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RESTRICTED INVESTIGATIONS

In Re an investigation by the Metropolitan Police into allegations made in an article appearing in the New York Times on 1st September 2010

Operation Varec

Background

1. In 2006 the Metropolitan Police conducted inquiries into allegations that staff at the News of the World (NOW) newspaper were involved in the unlawful interception of voicemail messages that had been left on mobile telephones.

2. In August 2006 Clive Goodman (the Royal correspondent of that newspaper) and Glen Mulcaire (a private detective engaged by the newspaper to carry out investigations) were both arrested and charged with offences of unlawful interception. In November 2006 they both pleaded guilty.

3. In January 2007 they were both sentenced to terms of imprisonment. On the day of sentence the Editor of the NOW since 2003, Andy Coulson, resigned. He said that he had no personal knowledge of the offending of Goodman or Mulcaire but felt it his duty as Editor to take responsibility and resign.

4. The involvement of the Crown Prosecution Service in the case then concluded with the sentencing of the defendants.

5. Following the conclusion of the criminal case the Culture, Media and Sports Committee (CMS) of the House of Commons required representatives of the NOW to appear before it to answer questions about the breadth of staff and management involvement in the illegal interception of mobile telephones. They were assured by Les Hinton (then Chief Executive of the newspaper's owner, News International), that a full, rigorous internal inquiry had been carried out and as a result of the inquiry the newspaper was satisfied that Clive Goodman was the only employee who had been involved in such behaviour and known what was going on.

6. Following the prosecution Goodman was dismissed by the newspaper and Mulcaire's contract was terminated. Both instituted proceedings for wrongful dismissal. Goodman claimed that News International had failed to follow the statutory dismissal and disciplinary procedure in relation to termination of his employment: Mulcaire argued that although the newspaper treated him at all times as a contractor, he had full employment rights based on such factors as mutuality of

obligation (i.e. he expected to be provided with work and the NOW expected him to be available for work). Following the receipt of legal advice about the chances of success of both claims the newspaper settled both of them paying money to both men in settlement.

7. In February 2009 the CMS Committee embarked upon an examination of Press Standards, Privacy and Libel. In July 2009 the Guardian newspaper reported that News Group newspapers had paid more than £1m in damages and costs to settle invasion of privacy cases brought by three people connected to the world of professional football; who said they were the victims of voicemail message interceptions on the newspaper's behalf by Mulcaire. One of those three was Gordon Taylor, whose telephone messages Mulcaire had been convicted of unlawfully intercepting. Nothing about those cases had previously been in the public domain because of confidentiality clauses contained in the financial settlements.

8. The CMS Committee considered that these allegations cast some doubt on testimony provided to it by News International executives in 2007. The Committee therefore reopened hearings to pursue the matter and heard oral evidence from representatives of the Guardian, the Press complaints Commission, the Information Commissioner and the Metropolitan police as well as from current and by then former News International executives. The Committee also received written evidence from the DPP; and heard evidence from the solicitor who had acted for Gordon Taylor.

9. Following the reports made by the Guardian newspaper on 9th July 2009 the DPP issued a statement indicating that he had asked for an urgent examination of the material that was supplied to the CPS by the police in this case in order to satisfy himself and assure the public that the appropriate actions were taken in relation to that material. On 16th July 2009 the DPP issued a statement, and concluded that it would not be appropriate to re-open the cases against Goodman or Mulcaire, or to revisit the decisions taken in the course of investigating and prosecuting them. (See Annex 1)

10. The Director then followed that statement with a letter to the Committee dated 30th July 2009 that dealt with a particular document that had been provided to the CMS Committee by the Guardian newspaper. (See Annex 2). Throughout the summer and autumn of 2009 there followed a series of requests to the CPS by the Committee for documents generated during the

2006-7 prosecution. The DPP again wrote to the Committee on 3rd November 2009. (See Annex 3).

11. Further requests for information continued until early 2010, in particular for disclosure of copies of the pre-sentence reports of Goodman and Mulcaire.

12. Finally on 24th February 2010 the Committee published its report.

13. On 1st September 2010 the New York Times published an article that re-ignited public interest in the case by alleging that Andy Coulson had in fact known far more than he was prepared publicly to admit about telephone hacking at the newspaper during his tenure as editor. One former employee, Sean Hoare, was quoted in the article as saying that Andy Coulson had requested him to 'tap phones'; a claim he was to repeat in the United Kingdom during a series of interviews on radio and television that would be broadcast over the next few days.

14. Upon consideration of that article the Metropolitan police considered that the statements made by individuals in that article or subsequently in the media might constitute new evidence and therefore undertook a fact finding task under the name of Operation Varec. The terms of reference being:

"To assess whether allegations being made in the media since 1st September 2010 provided any new evidence of criminal offences, namely unlawful interception of communications, at News of the World, in 2005/6"

15. That fact finding exercise has now been concluded and I have received a request for advice dated 10th November 2010 from Detective Superintendent Dean Haydon. Attached to the request for advice are three appendices. **Appendix A** contains the outcome of 21 strands of inquiry/ areas of interest. **Appendix B** contains press cuttings and articles that have been gathered by the police. **Appendix C** contains a copy of the CMS Report, 'Press Standards, Privacy and Libel' that was published on 24th February 2010.

16. I shall now examine those 21 strands.

The New York Times

17. They were written to and invited to assist the police investigation. They declined. The contents of the newspaper article would not by itself provide admissible evidence to support any criminal proceedings unless persons making assertions in that article are prepared to stand by them and provide the police with admissible evidence to support their assertions. Where sources quoted in the article have remained anonymous, the newspaper will not reveal their identity and cannot be forced so to do. Where they are identifiable the police have sought to see them.

Sean Hoare

18. He was employed as a journalist at the NOW whilst Andy Coulson was editor. He left sometime during the period 2005-6.

19. In the NYT article he "recalled discussing hacking. When they had first worked together at the Sun newspaper he played tape recordings of hacked messages for Coulson. At News of the World, Hoare said he continued to inform Coulson of his pursuits. Coulson *'actively encouraged me to do it'* Hoare said. He was now revealing his own use of the dark arts – which included breaking into the messages of celebrities like David and Victoria Beckham – because it was unfair of the paper to pin the blame solely on Goodman.

20. When interviewed on the Radio 4 PM programme on 3rd September 2010 he said that a culture of the dark arts existed, and *"I've gone on record at the New York Times and said I've stood by Andy and been requested to tap phones. He was well aware the practice exists. To deny it is a lie"*. He made similar assertions in a number of interviews with a number of newspapers.

21. However, when he was interviewed under caution by the police on 14th September 2010 he would not answer any questions. The only 'evidence' against Coulson is therefore that contained in Hoare's pronouncements to the media.

Sharon Marshall

22. She had worked at News International between 2002 and 2004. She was quoted in the NYT article as follows:" It was an industry wide thing", said Sharon Marshall, who witnessed hacking while working at News of the World and other tabloids. "Talk to any tabloid journalist in the United Kingdom, and they

can tell you each phone company's four-digit codes. Every hack on every newspaper knew this was done".

23. When she was interviewed by the police on 12th September 2010 she said that she had no personal knowledge of telephone hacking by anyone. Of Coulson she said," *it is entirely possible that he wouldn't know.....an editor would not necessarily ask for the provenance of every single story*". She also told the police that she had been misquoted in the NYT article and some of her comments to their journalist had been taken out of context.

Paul McMullan

24. He was a journalist at the NOW. I have seen the transcripts of a number of interviews that he conducted with the Press and television in September 2010 where he admitted that he himself had carried out telephone hacking. He also appeared in the Channel 4 Dispatches programme broadcast on 4th October 2010. He asserted that Andy Coulson was complicit in the practice, and was aware of it, but that there was not really any evidence that he could provide to substantiate what he was saying.

25. He has been approached on a number of occasions by the police but has refused to cooperate. His reluctance to cooperate means that the police have nothing but his assertions that he was involved in the practice. Arresting him without the ability to question him and put detailed allegations and instances to him is most unlikely to produce cogent evidence either against himself or Andy Coulson. Additionally, as we shall come to later – the possibility of obtaining any technical data to support such allegations has in all probability long passed.

Brendan Montague

26. He is a freelance journalist who was quoted in the NYT article about the practice of' *blagging*' – gaining information by conning phone companies, government agencies and hospitals amongst others'. His quote reads '*what was shocking to me was that they used these tactics for celebrity tittle-tattle. It wasn't finding out wrongdoing. It was finding out a bit of gossip*'.

27. When interviewed by the police on 29th September 2010 he told them of an approach that he had made to Goodman in order to sell him a story. In the event he sold the story to a different newspaper. Thereafter he was the subject of a number of missed calls to his mobile telephone and the story became compromised. He discovered from his telephone provider that

someone had rung them purporting to be Brendan Montague and obtained details of telephone numbers that he had recently called. He later became aware of Goodman's prosecution and now believes that he was the victim of 'hacking'. I have been informed by the police that there is no telecommunications data or evidence to support this.

Ross Hall

28. He was employed at the NOW initially as a 'runner' and thereafter as a journalist. He left the newspaper in March 2009. Part of his duties included the transcription of conversations recorded by journalists working for the newspaper.

29. One such transcript, entitled, 'Transcript for Neville' produced much interest when it was produced to the CMS Committee by Nick Davies, a Guardian Journalist, in July 2009. It was dealt with in the letter from the DPP to the Committee dated 30th July 2009.

30. When interviewed by the police on 21st September 2010 he was able to produce a copy of that transcript that he had saved on his personal computer. He claimed not to remember transcribing it. He was unable to provide any evidence directly to implicate anyone at the NOW in telephone hacking.

Andy Coulson

31. He was the Editor of the newspaper from 2003 until January 2007. He was interviewed by the police on 4th November 2010 and maintained the position that he had adopted when providing evidence to the CMS Committee; namely that he had no personal knowledge of the practice of telephone hacking.

Clive Goodman

32. He refused to cooperate with the police.

Glen Mulcaire

33. He refused to cooperate with the police.

Neville Thurlbeck

34. Because of the 'Transcript for Neville' document he was interviewed under caution on 5th October 2010. He produced a pre-prepared statement in which he denied ever receiving the transcript in question – either by e-mail or any other method –

and said that he was unaware of its existence. He denied any involvement in telephone hacking. He then refused to answer any further questions.

Greg Miskiw

35. He is now a freelance journalist who had worked for the NOW. He was interviewed under caution. He provided a pre-prepared statement in which he outlined the dealings he had with Mulcaire which involved him negotiating a contract with him for a story about Gordon Taylor. He would not answer any further questions.

Matt Driscoll

36. He was quoted in the NYT article recalling a story about the footballer Rio Ferdinand and how his telephone records had been obtained when the newspaper was seeking to write a story about the time he had missed a drugs test.

37. He had been a Sports reporter at the NOW. He had been dismissed by the newspaper because of supposed inaccuracies in a report he had produced. He then instituted proceedings in the employment tribunal against the newspaper and received a substantial sum of money by way of settlement.

38. When interviewed by the police on 13th October 2010 he described how he had formed the impression that telephone hacking was carrying on. It was anecdotal information and he was unable to provide any direct evidence to support his contention.

Lee Harpin, James Scott and Gary Thompson

39. The police received anonymous letters implicating these three persons who were employed as supervisors by the newspaper in the period 2005/6. As a result the police wrote to them but have received no response.

Jack Wraith

40. He is the Chief Executive of the Telecommunications United Kingdom Fraud Forum representing the main GSM mobile networks and major fixed line networks that operate within the United Kingdom. In a witness statement he says the following:

"The United Kingdom agreed in 2006 to implement the requirements of the European Union Data Retention Directive

which lays down specified periods for which communications data is to be held by communications service providers and all members of the organisations I represent are compliant with these regulations. Communications data identified in the Data Retention (EC Directive) Regulations 2009 is held by communication service providers for a period of 12 months from when it is generated or processed in the United Kingdom by public communication providers".

These Regulations came into force on 6th April 2009. Regulation 5 specifies the 12 month retention period. Regulation 6(d) states that except in the case of data lawfully accessed and preserved, the data retained in accordance with these Regulations must be destroyed at the end of the retention period (i.e. 12 months).

The Home Office voluntary Code of Practice dealing with retention of communications data states at Paragraph 16 ' *The maximum retention period for data held under the provisions of this Code is 12 months, without prejudice to any longer retention period which may be justified by the business practices of the communication service provider'.*

The Producer of 'Dispatches'

41. On 4th October 2010 Channel 4 Television broadcast a programme entitled' *Tabloids, Tories and telephone hacking'*. Further allegations were made about the prevalence of telephone hacking and Andy Coulson's purported knowledge of and sanctioning of the practice.

42. The police wrote to the Producer of the programme and received the following response:

"*Having discussed the matter further with the producers who have direct dealings with the 13 individuals (who contributed to the programme), they do not believe that any of the individuals would be prepared to assist your investigation. I can also confirm that having spoken with the producers they do not have any additional evidence that was not included in the broadcast programme that could assist the MPS and that is not already in the public domain*".

The Editors of the Guardian, Daily Telegraph and Independent newspapers

43. The Guardian responded with a lengthy letter that criticized the breadth of the original investigation and the fact that in the course of the present investigation the police were

intimidating witnesses by interviewing them under caution. The editor also suggested that seeking to obtain evidence from the Guardian should be a matter of last resort for the police. The Daily Telegraph pointed out that any unpublished material not in the public domain was journalistic material and therefore special material under the provisions of the Police and Criminal Evidence Act 1984. The Independent did not respond.

Staff from the News of the World

44. The police sent letters to 19 members of staff identified by the newspaper as still being employed there and that had been employed there in 2005-6 to seek their cooperation. No further information has been forthcoming.

45. In summary therefore, no person that has made allegations in the media has been prepared to come forward and assist the police examination of the NYT article.

46. I have been asked for my opinion on five questions:

Question 1

Has the current Metropolitan Police investigation revealed any further evidence relating to unlawful interception of communications, namely mobile telephones, involving the News of the World?

47. Based on my summary of the evidence and information that I have set out above the answer to that question must be no.

Question 2

Is there evidence to justify or support a re-opening or re-investigation of R v Goodman and Mulcaire (Operation Caryatid refers)?

48. As Detective Superintendent Haydon observes in his request for advice, this is a matter for the police, but as set out above my opinion is that no new admissible evidence has emerged.

Question 3

Is there sufficient evidence to support a new prosecution against any individual?

49. Whilst there are some 'admissions' by Sean Hoare and Paul McMullan in press and media interviews they have not, in the case of Sean Hoare been prepared to repeat them when questioned by the police, or in the case of Paul McMullan even talk to the police.

50. No admissible evidence has emerged that Andy Coulson was in anyway involved in anything unlawful.

Question 4

Clarification of the law relating to unlawful interception of communications relating to mobile telephone voicemails, for the benefit of future cases.

51. In this respect on 7th October 2010 Keith Vaz MP, the Chair of the Home Affairs select committee wrote to the DPP seeking his views on the definition of offences relating to unauthorised tapping or hacking of mobile communications and, in particular, whether the relevant statutes present difficulties in terms of gathering sufficient evidence to prosecute a case. The DPP responded on 29th October 2010.

52. In terms of the law this is what he said in response:

> The relevant law is complex. So far, prosecutions have (rightly in my view) been brought under the Regulation of Investigatory Powers Act 2000 (RIPA), but, depending on the circumstances and available evidence, offences under the Computer Misuse Act 1990 and/or the Data Protection Act 1998 might also fall to be considered in on-going or future investigations.

As is well known, Part I of RIPA deals with communications generally. Chapter 1 (sections 1-20) deals with "Interception", the provisions of sections 1-5 setting out the framework and definitions for lawful, unlawful and authorised interception.

Section 1 creates two interception offences. Section 1(1) of the Act provides:

> *"(1) It shall be an offence for a person intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of –*
>
> *(a) ...; or*
>
> (b) *a public telecommunication system."*

Section 1(2) creates a like interception offence in respect of private telecommunication systems, which excepts from liability the system controller or someone acting with the consent of the user. This is a considerable extension of the previous statutory regime.

The Act defines 'communication' (section 81(1)) as including –

> *"(b) anything comprising speech, music, sounds, visual images or data of any description; and*
> (c) *signals serving either for the impartation of anything between persons, between a person and a thing or between things or for the actuation or control of any apparatus;"*

When considering what hardware is comprised in the system over which the communication is transmitted, 'apparatus' is defined in section 81(1) as including any equipment, machinery or device and any wire or cable.

There are then both geographical and 'system' limits to liability for the offence of unlawful interception under section 1 – the interception must take place in the United Kingdom and it must occur in the course of transmission by a public or a private telecommunication system (a private system is a telecommunications system directly or indirectly attached to a public one). Once the communication can no longer be said to be in the course of transmission by means of the 'system' in question, then no interception offence is possible.

The central core of the actus reus of the offence requires proof that a communication was intercepted. As to what is interception, section 2(2) provides as follows:

> *"(2) For the purposes of this Act, but subject to the following provisions of this section, a person intercepts a communication in the course of its transmission by means of a telecommunications system if, and only if, he –*

so modifies or interferes with the system, or its operation,
so monitors transmissions made by means of the system, or
so monitors transmissions made by wireless telegraphy to or from apparatus comprised in the system,

> *as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication."*

Meaning of 'modifies', section 81(1) provides that "modification" includes alterations, additions and omissions, and that cognate expressions shall be construed accordingly; its meaning in section 2 is also further dealt with by subsection (6).

"Interferes" is not further defined and neither is the word "monitors"; however, the ordinary meaning of the word "monitors" includes "listen to and report" and "observe" (New Shorter Oxford Dictionary, 2002). It is thus wide enough to include listening in to a telephone conversation or to a unilateral telephone speech message.

As to any limit of time in the definition of unlawful interception, section 1 contains the expression '*...in the course of its transmission...*'; section 2(2), which defines interception, refers again to this expression and also contains the words '*while being transmitted*'. This confinement of the time window for unlawful interception is further reflected in subsection 2(8). Taking the ordinary meaning of those expressions one would expect the transmission of a communication to occur between the moment of introduction of the communication into the system by the sender and the moment of its delivery to, or receipt by, the addressee. However, it should be noted that the limiting definition of interception in section 2(2) is expressly made subject to the other provisions of section 2 that follow (i.e. subsections 2(3)-(11)). They deal with such matters as broadcast transmissions, territoriality, and the distinction between communication content and attached traffic data among others.

Of most significance to you and the Committee is the fact that the definition of interception in subsection 2(2) is to be read subject to the particular provision in subsection 2(7), which extends the concept of transmission, and with it the time window, and reads as follows:

> *"(7) For the purposes of this section the times while a communication is being transmitted by means of a telecommunications system shall be taken to include any time when the system by means of which the communication is being, or has been, transmitted is used for storing it in a manner that enables the intended recipient to collect it or otherwise to have access to it."*

The specific extension of both the times and the kind of activity taking place during which a communication is being 'transmitted' therefore includes any period during which the transmission system stores the communication; but it does not extend to all such storage, but only those periods when the system is used for

storage *"in a manner that enables the intended recipient to collect it or otherwise to have access to it"*.

The difficulty of interpretation is this: Does the provision mean that the period of storage referred to comes to end on first access or collection by the intended recipient, or does it continue beyond such first access for so long as the system is used to store the communication in a manner which enables the (intended) recipient to have subsequent, or even repeated, access to it?

Unfortunately there is no decision yet in which a court has determined this construction issue.

Some assistance can be gleaned from a series of decisions in which the Court of Appeal has considered the definition of interception. Most of these cases have been in the context of telephone voice communications, where investigators used equipment to record speech associated with the call which was then sought to be adduced as evidence for the Crown: see, for example, R. v. Hardy & Hardy [2003] 1 Cr. App. R. 494 and R. v. E. [2004] 2 Cr. App. R. 484 (and the other authorities referred to by the Court of Appeal in giving its judgment). If there is a theme, it has been to restrict the ambit of the interception definition in this context.

Perhaps the case most on point so far is R. (on the application of NTL Group Ltd.) v. Ipswich Crown Court and another [2002] 3 W.L.R. 1173, [2003] Q.B. 131, [2002] EWHC 1585 (Admin.)., where the Divisional Court considered the situation of a telecommunications company facing an application for the production of the content of e-mails said to be relevant to a fraud investigation, by police officers who had applied to the Crown Court under section 9 and Schedule 1 of the Police and Criminal Evidence Act 1984. The company argued that if the order made applied to material in the system before it was made, it might well find itself in breach of section 1(1) of RIPA, having regard to the provisions of section 2(7) & (8). The Court held that, subject to authorisation by the making of the order, the company would have committed the section 1 offence, since diverting the content of the mails to storage and so making them available would amount to interception. In his judgment Lord Woolf CJ observed at paragraphs 18-19 that in relation to the effect of section 2(7) of RIPA: *'Subsection (7) has the effect of extending the time of communication until the intended recipient has collected it'*.

In due course, no doubt, the proper construction of sections 2(2) and 2(7) of RIPA will be determined authoritatively by a court.

53. The DPP concluded his letter with the following passage:

I have given very careful thought to the approach that should be taken in relation to on-going investigations and future investigations.

Since the provisions of RIPA in issue are untested and a court in any future case could take one of two interpretations, there are obvious difficulties for investigators and prosecutors. However, in my view, a robust attitude needs to be taken to any unauthorised interception and investigations should not be inhibited by a narrow approach to the provisions in issue. The approach I intend to take is therefore to advise the police and CPS prosecutors to proceed on the assumption that a court might adopt a wide interpretation of sections 1 and 2 of RIPA. In other words, my advice to the police and to CPS prosecutors will be to assume that the provisions of RIPA mean that an offence may be committed if a communication is intercepted or looked into after it has been accessed by the intended recipient and for so long as the system in question is used to store the communication in a manner which enables the (intended) recipient to have subsequent, or even repeated, access to it.

Question 5

Should further revelations be made in the media or to the police on this same issue, what criteria should the MPS/CPS adopt to establish if the revelations constitute 'new' evidence in this case?

54. I have discussed this with Detective Superintendent Haydon in conference. In addition to the possibility of further revelations in the media I am aware that there are a number of ongoing civil actions against the Metropolitan police arising out of the prosecution of Goodman and Mulcaire. At present I have been told that there are Judicial Review proceedings ongoing by Chris Bryant MP, Brian Paddick, Brendan Montague and Lord John Prescott.

55. Additionally there are ongoing applications for disclosure in privacy actions by Nicola Phillips (ex PA to Max Clifford), Sky Andrews and AZP (a celebrity whose name can not be disclosed under the terms of a Court Order). In these proceedings the Metropolitan police are engaged because some information requests relate to material in their possession from the prosecution of Goodman and Mulcaire. It is possible that as a result of the disclosure applications further information or evidence might come in to the possession of the police.

56. I have agreed with Detective Superintendent Haydon that in the future if any revelations come to the attention of the Metropolitan police that he considers could properly be said to constitute new and substantial evidence of offending that we will meet together as a panel and conduct a joint assessment of the material and decide whether further assessment or investigation is likely to provide evidence to support criminal proceedings.

Conclusion

57. In summary, I do not consider that there is now any evidence that would reach the threshold for prosecution set out in the Code for Crown Prosecutors. In my opinion there is insufficient evidence to provide a realistic prospect of conviction against any person identified in the New York Times article. In fact I consider that the available evidence falls well below that threshold.

58. Should any evidence come to the attention of the police that might constitute an offence under the Regulation of Investigatory Powers Act 2000 (RIPA), then the approach set out in Paragraph 53 above will be followed.

59. I am happy further to discuss any aspect of this advice should you wish.

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