

Secrets beyond lies: the police and state's requests for secrecy

An overview of the secrecy requests made by the police and state bodies to the Public Inquiry into Undercover Policing

Introduction

On 22-23 March 2016 a crucial hearing will take place in London, as part of the Public Inquiry into Undercover Policing. The two day preliminary hearing is set to determine if the inquiry will be open and transparent or whether it will be a secret process, which would largely exclude both the public and non-state Core Participants.

Several bodies – Metropolitan Police Service (MPS), National Crime Agency (NCA), National Police Chief's Council (NPCC) and the Home Office – have made written submissions in advance of the hearing. These have been published on the Inquiry website.

These submissions, which run to over 70 pages, **argue that the Inquiry should largely be held in secret and that the policy of Neither Confirm Nor Deny should be upheld throughout.**

On the other side, non-state Core Participants – that is, people who are part of the inquiry because they were affected by the police infiltrations – **will be arguing that it is essential that the public inquiry is just that: public.**

For this crucial hearing, we believe strongly that every member of the public should have a chance to understand what is at stake.

To aid this understanding, we have produced this Q&A briefing. It includes

- an overview of the legal framework for the submissions and the factors that the inquiry Chair must consider when deciding these issues
- a summary of the state Core Participant submissions (i.e. the police and Home Office)

At the time of writing, counter submissions by the non-state Core Participants' had not yet been released; please look out for them on the inquiry website:

<https://www.ucpi.org.uk/witness-statements-and-submissions/>

Please note that this briefing has been provided for public education, and is in no way an endorsement of the submissions it summarises.

This briefing provides an overview of submissions by the state Core Participants (the police and other state bodies) on the legal principles relevant to applications for ‘restrictions’ in the Inquiry. The original documents can be found at the Inquiry website; we provide links at the end of this briefing.

Who made these submissions for ‘restrictions’?

The Metropolitan Police Service (MPS), National Crime Agency (NCA) and National Police Chief’s Council (NPCC) have all provided submissions arguing for secrecy. As these police agencies are broadly in agreement on their submissions we refer to them collectively as ‘police submissions.’

The Secretary of State for the Home Department (SSHJ) submissions and the witness statement filed by the Cabinet Office are separately identified in this briefing.

(Note: submissions by non-state Core Participants, i.e. those who have been most affected by what is known so far of the undercover operations, are expected soon.)

What are ‘restrictions’ in a public inquiry?

‘Restrictions’ refer to restriction of access to both people attending at the Inquiry and documents considered as part of the Inquiry.

The main legislation which sets out the rules governing public inquiries is the Inquiries Act 2005 and the Inquiry Rules 2006.

Section 19 of the Act gives the Chairman (Lord Justice Pitchford) and the Minister who called the Inquiry (the Home Secretary, Theresa May) the power to create ‘closed material procedures’ where restrictions are placed on attendance and/or to disclosure of documents provided to the Inquiry.

These restrictions can *only* be put in place if (1) they are required by law; (2) if the Chairman or Minister considers it assists the Inquiry in fulfilling its aims; or (3) if it is necessary in the public interest.

As detailed below, it is expected that the majority of restriction applications will be made on public interest grounds. Unsurprisingly, state core participants and non-state core participants’ hold conflicting views on what is in the public interest within the context of the Inquiry.

A restriction imposed by the Chairman is done by way of a ‘restriction order’; a restriction imposed by the Minister is done by way of a ‘restriction notice’. The Inquiry has stated that it expects the state core participants to apply for restriction orders from the Chairman, rather than restriction notices from the Minister.

What has the public Inquiry team said so far about restrictions?

The Inquiry legal advisers have highlighted the ‘strong public interest in the Inquiry being able to carry out its work and get to the bottom of the matters which it is required to investigate.’ They have stated that where a restriction application is made on public interest grounds, ‘the public interest in the restriction sought has to be weighed in the balance

against the public interest in an open and thorough Inquiry which will address the public concerns which have led to the Inquiry being set up.'

What do the police submissions say?

The police submissions are noteworthy for the almost suffocating level of secrecy they request of the public inquiry.

- The police submit that openness is not a necessary feature of a public inquiry. They claim that 'open' and 'thorough' in the context of the Inquiry are mutually exclusive concepts. The police state that thoroughness necessitates a move away from public proceedings in order for the Inquiry to be able to consider sensitive evidence. In short, the police position is that closed procedures are in the public interest, so long as the final outcome is 'expressed openly so far as possible.'
- The police state their view that 'in the overwhelming majority of instances ... considerations of fairness and the public interest come down in favour of not disclosing the fact of or details of an undercover police deployment including, but not limited to, the identity of undercover police officer' (UCO).
- The police submit that Neither Confirm Nor Deny is a long established policy that should be adhered to. The police rely on the analysis of NCND provided by the Cabinet Office witness, summarised below. They submit that the public interest in maintaining NCND is 'very high indeed'. It is claimed that NCND is an effective tactic in UCO deployments (even where there has been a public revelation falling short of official confirmation), to be effective NCND must be applied consistently and keeping promises relating to anonymity is essential. The police state that they are specialists in this area and that their views should carry particular weight and be accepted unless there are very strong counter arguments. The police state that if the Inquiry was to undermine the policy of NCND this would damage present and future police operations.
- Accordingly, the police will be applying for restriction orders to ensure that no material is disclosed that could lead to the identification of a UCO. This means that much of the details of past or current deployments would be considered in the absence of the public (in their submissions the public includes non-state core participants). The police state that even seemingly innocuous pieces of information could lead to the identification of officers; they refer to this as the 'mosaic effect'.
- In response to submissions that MPS officers may have forfeited the right to protection from disclosure due to their 'alleged conduct', the police state that it would be wrong for the Inquiry to reach prior judgments before examining the evidence. Further even if an individual officer is found to have engaged in discreditable conduct, the police state that this does not justify disclosure. The police submit that the damage that disclosure might cause to the individuals family, the public at large and the ability to deploy UCOs in the future mean that disclosure is unlikely to be justified. Finally, when considering discreditable conduct, the police submit that 'care must be taken to avoid decisions based on the benefit of hindsight or differing standards - the events subject to this Inquiry go back to 1968, i.e. over 47 years ago.'

- The police also submit that the Inquiry is not the correct body to determine whether the publication of a document is in the public interest or not. They state that senior law enforcement officers, government officials and/or ministers should determine the harm that could be caused through the publication of sensitive information. In other words, the Inquiry should defer to the submissions provided by the state core participants when determining what is in the public interest.

The submissions from the non-state Core Participants are expected to counter these arguments in the strongest possible terms.

What are the police's justifications for keeping officers' identities secret?

To first explain the background: there is an ongoing battle over the confirmation of identities of undercover officers. Already this has been an exhausting and frustrating aspect of all the legal cases so far brought against the police. Those affected by the activities of undercover units fear that what is already known of undercover abuse – painstakingly researched by those affected – may be the tip of the iceberg. They argue that the cover names should be released so that others affected may come forward, including to participate in the public inquiry.

Unsurprisingly, but no less shockingly, a significant proportion of the police submissions relate to preventing the disclosure of undercover officer's identities during the Inquiry. For the most part, these submissions are based on public interest arguments. However, the police also claim that exposure could lead to breaches of UCOs' rights under the European Convention of Human Rights (ECHR) and therefore the Inquiry is bound by law to protect their identities.

In summary, the police submit that undercover officers' names (including cover names) should be kept secret for the following principle reasons:

1. Prevention of disclosure is required to adhere to NCND policy.
2. The disclosure of an officer's name poses risks to the officer and their family. The police claim that disclosure could lead to breaches of officers' Convention rights, specifically their right to life (Article 2); right to freedom from torture or cruel and degrading treatment (Article 3), and their right to privacy and family life (Article 8). In particular, concerns are raised that officers could suffer 'social ostracisation; subjective fears leading to serious emotional unhappiness.' Additionally, it is possible that a UCO's ability 'to pursue a particular occupation' would be inhibited. Where there is a risk of interference with a UCO's human rights, the police submit the Inquiry has 'a duty' to make a restriction order.
3. The disclosure of any one officer, may result in in the exposure of other officers who worked with the officer. This is referred to as the 'mosaic effect.'
4. Disclosure may negatively impact on the ability of law enforcement agencies to recruit and retain undercover officers or informants.
5. Disclosure may mean that other countries will become unwilling to allow their undercover operatives to work within the UK due to concerns that they could be exposed.

6. Officers had a 'lifelong expectation' that their identities would remain confidential. It would therefore be unfair to breach this confidentiality. The police state that the Inquiry should only consider identifying officers who have been officially confirmed as a UCO. They submit that any officers who have been identified by the press and/or through civil court proceedings, but have not been officially confirmed, should have their identity protected.

The non-state Core Participants' submissions are expected to strongly counter these arguments. Already the whistleblower Peter Francis, a former undercover officer, has given a submission disputing the police's asserted 'lifelong expectation'.

In what way do the police submissions claim that disclosure could undermine the efficacy of the Inquiry?

The police submit that not imposing restrictions could negatively impact on the Inquiry by:

- a) Inhibiting the cooperation of witnesses (for example, retired police officers) who would not wish to give evidence in public;
- b) Preventing the Inquiry from assessing the damage done to officers as a result of their deployments, if the Inquiry itself is damaging through disclosure;
- c) Limiting the potential for the Inquiry to make recommendations as to the future deployment of UCOs due to the alleged harm that will be done to the tactic of undercover policing through disclosure.

Non-state Core Participants are expected to counter these arguments in their submissions.

If the police's submissions were accepted, how would the public inquiry proceedings be affected?

The police state that despite their intention to generally apply for restriction orders for most evidence relating to UCOs and their operations, they expect the evidence of non-police core participants and members of the public to be heard in public.

In other words, the evidence of those who were subject to abuse or other unlawful police practices will be heard publicly, but the evidence of state agents and their operations which the Inquiry was set up to investigate will not.

The police submit that UCOs may, however, be able to give evidence on particular themes, for example their 'general understanding on the appropriateness of sexual relationships', if creative measures are taken to protect their identity.

Finally, the police state that if their submissions in relation to restrictions are adopted 'many if not most' of Pitchford's conclusions will still be stated publicly.

It is unlikely that any of this will be remotely satisfactory to the non-state Core Participants, or indeed the general public.

Are the police seriously arguing that this would be a ‘public’ inquiry, and in the ‘public’ interest?

The police hold that the public at large will not be concerned by the use of restriction orders.

They state that public will understand that much of the material should not be disclosed due to its sensitive nature and would conversely be concerned if the evidence was made public as it could negatively impact on the police’s ability to prevent and detect crime.

Further they state that the general public will be reassured as the Chairman will be able to request and have access to all evidence.

While we await the non-state Core Participants’ submissions on these matters, it is notable that the police do not seem to comprehend the level to which the actions of the units are of public concern. Nor do they seem to realise that what’s at issue is the police’s ability to prevent and detect the crime and misconduct of their own officers and units.

Aside from the police, what other state bodies or people have made submissions asking for secrecy?

There is a submission from the Secretary of State for the Home Department, i.e. on behalf of the Home Secretary (this submission is labelled ‘Home Office’ on the Inquiry website), and a witness statement filed by the Cabinet Office.

Here is a summary of Home Secretary / Home Office submission:

- The submission states that the policy of NCND is ‘necessary to preserve the effectiveness of law enforcement techniques’ and ‘is a weighty public interest.’ It states that the policy must be applied consistently in order to be effective and, if the policy is departed from, any departure must not undermine the effectiveness of the policy.
- The submission claims that the Secretary of State is ‘committed to restoring public confidence in the police by uncovering the truth of [the allegations against police undercover units], and doing so in as open a way as possible,’ but goes on to argue that it is necessary to balance the need for the Inquiry to be held in public against the need to ensure that that law enforcement agencies can effectively continue their work.
- The submission concludes that where the competing demands of the need for public access to the Inquiry and the need to protect sensitive police information are in direct opposition, the public interest in ensuring police tactics remain effective takes precedence over the interest in public access to information.

Here is a summary of the Cabinet Office witness statement - NCND policy

- The statement says that the policy of NCND is used to protect sensitive information and applies where secrecy is necessary in the public interest. While not claiming to directly address the use of NCND by the police, it is intended to describe how the policy is generally applied in practice by government departments and agencies.

- The statement outlines the history of the term NCND and asserts that it has been used since at least the 1950s. It is claimed that the principle has remained constant and been applied in a variety of different situations.
- While asserting that NCND is not applied as a blanket policy, it is stated that departures from the policy will be rare. It says that it 'will be for the Government to make the initial decision about maintaining NCND.' It is asserted that this is because the government is 'the body with access to all the necessary information (including intelligence or other sensitive material) and with the democratic duty to protect the safety of its citizens.' However, the statement acknowledges that NCND is not a legal principle and it is ultimately for the courts to determine whether to maintain the principle in individual cases.
- The statement asserts that it is necessary to apply the policy of NCND even where an alleged agent has disclosed their role or identity, where this has not been subject to official confirmation. It says that when considering the policy, 'it would take something exceptional for the public interest to come down in favour of disclosure.' Finally, even if it appears that there would be little damage 'by the confirmation or denial of a specific piece of information, there is a legitimate public interest in the consistent application of the principle.'

As before, the non-state Core Participants are likely to contest these submissions. As we await the detail, we can remember that NCND has no legal basis, and there is a strong public interest argument to be made for public accountability.

In summary:

- **The police, despite being the subject of the scrutiny of the public inquiry, are expecting those they abused to open up and give evidence publicly, while they, the police, remain closed, only giving evidence in private.**
- **The government, in the form of a submission from the Home Secretary, seems to be supporting the police's position.**
- **The non-state Core Participants' counter-submissions are due to be released shortly, and the hearing itself will take place on Tuesday and Wednesday 22-23 March 2016.**

Disclaimer: This briefing was prepared to the best of our ability by the support group, Police Spies Out of Lives, and if it contains any factual errors we will endeavour to correct them. Please contact us by email, contact@policespiesoutoflives.org.uk or twitter @out_of_lives

Source documents:

<https://www.ucpi.org.uk/wp-content/uploads/2016/02/160212-submissions-on-the-legal-approach-to-restriction-orders-Met-Police.pdf>

<https://www.ucpi.org.uk/wp-content/uploads/2016/02/160212-submissions-on-the-legal-approach-to-restriction-orders-NCA.pdf>

<https://www.ucpi.org.uk/wp-content/uploads/2016/02/160212-submissions-on-the-legal-approach-to-restriction-orders-NPCC.pdf>

<https://www.ucpi.org.uk/wp-content/uploads/2016/02/160212-submissions-on-the-legal-approach-to-restriction-orders-Home-Office.pdf>

<https://www.ucpi.org.uk/wp-content/uploads/2016/01/NCND-PDF-unsigned-witness-statement.pdf>