COUNSEL TO THE INQUIRY'S NOTE ON THE PRINCIPLES APPLICABLE TO DISCLOSURE OF DECEASED CHILDREN'S IDENTITIES

Introduction

1. The purpose of this note is to assist the Chairman and the core participants in relation to the law and procedure applicable to the issue of deceased children's identities.

2. The issues identified by the Chairman for consideration were:

   (1) whether the state has a duty to disclose to the parents of a deceased child that the identity of that child was used for police purposes; and

   (2) if there is a public interest test to be applied, what does it comprise and how is it to be measured?

Disclosure of a deceased child's identity in the ordinary course of the Inquiry

3. The starting point for consideration of these issues is to note that, save where a restriction order is made, the work of the Inquiry is likely to put into the public domain the details of the use of the identities of many deceased children in the construction of the legends of undercover police officers.

4. It is already publicly known that the Special Demonstration Squad used the details of deceased children as the cover identity of undercover police officers. 42 such identities had been confirmed or were regarded as highly likely at the time of Operation Herne's first report published in July 2013; the same report refers to a total of 106 covert identities being used by the Special Demonstration Squad during the 40 years of its existence. The report states that the National Public Order Intelligence Unit also used this tactic.

5. In announcing this Inquiry, the Home Secretary particularly referred to historical failings uncovered by Operation Herne and the work of Mark Ellison QC. These were failings of the Special Demonstration Squad and the National Public Order Intelligence Unit. These two organisations are expressly mentioned in the Inquiry's terms of reference, and it is evident that while the terms of reference extend to undercover policing by all forces, the activities of these two organisations have a particularly significant part in the public concern which gave rise to this Inquiry. Operation Herne had already reported on the use of the identities of deceased children when this Inquiry was announced.

6. In these circumstances, it may be expected that evidence about the activities of the Special Demonstration Squad and the National Public Order Intelligence Unit will form a substantial part of the evidence heard by the Inquiry. The evidence (and particularly the evidence covered by the first module) will cover the deployments of many undercover officers from these organisations, and will include evidence from the officers themselves and from others affected by their work.

7. Subject to the caveat that any restriction orders may prevent the disclosure and publication of the information, this evidence would ordinarily be expected to include details of the officer's cover identity and the process by which it was created.

8. Applications for anonymity have been made, or are expected to be made, in relation to the covert identities of most undercover police officers. If the identity used by a particular police officer was that of a deceased child, the application will therefore by its nature also be an application to restrict a disclosure of the fact that the identity of that particular deceased child was used by any police officer.

9. The starting point for consideration of the disclosure of a deceased child's identity will need to be consideration of the merits of any anonymity application in relation to it. This is because once an application for anonymity has been made, the identity becomes "potentially restricted evidence" under Rule 12 of the Inquiry Rules 2006, and may not be disclosed save in the circumstances set out in that rule.

10. Procedurally, therefore, the issue of disclosure of information which the Inquiry proposes to call as evidence can only be dealt with through the restriction order mechanism. A question does arise as to whether, in circumstances where an anonymity application relates to the identity of a deceased child, any particular factors arise which would affect the public interest in favour of, or against, disclosure. This issue is considered below.

No restriction order

11. If the Inquiry decides to call evidence about the use of a particular identity by an officer which was based on that of a deceased child, and no restriction order is made, the evidence will enter the public domain. The fact that it does so may, even if there was no direct communication with the family of the child, have the effect of alerting any family member to a use of a relative's identity of which they were not previously aware. A need arises, as a matter of fairness to the family, in such a case, to ensure that they are informed sensitively in advance of any publication by the media and that there is an opportunity for the family to make representations to the Inquiry, before publication of the name, if they so wish.

12. Accordingly, where any application for a restriction order is refused, and where that application relates to the use of an identity based on that of a deceased child, it is suggested that the Inquiry should not disclose or publish any information from which the personal details of that child may be ascertained until steps have been taken to endeavour to contact any remaining relatives. It is submitted that ordinarily the police force responsible for the police officer or unit involved will be the most appropriate entity to make the communication. There are a number of reasons for this. Firstly, the police are best equipped to identify and trace any remaining relatives. Secondly, members of the police have training and experience in the communication of distressing news. Thirdly, it is the police and not the Inquiry who are in a position to offer any apology which they may consider appropriate (noting the apology already given to the public by the Commissioner of Police of the Metropolis in 2013).

Restriction order made

13. If a restriction order relating to the identity is made, however, the position is different. In principle a restriction order need not be of blanket application but may include exceptions to a general prohibition on disclosure. It would be possible to give consideration to disclosure to family members separately from disclosure to the general public. This would, however, be a form of disclosure to a particularly limited group of persons. The question of disclosure to a limited category of people has already been considered and as an approach to this issue, it would be open to all of the objections identified by the Chairman in his ruling on the principles applicable to restriction orders (dated 3 May 2016) at paragraphs 168 – 170. In particular, it will be inappropriate or impossible to ascertain whether a family was prepared to receive information on conditions of confidentiality, and inappropriate or impossible to subject the families to any vetting process before making disclosure of a name.

14. It may be the case that, in practice, the Inquiry's investigations will encompass every use of a deceased child's identity, or of every instance of which records now remain. The use of the identities of deceased children, as a tactic, is a matter falling within the Inquiry's terms of reference. Moreover, evidence about other aspects of undercover policing will in any event require officers to give evidence about their covert roles and identities, which may reveal, subject to any restriction order, the use of identities based on deceased children.

15. To report on the existence, extent and effect of the use of deceased children's identities, or on other aspects of undercover policing in accordance with the terms of reference will not automatically require, however, that every single use of a child's identity is individually sought out and reviewed by the Inquiry. The terms of reference cover a period of nearly 50 years and include undercover policing not only for the purpose (or avowed purpose) of maintaining public order but also for the purpose of

ordinary criminal investigations across every police force in England and Wales. As the Chairman said in his ruling on restriction orders at paragraph 198, *"It is not the obligation of the Inquiry to locate all those whose private lives may have been touched by undercover policing. It is not the obligation of the Inquiry to pursue every possible avenue of inquiry."*

16. The terms of reference require only that the Inquiry review all documents as the Chairman shall judge appropriate, which is a judgement to be exercised as the Inquiry's investigation proceeds having due regard to the need to conduct the Inquiry fairly, to fulfil the terms of reference and allay public concern, and to avoid unnecessary cost.

17. The final question which arises, therefore, is whether there is any duty to disclose to the parents of a deceased child that the identity of that child was used for police purposes, in circumstances where it was unnecessary for the purposes of the public inquiry that evidence about the identity of the particular child in question be called. This issue again falls to be answered by reference to the first question posed by the Chairman.

Obligations to Disclose

18. The first question posed by the Chairman is whether the state is under any obligation to disclose to the parents of a deceased child that the identity of that child was used for police purposes.

19. The question is framed in terms of the child's parents, no doubt because it is a child's parents that will almost invariably be most acutely affected by the grief of losing their child, but might equally be posed in relation to any other close family member. In practice, given the conclusions set out below, it is sufficient to consider the issue in relation to the parents of the deceased child.

20. The starting point is to consider this question in the abstract, independent of the existence of the Inquiry. The question may be posed in the following way: would the state have had an obligation to inform the parents of a deceased child that the identity of that child was used for the police purposes if no inquiry had been ordered? To put this another way, is the Inquiry under any legal obligation to take any step which it would not have taken in any event?

21. Posed in this way, it may be seen that the question is, and may remain, academic. The only situation in which the existence of a freestanding legal obligation to inform parents would become significant is if the Inquiry makes a decision that it is not relevant and necessary to the terms of reference to consider each individual instance of the use of a deceased child's identity in the course of its investigation. That situation

has not arisen, and may never do so. Nothing in the circumstances presently known (that there were at least 42 such identities likely used by the Special Demonstration Squad, out of 106 covert identities) makes such a decision likely.

22. In considering the question whether there exists a freestanding legal obligation to inform parents, therefore, it is important to recall that the answer to the question may never in practice affect the steps taken by the Inquiry. For the reasons set out below, however, it appears that the answer to this question is no. Neither the common law nor any of the jurisprudence of the European Court of Human Rights provides a basis for saying that the state carries any such obligation.

23. The starting point in any analysis of this issue is the decision of the Court of Appeal in *R (Children's Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34. In that case, it was the accepted position that restraint and painful compliance techniques had been unlawfully used in Secure Training Centres over a period of many years until at least 2008. The Claimant charity, supported by the Equality and Human Rights Commission, sought to compel the Secretary of State to disclose this fact to the children detained in those centres, many of whom it was presumed would have been unaware that the techniques were unlawful and that they had legal rights in consequence. The argument failed, the Court holding that there was no obligation either at common law, in public law or under the European Convention on Human Rights. Each of these three strands of the argument may be considered separately.

Common Law

24. The argument for a common law duty of disclosure in *Children's Rights Alliance* was based on the principle of access to justice, it being taken as read in that case that victims of unlawful restraint techniques were likely to have well-founded claims in damages against the Secretary of State.

25. The Court noted that the principle of access to justice is, though an important constitutional right, primarily concerned with ensuring that access to justice is not impeded. The suggestion that there was any duty for a party in private law to inform a potential litigant of facts which might give rise to a claim against itself was described at paragraph 32 as *"like a colour not known on the spectrum".*

Public Law

26. The Court of Appeal in *Children's Rights Alliance* next considered whether there was any public law duty (that is, a duty owed by the state) to make disclosure. This argument was again dismissed. The highest that the Court put it was at paragraph 46:

> "*It might (though it is difficult to state a practical example) be possible to construct a set of circumstances in which, perhaps by force of the doctrine of legitimate expectations rather than irrationality, a public body might come to owe a duty of the kind contended for"* [that is, to disclose information].

27. There is therefore no general obligation for state bodies to provide information about their interactions with the public or about any other matter. This is reflected in the fact that, prior to the enactment of the Data Protection Act 1998 and the Freedom of Information Act 2000, there was no generally enforceable right to obtain information from the national authorities. (Such duties as there were arose in particular contexts, such as a court order to make disclosure in civil litigation or a statutory requirement to publish certain specified information.)

28. Rights do now exist under the Data Protection Act 1998 and the Freedom of Information Act 2000 to seek information from public authorities. In the context of the Data Protection Act 1998, a parent or family member would be unable to obtain information from the public authority relating to a deceased child, as data subjects can only access information about themselves. A request could not be made on behalf of the deceased child because a subject access request can only be made in respect of a living person: see the definition of personal data contained within section 1(1) of the Data Protection Act 1998. The Freedom of Information Act 2000 does not apply to the Inquiry: see section 32 of that Act. However, it does apply to police forces. In the context of the Freedom of Information Act 2000, it may be the case that a response would be refused on the basis of, amongst other matters, section 31 of the Act, on the grounds that to confirm or deny that a particular child's identity was used would be likely to prejudice the prevention or detection of crime, the apprehension or prosecution of offenders or the administration of justice, in that it would confirm or deny that a particular individual was an undercover officer. We understand that to have been the approach of Operation Herne to date.

29. Although it therefore appears unlikely that either enactment would in practice result in the disclosure of material relating to undercover policing, the fact that it was necessary to create these avenues at all (though they are likely to be unavailing) confirms that there is no general right to be given official information.

30. Other situations in which there is a general ongoing duty to make disclosure arise from the particular context: there is for example an ongoing duty to disclose material which may be relevant to the safety of a conviction, though this is far less onerous than the duty of disclosure during the prosecution of a case: *R (Nunn) v Chief Constable of Sussex Police* [2015] AC 225 (SC). None appears applicable in the present case.

Article 8

31. Finally, the court in *Children's Rights Alliance* considered whether there was any positive obligation to inform potential victims of violations of their rights under the European Convention on Human Rights.

32. Article 8 of the Convention provides as follows:

> 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

33. The starting point for consideration of any obligation which may arise under Article 8 is that the relevant individual must have the status of a victim within the meaning of the convention.

34. The applicable principles were summarised in *Valentin Campeanu v Romania* (application no 47848/08, GC, unreported 2014) at paragraphs §96 – 100. In order to be able to lodge an application with the European Court, an individual must be able to show that he or she was "directly affected" by the matter complained of. There are limited exceptions to this. Where an applicant has died, the next of kin will be entitled to pursue any application that had been lodged by the applicant before death. The Court has been restrictive in other circumstances, limiting the standing to bring an application to situations inapplicable at present, such as those where it is alleged that the state is itself responsible for the disappearance or death of the individual. The adoption by the state of the identity of a deceased child appears likely, subject to the particular facts of any given case, to engage the right to respect for private and family life of close relatives of that child. We proceed at this stage on the assumption that at a violation of Article 8 may arise in these circumstances.

35. However, the question which arises is whether this is sufficient to give rise to any obligation to make disclosure. It is to be noted that any obligation to make disclosure would take the form of a positive obligation under Article 8 of the Convention, and whether this exists is a separate question from whether any violation of the rights of the family may have occurred in the past.

36. Again, the answer to this question in the *Children's Rights Alliance* case was 'no'. The Claimants in that case relied in particular on *Guerra v Italy (1998) 26 EHRR 357*

and *Roche v United Kingdom* (2005) 42 EHRR 600 (see paragraph 54), cases which have already been considered in the context of the principles applicable to restriction orders. In both cases the European Court found that disclosure should be made. *Guerra* concerned the non-disclosure by the state of information about the risks of toxic emissions in a particular part of Italy; *Roche* concerned non-disclosure of information about physical health. However, the factual circumstances of those cases were very different, and in particular the context of each was that disclosure was necessary to secure the ongoing effectiveness of Convention rights. The position in relation to the parents of a deceased child is far more closely analogous with that of the *Children's Rights Alliance* case than that in *Guerra or Roche.*

37. Of particular significance is the following passage at paragraph 60 of the judgment of Lord Justice Laws:

> *"The Strasbourg court's recognition of state responsibility to take positive action has arisen in disparate circumstances. The court has not articulated any general principle from which individual instances of such an obligation may be derived; indeed it was stated in Plattform "Ärzte für das Leben" v Austria (1991) 13 EHRR 204, para 31 that 'The court does not have to develop a general theory of the positive obligations which may flow from the Convention.'"*

38. The effect of this observation is that, in the context of positive obligations in particular, the domestic courts should be slow to articulate general principles in relation to positive obligations under the Convention where the court itself has not done so.

39. It may be argued that this was the approach taken in *R(Bryant) v Commissioner of Police of the Metropolis* [2011] HRLR 27. In that case, Mr Justice Foskett was considering whether the failure to inform victims of phone hacking constituted an arguable breach of Article 8. This was only a decision granting permission to apply for judicial review, and the issue was therefore what issues were arguable rather than the resolution of them. He also considered *Guerra* and other cases. At paragraph 52, he said:

> *"I respectfully agree that the two specific cases mentioned are very different on the facts from the present case… There can be no doubt that the police (a "public authority") must come into possession of a great deal of information from a variety of sources (including intelligence sources) that could, for example, indicate that someone's right to respect for his or her private life is potentially threatened…*
>
> *This is a difficult, controversial and sensitive area. I am far from saying that the ultimate conclusion of the court in this case may not be that, even if art.8 was*

engaged, it was not breached by the failure of the police to alert each of the claimants to the fact that their names, or names of those associated with them, had been identified within the material retrieved in the investigation. The essential question, however, at this stage is whether the contrary argument is wholly untenable such that permission should not be given to enable it to be put before the court for full argument.

An example of a less high-profile situation in which the issue might arise would be one in which a local police force comes into possession of information that suggested that elderly residents in a particular community were likely to be the target of a team of confidence tricksters and that the confidence tricksters were hacking into the mobile phones of the relatives of these elderly residents to find out when the residents would be alone in their homes. Would that raise an arguable case under art.8 that the police owed a positive obligation to take steps to alert those who might be targeted if they can be identified? I am inclined to think that in principle the answer to the question posed would be "yes". There might be reasons why, in the particular circumstances, the police decide to do nothing or that limited action is proportionate, but, as it seems to me, the case that they should do something to alert the potential targets would be arguable. That is one situation that comes to mind: there may be others."

40. Although permission to seek judicial review was granted by Foskett J., the merits of the application were never argued.[1]

41. There are also cases in relation to Article 8 which are based on the need to ensure that family members of a person who has suffered a violation of their human rights do not have their suffering exacerbated by the way in which any investigation is conducted. In *Macmahon's application for judicial review* [2012] NIQB 93, following an earlier decision on the same subject reported at [2012] NIQB 60, the High Court of Northern Ireland found a breach arising from a failure to keep family members informed of prosecution decisions in relation to the acceptance of pleas. The rationale for this was that:

"The right to respect for physical and psychological integrity is included in Article 8. In the case of victims, in my judgment, this requires the state to desist from conduct which would, as here, significantly exacerbate the applicant's understandable feelings of distress and anguish." (at paragraph 23, per Mr Justice Treacy)

[1] This information is recorded in the statement made by Chris Bryant MP to the Leveson Inquiry.

42. The issue arose in the context of a criminal investigation, and there was no suggestion that public interest immunity would be asserted over the information that was not disclosed. The Court noted at paragraph 71 of the first judgment that recommendation 10 of Sir William MacPherson's report into the death of Stephen Lawrence, which suggested that investigating officers' reports resulting from public complaints should not attract public interest immunity as a class and that they should be disclosed to complainants subject only to a 'substantial harm' test. This, like many of the public interest factors in favour of openness in an inquiry, was to encourage openness and transparency in order to ensure public confidence in the system.

43. There is only one Strasbourg case identified by the counsel team which appears to go so far as to suggest the existence of any freestanding duty to investigate or make disclosure in relation to alleged historical violations of Article 8: *Craxi v Italy* (2004) 38 EHRR 47. The context for this case was the release into the public domain of transcripts of intercepted telephone calls during a criminal trial; it was contended by the Applicant that they contained information of relevance to his private life and should not have been published. The Court held that the information in the transcripts, which was of a personal nature, had little or no connection with the charges, and hence their publication did not correspond to a pressing social need. The Court said, at paragraph 75:

> *"In the present case the Court recalls that disclosures of a private nature inconsistent with Art.8 of the Convention took place. It follows that once the transcripts were deposited under the responsibility of the registry, the authorities failed in their obligation to provide safe custody in order to secure the applicant's right to respect for his private life. Also, the Court observes that it does not appear that in the present case an effective inquiry was carried out in order to discover the circumstances in which the journalists had access to the transcripts of the applicant's conversations and, if necessary, to sanction the persons responsible for the shortcomings which had occurred. In fact, by reason of their failure to start effective investigations into the matter, the Italian authorities were not in a position to fulfil their alternative obligation of providing a plausible explanation as to how the applicant's private communications were released into the public domain…"*

44. The case is notable for its dissent. Judge Zagrebelsky said, at paragraphs 21 – 22:

> *"In this case — it seems to me, for the first time — the Court imposes on the Contracting States a new positive obligation going beyond what the Court has up till now required in cases concerning the interception of telephone calls by the authorities. The Court's case law on this subject has been quoted above. Positive procedural obligations are seen by the Court as necessary and inherent in Art.8*

in order to avoid abuses of power and thus a violation of this provision. To my knowledge, never before has the Court imposed in cases comparable to this one a procedural obligation on the State, similar to the obligation to conduct an effective investigation, after *a violation of Art.8 has occurred. I refer not only to an interference with private life and correspondence through the interception of telephone conversations, but also to the identical interference caused by censoring mail or leaking documents relating to judicial proceedings."*

"Up till now, only in cases concerning Arts 2 and 3 has the Court imposed on the States a procedural obligation to carry out an effective investigation subsequent to acts leading to a person's death, torture or inhuman or degrading treatment. But such a requirement is clearly and understandably justified by the necessity to protect such a fundamental right as the right to life and to prevent torture or ill-treatment. I do not think that that aim of the Court can easily be expanded so as to cover any possible violation of the Convention, beyond rights of such an importance as to be subject to no derogation even in time of emergency."

45. It is plain, therefore, that he regarded the Chamber decision in *Craxi* as extending the obligation to carry out an effective investigation to apply to Article 8.

46. However, the Court has not notably developed the *Craxi* decision into a line of authority. In more recent times, on the contrary, the court has appeared to withdraw from the apparent position in *Craxi* to state only that it has *"not excluded"* the possibility that there is an Article 8 investigative obligation. In *CAS and CS v Romania* (2015) 61 EHRR 18, a case involving allegations of child abuse and rape not involving state agents, the Court set out the familiar principles in relation to Article 3 investigations. It then said at paragraphs 71 – 72:

"71 Furthermore, positive obligations on the state are inherent in the right to effective respect for private life under art.8 ; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with art.8 in the sphere of protection against acts of individuals is in principle within the state's margin of appreciation, effective deterrence against serious acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection.

72 The Court reiterates that it has not excluded the possibility that the state's positive obligation under art.8 to safeguard the individual's physical

integrity may extend to questions relating to the effectiveness of a criminal investigation.

47. Applying these principles to the facts, the Court concluded (at paragraph 83) that the authorities had failed to meet their positive obligations to conduct an effective investigation into the allegations of violent sexual abuse and to ensure adequate protection for the child's private and family life. It appears that the violation of Article 8 actually identified by the Court was a consequence of the failure to carry out the investigation which there was a positive obligation to conduct under Article 3, and that it was no part of the court's determination that the violation of Article 8 was based on any positive obligation to investigate Article 8 breaches.

48. The passage quoted above reflects earlier comments in cases including *MC v Bulgaria* (2005) 40 EHRR 20 at paragraphs 150 - 152.

49. The proposition that the Court has 'not excluded' this possibility appears to indicate that the law in this area has not been conclusively determined. In any event, it appears that the Court is there making reference to deficiencies in any possible criminal investigation, and not to any requirement for a more heightened investigative obligation analogous to those which exist in the Article 2 or 3 context. The frequent repetition of these lines since *Craxi* would tend to suggest, bearing in mind that the Strasbourg court does not apply a formal doctrine of precedence, that it has chosen not to follow *Craxi*. In these circumstances it cannot be said that *Craxi* comes close to representing a clear and consistent line of authority from the Strasbourg courts such that the domestic courts or tribunals would be under any duty under section 2 of the Human Rights Act 1998 to apply it.

50. Finally, it is right to observe that even if, contrary to these submissions, there exists a positive obligation to investigate or to provide information in the present circumstances, such an obligation could not be unlimited. Even in cases giving rise to investigative obligations arising under Articles 2 and 3 of the Convention, Strasbourg case law expressly accepts that there may be cases in which the victims and the public cannot see all of the investigator's evidence*: Chahal v United Kingdom* (1996) 23 EHRR 413*; McCann and others v United Kingdom* (1996) 21 EHRR 97.

Duty to notify: Conclusion

51. As noted above, the work of the Inquiry will involve calling evidence about the practice, including evidence from a number of officers who used the practice, which subject to any restriction order will have the effect of putting the officers' cover identity into the public domain. No decision has been made that the Inquiry should fall short of considering every use of a deceased child's identity, or of every instance

of which records now remain. It may well be the case that the Inquiry will do so, and if it does, every such identity will be made public subject to any restriction order, and hence the question of any freestanding duty to inform families will have no practical effect on the information disseminated by the Inquiry.

52. In response to the particular question posed by the Chairman, however, the disclosure of this information, whether to the families of the children, or to core participants and the public, arises from and for the purposes of the Inquiry itself, and not as a result of any freestanding legal obligation.

Public Interest factors

53. The second question identified by the Chairman is: if there is a public interest test to be applied, what does it comprise and how is it to be measured?

54. Given the conclusions set out above, this question may be addressed within the context of the restriction order process since it is following that process that any disclosure will be made.

55. Since posing this question, the Chairman has issued a ruling in relation to the principles applicable to restriction orders. The public interest factors set out therein will all be applicable, as in any other application for a restriction order. This includes, in particular, the starting point that no restriction order will be made, in the public interest of openness in the Inquiry and in its proceedings, unless it is necessary in the countervailing public interest of the protection of individuals from harm and/or effective policing.

56. Although the underlying framework of public interest is similar, the application of these principles does give rise to particular considerations in the context of the families of deceased children.

57. The families of deceased children are in a particularly unusual position in relation to their interests in the Inquiry providing them with information. This is because it is not in general possible to know, in advance of providing them with the information about the use of their family member's identity, whether they would have wished to receive it.

58. The Inquiry will be interested to hear submissions from those who have, or believe they have, been affected by this issue as to the approach to be taken. However, it is also important to guard against the assumption that all families would react in the same way. Those families who have chosen to contact Operation Herne or the Inquiry are self-selecting, and while their experience is of undoubted value, it does not follow that the views of any one family will be representative of those of any other.

59. It is easy to understand that many families would wish to know about the use to which the identity of a deceased child had been put. It is also easy to understand that many families may wish that they did not have to suffer the distress of knowing about it. It may be the case that both of these views are held, to a greater or lesser extent, within a single family.

60. Accordingly, our provisional submission is that where the views of the family are not known, the starting point is that no presumption should be made at all as to what they would be. This will mean that, although the views of the family might be a relevant factor in principle, there will in practice be no weight that can be attached to it because it cannot be ascertained in which direction it would tend.

61. A different position arises in relation to the families who have made contact with the police or the Inquiry. It may be presumed from their contact that these families wish to be informed. Although not granting core participant status to two applicants who believe that their relative's identity may have been used, the Chairman indicated in his judgment that their cases would be investigated. Having indicated a wish to engage with the Inquiry, their wish to be informed should properly be taken into account in the balancing exercise.

62. Similarly, the Inquiry would be assisted by evidence from those affected by this aspect of undercover policing. As in the case of those exposed to undercover police officers while deployed, such evidence is unlikely to be available if families are not informed. In the case of those families who have made contact with the Inquiry on the basis of their suspicions, it might as in the case of any other witness demean and be unfair to them to seek evidence without confirming or refuting their suspicions.

63. The final matter which arises for consideration is whether the Inquiry can put to rest the concerns of any family who believes that the identity of their deceased child has been used in undercover policing, when this is not in fact the case.

64. Two individuals, RDCA and Gordon Peters, applied for core participant status not knowing whether their relatives' identities had been used. The Chairman indicated that the Inquiry was not in a position to determine whether either had the necessary interest, but that an investigation would be made. In total, Operation Herne recorded in its public report that it had received inquiries from 14 families relating to 17 children.

65. A difficulty arises, however, because of the possibility that restriction orders will be made in relation to some identities. Until any such restriction order application is determined, it will not be known how much can be said, either publicly or to the family of the child whose identity was used, as to what occurred.

66. This is moreover a situation in which the difficulty at the heart of the 'neither confirm nor deny' issue may arise in particularly stark form. Were the Inquiry to inform, for example, 13 out of the 14 families which contacted Operation Herne that the identity of their relative was not used, but not provide any information to the fourteenth, there would appear to be an unavoidable inference that the reason for silence in the fourteenth case was that the identity of the child was used.

67. A cautious approach is appropriate in relation to this issue. There is an obvious public interest in allaying the concerns of particular families who have raised them. However, there is also a risk that an early indication in one case will put the Inquiry in a difficult decision in relation to future cases. Decisions as to how to proceed in relation to allaying the fears of individual families should not be taken until it is known to what extent the Inquiry's investigation will or could cover all instances of the use of the identities of deceased children. Moreover, decisions should not be taken in relation to individual identities until the impact of the pattern of disclosure is known.

68. This does not necessarily mean that the Inquiry must adopt a blanket approach to this issue. It does, however, mean that the question of disclosure of the fact that a particular identity was not used should be delayed until the consequences of the disclosure, and hence the relevant public interest factors, can be properly identified.

Conclusion

69. For the reasons set out above, there is no duty on the Inquiry, independent of its investigation, to make disclosure to the families of children whose identities have been used by undercover officers at common law, in public law, or under section 6 of the Human Rights Act 1998 read with Article 8 of the European Convention on Human Rights. Nor is there a right to the information under the Data Protection Act 1998. The Freedom of Information Act 2000 does not apply to the Inquiry.

70. However, the use of deceased children's identities by undercover police officers falls within its terms of reference and is of significant interest to the Inquiry. The Inquiry will no doubt wish to receive evidence in relation to many or, depending on how many there are, possibly even all such identities, and they will therefore be disclosed subject to the restriction order process.

71. Accordingly, it is submitted that the following procedure should normally be adopted (as is, in effect, required by the statutory framework):

    a) First, the Metropolitan Police (or any other person or body) may make an application for a restriction order over any evidence.[2] As is clear from

[2] In principle, the Chairman also has power to make a restriction order without any application being made.

applications already received, this will include applications to restrict any evidence of identities used by undercover officers.

b) Secondly, if the identity used by a particular police officer was that of a deceased child, the application will by its nature also be an application to restrict any evidence that the identity of that deceased child was used by the police officer. The application should identify that fact, or any evidence tending to suggest or refute that the identity of a deceased child has been used.

c) Thirdly, any evidence over which an application for a restriction order has been made is 'potentially restricted evidence' under rule 12 of the Inquiry Rules 2006. Rule 12(2) provides that potentially restricted evidence is subject to the same restrictions as it would be subject to if the order sought in the relevant application had been made. The effect of this is that, if the Metropolitan Police, or any other person or body, applies for a restriction order over the identity of a deceased child used by a police officer, the Inquiry Rules 2006 provide that the identity in question cannot be released until the application has been determined, subject to the exceptions in that rule.

d) The application for a restriction order should be considered. Because the views of a family cannot be ascertained until disclosure is made, no assumption should be made about the wishes of the family. Other public interest factors as identified in the Chairman's ruling on restriction orders will be applicable, as relevant to the situation, in the terms set out in paragraphs 56 - 63 above.

e) Upon determination of an anonymity application (including expiration of the time limit for challenging the decision), and if the cover name is to be published, prior to any disclosure to core participants or the public, the family should, if they can be found, be notified by the police. Should they wish to do so it will be open to them to make representations to the Inquiry before the name is published.

f) Finally, any question of informing families who have raised concerns that the identities of their relatives were not used should be deferred until the position is more fully known and the consequences of disclosure can be identified.

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VICTORIA AILES

17 May 2016