

Appendix 1

Keeping People Safe and Secure: Draft Criteria for Restrictions on Disclosure from the HIU to Families

Introduction

There will be a general presumption of disclosure of all relevant information in the possession of the HIU to families, subject only to the duty not to prejudice the administration of justice and the criteria detailed below. In circumstances where the HIU have concerns regarding whether the disclosure of information could jeopardise the administration of justice (i.e. a possible prosecution or prosecution with a reasonable chance of success) the HIU shall seek the advice and guidance of the DPP as to whether particular information should be included in a family report or indeed whether any family report should be issued in advance of a pending or ongoing prosecution.

Extent of Disclosure

In cases where the information reveals evidence of human rights abuses, criminal activity and misconduct by act or omission by any person, the information disclosed to the families shall, in all circumstances where relevant information exists, be sufficient to establish in general what measures might reasonably be taken to prevent recurrence and, without prejudice to that generality, in particular to:

- a) Identify the organisation, group or state agency involved.
- b) Describe the nature of the wrongdoing including;
 - i) The nature of acts of commission or omission.
 - ii) Whether any relevant action or omission by a public authority was lawful (including, in particular, whether any deliberate use of force was justified in the circumstances).
 - iii) Whether any action or omission of a perpetrator was carried out with the knowledge or encouragement of, or in collusion with, a public authority.
 - iv) Whether the actions investigated had or may have been wholly or partly motivated by racial, religious or other sectarian factors.
- c) Make clear the chains of command of the persons directly involved in the wrongdoing and, in the case of state involvement, the supervisory systems, or lack of them, that existed.
- d) Indicate whether the actions investigated were or may have been connected with other offences or actions (whether or not already investigated) and
- e) Detail the legislative, regulatory or policy gaps that allowed the wrongdoing to occur.

The above elements represent a minimum level of disclosure.

Redactions of sensitive information

Article 2 The Duty to Protect Life

No 'sensitive information' shall be provided in a HIU report to a family which might present a real and immediate threat to the life of an identified individual or individuals from the criminal acts of a third party.

The first basic ground for restrictions on disclosure is the duty on the state to prevent harm to individuals deriving from Article 2 of the ECHR. The “floor” of the Article 2 substantive obligation on the state to protect life is the Osman test. The full test is that if “*the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and ... they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk,*” they have failed to meet their Article 2 obligation.¹ The HIU Panel and the Independent Judicial Mechanism would have to determine, in the context of the presumption of full disclosure of information to families gathered in the course of a HIU investigation, whether the redaction of specified sensitive material was required in order to mitigate a real and immediate risk to the life of an individual or individuals.

Article 3 The Duty to Prevent Harm to Individuals

The state also has a positive duty to prevent harm to individuals under Articles 3 of the ECHR. In relation to restrictions on disclosure, this duty should be interpreted in the following way:

Duty is to individuals

The risk of harm must be to an identified individual or individuals, not a class of persons.

The harm to be prevented

The harm to be prevented includes physical or specific psychological injury or harassment or intimidation likely to reach the threshold of inhuman or degrading treatment.

The risk

There must be a direct, foreseeable and describable link between the proposed disclosure and the anticipated harm. That means that the risk must be imminent or in the foreseeable future and wholly created or materially enhanced by the proposed disclosure.

¹ See paragraph 116, *Osman v UK* (87/1997/871/1083), ECHR Judgment 28 October 1998

The nature and source of the threat

The threat must be to carry out harm as defined above through criminal acts. The source of the threat must be either an identified individual or individuals or a clearly definable group that in either case has demonstrated the willingness and capability to carry out threats as described to either the individual(s) concerned or to a defined class of persons to which the individual(s) arguably at risk belong.

Protection of operational counter-terrorist methodologies and effectiveness

On the basis that under Articles 2 and 3 ECHR it may be necessary and proportionate, some information may be redacted from HIU reports to protect the effectiveness of operational methods of the police and other security services which are in current use and which are lawful - i.e. obsolete or “arguably illegitimate”² methods cannot be concealed by restrictions on disclosure. Information about contemporary, legitimate operational methods must not already be in the public domain to qualify for redaction. It must also be demonstrated that the proposed disclosure would, in fact, in the foreseeable future, damage the operational effectiveness of the method in question in such a way as to place a person or persons at a real and immediate risk of serious harm. In general, the reasons for restricting disclosure under this criterion must be “particularly convincing and weighty.”³

The Redactions

Any redaction of information must be the minimum which is necessary to materially reduce the risk of death or harm to the specified persons concerned and proportionate to the level of risk when balanced against the public interest in disclosure. As is the case with reports issued by the Office of the Police Ombudsman, such redactions should only relate to the narrative or ‘findings’ elements of HIU report and not to the Conclusions reached. Such redactions cannot be used to obscure or block the disclosure of information below the minimum necessary elements of information outlined above.

² Dil and Others v Commissioner of Police [2014] EWHC 2184 (QB), para 42

³ Smith and Grady v. United Kingdom (1999)