is to 18 effectively mirror NCND; that is, to give weight to the 19 police practice of consistently neither confirming nor 20 denying any matter related to undercover policing in the 21 way in which the Inquiry approaches the police's 22 evidence. To do that it is requiring the Inquiry to 23 conduct secret hearings wherever NCND would prevail. 24 The position that the police are inviting the 25 Inquiry to take is in fact to hold that NCND should</p> <p style="text-align: center;">Page 121</p>	<p>1 a restriction order?" 2 Our position -- I will go through these particular 3 public interests at a later point in time -- is that 4 (ix) in 1, that is, "loss of blanket/absolute NCND 5 protection", does not feature in the balancing exercise 6 under section 19. It plays no part whatsoever. 7 So when you come to 2, it is also the case that (i), 8 "Protection of unhindered functioning of police 9 investigation as represented by NCND", also does not 10 feature; that is NCND does not play a part in the 11 balancing of whether or not a restriction order should 12 be made. There are other factors that follow that do 13 and we will see why at a later stage. 14 The reason why we say that 2(i), "The protection of 15 the unhindered functioning of police investigation as 16 represented by NCND plays no part", is precisely because 17 of 1(ix), the "loss of blanket/absolute NCND 18 protection". But we would not put it that way. We 19 don't put it that there has been a loss of the blanket 20 NCND protection; rather we put it in the following way, 21 as I have already indicated: the Inquiry cannot function 22 with weight being given in the balancing exercise to 23 NCND or to the mirroring of NCND and, in any event, 24 there is no need for the Inquiry to proceed on that 25 basis. There is no need to give weight to the public</p> <p style="text-align: center;">Page 123</p>
<p>1 prevail in all circumstances, save where they themselves 2 have officially confirmed the identity of an undercover 3 officer. Everything else we hear about it being 4 necessary to weigh other particular public interests in 5 the balance, as we will see, really don't fall to be 6 weighed in the balance at all if, in fact, the Inquiry 7 were to accede to the approach that they invite it to 8 take in relation to NCND because, as we shall see, NCND 9 or the mirroring of the stance of NCND does the job of 10 protecting all those other individual public interests 11 and you don't protect them both; you don't protect them 12 twice. It is an either/or choice. But we will see 13 that. 14 Perhaps I can explain or try to explain our position 15 by reference to the document that you produced setting 16 out some of the issues for consideration. It's not the 17 document that was produced by Counsel to the Inquiry 18 this morning; it is the document the other parties have 19 been running through this morning and this afternoon, 20 the "Issues for consideration" document. 21 Question 1 asks, "What are the possible components 22 of the public interest that tend against the making of 23 a restriction order?" 24 Question 2, "What are the possible components of the 25 public interest that tend in favour of making</p> <p style="text-align: center;">Page 122</p>	<p>1 interest in maintaining NCND. 2 Just to outline why we say there is no need to do 3 that, it is because -- precisely because -- the 4 underlying interests which a consistent application of 5 the NCND stance serve to protect can properly be 6 protected by this Inquiry by other means -- 7 THE CHAIR: May I ask you a supplementary question? Would 8 you say that there is any public interest in maintaining 9 the confidentiality of the identity of undercover police 10 officers? 11 MS KAUFMANN: Yes, and you will have seen from our 12 submissions -- our written submissions -- that we have 13 identified that public interest as one of the public 14 interests to be weighed in the balance. 15 THE CHAIR: Yes. 16 MS KAUFMANN: What we will explain is that the public 17 interest in maintaining NCND, that is in the agencies 18 maintaining NCND, the agencies that deploy undercover 19 operatives or gather secret intelligence -- the public 20 interest which they discharge when they maintain an NCND 21 stance is precisely the protection of matters such as 22 the identity of officers. 23 THE CHAIR: Yes. 24 MS KAUFMANN: That's the important distinction we have to 25 keep in mind.</p> <p style="text-align: center;">Page 124</p>

1 So far as the police are concerned, NCND performs
 2 that function. The question is: do you need to do the
 3 same thing in this Inquiry to protect those underlying
 4 public interests? In our submission you don't.
 5 So if we come back to this, if we come back to 2(i),
 6 the first reason we advance why this Inquiry does not
 7 need to attach any weight to the public interest that
 8 NCND performed is because it itself can do the job that
 9 NCND does. It can do it if we look at (ii) and we
 10 ignore (i) and we look at the factors that this Inquiry
 11 can take into account in the balancing exercise:
 12 fairness to the individual which takes account of
 13 confidentiality; harm to the individual, the risk that
 14 the individual faces from disclosure.
 15 One of the primary purposes or primary public
 16 interests that the NCND stance protects is to ensure
 17 that undercover operatives are not put at risk if their
 18 identities are disclosed, "harm to the function of
 19 detecting and preventing crime", because if you say
 20 nothing, you neither confirm nor deny, you don't
 21 disclose methods.
 22 So secrecy, the NCND stance, simply serves the job
 23 of protecting a number of underlying public interests.
 24 Now if this Inquiry can do that, you don't need to have
 25 regard to NCND. That's point number 1.

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1 Secondly, there are other aspects of the NCND
 2 stance -- and we will come and look in detail on this --
 3 but, for example, the need for a consistent approach
 4 that has a particular value which it may be said would
 5 be threatened if disclosures are made, but -- and this
 6 is where we come to the submissions we made in
 7 paragraphs 44 and 49 and we will come to those -- this
 8 Inquiry can operate in a way that means that it can, as
 9 it were, mirror the consistent approach and therefore
 10 again we don't need NCND.
 11 Finally --
 12 THE CHAIR: I hope that I have not misled you by phrasing
 13 these questions in this way. All that is meant by 1(ix)
 14 is that it is undeniable in the current circumstances
 15 that there cannot be blanket NCND protection, whether
 16 original or mirrored, because in the Herne reports, for
 17 example, there is plenty of material placed in the
 18 public domain, presumably as a consequence of Herne
 19 asking itself the public interest question, which means
 20 that it would be ludicrous for anyone to suggest today
 21 that nothing at all can be said in public about
 22 undercover police officers or undercover policing. So
 23 the reason why it is included in paragraph 1(ix) is
 24 simply to point out that we are not in the realm of
 25 blanket NCND.

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1 MS KAUFMANN: Because exceptions have already been made
 2 THE CHAIR: Yes.
 3 Secondly, the point of paragraph 2(i) is to ask the
 4 question: well, does it remain or may it remain at any
 5 level as a consideration? That's why the question is
 6 asked whether an undercover name or a target should or
 7 should not be disclosed. That's all that is meant
 8 there.
 9 At what level is the public interest justifying NCND
 10 actually going to be protected? For example, would it
 11 be against the public interest to name an undercover
 12 name? Would it be against the public interest to name
 13 a specific target?
 14 MS KAUFMANN: Our position on that is there is no weight to
 15 be attached to NCND and so that question, the question
 16 of whether or not one -- the question you have posed at
 17 2(i) assumes that a value is to be attached to NCND. It
 18 then asks the question of whether or not the interest in
 19 protecting or giving weight to NCND can be met by simply
 20 giving the undercover name. That's the question that is
 21 posed there.
 22 Our submission is that is the wrong question. The
 23 starting point is that there is no weight to be given to
 24 NCND at all when it comes to section 19. The Inquiry is
 25 going to have to make a prior determination about

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1 whether or not it proceeds on a presumption of openness
 2 or it proceeds on a presumption of secrecy. Proceeding
 3 on a presumption of secrecy is what it means to give
 4 weight to NCND in the section 19 exercise and I hope I'm
 5 going to be able to explain why that is the case.
 6 If we can turn to what it means to give weight to
 7 NCND. We have already started. As I said, it is
 8 a tool. As you know, it is a tool which is actually
 9 used by the agencies. It is an answer that they give in
 10 order to protect a number of underlying public interests
 11 which it is well recognised it is in the public interest
 12 to protect: the identity of informants, of CHIS, methods
 13 and also the utility of the tool of intelligence
 14 gathering, in this instance undercover policing --
 15 protecting all those things.
 16 The way in which they protect all those underlying
 17 interests is a very simple way. They neither confirm
 18 nor deny. A veil of secrecy is put over all information
 19 relating to intelligence-gathering.
 20 What is absolutely central -- central -- to the way
 21 in which NCND works, a critical aspect of its efficacy,
 22 is that it is applied consistently. So when one talks
 23 about not applying blanket NCND, there is a big
 24 difference between making exceptions in the individual
 25 case, which NCND already contemplates -- there will

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1 always be exceptions to this -- but applying the stance
 2 of NCND is premised upon its consistent application
 3 subject to a few exceptions. The reason why it has to
 4 be applied consistently has been identified in the
 5 Scappaticci case. That is tab 49 of volume 2,
 6 paragraph 15.

7 Before we look at this paragraph, obviously by
 8 neither confirming or denying in the individual case,
 9 one is thereby protecting the particular officer. You
 10 are not disclosing that officer's identity; you
 11 therefore protect him. But that is not enough. You
 12 have to apply it consistently in relation to any
 13 question whatsoever about intelligence-gathering for the
 14 reasons that are here identified because, if you deny in
 15 one case or affirm in another case, it has knock-on
 16 implications in other cases and may lead to the
 17 identification of officers who are wholly unconnected to
 18 the circumstances relating to the Inquiry.

19 So:
 20 "The reasons for adopting and adhering to the NCND
 21 policy appear from paragraph 3 of Sir Joseph Pilling's
 22 affidavit. To state that a person is an agent would be
 23 likely to place him in immediate danger from terrorist
 24 organisations. To deny that he is an agent may in some
 25 cases endanger another person, who may be under

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1 suspicion from terrorists. Most significant, once the
 2 Government confirms in the case of one person that he is
 3 not an agent, a refusal to comment in the case of
 4 another person would then give rise to an immediate
 5 suspicion that the latter was in fact an agent, so
 6 possibly placing his life in grave danger ...

7 "If the Government were to deny in all cases that
 8 persons named were agents, the denials would become
 9 meaningless and would carry no weight. Moreover, if
 10 agents became uneasy about the risk to themselves being
 11 increased through the effect of Government statements,
 12 their willingness to give information and the supply of
 13 intelligence vital to the war against terrorism could be
 14 gravely reduced. There is in my judgment substantial
 15 force in these propositions and they form powerful
 16 reasons for maintaining the strict NCND policy."

17 "Strict NCND policy" means consistent application
 18 across the board.

19 What is interesting about this case and significant
 20 about this case is here Mr Scappaticci was seeking
 21 a denial because he was suspected of being an informant
 22 and he was saying, "that places me in danger". Even
 23 that risk that he was presented with was not sufficient
 24 to justify overriding the public interest in maintaining
 25 a consistent application of NCND to protect the utility

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1 of the tool and to protect potentially other
 2 individuals.

3 So when we look at NCND, we always have to
 4 understand that it is not simply neither confirming nor
 5 denying in this individual case; giving weight to NCND
 6 and to the stance of NCND means giving weight to the
 7 need for a consistent blanket of secrecy. That's what
 8 it necessarily means.

9 So if we then have a look -- before we do, I make
 10 the point that there are always exceptions to NCND. It
 11 is a policy that is applied by the intelligence
 12 services -- we say it is applied by them -- and there
 13 will be circumstances in which they will make exceptions
 14 to that. We know that they have done so, for example in
 15 circumstances relating to this Inquiry, they have
 16 identified -- confirmed rather -- the identity of
 17 Mark Kennedy. That is a departure from the consistent
 18 application of NCND, but it is an exception. It not an
 19 application of the policy. It is a clear departure and
 20 exception.

21 Similarly in relation to Mr Boyling, Jim Boyling, he
 22 has been confirmed. That is again a departure from this
 23 policy whose integrity depends upon its consistent
 24 application. The significance of the departures is that
 25 what it shows is that a single departure does not

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1 necessarily mean the whole thing comes tumbling down.
 2 One has to ask oneself in the particular circumstances
 3 of the case whether a departure or whether a failure to
 4 mirror is going to have the effect of undermining the
 5 utility of the tool, bringing about some of the threats
 6 that the tool is intended to prevent.

7 Can I turn now to how the courts approach NCND
 8 because how the courts approach NCND is not, in our
 9 submission -- or does not -- dictate how this Inquiry
 10 should approach NCND, but it is very important to see
 11 what they actually do do.

12 THE CHAIR: Can I just point out to you a puzzle that
 13 I have? I have obviously got it wrong, but I thought
 14 you had made two contradictory submissions. One is that
 15 there is no weight to be given to NCND in any form in
 16 this Inquiry; the other is that you have to look at NCND
 17 on the facts of each individual case. To my mind, those
 18 propositions are inconsistent.

19 MS KAUFMANN: No. There is no room in this Inquiry for the
 20 Inquiry to say and to put into the section 19 balance
 21 the public interest in the police maintaining a "neither
 22 confirm nor deny" stance. That is completely different
 23 from saying that this Inquiry cannot take account of the
 24 underlying public interest that that stance serves to
 25 protect.

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<p>1 THE CHAIR: In that case we are on the same wavelength. 2 MS KAUFMANN: Yes. You are perfectly entitled to do that. 3 THE CHAIR: Right. 4 MS KAUFMANN: In fact we say it is your ability to do that, 5 it is your ability to put all of these individual 6 factors into the equation in deciding whether to impose 7 a restriction order, which means that you don't have to 8 have regard to and attach any weight to the fact that 9 the police go about doing this by neither confirming nor 10 denying. You don't have to do that. 11 THE CHAIR: It is the underlying public interest that always 12 has to be justified -- 13 MS KAUFMANN: They have to be justified. 14 THE CHAIR: -- when the policy is applied. 15 MS KAUFMANN: That is why the policy is applied. So the 16 starting point is: why does this policy exist -- 17 THE CHAIR: Which is why I asked the question in the issues 18 note, "At what level of disclosure would the public 19 interest be met?" 20 MS KAUFMANN: Which public interest? 21 THE CHAIR: Either of them, in disclosure or against 22 disclosure. 23 MS KAUFMANN: I think one has to break down what are public 24 interests. The critical point for our purpose is that 25 none of those public interests is the public interest in</p> <p style="text-align: center;">Page 133</p>	<p>1 denying, the individuals who are gathering that 2 intelligence will be protected; they will remain able to 3 gather the intelligence; the methods they use will be 4 protected; they will remain able to gather the 5 intelligence to protect the national security; the 6 utility of the tool will be maintained because there 7 will be confidence through the application of this 8 policy on the part of those who are gathering 9 intelligence that they will continue to be protected in 10 this way and, therefore, national security will be 11 protected by protecting the intelligence-gathering 12 methods and individuals who are doing it. That's how it 13 works. 14 So, equally, we accept that when the police make 15 an NCND response in relation to their undercover 16 activities, while it may not protect national security 17 because what they are doing does not protect national 18 security save in some circumstances, it will protect the 19 prevention of crime because, by protecting the 20 individuals who are involved in gathering intelligence 21 to prevent crime, they are thereby protecting the 22 prevention of crime by protecting the methods and so 23 forth. 24 So we readily accept that the courts have and do 25 recognise that there is a public interest in the</p> <p style="text-align: center;">Page 135</p>
<p>1 maintaining a NCND response -- 2 THE CHAIR: Yes, I understand that. 3 MS KAUFMANN: -- which is not to say -- we are not hereby 4 saying that there is no public interest in the police 5 maintaining a NCND response. We don't say that for 6 a moment. But what we are saying is that this Inquiry 7 does not have to give weight to it. 8 So can we look at what the courts do? The starting 9 point is, as the police say, the courts have long, long 10 recognised the utility of the NCND stance, the public 11 interest that it serves, because it is a mechanism for 12 protecting not only national security -- and national 13 security when it comes to the intelligence services 14 whose techniques and operations are under 15 consideration -- but also it protect national security 16 for reasons that relate to the way in which it protects 17 particular interests that need to be protected for the 18 tool to remain useful. 19 So to break that down, if the intelligence-gathering 20 had been done by the Security Services, then it is being 21 done for the purposes of protecting national security. 22 That's why they operate. The reason an NCND stance is 23 given in relation to any questions about 24 intelligence-gathering by the Security Services is 25 because, by saying nothing, neither confirming nor</p> <p style="text-align: center;">Page 134</p>	<p>1 intelligence services and in the police deploying 2 an NCND substance -- that is a consistent "neither 3 confirm nor deny" stance -- to protect those underlying 4 interests. So that's the starting point. There is 5 a public interest in giving effect to the NCND stance. 6 So when the case comes before the court, the 7 question for them is what do they do when the police or 8 the intelligence services say, "We rely upon our stance 9 of neither confirming nor denying in relation to this 10 particular piece of evidence". What the courts say in 11 that situation has been most recently articulated by the 12 Court of Appeal in the case of Mohamed, which is at 13 tab 52, I hope, in the same volume, volume 2. 14 So the facts of this case were that two individuals 15 had been detained in Somalia. They had been brought 16 back to the United Kingdom, where they had been put 17 under control orders and T-Pims, and they sought to 18 challenge the decision to put them under the control 19 orders and under the T-Pims on the basis that their 20 capture and removal back to the United Kingdom had been 21 an abuse of power. It had effectively -- 22 THE CHAIR: I was a member of the court that considered the 23 leave application. 24 MS KAUFMANN: The leave application. So you will remember 25 then, the circumstances. They wanted to argue that this</p> <p style="text-align: center;">Page 136</p>

<p>1 is an abuse of power, and the whole of the government's 2 evidence relating to whether or not there was an abuse 3 of power in getting them back to England was heard in 4 a closed material procedure. 5 So it is actually a situation in which there was 6 representation on their part -- so it wasn't just 7 a situation in which that was considered completely in 8 private -- there was representation by the special 9 advocates. The court -- it is worth just looking at 10 paragraph 16 to see how the court looked at or 11 identified what it is that the court was saying they had 12 to address here. 13 We can see there is reference to R v Mullen and that 14 case, like ex parte Bennett, is a case where criminal 15 proceedings were stopped on the basis that a person was 16 brought before the court on the basis of a similar abuse 17 of process. 18 So if we then turn over to paragraph 19, there was 19 reference and reliance on the Al Masri case, which we 20 will come to, which was a case referred to in our 21 submissions dealing with an extraordinary rendition by 22 the United States of America, a case decided by the 23 Grand Chamber of the European Court of Human Rights. 24 Reliance had been placed on some of the observations 25 made by the Grand Chamber and this was criticised by the</p> <p style="text-align: center;">Page 137</p>	<p>1 court should approach, in the face of that key public 2 interest, the countervailing public interest in the 3 court giving effect or allowing the police to rely upon 4 and give effect to their stance of NCND. They say: 5 "Lurking just below the surface of a case such as 6 this is the governmental policy of neither confirm nor 7 deny, to which reference is made. I do not doubt there 8 are circumstances in which the court should respect it." 9 That is right. The courts have long said it pursues 10 a legitimate and important public interest. 11 "However, it is not a legal principle and indeed it 12 is a departure from procedural norms relating to 13 pleading and disclosure. It requires justification 14 similar to the position in relation to public interest 15 immunity. It is not simply a matter of a government 16 department to litigation hoisting the NCND flag and the 17 court automatically saluting it. Where statute does not 18 delineate the boundaries of open justice, it is for the 19 court to do so. 20 "In the present case I do not consider that the 21 claimants or the public can be denied all knowledge of 22 the extent to which their factual or legal case on 23 collusion and mistreatment was accepted or rejected. 24 Such a total denial offends justice and propriety. It 25 is for these fundamental reasons that I consider that</p> <p style="text-align: center;">Page 139</p>
<p>1 Secretary of State. 2 Lord Justice Maurice Kay said this: 3 "The express inclusion of the criteria of 4 maintaining public confidence in adherence to the rule 5 of law is apt." 6 That is something that was included in the Al Masri 7 case. 8 "It reflects what Lord Phillips said in AF number 3. 9 Indeed, if the wider public are to have confidence in 10 the justice system, they need to be able to see that 11 justice is done, rather than being asked to take it on 12 trust." 13 So this is a case in which there are only 14 allegations of wrongdoing at this stage. This is 15 important because Mr Hall said earlier that where there 16 are only allegations of wrongdoing, there is no need for 17 the court to determine those allegations according to an 18 open process. That is precisely what there was here, 19 only allegations. 20 Lord Justice Maurice Kay cites the importance of the 21 rule of law and the importance of the public having 22 confidence in the justice system and seeing that justice 23 is being done and not just taking the court's word for 24 it. 25 He then goes on to state at paragraph 20 how the</p> <p style="text-align: center;">Page 138</p>	<p>1 the principal ground of appeal is made out." 2 So what we see there is that the court brings into 3 account a competing public interest, in that instance 4 the rule of law, the need for justice to be done openly, 5 particularly when one is looking at wrongdoing, an 6 allegation of wrongdoing on the part of the state, and 7 one weighs it -- this is the critical point, Sir -- not 8 against the underlying public interests that NCND 9 protects, but against the public interest in the police 10 maintaining a consistent NCND stance; that is against 11 the public interest in them continuing to use that 12 mechanism as a means of protecting the underlying public 13 interest. 14 That is what "giving weight to NCND" means. It is 15 asking this Inquiry to put into the balance the public 16 interest in a consistent NCND stance as the means to 17 protect the underlying public interests. If the court 18 gives weight to that, then all the other underlying 19 public interests that are on the paragraph 2 side of the 20 balance are incorporated. It is that public interest in 21 secrecy that falls to be weighed against absolutely 22 everything else and that alone. 23 We can see that the court is not balancing any other 24 underlying public interests when it undertakes these 25 balancing exercises where the NCND flag is waved from</p> <p style="text-align: center;">Page 140</p>

<p>1 the DIL case, which is in volume 3, tab 60. 2 So, in this case, this relates to a number, as you 3 know, Sir, of the core non-state core participants who 4 had relationships, deceitful relationships, with 5 undercover police officers, and when they brought their 6 claim in the High Court for damages for a number of 7 torts that arose from the having of those relationships, 8 the Commissioner responded to the pleading -- the 9 particulars of claim -- with a neither confirm nor deny 10 defence. 11 So he relied upon the legitimate stance of neither 12 confirm nor deny to say, "I'm not going to say anything. 13 I'm not going to say anything about the identity of the 14 police officers; I'm not going to say anything about 15 whether or not they were police officers; I'm not going 16 to say anything", and he said nothing. 17 So we went to the court and said, "Well, that's just 18 not right. NCND has to be outweighed in the 19 circumstances of this case for a number of reasons". 20 What the court then did is it examined whether or not 21 there were public interests that outweighed the public 22 interest, which it took and accepted -- the court 23 started -- you will see the court reviewed a lot of 24 authorities in which effectively the courts have upheld 25 the NCND stance as serving a legitimate public interest Page 141</p>	<p>1 not been official confirmation. In those circumstances 2 the court upheld the reliance upon NCND. 3 It held -- it implicitly held -- that the arguments 4 that we have put forward that the public interest in the 5 claimant's rights of access to the court did not 6 outweigh the public interest in allowing the police to 7 give effect to its policy of NCND. 8 But, again, what we don't get in this case is any 9 attempt to weigh the underlying interests that NCND 10 serves to protect. The only question for the court was: 11 does the public interest in the right of access to the 12 court outweigh the public interest in allowing the 13 police to rely upon their NCND response? The answer was 14 "no". Without official confirmation, the other factors 15 did not outweigh. 16 In the McGartland case, volume 2, tab 50, this was 17 a case where Mr McGartland was an IRA informant. He had 18 provided information to the RUC and his cover had been 19 blown. He was taken over to mainland Britain, protected 20 for about nine years or so, and then he was tracked down 21 and shot six times, with the result that he then needed 22 to be protected all over again, given a new identity, 23 moved, and his claim arose out of alleged failures on 24 the part of the Security Service, who had overtaken 25 responsibility for his protection, to provide him with Page 143</p>
<p>1 and concluded therefore that there is a public interest 2 in allowing the police to rely upon it and asked itself 3 whether or not that was outweighed in the circumstances 4 of the case. 5 Now at paragraph 45 you can see the conclusions that 6 it came to. In relation to Jim Sutton -- that is 7 Jim Boyling -- it looked at what had happened on the 8 part of the police in relation to his identity and 9 concluded that in fact there had actually been official 10 confirmation by the police of his identity. In those 11 circumstances, they said, "Well, you can't rely on NCND 12 where you yourself have officially confirmed his 13 identity", which is a matter of common sense. If you 14 have officially confirmed something, you can't, as it 15 were, seek to put the genie back in the bottle by 16 neither confirming nor denying it. It is out; you have 17 confirmed it. So NCND has no part to play there. No 18 public interest. It is obviously defeated. 19 The same with Bob Robinson, which is Bob Lambert, 20 paragraph 46. 21 But in the case of Mark Cassidy and John Barker or 22 John Dines and Mark Jenner, the court looked at what had 23 already entered the public domain -- and there was 24 masses in the public domain about both of them -- but 25 what had not happened in their cases was that there had Page 142</p>	<p>1 medical treatment and to provide him with subsistence in 2 order that he could live once again in hiding. 3 Again, the response to his claim was a blanket NCND 4 response, so they neither confirmed nor denied in their 5 defence whether he was an undercover or was an informant 6 who had provided valuable intelligence to the RUC and 7 the Security Services. The consequence of that "neither 8 confirm nor deny" response was that they then wanted the 9 entire case to be heard in secret. 10 This challenge that was considered by the Court of 11 Appeal was a challenge which was brought by 12 Mr McGartland, who wanted the court first to consider 13 whether or not the intelligence services were entitled 14 to rely upon NCND. Now, there was no challenge in that 15 case to the legitimacy of the intelligence services 16 using NCND as a way to protect the 17 intelligence-gathering tool of informants -- of using 18 informants. The challenge was purely on the basis that 19 in fact it couldn't be invoked in the circumstances of 20 his case because they had already officially confirmed 21 his identity or because his self-disclosures were such 22 that, in the circumstances of his case, where it was he 23 that was bringing the claim and he had self-disclosed, 24 there was no purpose to be served by the NCND response. 25 I'm not going to take you, Sir, to any passages Page 144</p>

1 because there aren't any in particular to take you to,
 2 but the point about this case is yet again the court did
 3 not engage in any exercise of looking at the underlying
 4 interests that NCND serves to protect, but simply asked
 5 itself: is the public interest -- the acknowledged
 6 public interest that there is -- in giving effect to the
 7 intelligence service's reliance on NCND as a tool to
 8 protect intelligence-gathering outweighed in this case?
 9 The answer was, "No, it's not, because there has not
 10 been official confirmation".
 11 There may be -- there may be, they found -- even if
 12 he himself has self-disclosed, there may be, in the
 13 course of determining this claim, a need to look at
 14 matters such as methods whereby intelligence-gathering
 15 is conducted and we don't know that yet, so, no, it's
 16 not outweighed. So that's the way the court approaches
 17 it.
 18 Now I want to turn to the police case and the police
 19 case as set out in their documents, as opposed to what
 20 Mr Hall has been asking the court to do today, because
 21 Mr Hall today appears to have suggested to the court
 22 that in each case in which the court is going to
 23 consider a restriction order, it will have to look at
 24 all the factors to be weighed into the balance. He
 25 didn't mention until the very end NCND, but he appeared

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1 to accept that the court should put into the balance the
 2 harm to the individual, the promise of confidentiality,
 3 all these matters that the NCND stance is intended to
 4 protect, as well as NCND. For the reasons given, we say
 5 that's the wrong approach.
 6 If one examines what is in the written submissions,
 7 it becomes clear that what the police are really
 8 contending for is that this Inquiry should give decisive
 9 weight to the public interest in allowing the police to
 10 maintain an NCND stance. We can see this because, if we
 11 could turn to their submissions which are in tab 2, they
 12 start with:
 13 "In general we agree [paragraph 1.21 on page 1] with
 14 Counsel to the Inquiry's submissions that in general the
 15 question of what to disclose was a balancing exercise
 16 involving considerations of fairness and the public
 17 interest. However [this is the critical passage] it is
 18 likely that in the overwhelming majority of instances,
 19 the MPS will be submitting that considerations of
 20 fairness and the public interest come down in favour of
 21 not disclosing the fact of or details of the undercover
 22 police deployment, including but not limited to the
 23 identity."
 24 Then this paragraph:
 25 "In considering the public interest balance, the

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1 public interest in consistently maintaining the stance
 2 of neither confirm nor deny is very high indeed."
 3 In fact we can see from what they say they will be
 4 asking for that it is not very high indeed; it is
 5 decisive. We see at 4 what this leads to, this very
 6 high value to be attached to that interest:
 7 "In practice the MPS will be applying for much of
 8 the detail of past and current deployments to be
 9 considered in the absence of other core participants and
 10 of the general public. The MPS wishes to be clear about
 11 this at the outset. Where reference is made below to
 12 the public, that should be taken as including the core
 13 participants."
 14 Ie when it comes to hearing anything about what the
 15 officers were doing, who those officers are, that's all
 16 going to be done in secret. We can see that again at
 17 page 27 at paragraph 6(1).
 18 So first of all we get:
 19 "The nature of the restriction order sought will
 20 depend on the particular facts. It is important to ...
 21 make clear that anonymity is not the sole restriction
 22 for which the MPS will be applying. Counsel to the
 23 Inquiry set out a range of measures which may be
 24 required. The measures for which the MPS will contend
 25 are those which, with no more restriction on public

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1 access than can be justified, ensure that no material is
 2 disclosed by the MPS or the Inquiry, whether
 3 documentary, in the course of oral evidence or during
 4 submissions, that confirms any matter that could lead to
 5 the identification of an undercover officer ..."
 6 Then:
 7 "... ensures that no material is disclosed that puts
 8 others at risk of harm ..."
 9 And then, "... no material that could damage the
 10 public interest, principally the prevention and
 11 detection of crime ...", and so forth.
 12 Then at the bottom:
 13 "... will apply save where undercover officers have
 14 been officially confirmed or where there is an
 15 illegitimate method that is not and will not ever be
 16 used."
 17 The critical point about that is that that is not
 18 referable to a balancing of any of the public interests
 19 that are listed in paragraph 2 of the list of issues at
 20 (ii) onwards.
 21 It is not dependent on whether there is a list of
 22 harm to those individuals. The only cases where,
 23 according to the police, a police officer can be
 24 identified is where the police themselves have already
 25 officially confirmed the identity.

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<p>1 So it doesn't matter one jot whether or not, in 2 relation to that particular police officer, no harm will 3 come to him. That's not relevant to the exercise. This 4 request or the setting out here of what will be 5 requested is set out on the basis that NCND -- that is 6 the need for a consistent veil of secrecy -- is what 7 prevails above anything else and that is the only thing 8 that really needs to be put into the balance. 9 THE CHAIR: The justification Mr Hall gave is at 10 paragraph 1.3. 11 MS KAUFMANN: Yes, it's the regard to the bigger picture. 12 That's what NCND is doing. It is the whole regard to 13 the bigger picture. It doesn't depend, as he says here, 14 on the risk of harm that they as individuals will face. 15 That is not the basis upon which they are going to be 16 seeking restriction orders in relation to every single 17 officer, save when his identity has already been 18 disclosed. 19 So, for example, let's take an officer who has not 20 been officially confirmed, John Dines. Let's take 21 John Dines as an example of an officer whose identity 22 has not yet been officially confirmed. I don't know 23 whether you are aware, Sir, but last week Helen Steel 24 tracked John Dines down in Australia. The fact that she 25 tracked John Dines down in Australia was broadcast</p> <p style="text-align: center;">Page 149</p>	<p>1 THE CHAIR: Are we in the authorities bundle? 2 MS KAUFMANN: No, I'm sorry, the submissions bundle. 3 THE CHAIR: All right. 4 MS KAUFMANN: This is the submissions of the 5 National Crime Agency. At paragraph 31 of those 6 submissions, page 8: 7 "The CTI are of course right to state that each 8 application for a restriction order, including those 9 raising NCND issues, must be considered on their own 10 facts. However, the undoubted need to consider any such 11 application on its individual merits does not alter the 12 fact that many of the issues relating to NCND are of 13 a general nature and cannot be confined to a particular 14 case." 15 Further down the paragraph: 16 "But as the evidence and submissions served by the 17 NPS demonstrate, the damage potentially caused by that 18 one disclosure may go much wider than that." 19 Three lines down: 20 "The disclosure may also have an incrementally 21 damaging effect on the ability of law enforcement 22 agencies to recruit and retain undercover officers and 23 informants. One of the purposes of the NCND policy is 24 to prevent this type of contagion. Therefore whilst the 25 chairman will of course consider each case on its</p> <p style="text-align: center;">Page 151</p>
<p>1 across the world -- broadcast very, very widely on 2 national television here and written up extensively in 3 the newspapers. In fact, John Dines is on camera 4 talking to her. That is out there. It is not an 5 official confirmation. It's a self-disclosure. He 6 apologised on camera for what he had done. 7 The police will have it that there should not be any 8 disclosure in relation to him. This Inquiry should not 9 officially confirm or require him to confirm that he was 10 an undercover police officer. That has nothing to do 11 with the risk that he faces -- 12 THE CHAIR: Let's put it another way. You say, if they do, 13 the only justification that they could plead is the 14 consistent application of NCND -- 15 MS KAUFMANN: Exactly. 16 THE CHAIR: -- that there is not an underlying public 17 interest to protect in that particular case. 18 MS KAUFMANN: No. Exactly. 19 THE CHAIR: Good. 20 MS KAUFMANN: So we can't get away from the fact that they 21 are placing tremendous reliance upon the consistent 22 application of NCND. 23 The same is true of the National Crime Agency in 24 their submissions. If you turn to tab 3 and to 25 paragraph 31 --</p> <p style="text-align: center;">Page 150</p>	<p>1 merits, he will need to reach conclusions about 2 the wider implications of a departure from NCND, which 3 you must apply in the individual case." 4 So here you have to give special weight to NCND for 5 these particular reasons and it's not just about looking 6 at the underlying interests that NCND serves to protect. 7 Can we turn back to the issues document just for 8 a couple of minutes? 9 THE CHAIR: Yes. 10 MS KAUFMANN: Well, I would if I could find it. Let me 11 explain by reference to this what our submissions are 12 which I'm then going to develop. 13 If we look at 1, all the issues identified in 1 -- 14 put but aside the (ix), "Loss of blanket/absolute NCND 15 protection", but all those public interests which I'm 16 going to articulate slightly differently are ones which 17 in our submission mean no weight can be given to the 18 public interest in allowing the police to rely on NCND. 19 That is on mirroring NCND in the course of this hearing. 20 That is consistently applying secrecy. 21 Now just like the public in applying NCND, just like 22 that, all the factors there are factors of general 23 application. They are factors that go towards what this 24 Inquiry needs to do and needs to achieve. So the 25 balance of those factors against giving any weight to</p> <p style="text-align: center;">Page 152</p>

<p>1 NCND have to be put against the balance in favour of 2 allowing weight to be attached to NCND now, at the 3 outset. There has to be a decision now: are those 4 factors which point to a requirement for openness, are 5 they decisive or is the weight and the public interest 6 in allowing the police to maintain this stance of 7 secrecy -- is that what is going to carry the day? 8 Both of those translate effectively as, "Is there 9 going to be a presumption of openness in the way we move 10 forward or is there going to be a presumption of 11 secrecy?", because if weight is given to NCND, we can 12 see from the way the courts approach it that the 13 starting point is that there is a legitimate interest in 14 maintaining secrecy in this Inquiry. The question then 15 is: is it outweighed by any particular factor? 16 If one starts from the position that there is 17 a presumption of openness, then the question becomes: do 18 any of the factors in (ii) through to (vii) or so -- do 19 they, in the particular circumstances of the case, mean 20 that there should in fact be a restriction order 21 imposed? Ie, openness is the starting point. You then 22 need to strictly justify a closed hearing or any form of 23 restriction order by reference to considerations of 24 fairness, by reference to considerations of 25 confidentiality, by reference to considerations of risks</p> <p style="text-align: center;">Page 153</p>	<p>1 presumption of secrecy and why, in addition, in the 2 particular circumstances of this Inquiry, there is 3 actually no public interest or need for that presumption 4 of secrecy in any event to play any role. 5 THE CHAIR: Would it cause anyone difficulty if we started 6 at 10 tomorrow, now that we all know where we are going 7 and where we are all sitting? 10 o'clock seems to me 8 a good idea. 9 All right then. 10 o'clock tomorrow. Thank you. 10 (4.33 pm) 11 (The Inquiry adjourned until 10.00 am, 12 Wednesday, 23 March 2016) 13 I N D E X 14 Opening remarks1 15 Submissions by COUNSEL TO THE INQUIRY6 16 Submissions on behalf of the Metropolitan12 Police Service by MR HALL 17 Submissions on behalf of the NCA by MR94 18 O'CONNOR 19 Submissions on behalf of the National106 Police Chiefs' Council by MS BARTON 20 Submissions on behalf of the separately109 21 represented police officers by MR BRANDON 22 Submissions on behalf of the Secretary of ...110 State for the Home Department by MR GRIFFIN 23 Submissions on behalf of victims by MS115 24 KAUFMANN 25</p> <p style="text-align: center;">Page 155</p>
<p>1 to the particular individual or, if what is in issue is 2 the disclosure of methods, by reference to the risk of 3 disclosure of methods and the damage that would be done 4 if such methods were to be disclosed. 5 But it is an exercise which assumes or presumes or 6 proceeds from a position that everything should be open 7 and then requires specific justification. Giving weight 8 to NCND proceeds from the assumption that you need 9 secrecy and you need to justify in the particular and 10 individual case some sort of departure. They are two 11 very, very different -- obviously -- starting points. 12 The implication of having to carry out this balance 13 at this stage and decide whether this Inquiry proceeds 14 on a presumption of openness or a presumption of secrecy 15 is that, if we are right that it proceeds on the basis 16 of a presumption of openness, then there is simply 17 nothing to put in the balance under (ii) in relation to 18 NCND because it will have been decided by the Inquiry 19 that it doesn't actually have a role to play in this 20 Inquiry. That is why we made our submission that 21 Counsel to the Inquiry are wrong or were wrong in their 22 original submissions to say that NCND is one of those 23 factors to be considered in the section 19 balance. 24 Now tomorrow I will move on to focus on why we say 25 this Inquiry simply cannot proceed on the basis of the</p> <p style="text-align: center;">Page 154</p>	

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