Preliminary issue: Disclosure of deceased children's identities

Ruling

Introduction

1. Paragraph 1(ii) of the Inquiry's terms of reference requires me to examine, among other things, the effect upon individuals and the public of undercover police operations conducted by the police service in England and Wales during the period from 1968 to date. Paragraph 1 (iv)(b) requires me to identify and assess the adequacy of the training and management of undercover police officers. Paragraph 5 requires me to investigate specifically the undercover operations of the Special Demonstration Squad and the National Public Order Intelligence Unit.

2. In July 2013 Operation Herne reported on the use by officers employed in the Special Demonstration Squad of the real identities of deceased children for the purpose of creating their undercover 'legends'.[1] In short, Operation Herne identified that, of 106 covert identities deployed by officers of the Special Demonstration Squad between 1968 and 2008, 42 were or were highly likely to have been the true identities of deceased children.

3. On 16 July 2013 the Commissioner of Police for the Metropolis, Sir Bernard Hogan-Howe, issued a general public apology for "the shock and offence" caused by revelation of the practice. Operation Herne had opened a "casualty bureau" on 5 February 2013 to receive enquiries from interested persons. By the date of the public apology some 14 enquiries had been received. The figure is now 23. All those who have made an enquiry have been visited by a family liaison officer from Operation Herne and handed a similar letter of general apology. However, the names of the children whose identities were used were not disclosed and the policy neither to confirm nor deny the use of any particular name has been applied. None of the interested relatives has been officially informed whether or not the identity of their loved one has been used for covert purposes

4. In order to fulfil its terms of reference the Inquiry will need to investigate how wide was the practice of using the names of deceased children to create an undercover legend, whether it is still used and, if not, when it ceased. The Inquiry will need to investigate and understand the reasons why this practice was adopted, whether and to what level of seniority it was approved, and, if it is the case, the reasons why and at whose direction it was discontinued. The Operation Herne investigation has

[1] See Operation Herne Report 1 – Use of covert identities, July 2013

concentrated on the Special Demonstration Squad. The Inquiry will need also to investigate practice within the National Public Order Intelligence Unit and its successors and within the 42 regional police forces.

5. This is a statutory inquiry to which the principle of openness applies subject to the making of a restriction order under section 19 of the Inquiries Act 2005.[2] The Inquiry must decide whether any of the information it acquires on this subject should be restricted from disclosure under section 19. The questions arise:

   (1) Does the state and/or the Inquiry have a duty to disclose to the parents or close relatives of a deceased child that the identity of that child was (or was not) used for covert police purposes; and

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

6. I have received from the Inquiry's counsel team a Note, dated 17 May 2016, on the principles applicable to disclosure of deceased children's identities. I have received a skeleton argument in response from Mr Nicholas Griffin QC, on behalf of the Home Office, dated 1 June 2016, adopting the Inquiry counsel team's Note. The National Police Chiefs' Council and the National Crime Agency followed suit. On 1 June 2016 I received the written submissions of Mr Jonathan Hall QC and Ms Sarah Le Fevre, dated 27 May 2016, on behalf of the Metropolitan Police Service. Also on 1 June 2016 I received the written submissions of Ms Heather Williams QC and Ms Fiona Murphy on behalf of the core participant, Mrs Barbara Shaw, and on behalf of Mr Gordon Peters and RDCA. All three are parents who wish to know whether their deceased children's identities were used by the police for covert purposes. Henceforward, I shall refer to those whom Ms Williams QC and Ms Murphy represent, as did counsel at the oral hearing, as "the Relatives". Ms Williams QC and Ms Murphy raised a number of issues that required reflection by the Inquiry's counsel team. I asked for and have received counsel to the Inquiry's further Note dated 10 June 2016.

7. Having announced that an oral hearing would be required, on 17 June 2016 I received skeleton arguments from Ms Heather Williams QC and Ms Murphy, from Mr Jonathan Hall QC and Adam Payter, and from Mr Andrew O'Connor QC, on behalf of the National Crime Agency. I heard oral submissions on 22 June 2016 at the Royal Courts of Justice.

[2] See Restriction Orders: Legal Principles and Approach ruling (3 May 2016), paragraphs 82 - 112

Does the state and/or the Inquiry have a duty of disclosure?

8. I shall first summarise the written and oral submissions I have received on the issue of principle as to whether the state has a positive obligation to make disclosure to a deceased child's parent or close relative that the identity of the child was used by the police for covert purposes.

Common law

9. In the opinion of counsel to the Inquiry there is no general common law duty upon the state to make disclosure of information held by the state. The incremental statutory programme leading to the Data Protection Act 1998 and then the Freedom of Information Act 2000 bears witness to the absence of any pre-existing general common law right to disclosure of information. Furthermore, there will be no obligation on the Inquiry to make disclosure under either statute. Only living data subjects may make application under the Data Protection Act 1998, and section 32(2) of the Freedom of Information Act 2000 exempts the Inquiry from the disclosure obligations created by that Act.[3] Interested parents have already made Freedom of Information Act requests to the Metropolitan Police Service. Section 31 (1)(a) exempts from disclosure information that, if disclosed, would or would be likely to prejudice the prevention and detection of crime. As I have said, on receipt of such requests the Metropolitan Police Service has neither confirmed nor denied the use of the name of any particular deceased child, presumably on the ground that disclosure would or would be likely to prejudice the prevention or detection of crime.

10. In *R (Children's Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34 a number of children and young persons, while detained in secure training facilities, had been subjected to unlawful restraint techniques. The claimant sought to establish against the state, as tortfeasor, a common law obligation to seek out and make disclosure of its wrongdoing to putative claimants, founded on the constitutional requirement that the state should afford its citizens effective access to justice. The Court of Appeal held that no such obligation arose. The state's common law duty was *not to obstruct* access to justice. That duty did not extend to informing a putative claimant of a right of action against a putative defendant, whether that defendant was a private individual or the state, nor did any such obligation arise in public law.

11. The Metropolitan Police Service, the National Police Chiefs' Council and the Home Office agree. On behalf of the Relatives, Ms Williams QC and Ms Murphy explained

[3] Counsel to the Inquiry's note (17 May 2016), paragraphs 24 - 30

that they did not rely on a common law (or statutory or other public law) duty to provide information.[4] They relied on Article 8 of the European Convention on Human Rights.

Article 8 European Convention on Human Rights

12. Section 6 of the Human Rights Act 1998 provides that it is unlawful for a public authority (including, for these purposes, the Inquiry Chairman) to act in a way that is incompatible with a Convention right. Article 8 of the European Convention on Human Rights states:

> ***"Right to respect for private and family life***
>
> *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."*

13. The primary duty of the state is not to *interfere* with the *"exercise of this right"*. However, the European Court of Human Rights has in several instances recognised that the duty upon the state to render this right effective implies a duty not just to refrain from interference but also to take positive action to protect it.

14. Counsel to the Inquiry considered that the use by the state of the details of a deceased child for covert purposes is likely to have engaged the Article 8 rights of the child's parents or nearest relatives. However, they observed, the present issue is not whether a breach of the right of respect for private and family life of the deceased child's surviving close relatives has taken place but whether there exists a positive obligation upon the state to disclose the breach.[5] In *R(Children's Rights Alliance for England) v Secretary of State for Justice*, the Court of Appeal identified occasions on which the Strasbourg Court had found that, where required to fulfil its duty to the applicant to provide effective enjoyment of the right to respect for their private and family life, home and correspondence, the state had a positive

[4] Written submissions by the Metropolitan Police Service (27 May 2016), paragraph 4; written submissions by the National Police Chiefs Council (1 June 2016), paragraph 4; written submissions by the Home Office (1 June 2016), paragraph 3; written submissions by the Relatives (1 June 2016), footnote 2.

[5] Counsel to the Inquiry's note (17 May 2016), paragraphs 33 – 35

obligation to make arrangements for disclosure of information that it held.[6] Failure to make those arrangements constituted the breach. However, there was no line of Strasbourg authority for the wider proposition advanced by the claimant that after the event the state was obliged to disclose a breach of Article 8.[7]

15. In the Northern Ireland case of *MacMahon's (Aine) Application* [2012] NIQB 60 the applicant was the partner of a man who was stabbed to death in Belfast. Without notice to or consultation with the applicant the prosecutor had discontinued the prosecution for murder and accepted lesser pleas of guilty from the defendants. Mr Justice Treacy held that the Public Prosecution Service had been in breach of its own policy towards victims and witnesses. In a separate judgment following a further hearing ([2012] NIQB 93) Mr Justice Treacy held that the breaches of policy by the Public Prosecution Service amounted also to breach of the state's positive obligation to secure respect for the applicant's private life. He explained his decision as follows:

> *"[21] .... In my view the right of the partner of a person whose life is unlawfully taken to be appropriately involved in and informed about prosecutorial decisions concerning that death do properly come within that broad range of interests protected by Article 8.*
>
> *[22] Adherence to the Code of Practice and Victim's Policy which applied in this case could have ensured that the respondent did demonstrate appropriate respect for this victim's protected interest. The [Public Prosecution Service] chose not to adhere to its own guidance documents and I find that, in the difficult circumstances of this case, that choice did constitute a breach of Article 8. To find otherwise would fly in the face of a long line of Strasbourg jurisprudence which insists that the rights guaranteed by the [European Convention on Human Rights] should be effective rights. It would be inconsistent with that line of authority for this court to declare that failure to follow the guidance that would have delivered respect for this victim's Article 8 interest was a matter of no legal consequence.*

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[6] See paragraph 54, per Lord Justice Laws: failure to warn residents of risk from toxic emissions from activity on land nearby *(Guerra)*; failure to provide information as to risks of participation in chemical tests at Porton Down *(Roche).*

[7] This is a distinction also illustrated by Mr Justice Foskett in his decision to grant an application for judicial review in *R (Bryant) v Commissioner of Police for the Metropolis* [2011] HRLR 27. He regarded it as arguable that if, hypothetically, the police were in possession of information that elderly residents were being targeted by confidence tricksters the police had a duty under Article 8 to warn them.

> *[23] 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. In my view this is incompatible with the positive obligation inherent [in] an effective respect for private and family life and, accordingly, I find that Article 8 has been breached."*

16. The decision was explained by the judge as a breach of the positive duty under Article 8. It was comprised in a failure to inform and consult about a matter essential to the applicant's present enjoyment of private life. Counsel to the Inquiry expressed the view that there appeared to be only one occasion when the European Court of Human Rights had found a positive obligation to investigate a *past* breach of Article 8 and, thus, in the course of the investigation, to make disclosure of the breach. In *Craxi v Italy* [2004] 38 EHRR 47 the First Section examined the circumstances in which, in the course of a criminal prosecution for, among other things, corruption, the state had leaked to the press the contents of covertly recorded conversations between the applicant and others, including passages containing irrelevant personal information. The Court held that the State had been in breach of the negative obligation imposed under Article 8 of the European Convention on Human Rights. At paragraph 75 of its judgment, however, the Court went further, observing that an effective inquiry (conducted in order to impose a sanction on the persons responsible or to provide a plausible explanation for the decision to publish irrelevant personal details) had not taken place, implying the existence of a positive obligation to investigate suspected breaches of Article 8. That proposition was challenged in the dissenting judgment of Judge Zagrebelsky and the decision has not been followed or developed in subsequent Strasbourg cases.

17. On the other hand, in *CAS and CS v Romania* [2015] 61 EHRR 18 the Third Section of the European Court of Human Rights examined circumstances in which the state had failed adequately to investigate serious allegations of child sexual abuse. The Court held, at paragraph 73 of its judgment, that the allegations of abuse reached the threshold of Article 3 inhuman or degrading treatment; and (paragraphs 68 and 69), that the positive obligation on the state to investigate arose, in order to secure to its citizens effective protection from ill-treatment at the hands of individuals. The investigation that had taken place had been lengthy, delayed and ineffective, and it had failed to acknowledge the vulnerability of the child complainant (paragraphs 77 – 82). There were, accordingly, breaches of both Article 3 and Article 8 (paragraph 83).

18. The Court in *CAS and CS* applied the decision of the First Section in *MC v Bulgaria* [2003] ECHR 651 in which the applicant alleged that the state had failed adequately to investigate her allegation of rape as a child. The First Section summarised the effect of the Strasbourg cases relating to the positive obligation to carry out an effective investigation as follows:

> *"149. The Court reiterates that the obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see* A. v. the United Kingdom*, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2699, § 22;* Z. and Others v. the United Kingdom [GC]*, no. 29392/95, §§ 73-75, ECHR 2001-V; and* E. and Others v. the United Kingdom*, no. 33218/96, 26 November 2002).*
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> *150. Positive obligations on the State are inherent, in the right to effective respect for private life under Article 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 Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave 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 (see* X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, pp. 11-13, §§ 23, 24 and 27; and* August v. the United Kingdom (dec.)*, no. 36505/02, 21 January 2003).*
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> *151. In a number of cases Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation (see* Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Reports 1998-VIII, p. 3290, § 102). Such positive obligations cannot be considered in principle to be limited solely to cases of ill-treatment by State agents (see, mutatis mutandis,* Calvelli and Ciglio v. Italy [GC]*, no. 32967/96, ECHR 2002-I).*

> *152. Further, the Court has not excluded the possibilities that the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation (see* Osman v. the United Kingdom*, judgment of 28 October 1998, Reports 1998-VIII, p. 3164, § 128).*
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> *153. On that basis the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution."*

19. Counsel to the Inquiry concluded that there was, on the current state of authority, no freestanding obligation to investigate breaches of Article 8 (compare the need for an *effective* investigation of alleged ill treatment that reached the Article 3 standard) or to make disclosure of historical breaches of Article 8. Any decision made by the Inquiry to disclose the facts to the parents or close relatives of a deceased child would be made for the purposes of the Inquiry and not to fulfill the requirements of Article 8.[8] This view also found support in the submissions of the Metropolitan Police Service, the National Police Chiefs' Council and the Home Office.[9]

20. Ms Williams QC and Ms Murphy disagreed. First, they submitted that the state has appropriated, used and stored for covert and unauthorised purposes the personal details of a deceased loved one. The parents or closest relatives of *those* deceased children are direct victims for the purpose of Article 34 of the European Convention on Human Rights.[10] Secondly, however, because the appropriation, use and storage of personal data were carried out secretly the Relatives cannot prove that they are in fact victims. In such circumstances the European Court of Human Rights would, nonetheless, recognise them as direct victims.[11] Thirdly, the state owes a negative obligation under Article 8 of the European Convention on Human Rights to the parents or close relatives of deceased children not to interfere with their right to respect for their private life, save, under Article 8 (2), in accordance with the law, in proportionate pursuit of a legitimate aim. Fourthly, where there is a sufficient connection between the substantive right of respect for private life and information in the hands of the state to which the applicant seeks access, a positive obligation may be imposed to provide an effective and accessible procedure by which the

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8 Counsel to the Inquiry's note (17 May 2016), paragraphs 49 and 52

9 Written submissions by the Metropolitan Police Service (27 May 2016), paragraph 4; written submissions by the National Police Chiefs Council (1 June 2016), paragraph 4; written submissions by the Home Office (1 June 2016), paragraph 3

10 Written submissions by the Relatives (1 June 2016), paragraphs 30 and 31

11 *Klass v Germany* [1979-80] 2 EHRR 214 at paragraph 33; see also the restatement in the Grand Chamber decision of *Zakharov v Russia* [2015] Appn. No 47143/06 at paragraphs 164 - 172

relevant information can be sought and obtained. Fifthly, whether a positive obligation exists depends on the particular circumstances, primarily whether there exists a countervailing public interest in refusing access.[12]

21. Ms Williams QC and Ms Murphy pointed out that the Court of Appeal in *R (Children's Rights Alliance for England) v Secretary of State for Justice* was considering a different argument, namely that, in circumstances in which the putative claimants were already aware of the underlying conduct towards them (and were not seeking access to records), the state was required to investigate, to identify them, to seek them out and to inform them of their right of action. The Court acknowledged a right to obtain information from the state in certain circumstances but held that this right was to be distinguished from the duty for which the Children's Rights Alliance and the Equality and Human Rights Commission were arguing. Lord Justice Laws explained at paragraphs 54 and 55:

> *"54. …. The jurisprudence shows that there is a varied range of circumstances in which the state will be required both to seek and provide information, and that such obligations may arise in the context of different Convention rights, notably articles 2 (the right to life), 3 and 8. Mr Coppel* [on behalf of the Equality and Human Rights Commission] *sought to mine this field, placing some emphasis in his oral submissions on* Guerra v Italy *(1998) 26 EHRR 357*, Roche v United Kingdom *(2005) 42 EHRR 600 and* Weber and Saravia v Germany *(Application No 54934/00) (unreported) given 29 June 2006. These cases all included complaints of breach of article 8. In the* Guerra *case (which Mr Hermer cited to Foskett J) it was said that the applicant's article 8 rights had been violated by the state's failure to provide appropriate information about the risks of toxic omissions arising from the production of fertilizer near their homes. In the* Roche *case the applicant had suffered stress and anxiety arising from uncertainty as to the health risks he might have run through his participation in nuclear tests at Porton Down, and claimed that he should have been given relevant and appropriate information to allow him to assess the risk. The first applicant in the* Weber and Saravia *case was a journalist who complained of statutory measures providing for the interception and monitoring of telecommunications. The claims in the* Guerra *and* Roche *cases succeeded; the application in the* Weber and Saravia *case was dismissed as being manifestly ill-founded.*

[12] Written submissions by the Relatives (1 June 2016), paragraphs 37, 38, 42, 43

> 55. *None of these cases, in my judgment, supports the position contended for by Mr. Coppel. They are all instances (and there are others: see for example* Őneryildiz v Turkey *(2004) 41 EHRR 325) of failure by the state to provide* factual *information which, for one reason or another, should have been given in order to secure the effectiveness of the Convention right. I incline to accept Mr Strachan's submission that there is no reason to suppose that a trainee seeking information about his or her time in [a Secure Training Centre] would be denied it."*

22. In their written and oral submissions Ms Williams QC and Ms Murphy examined the facts and conclusions of some of the Strasbourg cases in order to demonstrate that the positive obligation for which the Relatives contended was the same positive obligation as that recognised and acknowledged by the Court of Appeal in *R (Children's Rights Alliance for England) v Secretary of State for Justice*.[13] I shall be selective in my own review.

23. In *Gaskin v United Kingdom* [1989] 12 EHRR 36 the applicant sought access to records of his foster care as a child. The local authority gave access to records compiled from human sources of information who consented to disclosure but it declined access to records compiled from sources who wished to maintain their confidentiality. The European Court of Human Rights concluded that the records held by the local authority *"do relate to Mr Gaskin's 'private and family life' in such a way that the question of his access thereto falls within the ambit of Article 8"* (paragraph 37) and that the applicant *"had a vital interest, protected by the Convention, in receiving information necessary to know and to understand their childhood and early development"* (paragraph 49). In deciding whether a positive obligation existed the Court *"will have regard to the fair balance that has to be struck between the general interest of the community and the interests of the individual"* (paragraph 42). While a system of access based on the consent of the contributor of information could, in principle, be compatible with Article 8, the local authority's system did not provide for an independent authority to adjudicate in a case where consent was unavailable or unreasonably withheld. For that reason the United Kingdom was in breach of its positive obligation under Article 8 (paragraph 49).

24. In *McGinley and Egan v United Kingdom* [1998] 27 EHRR 1 the applicants were servicemen employed in the Christmas Island area of the Pacific Ocean where nuclear tests took place in 1958. They sought access to information held by the

[13] Written submissions by the Relatives (01 June 2016), paragraph 43; transcript of hearing on 22 June 2016, pages 39 - 55

United Kingdom Government that would assist them to discover whether they had been subjected to radiation levels that posed a risk to health. The European Court of Human Rights held, at paragraph 97 of their judgment, that *"the issue of access to information which could either have allayed the applicants' fears … or enabled them to assess the danger to which they had been exposed, was sufficiently closely linked to their private and family lives within the meaning of Article 8 as to raise an issue under that provision".* By declining access to documents the United Kingdom had not "interfered with" the applicants' right to respect for their private or family life but (paragraph 98):

> *" … in addition to this primary negative undertaking, there may be positive obligations inherent in effective respect for private or family life. In determining whether such a positive obligation exists, the Court will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual, or individuals, concerned (see* Gaskin v United Kingdom *[1990] 12 EHRR 36 at paragraph 42)."*

25. The Court found that the applicants had an interest in obtaining access to information affecting their private lives and there was no countervailing public interest in retaining it (paragraphs 100 – 101). However, the Government had complied with its positive obligation to provide *"an effective and accessible procedure … which enables such persons to seek all relevant and appropriate information"* in proceedings before the Pensions Appeal Tribunal (paragraph 102). There was no evidence before the Court that an application made in those proceedings would not have been successful. The applicants had failed to avail themselves of the opportunity to obtain access to the relevant documents. Accordingly, there had been no breach of the State's positive obligation under Article 8 (paragraphs 102 – 104).

26. In *Guerra v Italy* [1998] 26 EHRR 357 the applicants were residents of Manfredonia in Italy. They lived about 1 kilometre away from a privately run fertiliser plant that, since 1976, had expelled toxic substances into the air. The European Court of Human Rights held that the toxic emissions had a direct effect on the applicant's right to respect for private and family life; accordingly Article 8 was engaged (paragraph 58). While the authorities in Italy had not "interfered with" the applicants' Article 8 right to respect for their private and family life, they had failed to take positive steps, by releasing relevant information in their possession about the danger created by toxic pollution, to ensure effective protection for the applicants' right. In breach of the positive Article 8 obligation, the authorities had held back

information about the plant and its emissions that would have assisted the residents to assess the risk of harm created by remaining in their homes in close proximity to the emissions (paragraphs 59 – 60).

27. A positive obligation to provide information was also found in *Roche v United Kingdom* [2006] 42 EHRR 30. The applicant feared that he had been adversely affected by exposure to toxic chemicals while participating in tests at Porton Down in 1962 and 1963, and suffered anxiety and distress in consequence. The Court held, following *McGinley and Egan*, that *"a positive obligation arose to provide 'an effective and accessible procedure' enabling the applicant to have access to 'all relevant and appropriate information' which would allow him to assess any risk to which he had been exposed during his participation in the tests"* (paragraph 162). As to compliance, the Court held that Mr Roche's position was to be distinguished from that of Mr McGinley and Mr Egan. Mr Roche had attempted by a variety of means to obtain access to the "relevant and appropriate information", including through the Pensions Appeal Tribunal disclosure procedure, and his efforts had been ineffective. The Court found that the State had failed to provide *"an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information which could allow him to assess any risk to which he had been exposed during his participation in the tests"* (paragraph 167).

28. The existence of a positive obligation towards applicants seeking access to information affecting their enjoyment of private or family life has been re-stated in *MG v United Kingdom* [2003] 36 EHRR 3 (paragraph 28), *Odievre v France* [2004] 38 EHRR 43 (paragraph 40), *KH v Slovakia* [2009] 49 EHRR 34 (paragraphs 45 – 47), *Godelli v Italy* [2012] Application No 33783/09 (paragraph 47) and *Szulc v Poland* [2013] 57 EHRR 5 (paragraph 84). Where appropriate the Court has itself carried out the exercise of balancing the interests of the individual against any countervailing public interest in non-disclosure. In *KH v Slovakia*, for example, at paragraph 49 the Court posed the ultimate question to be confronted as follows:

> *"49. The applicants in the present case obtained judicial orders permitting them to consult their medical records in their entirety, but they were not allowed to make copies of them under the Health Care Act 1994. The point to be determined by the Court is whether in that respect the authorities of the respondent State complied with their positive obligation and, in particular, whether the reasons invoked for such a refusal were sufficiently compelling to outweigh the Article 8 right of the applicants to obtain copies of their medical records."*

29. For the purpose of drawing attention to a recognition by the European Court of Human Rights of the special position of a nearest relative of a deceased person Ms Williams QC and Ms Murphy rely on the Court's decision in *Elberte v Latvia* [2015] 61 EHRR 7.[14] The applicant's husband was killed in a car accident. When his body was removed to the publicly run Forensic Centre for an autopsy, unknown to the applicant and without her permission, tissue samples were removed from the body. As to the applicant's standing to make the application, the Court held that her position as the deceased's nearest relative was sufficient to support the conclusion that the acts of the respondent state amounted to an interference with *her* right of respect for private life under Article 8 (paragraph 105 – 107). As to justification under Article 8 (2) the Court further held that domestic legislation had been unclear as to the circumstances in which tissue samples could lawfully be removed from a deceased's body without the consent of the next of kin. For that reason the interference by the state in the applicant's Article 8 right of respect was not "in accordance with the law" and therefore a violation of the right. At paragraph 140 the Court observed:

> *"140 … The Court has already found a violation of Article 8 of the Convention because, as the closest relative, the applicant had a right to express consent or refusal in relation to tissue removal* [under section 4 of the domestic statute] *but the corresponding obligation or margin of discretion on the part of the domestic authorities was not clearly established Latvian law and there was no administrative or legal regulation in this respect…"*

30. From these established principles Ms Williams QC and Ms Murphy argue that the Relatives are 'victims' for the purpose of Article 34 of the European Convention on Human Rights. They wish to know but have been denied knowledge as to whether the identities of their deceased children were appropriated, used and stored by the State for covert purposes and without their knowledge or consent. Accordingly (and I paraphrase):

    i. the conduct alleged touches the Relatives' Article 8 right of respect for their private life;

    ii. the State is in possession of the information that they seek;

    iii. they are in a current state of uncertainty, anxiety and distress as to whether the identities of their deceased children have been misused in this way; and thus

[14] Written submissions by the Relatives (1 June 2016), paragraphs 45 – 47

iv. the State has a positive obligation to provide them with "an effective and accessible procedure" enabling them to have access to "all relevant and appropriate information" so that either they can become reconciled with the truth or re-assured that no violation of their private life has occurred.[15]

31. In their Further Note of 10 June 2016 counsel to the Inquiry accepted that, when a request is received by the Inquiry from the parent of a deceased child to be told whether their deceased child's identity was used by the police for covert purposes, Article 8 is engaged. Mrs Shaw, Mr Peters and RDCA could reasonably be regarded as victims so as to trigger the positive obligation under Article 8.[16] However, the positive obligation creates a qualified right whose resolution depends upon a fair balance between interests that may conflict, those of the community and those of the individuals concerned. The procedure by which the right of access to information in the hands of the Inquiry will be determined is that provided by section 19 of the Inquiries Act 2005. All the factors to be considered in an Article 8 fair balance would also be considered in a public interest test under section 19 and in the absence of exceptional circumstances the result should be no different.[17]

32. In their skeleton argument of 17 June 2016 Ms Williams QC and Ms Murphy accepted that section 19 of the Inquiries Act 2005 provides the procedural mechanism by which the fair balance will be reached. They contend, however, that the existence of a positive obligation under Article 8 is a weighty factor for consideration in the public interest balance to be made under section 19 (3)(b) of the Act.[18] There is a strong public interest in openness at the Inquiry, particularly where the information held by the Inquiry relates to misconduct by a public authority. A positive obligation owed to 'victims' of police misconduct adds weight to the public interest in disclosure.

33. Mr Jonathan Hall QC and Mr Adam Payter, in their skeleton argument of 17 June 2016 on behalf of the Metropolitan Police Service, accepted that the Relatives are to be treated as victims for the purpose of section 6 of the Human Rights Act 1998.[19] They submit that where a positive obligation arises under Article 8, its substance is to provide a mechanism by which competing interests can be assessed although, it is conceded, the European Court will in some circumstances examine whether the mechanism provided has been effective.[20] In Strasbourg the

[15] Transcript of hearing on 22 June 2016, pages 22 - 23
[16] Counsel to the Inquiry's further note (10 June 2016), paragraphs 11 - 12
[17] Counsel to the Inquiry's further note (10 June 2016), paragraph 13
[18] Skeleton argument on behalf of the Relatives (17 June 2016), paragraphs 3 - 4
[19] Skeleton argument on behalf of the Metropolitan Police Service (17 June 2016), paragraphs 8 - 9
[20] Compare *A v Ireland* [2011] 53 EHRR 13 at paragraph 245, *Gaskin*, *Roche*, *Odievre*, *Godelli* and *Szulc* with *McGinley and Egan*, *Guerra* and *KH*

issue would be whether the statutory mechanism provided by the Data Protection Act 1998 and the Freedom of Information Act 2000 (or other relevant rules and regulations) constituted compliance with the positive obligation.[21] They argued that the Inquiry would be under no free-standing duty to respond to an application for disclosure made on Article 8 grounds. The Inquiry is bound by its duties under section 19 of the Inquiries Act 2005. Unless the Inquiry concluded that evidence it had received was relevant and necessary for fulfillment of its terms of reference it need not be admitted; if it was not admitted no occasion for a decision under section 19 would arise.

34. In his opening remarks at the oral hearing held on 22 June 2016 Mr Barr QC sought to identify areas of agreement and disagreement between participants. As to the question whether any information about the use of deceased children's names would escape consideration by the Inquiry, Mr Barr QC announced the Inquiry's intention to treat all such information as relevant and necessary. As to the obligations of the Inquiry to consider disclosure of such information, Mr Barr QC submitted that section 19 of the Inquiries 2005 provided the "accessible and effective" mechanism by which the Inquiry would "strike a fair balance between competing interests when the close family member of the deceased child asks to know whether or not" the child's identity has been used by an undercover police officer. Every factor that would require consideration in an Article 8 balance will also fall to be considered when the Inquiry is considering an application for a restriction order under section 19.[22]

Conclusions – question 1

35. My conclusions on the issue of principle are as follows:

    (1) Whether the state owes a duty to investigate possible breaches of Article 8 in circumstances such as the present is not material since the Secretary of State has, in effect, ordered the Inquiry to do so under section 1 of the Inquiries Act 2005. The question I have to consider is whether the Inquiry has a positive obligation under Article 8 to disclose to interested persons information that closely concerns their right of respect to private life.

    (2) Where the state (or a public authority on behalf of the state) holds information that is closely concerned with the enjoyment of the private life of the interested person, Article 8 of the European Convention on Human Rights may give rise to a positive obligation to provide an "effective and accessible"

[21] Skeleton argument on behalf of the Metropolitan Police Service (17 June 2016), paragraphs 15 – 17
[22] Transcript of hearing on 22 June 2016, pages 4 - 7

procedure by which an application for disclosure can be decided. The positive obligation requires the state, by means of such a procedure, to make disclosure of "relevant and appropriate" information. Whether an obligation exists to make disclosure of the particular information requested depends on the striking of a fair balance between the interests of the individual and any countervailing interests of the public.

(3) The positive obligation of the state is in general met by the creation of statutory regimes under the Data Protection Act 1998 and the Freedom of Information Act 2000, and by the appointment of the Information Commissioner to consider complaints. However, for the reasons stated in paragraph 9 above, those regimes do not apply to the Inquiry in the present context. For reasons that appear below I do not accept that a statutory inquiry is immune from an application for disclosure of "relevant and necessary material" admitted by the Inquiry or that it would be an answer simply to refer the applicant to the Data Protection Act 1998 and the Freedom of Information Act 2000.

(4) Mrs Barbara Shaw, Mr Gordon Peters and RDCA are persons whom it is likely the European Court of Human Rights would treat as victims for the purposes of Article 34 of the European Convention on Human Rights whether or not their deceased child's identity was appropriated by the police for covert purposes.[23] In that event, they would also be 'victims' under section 7 (4), and therefore section 6, of the Human Rights Act 1998.

(5) The Chairman of the Inquiry is a public authority for the purposes of section 6 of the Human Rights Act 1998. The Chairman is required by section 6 not to act in a manner that is "incompatible" with the Convention rights of a 'victim', including a right under Article 8. This requirement applies to positive as it applies to negative obligations imposed by Article 8.[24]

(6) The Inquiry will be in possession of evidence that will be closely concerned with the private life of the parents or close relatives of deceased children. It will be under a duty to respond to applications for disclosure made by those who are to be treated as 'victims'. The Inquiry provides a mechanism by which the Relatives can seek access to relevant information. The procedure by which the Chairman must fairly resolve the balance between the interests of an individual seeking to obtain disclosure of such information and any

[23] While their cases are not on all fours with *Klass v Germany* or *Zakharov v Russia* the principles are, in my view, applicable to their circumstances.
[24] See Section 6 (6) of the Human Rights Act 1998

countervailing public interest in non-disclosure is that provided by sections 18 and 19 of the Inquiries Act 2005.

(7) The starting point for the Inquiry is that relevant and necessary evidence will be admitted and made public. However, I am required to consider the necessity for an order restricting disclosure either on the application of an interested person or of my own motion where the public interest requires it.

(8) As to the identification of those with a sufficiently close relationship with the information held by the Inquiry to trigger the positive Article 8 obligation, each request for information must be assessed according to its own facts. In my view, a principal consideration will be the family and emotional affinity between the applicant and the deceased child.

(9) In none of the 'positive obligation' cases drawn to my attention was the applicant faced with a refusal by the state to provide information on the grounds of the public interest in national security or the effective prevention and detection of crime or the Article 8 rights of others. Had these been the issues before the European Court of Human Rights, the Court would have been examining the comparative potency of the public interest or competing Article 8 arguments just as I shall be required to do under section 19 of the Inquiries Act 2005.[25]

Conclusions: question 2

36. My conclusions as to the nature of the balancing exercise by which applications for information are to be considered are as follows:

(1) Under the procedure provided by sections 18 and 19 of the Inquiries Act 2005 I am required, subject to any restriction order made under section 19, to take such steps as I consider reasonable to secure that members of the public (including the Relatives) are able to obtain or view a record of evidence and documents given, produced or provided to the Inquiry. Under section 19 (3) I may make a restriction order that specifies only such restrictions upon disclosure as are *"required by any statutory provision … or rule of law*" (paragraph (a)) or as I consider to be conducive to the Inquiry fulfilling its terms of reference *"or are necessary in the public interest"* (paragraph (b)).

(2) I may be required to make an assessment under section 19 (3)(a) of the Inquiries Act 2005 (*"required by any statutory provision"*) and section 6 of the

[25] See further Restriction Orders: Legal Principles and Approach ruling (3 May 2016), paragraphs 194 – 196 and 198

Human Rights Act 1998 as to whether a restriction order prohibiting the publication of an undercover identity should be made on the grounds that disclosure of the information would lead to exposure of a police officer's real identity and, as a result, a real and immediate risk of death or serious injury to the officer (in protection of the officer's rights under Article 2 and Article 3 of the European Convention on Human Rights).[26] Where such a risk is present and the undercover name belonged to a deceased child it is unlikely that the countervailing interest of the parent or close relative of the deceased child to be informed would influence a decision as to the reasonableness of making the restriction order.[27]

(3) I may be required to make an assessment under section 19 (3)(a) of the Inquiries Act 2005 (*"required by any statutory provision"*) and section 6 of the Human Rights Act 1998 as to whether a restriction order should be made on the grounds that disclosure of information would lead to an unacceptable risk of exposure of a police officer's true identity and would, as a result, create a disproportionate interference with their enjoyment of private or family life.[28] One of the exceptions provided by Article 8 (2) to the prohibition of interference with the officer's right of respect for private and family life is the need *"for the protection of the rights and freedoms of others"*. I accept that the proportionality balance to be struck under Article 8 (2) requires me to consider the weight of the positive obligation of disclosure owed by the state to a deceased child's parent.

(4) I may be required to make an assessment under section 19 (3)(b) of the Inquiries Act 2005 (as to whether a restriction order is *"necessary in the public interest"*) on the grounds that disclosure of information would lead to an unacceptable risk of exposure of a police officer's true identity and would, thus, create a risk of harm to the officer or their family.[29] Section 19 (3)(b) requires me to have regard *"in particular"* to the matters mentioned in subsection (4). The Article 8 interests of individuals other than the police officer at risk is not a matter specifically to be considered under section 19 (3)(b) and (4) of the Inquiries Act 2005, but I have no doubt that such interests are a proper and necessary consideration in reaching the public interest balance.

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[26] See Restriction Orders: Legal Principles and Approach ruling (3 May 2016), at paragraphs 172 – 176 and paragraph C1
[27] See Restriction Orders: Legal Principles and Approach ruling (3 May 2016), at paragraph 175
[28] See Restriction Orders: Legal Principles and Approach ruling (3 May 2016), paragraph C3, page 83
[29] See Restriction Orders: Legal Principles and Approach ruling (3 May 2016), sections A and B, pages 78 - 82

(5) I have already expressed the view that there is a strong public interest in openness in the Inquiry's proceedings, particularly where it is necessary to ensure that interested persons can participate fairly and effectively.[30]

(6) Ms Williams QC and Ms Murphy submitted that the positive and negative obligations owed to a 'victim' of police malpractice deserved significant weight. On the other hand, the weight to be given to protecting an officer *"where he chose to build his legend from the deceased child's identity"* may appropriately be reduced.[31] In my view, that the state owes to one of the interested persons a positive obligation under Article 8 to provide information subject to the countervailing interests of the public is an additional factor in favour of disclosure. Whether the comparative weight of the positive obligation would be enough to shift the balance in any particular case will have to await an assessment of the available evidence under section 19 of the Inquiries Act 2005. Finally, I do not consider it appropriate to apply factual assumptions in pre-judgement of competing Article 8 rights.

Fairness and practical considerations

(i) Public notice inviting expressions of interest

37. All counsel have addressed the practical consequences of recognition by the Inquiry of the Article 8 rights of the parents and close relatives of deceased children and the application of the principle of fairness to their interests. Counsel's submissions have been thoughtful and instructive. Despite the publicity already given to the Inquiry, it is agreed that the Inquiry should issue a public invitation to the families of children who were born and died during the relevant period to approach the Inquiry, if they wish, with an expression of interest.

38. Twenty-three families have already expressed a wish to know whether a deceased child's identity has been used by the police for covert purposes. It is likely that there will be other families who, if they were made aware of the Inquiry's investigation into the subject, would wish to make representations.

39. All counsel agree that, subject to the requirements of section 19 of the Inquiries Act 2005, families who wish to know whether their deceased's child's identity has been used for covert purposes should be informed one way or the other. They have addressed their minds to the question whether and to what extent the making of

[30] See Restriction Orders: Legal Principles and Approach ruling (3 May 2016), in particular paragraphs 110 and 112

[31] Skeleton argument on behalf of the Relatives (17 June 2016), paragraph 6

restriction orders under section 19 by the Inquiry may affect the fulfillment of this desirable outcome. For this purpose they have placed interested families into the following categories.

(ii) Classification of families' interests – category 1

40. The Category 1 families comprise those parents or close relatives of a deceased child whose identity has been used by a police officer for covert purposes **and** a provisional decision has been made not to impose a restriction order preventing publication of that information. Counsel to the Inquiry, counsel for the Relatives and counsel for the Metropolitan Police Service all agree that the family, whether it has expressed an interest or not, should be approached, if possible, and informed, in as sensitive a manner as can be achieved, of the Chairman's decision. In the case of those parents and close relatives who are not already known, the Metropolitan Police Service has offered to do its best to assist with tracing them, while leaving the task of providing information to the family to the Inquiry team. Parents or close relatives who are known to the Inquiry or are subsequently traced will be informed that if they wish they can make an application to the Chairman for a restriction order preventing disclosure of the deceased child's name for reasons personal to them. If they do not wish to make representations to this effect they will be informed of the manner in which the information will be made public.

(iii) Classification of families' interests – category 2

41. Category 2 families are those who have expressed an interest in knowing whether their deceased child's identity was used by the police for covert purposes **and** in respect of whose deceased child the Chairman has made a restriction order prohibiting disclosure of the covert identity. Counsel are agreed that in these circumstances no information can be provided to the family.

(iv) Classification of families' interests – category 3

42. Category 3 families are those who have expressed an interest in knowing whether their deceased child's identity was used by the police for covert purposes **and** the Inquiry finds no evidence that it was. The issue arises as to whether the families can be reassured with a negative response and, if so, when. Here, there is a division of opinion between counsel.

(v) When, if at all, can category 3 families be given a negative response?

43. Ms Williams QC and Ms Murphy emphasise that category 3 families are 'victims' by virtue of the close connection between the secret practice adopted by the police

service and the death of their loved one.[32] They have the same interest in knowing the truth as do families whose deceased child's identity was used for covert purposes. Their continuing anxiety requires the Inquiry to give reassurance as soon as possible. Since their child's identity was not used there would be no explicit risk of harm to anyone by saying so. [33]

44. While recognising the desirability of an early informative response to category 3 families, counsel to Inquiry have identified circumstances in which it may not be possible to provide the information requested. They submit that a negative response to a family wishing to know whether a deceased child's identity was used for covert purposes might create a serious risk of inference and speculation that could result in harm to the public interest. This is the risk best exemplified by the decision of the High Court in Northern Ireland in *Re: Scappaticci's Application* [2003] NIQB 56.[34]

45. In the context of this Inquiry the problem emerges as follows. As noted at paragraph 40 above, families will be informed that their deceased child's identity was used for covert purposes when a restriction order is not in place preventing disclosure of that information (category 1). As noted in paragraph 41 above, where a restriction order is in place, families cannot be informed that their deceased child's identity was used for covert purposes (category 2). Counsel to the Inquiry point out that if a pattern emerges that category 3 families are informed that their deceased child's identity was not used for covert purposes, it will quickly become apparent that families in categories 1 and 3 are provided with an answer to their request for information while families in category 2 are not; accordingly, the remainder will infer (or speculate) that they fall within category 2, namely among those in respect of whom a restriction order has been made to prevent disclosure of an undercover identity. If that were to be the outcome, the purpose of making the restriction order would be or would likely be defeated. Counsel to the Inquiry urge a cautious approach by which the Inquiry first acquires the best possible factual overview in which possible consequences are better understood and then considers a form of disclosure that minimises the risk of damage to the public interest, perhaps on a once-for-all occasion.[35] Counsel for the Metropolitan Police Service concur both with the analysis and the recommendation.[36]

46. Counsel for the Relatives describe *Re: Scappaticci's Application* as an endorsement of the policy neither to confirm nor deny a particular state of affairs on its particular

[32] See paragraphs 20 and 30 above
[33] Written submissions by the Relatives (1 June 2016), paragraphs 55 and 67 – 68
[34] Counsel to the Inquiry's further note (10 June 2016), paragraphs 14.2 and 23 – 29; Restriction Orders: Legal Principles and Approach ruling (3 May 2016), paragraphs 117 - 121
[35] Counsel to the Inquiry's further note (10 June 2016), paragraph 25.3
[36] Skeleton argument on behalf of the Metropolitan Police Service (17 June 2016), paragraphs 33 - 34

and somewhat unusual facts. They argue that none of the extreme risks considered in that case are likely to apply to present circumstances.[37] It is contended that the policy neither to confirm nor deny is no more than one relevant factor to be considered in reaching a fair balance. The families' Article 8 right to know is a strong countervailing factor. In any case, if the Inquiry adopted a trickle or sequential release of information to families whose deceased children's identities had not been used for covert purposes, the risk of inference or speculation would be reduced.[38]

47. In her oral submissions Ms Williams QC referred to some of the reasoning and conclusions reached in my Restriction Orders: Legal Principles and Approach ruling of 3 May 2016.[39] My conclusion was that the utility of the "Neither confirm nor deny" policy is likely to depend on the nature of the information whose secrecy it is sought to protect and the precise factual and legal context in which application of the policy is sought. Resolution of the public interest balance will depend upon the sensitivity of the information, the prominence of the countervailing public interest and a careful measurement of the harm that would follow respectively disclosure and non-disclosure. Ms Williams QC contended that an assessment of the likelihood that undesirable inferences would be drawn should a negative response be given to category 3 families was a necessary component of the measurement and balancing exercise. She argued that in relation to a family whose deceased child's identity had been used for covert purposes, some would receive a positive answer while others, in respect of whom a restriction order was in place, would receive no answer at all. Those who received no answer at all would be likely to infer either that a restriction order prevented a positive answer, or that the position in relation to their child had not been ascertained or that there was no relevant evidence to give. Ms Williams QC submitted that there was no reason to conclude that those who received no information would infer that their deceased child's identity had been used for covert purposes.

Conclusions: fairness and practical considerations

48. I shall consider, first, the issue of whether it is possible to inform families in category 3 (paragraph 42 above) at an early stage that there is no evidence that the deceased child's identity was used by the police for covert purposes.

[37] Skeleton argument on behalf of the Relatives (17 June 2016), paragraphs 23 - 29
[38] Written submissions by the Relatives (1 June 2016), paragraphs 67 - 71
[39] Transcript of hearing on 22 June 2016, pages 57 – 66; Restriction Orders: Legal Principles and Approach ruling (3 May 2016), paragraphs 145, 146, 148

49. It is necessary to remind myself of the factual context in which the issue arises: I will be asked by the families to disclose whether or not their deceased child's identity was used by the police for covert purposes. I need to assume for current purposes that, having carried out the necessary examination under section 19 of the Inquiries Act 2005, I will have made some restriction orders requiring that the undercover identity of an officer that is also the real identity of a deceased child shall not be disclosed (because, for example, the disclosure of an undercover identity is attended by an unacceptable risk of exposure of the officer's true identity which, in turn, would create an unacceptable risk of serious harm to the officer or his family).

50. If these circumstances arise I will need to make restriction orders that are effective to prevent disclosure of the information that should remain secret. If to release information that a deceased child's identity *was not* used for covert purposes were to have the effect of risking revelation of a deceased child's identity that *was* used for covert purposes, then the restriction order made in respect of the latter's identity would be undermined. I accept the analysis of counsel to the Inquiry summarised in paragraph 45 above. It is the combination of disclosure to category 1 and category 3 families that creates the temptation to infer that if disclosure is not made to a family it must be because there is a restriction order in place.[40] I do not accept the attempt by counsel for the Relatives to diminish the risk of the undesirable inference because (i) the Inquiry has already said that it regards evidence of the use of a deceased child's identity as of itself relevant and necessary to the Inquiry's terms of reference and (ii) I regard the chances of a parent inferring that perhaps the Inquiry does not know the answer, even after a lengthy investigation, as remote.

51. It is clear that there is a strong public interest in providing an answer to concerned families, if possible and as soon as possible. However, I am bound to conclude that serious public interest concerns arise. My view is that the risk of the undesirable inference may be present to a greater or lesser extent whether the negative responses were given to families (asking whether their deceased child's identity had been used) all at one time or in tranches or in a trickle. The overwhelming advantage of caution and postponement of a decision is (a) avoidance of the unforeseen risk of serious harm and (b) the ability of the Inquiry, in the meantime, to acquire an overview of (i) the number and nature of restriction orders needed to protect the identity of and harm to undercover officers, (ii) the risk of an identifiable pattern emerging that undermines those orders and (iii) the terms of or procedure for disclosure that might best avoid or reduce the risk of harmful inference or

[40] While I accept that the factual context is very different this is, to my mind, a classic problem of the *Scappaticci* type that will require me to consider whether the only way to avoid an unacceptable risk of harm is to make no response.

speculation. I have balanced the interests of families who have a keen and immediate interest in disclosure with the risk of harm to the public interest and I conclude that in the present circumstances caution is essential.

52. I turn, secondly, to the issue whether and, if so, in what terms the Inquiry should issue an invitation to the families of deceased children to contact the Inquiry with expressions of interest.

53. Counsel have, in my view, correctly identified the categories of families whose interests the Inquiry is required to consider. The Inquiry's obligation is to respond to any parents or close relatives who wish to know whether their deceased child's identity was used by the police for covert purposes. The Inquiry will not be able to provide confirmation if a restriction order is in place that prevents disclosure of the use of the identity of the family's deceased child; neither, as I have accepted, can the Inquiry provide negative information if to do so would have the effect of undermining a restriction order made in respect of another deceased's child's identity. It is possible that confirmation can be given only to those families whose deceased children's identities were used for covert purposes and the Inquiry decides that no restriction order is required to prevent disclosure.

54. In the case of those families who do not make their wishes known to the Inquiry in advance of a provisional decision not to make a restriction order, the Inquiry has a responsibility to trace them if it can, so as (i) to afford them the opportunity to make representations as to why, for reasons personal to them, a restriction order should be made to prevent the public disclosure of the child's identity and, alternatively, (ii) to inform them as sensitively as possible of the Inquiry's decision to make the child's identity public and the circumstances in which disclosure will be made.

55. Since the Inquiry's obligation is to respond to families who express their wish to receive information, I agree with counsel that it is appropriate to issue an invitation explaining to families who may be affected of their right to make an approach.

56. Unfortunately, for reasons given in paragraph 53, it may not be possible for the Inquiry to provide families who have expressed an interest with an answer to the question they have posed. On one view, the publication of an invitation to contact the Inquiry may have the effect of prolonging, if not exacerbating, a family's state of uncertainty and grief.

57. While the dilemma is troubling, my conclusion is that the Inquiry's principal duty is publicly to explain its work so that those families who wish to do so are provided with an informed opportunity to respond. The alternative is to do nothing and risk

the discovery of families whose interest emerges too late for a meaningful response or whose interest in these important matters does not emerge at all.

58. In order that families should not be misled as to the practical effects of an expression of interest the Inquiry's public notice should explain that an expression of interest may result in a response that is delayed or in no response at all.

59. The Inquiry will consult the interested participants both upon the terms and the timing of the public notice.

14 July 2016

Sir Christopher Pitchford
Chairman, Undercover Policing Inquiry