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THE LEVESON INQUIRY

SUBMISSIONS FOR MODULE 4

ON BEHALF OF THE METROPOLITAN POLICE SERVICE

10 JULY 2012

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1. Introduction

- 1.1. Module 4 concerns the term of reference of the Inquiry *“to make recommendations for a new more effective policy and regulatory regime which supports the integrity and freedom of the press . . .while encouraging the highest ethical and professional standards.”* The Inquiry is also charged with making recommendations for *“the future conduct of relations between the police and the press”*.
- 1.2. These Module 4 submissions on behalf of the MPS are directed to the narrow but labyrinthine issue of Production Orders in respect of journalistic material. It is submitted that this is an area of police/press regulation in need of reform and streamlining. It is submitted that it would be appropriate for the Inquiry to consider making recommendations for change in this area or, at the very least, to recommend a review of the existing statutory powers available to police officers to obtain journalistic material during the course of a criminal investigation.
- 1.3. As has become clear from the evidence of the Operation Caryatid officers in Module 2, the MPS faced practical difficulties in obtaining material from News International in 2006. News International gave the impression of co-operation with the MPS or at least indicated through their lawyers an intention to co-operate. The veneer of co-operation meant that the CPS and the MPS considered an application for a Production Order was unlikely to meet with success. As discussed more fully below, this was because one of the conditions for the grant of a Production Order is that other methods of seeking the material have been tried and have failed. In light of the evidence that the Inquiry has received during Module 2, it is evident that the outcome of Operation Caryatid might well have been very different had there been proper co-operation, or if a Production Order application had been pursued in 2006 and access to documentation at News International granted by way of an order of the Court.

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- 1.4. The MPS has identified three issues that are of particular significance in this area:
- a. The camouflage of apparent co-operation may itself defeat an application for a Production Order because of the requirement in the access conditions in Sch.1 to the Police and Criminal Evidence Act 1984 ("PACE"), that "*other methods*" of obtaining the material to have failed.
 - b. In any event, it is extremely difficult to obtain journalistic material via a Production Order.
 - c. There is no statutory exclusion from journalistic material of items held with the intention of furthering a criminal purpose. By comparison, "*criminal purpose*" material is excluded from legal privilege by s. 10(2) of PACE.

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2. Production Orders: Legislative Provisions

- 2.1. A police officer has a general power to search any premises occupied or controlled by a person who is under arrest for an indictable offence, if he has reasonable grounds for suspecting that they contain relevant evidence (s.18 PACE). Once lawfully on any premises, a police officer then has a power to seize anything which he has reasonable grounds for believing he would be authorised to search and seize, where it is not reasonably practicable to determine there and then whether he does indeed have such authorisation (s.50 Criminal Justice and Police Act 2001 (“CJPA”)).
- 2.2. However, these general powers are of limited use in investigating suspected criminal conduct by journalists. The s.18 power applies only to premises occupied or controlled by a person who is under arrest. The power is thus exercisable when an arrest has already been made, not at any preliminary stage in an investigation. It is also likely to be limited to an individual journalist’s desk and does not allow for more thorough or wide-ranging searches.
- 2.3. Furthermore, if a police officer seizes anything which appears to be ‘excluded material’ or ‘special procedure material’ (which includes journalistic material – see below) this must be returned as soon as is reasonably practicable, unless it cannot be separated from other property which it is lawful to retain (s.55 CJPA), or there are reasonable grounds to believe it is property obtained in consequence of an offence or evidence in relation to an offence (s.56 CJPA).
- 2.4. In practice, therefore, the police have to rely heavily upon the more specific powers in PACE s.9 and Sch.1 in any investigation into suspected wrongdoing by the media.

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Section 9 and Schedule 1 PACE

- 2.5. Section 9 PACE provides that a constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Sch.1 to PACE.
- 2.6. Journalistic material is expressly identified as special procedure material. It may also be excluded material if it has been received in confidence.

Special Procedure Material

- 2.7. Special procedure material is defined in section 14 of PACE. The section reads:

“14. – (1) In this Act “special procedure material” means-
(a) material to which subsection (2) below applies
*(b) **journalistic material, other than excluded material.***

*(2) Subject to the following provisions of this section, **this subsection applies to material, other than items subject to legal privilege and excluded material**, in the possession of a person who-*

(a) acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office; and

(b) holds it subject –

(i) to an express or implied undertaking to hold it in confidence; or

(ii) to a restriction or obligation such as is mentioned in section 11(2)(b) above.

(3) Where material is acquired –

(a) by an employee from his employer and in the course of his employment; or

(b) by a company from an associated company,

it is only special procedure material if it was special procedure material immediately before the acquisition.” [emphasis added]

- 2.8. ‘Special procedure material’ thus includes journalistic material, but not journalistic material which is also ‘excluded material’.

Journalistic Material

- 2.9. Journalistic material is defined in section 13 of PACE which provides:

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“13. – (1) Subject to subsection (2) below, in this Act “journalistic material” means material acquired or created for the purposes of journalism.

(2) Material is only journalistic material for the purposes of this Act if it is in the possession of a person who acquired or created it for the purposes of journalism.

(3) A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes.” [Emphasis added]

2.10. ‘Journalistic material’ is thus only material which is acquired or created for the ‘purposes of journalism’. The phrase ‘purposes of journalism’ is not defined in PACE.

2.11. The starting point in deciding the “purpose” of an activity is normally to consider its dominant purpose. *Bennion on Statutory Interpretation*, 5th ed (2008) states at p 1268:

“Similarly, an enactment may lay down a qualifying condition in terms of the purpose of some person in doing an act as if it were the only purpose possible, whereas it may in the instant case, be in fact, one of several purposes. Here the court will construe the enactment as requiring the main or dominant purpose to be the one specified.”

2.12. The Supreme Court recently considered the phrase ‘purposes of journalism’, albeit in the context of the Freedom of Information Act. In *Sugar v British Broadcasting Corporation* [2012] UKSC 4, whilst Lord Wilson said that the dominant purpose test applied to determine if something was held for journalistic purposes, the other Justices of the Supreme Court held that the phrase should be given a narrow meaning. Lord Phillips said at [67]:

“I believe that Lord Walker has the answer. He has concluded, as have I, that the protection is aimed at “work in progress” and “BBC’s broadcasting output”. He suggests that the Tribunal should have regard to the directness of the purpose of holding the information and the BBC’s journalistic activities. I agree. Information should only be found to be held for purposes of journalism, art or literature if an immediate object of holding the information is to use it for one of those purposes.” [emphasis added]

2.13. Lord Walker said at [84]:

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“I respectfully agree with the measured comments of Lord Neuberger MR (para 55): ‘In my view, whatever meaning is given to ‘journalism’ I would not be sympathetic to the notion that information about, for instance, advertising revenue, property ownership or outgoings, financial debt, and the like would normally be ‘held for purposes . . . of journalism’. No doubt there can be said to be a link between such information and journalism: the more that is spent on wages, rent or interest payments, the less there is for programmes. However, on that basis, literally every piece of information held by the BBC could be said to be held for the purposes of journalism. In my view, save on particular facts, such information, although it may well affect journalism-related issues and decisions, would not normally be ‘held for purposes . . . of journalism’. The question whether information is held for the purposes of journalism should thus be considered in a relatively narrow rather than a relatively wide way.” [emphasis added]

2.14. Lord Brown said at [106]:

“As for the point at which information will cease to be held to any significant degree for the purposes of journalism and become held instead, say, solely for archival purposes, that necessarily will depend on the facts of any particular case and involve a question of judgment. I too agree with Lord Walker that the central question to be asked in such a context will be not which purpose is predominant, but rather whether there remains any sufficiently direct link between the BBC’s continuing holding of the information and the achievement of its journalistic purposes.” [emphasis added]

Excluded Material

2.15. Excluded material is defined in section 11 of PACE. It essentially covers medical records and journalistic material. The section reads, so far as is relevant, as follows:

“11. – (1) Subject to the following provisions of this section, in this Act “excluded material” means-

...

(c) Journalistic Material which a person holds in confidence and which consists –

- (i) of documents; or*
- (ii) of records other than documents.*

(2) A person holds material other than journalistic material in confidence for the purposes of this section if he holds it subject-

- (a) to an express or implied undertaking to hold it in confidence; or*
- (b) to a restriction on disclosure or an obligation of secrecy contained in any enactment...*

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(3) *A person holds journalistic material in confidence for the purposes of this section if-*

(a) he holds it subject to such an undertaking, restriction or obligation; and

(b) it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism.” [emphasis added]

2.16. ‘*Journalistic material*’ is always special procedure material by virtue of s.14(1)(b). However, if it continues to be held subject to an undertaking, restriction or obligation of confidentiality, then it is also ‘*excluded material*’. The paradigm example is a source who gives information to a journalist on condition that his identity is not disclosed in any publication of or about that information.

2.17. One difficulty with these statutory provisions is that it is unclear the extent to which journalistic material is excluded material if a journalist creates or acquires documents in furtherance of a crime (e.g. making corrupt payments or procuring misconduct in public office). This is discussed further below.

Applying for a Production Order: Schedule 1 Access Conditions

2.18. Journalistic material will always fall within s.9 PACE and any application for access has to be made under Sch.1.

2.19. Schedule 1 of PACE allows a constable to apply to a Circuit Judge for a Production Order (or in certain circumstances a search warrant) for special procedure material if the conditions set out in the first set of access conditions are satisfied; and for excluded material if the conditions set out in the second set of access conditions are satisfied.

2.20. The first set of access conditions is complicated. The reason the High Court has often quashed Production Orders is that there has not been strict compliance with the pre-conditions set out in Sch.1, paragraph 2, which reads:

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- “2. The first set of access conditions is fulfilled if—
- (a) there are reasonable grounds for believing —
 - (i) that an indictable offence has been committed;
 - (ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application, or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable to specify);
 - (iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and
 - (iv) that the material is likely to be relevant evidence;
 - (b) other methods of obtaining the material—**
 - (i) have been tried without success; or**
 - (ii) have not been tried because it appeared that they were bound to fail; and**
 - (c) it is in the public interest, having regard —
 - (i) to the benefit likely to accrue to the investigation if the material is obtained and;
 - (ii) to the circumstances under which the person in possession of the material holds it,
 that the material should be produced or that access to it should be given.” [emphasis added]

2.21. It is essential in any application for a Production Order that the information the constable produces in support of his application addresses each of these conditions with sufficient detail, and that in turn the judge gives reasons for being satisfied that each of these conditions is fulfilled. In *R v Central Criminal Court, ex p. Adegbesan*, 84 Cr.App.R. 219, the court held it was the duty of the constable to set out a description of all that is sought to be produced. It is not enough for a constable simply to assert that the access conditions have been met. The judge should not make an order unless satisfied that one or other of the sets of access conditions is fulfilled: *R. v. Crown Court at Lewes, ex p. Hill*, 93 Cr.App.R. 60.

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2.22. Before making an order the court itself must be satisfied that the access conditions are satisfied. Judge LJ said in *R v Central Criminal Court, ex parte Bright* [2001] 1 WLR 662:

“[78]. In my judgment, and contrary to Miss Montgomery's submission, it is clear that the judge personally must be satisfied that the statutory requirements have been established. He is not simply asking himself whether the decision of the constable making the application was reasonable, nor whether it would be susceptible to judicial review on Wednesbury grounds.

[79]. In my judgment it is equally clear that the constable making the application must satisfy the judge that the relevant set of conditions is established... And I should emphasise, under the rules currently under consideration, grounds for belief, not merely grounds for suspicion, are required, and the material to be produced or disclosed is not merely general information which might be helpful to police inquiries, but evidence, in the sense in which that term is applied in the Crown Court, 'relevant and admissible' at a trial.”

2.23. It is also important that the constable makes full disclosure in applying for a Production Order (*R. v. Acton Crown Court, ex p. Layton* [1993] Crim.L.R. 458).

2.24. The second set of access conditions, which applies to excluded material (including journalistic material held under an undertaking or obligation of confidentiality), is found at paragraph 3 and reads:

“3. The second set of access conditions is fulfilled if—
(a) there are reasonable grounds for believing that there is material which consists of or includes excluded material or special procedure material on premises specified in the application, or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable so to specify);
(b) but for section 9(2) above a search of the premises for that material could have been authorised by the issue of a warrant to a constable under an enactment other than this Schedule; and
(c) the issue of such a warrant would have been appropriate.”

2.25. Section 9(2) abolished searches for special procedure material and excluded material pursuant to any prior enactment. It reads:

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“(2) Any Act (including a local Act) passed before this Act under which a search of premises for the purposes of a criminal investigation could be authorised by the issue of a warrant to a constable shall cease to have effect so far as it relates to the authorisation of searches –

(a) for items subject to legal privilege; or

(b) for excluded material; or

(c) for special procedure material consisting of documents or records other than documents.”

2.26. The second set of access conditions (for excluded material) is thus often difficult to satisfy in that it is contingent upon there having been a power to issue a search warrant in respect of the offence being investigated prior to the coming into force of PACE. For example, this includes investigations into stolen goods and offences under the Official Secrets Act, but it does not include investigations into offences such as corruption or misfeasance in public office.

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3. "Criminal" Journalistic Material

- 3.1. As can be seen, the second set of access conditions is even more restrictive than the first set. One problem for the MPS has been that it is not clear whether journalistic material continues to fall within the scope of the excluded material definition, and thus remain subject to the second set of access conditions, if the journalist has created or acquired it in furtherance of a crime. The question that arises is as follows: if there was iniquity such as crime or fraud did the duty of confidence ever arise? If not, then the journalistic material will not be held under an undertaking, restriction or obligation of confidence as required by s.11(3) of PACE.
- 3.2. The concept of confidentiality is subject to limiting principles, one of which is that the public interest in protecting confidences may be outweighed by some other countervailing public interest which favours disclosure, such as that a person cannot be the confidant of a crime or fraud (see Lord Goff in *AG v. Guardian Newspapers (No. 2)* [1990] 1 AC 109 at 282-3). However, the case law concerning the 'defence of iniquity' deals with whether a contractual duty of confidence can be enforced (see e.g. *Gartside v. Outram* (1857) 26 LJ Ch (NS) 113, *Initial Services v. Putterill* [1968] QB 396, at 410). There is no direct authority on whether confidentiality under the PACE statutory decision still applies, where it is in the context of criminal behaviour.
- 3.3. A caveat was expressly introduced into s.10 of PACE, dealing with legal professional privilege, which reads:

"(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege."

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However, no such caveat was introduced into s.11 of PACE dealing with journalistic material held in confidence.¹

- 3.4. There are very similar provisions to Sch. 1 to PACE in Sch.5 to the Terrorism Act 2005, paragraph 4 of which states that the definitions of “*items subject to legal privilege*”, “*excluded material*” and “*special procedure material*” are the same as in ss.10 to 14 of PACE. Paragraph 5 of Sch.5 reads, in relevant part, as follows:

“5. – (1) A constable may apply to a Circuit judge [or a District Judge (Magistrates' Courts)] for an order under this paragraph for the purposes of a terrorist investigation.

(2) An application for an order shall relate to particular material, or material of a particular description, which consists of or includes excluded material or special procedure material.”

¹ The debates in Hansard demonstrate this. Mr Mayhew was the promoter of the bill for the Government. He was answering questions in committee on excluded material in PACE. On 3rd May 1983 there was the following exchange:

Mr. Lawrence

I wish to make two points, one that ends in a question and the other that ends in a suggestion. The hon. Member for Lewisham, West (Mr. Price) waxed long and eloquent about journalists not getting special privileges, and said that if they did have them' hey should not claim them. Certainly they should not claim or have the privilege of being immune to the consequences of being party to a crime.

In the legal privilege section of new clause 4, subsection (4) provides: Documents or articles held with the intention of furthering a criminal purpose are not items subject to legal privilege. 159 Why should the journalist be privileged and immune from any of the consequences of those communications being the subject of crime?

...

Mr. Mayhew

There will be many interesting opportunities to develop thoughts like that.

In answer to a question raised by my hon. and learned Friend the Member for Burton (Mr. Lawrence), the qualification for information held in furtherance of a criminal purpose relates to legally privileged material but not in respect of the new types of excluded material. This is because the qualification was already in the Bill as it has long been part of the well-established and understood definition of legally privileged material. If it is held in furtherance of a criminal purpose, privilege is not attracted. Its absence in other cases will not, as I have already attempted to explain, make any substantial difference. Where people are engaged in criminal activities, they will be liable to arrest for the offences and to search in right of that offence. In this context, the formula in section 10 of the Contempt of Court Act 1981 166 is not as relevant as my hon. and learned Friend the Member for Burton thought it was. It follows that no useful purpose is served by applying the qualification to the new categories.

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3.5. The (much simpler) set of access conditions are at paragraph 6, which reads [emphasis added]:

“6. – (1) A Circuit judge may grant an application under paragraph 5 if satisfied–

(a) that the material to which the application relates consists of or includes excluded material or special procedure material,

(b) that it does not include items subject to legal privilege, and

(c) that the conditions in sub-paragraphs (2) and (3) are satisfied in respect of that material.

(2) The first condition is that–

(a) the order is sought for the purposes of a terrorist investigation, and

(b) there are reasonable grounds for believing that the material is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation.

*(3) The second condition is that **there are reasonable grounds for believing that it is in the public interest that the material should be produced or that access to it should be given having regard–***

(a) to the benefit likely to accrue to a terrorist investigation if the material is obtained, and

(b) to the circumstances under which the person concerned has any of the material in his possession, custody or power.”

3.6. Parliament has therefore expressly allowed applications to be made for excluded material (including journalistic material obtained in confidence) in terrorism cases, and added a ‘public interest’ condition (similar to paragraph 2(c) of Sch.1 to PACE) under which the court can take into account, amongst other factors, whether the journalist or media corporation was involved in any criminal activity. Yet Parliament did not include any such provisions in PACE. It is arguable, therefore, that Parliament did not intend the courts to override the PACE definition of journalistic material held in confidence simply by saying it is not held in confidence where it is not in the public interest.

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4. Obtaining Journalistic Material in Practice: Op Caryatid & Module 2 Evidence

4.1. It is virtually inevitable that, in any situation where there is an attempt by the police to obtain journalistic material, there will be resistance from the journalist or media organisation who holds it. In many cases, this will derive from a legitimate desire to protect sources. However, it means in practice that obtaining journalistic material can be extremely difficult even where there is a warrant or Production Order. This was borne out by the evidence in Module 2.

4.2. Following the arrest of Clive Goodman on the morning of 8th August 2006, he was escorted by officers to the News of the World building in Wapping by officers intending to execute a s.8 PACE warrant and s.18 search power. They were approached by an editor and security staff who stated that in their view the police were on the premises unlawfully. The MPS Forensic Management Team was refused entry to the building.² The whole event was described by DCS Surtees as *“a tense standoff . . . with the NOTW lawyers informing the police officers that their presence was unlawful . . . their seizure of items from Goodman’s desk was also unlawful and so they intended to seek a Court Order”*.³ John Yates also described it as *“a sort of Mexican standoff at Wapping HQ”*.⁴ He said that he thought the newspaper lawyers would want to test the warrant and do everything they could do to safeguard journalistic material. He added *“I wouldn't necessarily think that would be an unusual turn of events at a newspaper.”*⁵

4.3. Peter Clarke said:

“Well, in terms of the investigation, it became immediately apparent that we weren't going to get any co-operation whatsoever from News International.

² Surtees WS §46 MOD200004191

³ Surtees WS §47 MOD200004192 and Surtees [PM43/45/24]

⁴ Yates [PM44/45/8]

⁵ Yates [PM44/45/14]

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Unusually, when normally when one deals with something that's happening within a large international corporation, or indeed a large national corporation, companies bend over backwards to try to preserve their reputation and assist in enquiries. This was a closing of the ranks from very early on.”⁶

- 4.4. Later, difficulties emerged because of the veneer of apparent co-operation when the MPS engaged with the lawyers for the News of the World. Based on legal advice as to the process to follow before a Production Order would be granted, the MPS entered into correspondence with BCL Burton Copeland Solicitors acting for News Group Newspapers Ltd.⁷ The MPS were assured by those solicitors that they would assist the investigation.⁸ In a letter from Burton Copeland to DS Beadell on 31st August 2006, reference was made to a Sch.1 PACE application and the solicitors indicated:

“my clients intend to provide such material as you or your colleagues might reasonably require from them in connection with your enquiries”⁹

The response from Burton Copeland to DI (then DS) Maberly’s request for information dated 14th September 2006 stated:

“We hope, however, that this careful response will satisfy you that you are now in possession of all relevant material to which you are entitled.”¹⁰

- 4.5. DCS Surtees said:

“In consultation with the CPS we entered into correspondence with Burton Copeland Solicitors regarding the additional documentation. Their lawyers initially advised that they would assist us but it became very apparent they were unwilling to do so and very little evidence was forwarded to us to assist us in gaining a fuller picture from the perspective of original NOTW documentation as to what their involvement was.”¹¹

⁶ Clarke [AM44/33/5]

⁷ Williams §42 MOD200004141

⁸ Williams §42 MOD200004141

⁹ Maberley WS §40 MOD200004224, MOD200003626

¹⁰ Maberley WS §43 MOD200004225, MOD200003648

¹¹ Surtees WS §68 MOD200004201

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- 4.6. Peter Clarke noted that apparent co-operation might affect the application for a Production Order. When asked whether he was surprised that an application for a Production Order was not made said:

“In view of the first response from the News International lawyers Burton Copeland, I'm probably not surprised because that was phrased in such a way that one could argue very -- well, not convincingly, but you could argue that that amounted to co-operation and therefore would prevent the application for a production order.”¹²

¹² Clarke [AM44/33/5]

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5. Article 10 Considerations

5.1. The Chairman has frequently reiterated during the course of this Inquiry the importance of ensuring freedom of the press. Paragraph 1.1(b) of the Draft Criteria for a Regulatory Solution produced by the Inquiry in respect of Module 4 provides that any solution must “*recognise the importance for the public interest of a free press in a democracy, freedom of expression and investigative journalism*”. Any consideration of the issue of Production Orders must take into account freedom of the press, and in particular the effect of Article 10 ECHR.

5.2. Furthermore, s.10 of the Contempt of Court Act 1981 provides:

"No Court may require a person to disclose, nor is any person guilty of contempt of Court for refusing to disclose, the source of the information contained in that publication for which he is responsible, unless it be established to the satisfaction of the Court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

There is no material difference of principle between s.10 and Article 10 (see Thorpe LJ in *Camelot Group Plc v Centaur Communications* [1999] QB 124 at 138G).

5.3. There are a large number of authorities on this topic; particularly helpful guidance has been provided in *Shiv Malik v Manchester Crown Court* [2008] EWHC 1362 (Admin), where Lord Justice Dyson held as follows:

"[48] The correct approach to the article 10 issues as articulated in both the Strasbourg jurisprudence and our domestic law emphasises that (i) the court should attach considerable weight to the nature of the right interfered with when an application is made against a journalist; (ii) the proportionality of any proposed order should be measured and justified against that weight and (iii) a person who applies for an order should provide a clear and compelling case in justification of it.

[49] The significance of article 10 in the scheme of the Convention has been underlined many times by the ECtHR. It is acknowledged domestically in

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section 12 of the HRA. The importance of the protection of sources is also acknowledged in section 10 of the Contempt of Court Act 1981. Any curtailment of article 10 "...must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved....one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally": Reynolds v Times Newspapers Ltd [2001] 2 AC 127, 200F per Lord Nicholls.

[50] The importance of the right and the weight of the justification required for an interference that compels a journalist to reveal confidential material about or provided by a source has been frequently stated both in Strasbourg and in our courts...[see] John v Express Newspapers [2000] 1 WLR 1931 at [27] where the court of appeal said: "Before the courts require journalists to break what a journalist regards as a most important professional obligation to protect a source, the minimum requirement is that other avenues should be explored"; and Ashworth Hospital Authority v MGN Ltd [2002 UKHL 29, [2002] 1 WLR 2033 at [61] where Lord Woolf CJ] said that disclosure of a journalist's sources has a chilling effect on the freedom of the press and that the court will "normally protect journalists' sources".

...

[56] In our view, it is relevant to the balancing exercise to have in mind the gravity of the activities that are the subject of the investigation, the benefit likely to accrue to the investigation and the weight to be accorded to the need to protect the sources."

- 5.4. The courts must consider Article 10 and carry out a balancing exercise in any case involving the press, even if it relates to material that does not fall within the s.13 PACE definition of 'journalistic material' or is not being held in confidence such that it falls under the s.11 definition of 'excluded material'. There is also the added safeguard of s.10 of the Contempt of Court Act. Thus, even if the statutory framework for obtaining Production Orders was to be simplified and/or the status of 'criminal' journalistic material clarified, there would continue to be comprehensive protection of Article 10 rights.

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6. Conclusions

6.1. The current legislation governing Production Orders for journalistic material is overly complex. As a result, it is unjustifiably difficult for the police to investigate suspected criminal conduct by the press. In particular, it is possible for a journalist or media corporation to prevent or defeat applications for Production Orders or warrants by creating a façade of co-operation with the police. It is also unfortunate that there is a lack of clarity as to whether journalistic material obtained in furtherance of criminal purposes still has the protection of 'excluded material'.

6.2. Given that Article 10 ECHR and s.10 of the Contempt of Court Act would ensure that due attention is paid to the importance of freedom of the press, it is submitted that the Inquiry may wish to consider recommending a simplification of the statutory framework for police access to journalistic material. The following examples of relatively straight-forward changes are merely suggestions. The Inquiry may, of course, have alternative ideas.

a. Amend s.11(3) of PACE, such that it reads:

"A person holds journalistic material in confidence for the purposes of this section if-

(a) he holds it subject to ~~such~~ an enforceable or lawful undertaking, restriction or obligation; and

(b) it has been continuously held (by one or more persons) subject to such an enforceable or lawful undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism."

b. Remove paragraph 2(b) of Sch.1 to PACE.

12 July 2012
Deputy Commissioner Craig Mackey