

# POLICE SPIES OUT of LIVES

## The Undercover Policing Inquiry Progress briefing 6: July/ August 2017

*This is an update on the Inquiry covering the period 23<sup>rd</sup> June - 18<sup>th</sup> August 2017. We hope to publish our next update at the end of September.*

*Undercover officers are referred to as UCOs and non-state/police core participants are referred to as NSCPs.*

### Contents

1. Introduction
2. Anonymity Applications
3. Disclosure of personal files
4. Rehabilitation of Offenders Act
5. Mitting – new Chair to the Inquiry
6. Witness evidence protocol
7. Panel and/or co-chair
8. Consultation on Module One issues
9. Inquiry Process

### Introduction

Mitting took over from Pitchford as Inquiry Chair in July and has published his first provisional decisions on two issues: the first tranches of anonymity applications and the use of spent convictions by the Inquiry. The Inquiry has also responded to NSCPs request for personal files. The Inquiry's response on all these issues is concerning and suggest that Mitting is taking a much more restrictive view on openness than Pitchford and fails to

understand the role that NSCPs can play in assisting the Inquiry to discover the truth.

### Anonymity applications

On 3 July, the Inquiry published Mitting's response to the first two tranches of anonymity applications (consisting of 22 UCOs and 7 managers or backroom staff) who served in the SDS from 1968 onwards.

Three UCOs did not make applications for the restriction of their cover names, and the Inquiry has consequently released

these names. This is the first time that the Inquiry has provided information about UCOs who had not already been exposed by activists or journalists. However, it is important to remember that these names are being released due to a police decision not to apply for anonymity - not because the new Chair ruled in the interests of openness.

These are the cover names and brief details of these officers' deployments:

**Rick Gibson:** *He is now deceased. He was operational between 1974 and 1976, when he was involved with the Troops Out Movement and Big Flame.*

**Douglas Edwards:** *His deployment commenced in 1968 and ended in 1971. Members of the public may have met him through anarchist groups, the Independent Labour Party, Tri-Continental, or the Dambusters Mobilising Committee.*

**John Graham:** *He was active between 1968 and 1969. He reported on the Vietnam Solidarity Campaign and the Revolutionary Socialists Students Federation.*

Of the remaining 19 UCOs:

- The Inquiry has been unable to ascertain cover names for 5;
- The cover name for one has already been confirmed;
- Mitting has already ruled to restrict publication of the cover name for 1 UCO (HN7) due to a psychiatric report which indicated that disclosure could lead to a risk of suicide;
- Mitting does not intend to release the cover names of 3 UCOs (including one who was 'involved indirectly' in deployments affecting the Lawrence family);
- 3 UCOs need to provide further information before Mitting can make a decision, and another UCO has been

granted an extension to apply for anonymity;

- Mitting intends to hold closed hearings to determine whether to release the cover names of 3 further UCOs (including one who spied on the Stephen Lawrence family justice campaign);

**This leaves just 2 UCOs out of 19 where Mitting currently intends to release the cover names, subject to further representations.**

Mitting's ruling to restrict disclosure of HN7's real and cover name provides little insight into his reasoning. While he highlights that the apparent risk of suicide was central to his decision, there was no evidence to show how he had considered competing factors in favour of disclosure, including the Article 8 rights of those spied upon by this officer, the importance of enabling miscarriages of justice to be identified, and the ability of the Inquiry to understand how political and social justice activists were targeted by UCOs.

In the cases where Mitting intends not to release cover names, he claims that it would infringe upon UCOs' Article 8 rights, citing concerns for their mental health (for example a "slight risk" of stress reaction), "some risk" to personal safety, unwanted press intrusion and the possible impact on one UCO's widow's private life to justify his decisions. Again it appears there was little if any consideration of factors which would favour openness. This is a stark contrast to the Inquiry's approach to the Article 8 rights of NSCPs.

Mitting has stated his intention to release the real names of the 7 managerial/backroom staff and 3 UCOs who are deceased (and for whom there is no record of their cover names). In respect of the remaining UCOs his starting point seems to be that real names should be

restricted unless there are specific reasons to warrant disclosure.

Mitting's approach marks a worrying change in the direction of the Inquiry. In these preliminary decisions and his ruling in respect of HN7, the fundamental principle established by Pitchford that the starting point is open proceedings with any restrictions strictly justified appears to have been ignored (see page 5: <https://policespiesoutoflives.org.uk/uploads/2016/11/Inquiry-Progress-Nov16-1.pdf>).

NSCP submissions on Mitting's provisional anonymity decisions are due by 21 September 2017.

The Inquiry intends to make final anonymity decisions in respect of these officers, and hold hearings where necessary, in October this year. They hope that all SDS applications will be determined in the beginning of 2018.

The Inquiry has also requested applications from a first tranche of NPIOU officers and intends that all NPIOU applications will be determined soon after the SDS decisions.

The Inquiry has stated that where possibly hearings will be held in public, but some inevitably will be held wholly or partly in secret. Notably, the 3 hearings that Mitting has stated he intends to hold so far will all be closed.

### **Disclosure of personal files**

NSCPs provided the Inquiry with submissions setting out why the Inquiry has a duty under both the Data Protection Act 1998, and Article 8 of the European Convention of Human Rights, to disclose all individual files to NSCPs (subject to legitimate redactions). See: <https://policespiesoutoflives.org.uk/uploads/2017/06/progressbriefing5public.pdf>

The Inquiry's response is very concerning. Partial data was provided to just 4 NSCPs and it was stated that at present the Inquiry does not hold personal files relating to any other NSCPs. The Inquiry claims that solicitors and barristers spent 130 hours, and paralegals 30 hours, to prepare the 4 responses.

The Inquiry stated that its method of investigation is to look at each UCO and their deployment on an individual basis. Through this process, the Inquiry intend to review all documents, including NSCPs personal files, to determine which documents are relevant and necessary and to disclose these limited documents (subject to any redactions) in due course. This approach is very unlikely to lead to NSCPs receiving full copies of their personal files as the Inquiry assert that all data included in these files will not be considered relevant and necessary.

Yet again, the Inquiry is failing to put NSCPs anywhere near the heart of the process. The failure to provide NSCPs with their personal information not only further erodes NSCPs' faith in the process, but also undermines the ability of the Inquiry to get to the truth. If the Inquiry obtained all personal files now and disclosed them to NSCPs it would enable NSCPs to use their knowledge to assist the Inquiry in focusing its investigations on the issues that are relevant and necessary.

### **Rehabilitation of Offenders Act**

Mitting published a 'minded to' note on the issue of individuals' spent criminal convictions being considered during the course of the Inquiry on 2 August (<https://www.ucpi.org.uk/wp-content/uploads/2017/08/20170802-minded-to-ROA-1974.pdf>). His intended approach is of real concern to NSCPs. Mitting has stated that he will admit evidence relating to spent convictions

when justice cannot be done except by admitting that evidence. This is uncontroversial. However, using the example of UCOs' restriction order applications for anonymity, he states that relevant spent convictions for violence or harassment will be considered, but that he will not allow the individual who the conviction relates to the opportunity to make representations about them at that stage. Mitting claims that as restriction orders will be kept under review, NSCPs can give evidence about their spent convictions "if it becomes necessary" during the substantive hearings.

His reasoning is plainly flawed. The Inquiry was set up due to serious concerns about undercover policing. Police evidence cannot be accepted at face value; it is essential that it is open to challenge. If UCOs are granted anonymity on the basis of unchallenged spent convictions, the Inquiry's ability to test police evidence is seriously undermined. There is every possibility that the information necessary to enable to someone to give evidence about the safety of their conviction will be withheld and police evidence will become entirely self justifying.

A further cause for concern is Mitting's intention to ask the Secretary of State for Justice to remove the protections offered by the Rehabilitation of Offenders Act that spent convictions can only be admitted where necessary and proportionate. It is unclear why Mitting anticipates a need to admit spent convictions except in those circumstances, and this raises significant concerns about the likelihood of interference with a rehabilitated person's Article 8 rights.

NSCP are due to provide a summary of the reasons why they wish to make submissions on Mitting's 'minded to' note by 14 September 2017.

## Mitting - new Chair to the Inquiry

As detailed above, Sir John Mitting has now taken over from Pitchford as Inquiry Chair.

Prior to this, NSCPs wrote to the Home Secretary expressing concerns about his appointment, due to his previous work representing state bodies as a barrister and his current role as Vice President of the Investigatory Powers Tribunal. The letter requested further information about Mitting, including whether he had previously advised on issues under investigation by the Inquiry (which and for who and/or confidential), and whether he had other advisory roles which could indicate a lack of impartiality.

The Home Office did not directly answer the questions in their response. The letter simply stated that Mitting had not raised any potential conflicts of interest and due diligence checks had not shown any existed. Further, he had no direct interest in matters to which the Inquiry relates, and no close associations with any interested party.

Concerns about Mitting's suitability appear to be increasingly justified in light of his recent decisions.

## Witness evidence protocol

Anyone who provides evidence to the Inquiry, whether they have been granted Core Participant status or not, will be a witness. All witnesses will be asked to provide a written witness statement, and they may also be asked to give oral evidence at a hearing. The protocol sets out how the Inquiry suggests that evidence is taken:

<https://www.ucpi.org.uk/wp-content/uploads/2017/06/20170612-draft-witness-statement-protocol.pdf>

In their submissions to the Inquiry on the protocol, NSCPs emphasise the need for the Inquiry to differentiate between state

witnesses and non-state witnesses - the Inquiry was called solely to investigate the conduct of the former who have interfered with the private lives of the latter. While NSCPs accept the protocol as drafted in respect of state witnesses, a number of changes are requested for NSCP witnesses.

In particular NSCPs assert that it would be unfair for the Inquiry to compel NSCPs to provide evidence (including personal documents) to the Inquiry when this could amount to a further invasion of their privacy. For the same reasons NSCPs should not be compelled to disclose documents which they use to refresh their memory in the preparation of their witness statements. Additionally, NSCPs should not be required to name third parties referred to in their witness statements, except in very limited circumstances.

NSCPs state that the requirement that a witness must disclose any pseudonym that they have used in a public account which relates to issues referred to in evidence should only apply to state CPs. This is because a blanket requirement to disclose would be a disproportionate interference with NSCP privacy rights and could also inhibit an individual's willingness to publish information that it is in the public interest under a pseudonym if they knew it would be connected to their real identity during the Inquiry.

Finally, NSCPs stress that it is essential that they are provided with all documents that are relevant to them before they provide the Inquiry with a witness statement.

### **Panel and/or co-chair**

At present, the Inquiry is led by a judge alone. NSCPs wrote to the Home Secretary at the beginning of the month to request that a co-chair and/or a panel are appointed.

A co-chair would be another judge who would work alongside Mitting.

A panel would consist of a number of people with expertise in different areas relating to the matters under consideration in the Inquiry (for example, race or sex discrimination), who would advise the Chair on specific issues.

A key advantage of appointing a panel (and potentially a co-chair) would be to increase diversity and broaden the perspective from that of a privileged, white, male judge and hopefully improve decision making. Additionally, in an Inquiry that has been plagued by delays, additional members could increase speed.

People involved in the Mcpherson Inquiry into police response following the murder of Stephen Lawrence believe that influence of the panel was invaluable in securing a good report.

A response has not yet been received.

### **Consultation on Module One issues**

The Inquiry has stated that it intends to consult on Module One issues to be used when questioning witnesses in early autumn.

Module One is the first part of the Inquiry and will focus on what happened in the deployment of UCOs in the past, their conduct, and the impact of their activities on themselves and others.

The Inquiry has stated that the detail of how officers from the Special Demonstration Squad were selected and trained, relationships they formed while undercover, engagement in criminal activity, supervisions and certain deployments are likely to be the main focus.

### **Inquiry process**

In its Two Year update note (<https://www.ucpi.org.uk/wp->

content/uploads/2017/07/20170727-two-year-update.pdf) the Inquiry has detailed the stages to be completed prior to evidential hearings:

- i. Complete paper investigations into the officers involved – gathering the documents it needs from wherever they can now be found, and reading and analysing them.
- ii. Complete the anonymity process for officers.
- iii. Complete the restriction order processes in relation to the documents.
- iv. Identify those who will need to be witnesses.
- v. Gather together the documents that each witness (whether officer or civilian) will need to draw on to make a statement and invite or request witnesses to provide statements.
- vi. Complete the restriction order processes in relation to the statements to

ensure appropriate information is put in the public domain – see the section on restriction orders below.

vii. Provide written evidence to be used at the hearing, including witness statements and documents, to the core participants involved.

viii. Prepare to hear opening statements, which legal teams will need time to prepare after they have seen the written evidence.

*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:*

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