The Leveson Inquiry

culture, practices and ethics of the press

RULING IN RELATION TO OPERATION MOTORMAN EVIDENCE

Lord Justice Leveson:

1. In 2003, Operation Motorman led to the seizure of the records of a private detective Steve Whittamore. On analysis, this material revealed that he had undertaken a vast amount of research for national newspapers which, prima facie, is likely to have involved widespread breaches of the Data Protection Act 1998. After the prosecution of Mr Whittamore, the Information Commissioner produced two reports, What Price Privacy and What Price Privacy Now, which purported to identify newspaper titles and the extent to which Mr Whittamore's services had been used. On 30 November 2011, Alexander Owens, who was the ex police officer responsible for the original investigation on behalf of the Information Commissioner, produced a memory stick with the details of the information seized. How that material should be dealt with in the context of this Inquiry was the subject of legal submissions on 2 December which, in order to ensure that the exchange of views was frank, I designated should be in private. I decided upon the way forward and, under the strictest of conditions, allowed core participants access to the material (to be returned at the conclusion of the Inquiry). Mr Owens then returned to give further evidence on 5 December, to be followed by Richard Thomas, the Information Commissioner at the time, on 9 December and thereafter by Christopher Graham, the present Information Commissioner.

2. At the end of February 2012, an application was made other than by a core participant to make public the submissions that I had heard in private. On 13 March, I ruled against that application for two reasons. First, I concluded that this private information was within the purview of the Information Commissioner whose decision as to appropriate disclosure deserved respect and, secondly, this Inquiry was not concerned with 'who did what to whom' but rather with the culture, practices and ethics of the press as a whole. I made the point that I did not intend to prejudice the ongoing criminal investigation and that, further, I considered it unfair to name other reporters who had not been the subject of criminal investigation. I then said that Mr Sherborne, on behalf of core participants who were his clients was at liberty to argue that the details should be made public consistent with the Terms of Reference of the Inquiry and my observations about fairness.

3. On 9 May 2012, Mr David Sherborne contended that the Motorman evidence was "as good as any example of the culture, practices and ethics of the press", widespread throughout Fleet Street and not subject to constraints because of the risk of prejudice to a criminal investigation. He pointed to the evidence of DCI Gilmour to the effect that seven journalists were questioned by the police and argued that their consistent response that they did not know that the material had been obtained unlawfully was hardly credible given the types of checks involved. He said that the information was

not historical because the interception of Milly Dowler's phone preceded the Whittamore raid and the report What Price Privacy Now preceded the conviction of Glen Mulcaire for intercepting mobile phone messages. Mr Sherborne submitted that the media core participants should answer two questions. First, what steps, if any, were taken in relation to those journalists who used the services of Mr Whittamore? If they were not disciplined, have they been promoted to more senior positions? Second, what steps, if any, have been taken to identify whether any of the information obtained through the services of Mr Whittamore is still being retained or used? And if none, why not for it needs to take place. These questions, he said, were highly relevant to my true understanding of whether the media failed to take what had emerged in these investigations seriously enough and thus relevant to the culture and practices of the press.

4. I returned to the question on 11 May when core participants representing media organisations responded. Mr Anthony White Q.C., for News International, argued that this application was very late and, in relation to his clients, the facts were essentially dealt with in the detailed statement of Pia Sarma, the editorial legal director: in 2006, individual journalists could not be identified and further information was then refused. It was not practical to go further in their records and the vast majority of Motorman data consisted of ex-directory telephone numbers that were obtainable through legitimate sources. Even if there was apparent wrongdoing, Ms Sarma had identified by examples the real prospect of a s. 55 defence. He said that one or two journalists named in the data remained in employment but to think about disciplinary action over nine years on was indefensible. He further pointed to the evidence of Mr Thomas and Mr Graham to the effect that the press was not perceived as a problem following 2006. As for the retention and any current processing of that information, it was low grade, personal data over nine years old and to ascertain whether even if present, it linked to a breach rather some legitimate source would require a huge and disproportionate effort. He went on to argue that the exercise would not advance the work of the Inquiry and that:

> "There are other officials under the Data Protection Act who have the duty of seeing whether our current processing is lawful, fair, appropriate. Any individual who is concerned can make a complaint under the Data Protection Act. The High Court has jurisdiction to rule. The ICO has jurisdiction to rule. … If our current processing, such as it is, is lawful under the Data Protection Act, the press can't be criticised for any retention and continuing processing."

5. Mr Desmond Browne Q.C. for Trinity Mirror plc made the point that the CPS had expressly concluded that there was insufficient evidence to prosecute the interviewed journalists some eight years ago and repeated the evidence provided by Mr Thomas and Mr Graham as to their more recent experience of the press. As for culture, practices and ethics, he pointed to the concession by the editors of the Daily and Sunday Mirror that it would be surprising if every request to Mr Whittamore by their journalists was covered by a public interest defence: it was unnecessary to go further. He argued that DCI Gilmour had said nothing in his evidence to suggest that offending journalists had been promoted and neither did he identify journalists. He made the same point as Mr White about difficulties in investigation and pointed to the

evidence of Ms Sly Bailey to the effect that he had adopted a forward looking approach, not declaring an amnesty and making clear what was completely and absolutely unacceptable. Finally, he expressed concern that six months after my ruling in private was too late for this exercise to be ordered and for Module 1 to be revisited.

6. Mr Caplan Q.C. for Associated Newspapers Ltd adopted the submissions of Mr White and Mr Browne. Although on 9 March, I raised with Mr Caplan the question addressed to Mr Paul Dacre concerning storage of information to which he undertook to provide an answer (see 6 February pm page 60, line 12), he overlooked his failure to do so and has not responded to a subsequent reminder (leading to the delay in ruling on this submission): suffice to say, this evidence continues to remain outstanding.

7. Mr Sherborne sought to respond to these submissions but was only able to do so on 22 May. He challenged the submission that the application was late and pointed to two recent television programmes (on ITV and Channel 4) about the unlawful trade in personal information. He said that he was able to identify a number of journalists from News International, Trinity Mirror and Associated Newspapers who were named in the Whittamore records and held senior editorial or journalist roles. He argued that the only reason that the files were released to core participants on 2 December was so that they could look at the material and make investigations. He emphasised that he was not asking that a discovery exercise be undertaken but, rather, to demonstrate the prevailing and continuing culture, practices and ethics of the press.

Analysis

8. The Whittamore records seized during Operation Motorman provided a very detailed account of the extent to which different press titles had engaged the services of Mr Whittamore, what he had done and how much he had charged. When I saw the identity of some of those who had been targeted and the nature of the information sought, it seemed to me clear not only that much information had been obtained in breach of the Data Protection Act 1988 but also that the potential to deploy the statutory defence was limited in the extreme. I was reluctant to disclose the details and put them into the public domain not least because of the consequent publicity, probably unwelcome, that would attach to the targets who would suffer a further invasion of privacy nine or ten years after Mr Whittamore had first undertaken the task. I was, however, prepared to do so and even took the step of seeking the views of some affected persons so that I could take their views into account before reaching a conclusion. However unwillingly, nobody sought to dissuade me from taking such steps as I thought necessary.

9. What was important was that there was a recognition by the press, highly relevant to any consideration of the culture, practices and ethics, that it was proper for me to proceed on the basis of my provisional conclusion. Some titles recognised that at least some of their requests must have involved breaches of the legislation; Associated Newspapers went so far as to accept that there was strong prima facie evidence of breach of the Act, a phrase which was accepted by Mr Dacre in evidence after he had taken legal advice. Although Associated Newspapers prohibited the use of private detectives after Motorman, at least one other national title continued to use Mr Whittamore's services notwithstanding that he had by then been convicted of criminal

offences arising out of the work that he had done. Against that background, the approach of the Information Commissioner and the attitude of the Press Complaints Commission to the concerns expressed in writing, at meetings and through the medium of the publications What Price Privacy and What Price Privacy Now also fall to be considered. However many titles this might affect, subject to argument, it seems to me that this history must give rise to inferences about the culture and practices of the press, and about the effectiveness of those in a position to determine, challenge or restrain those practices, which are highly relevant to the questions with which this Inquiry must deal in its recommendations.

10. I recognise that Mr Sherborne's argument is that conclusions as to the culture practices and ethics of the press can be derived from not only from the engagement of Mr Whittamore and the reaction to the publicity surrounding his criminality but also from any continued failings of corporate governance as evidenced by the absence of any real enquiry into the justification for the work placed by their journalists with Mr Whittamore, the extent to which private information was still being held (and, possibly, utilised), the lack of disciplinary action and the fact that at least a number of the involved journalists had been promoted to senior editorial positions. I agree that these are potentially relevant considerations. The question I have to deal with is the consequences which ought to flow from that conclusion.

11. I can express my conclusions quite shortly. If Mr Sherborne's clients wish to provide the Inquiry with such information as they have collated from the Whittamore records where a continuous link to the present day can be established, they should do that without further delay and in witness statement form. Any other core participant will then be able to submit a short statement in response, either from the title or the journalist concerned. The purpose of this exercise is necessarily limited. It would not be to require titles to list when each journalist who made a request to Mr Whittamore left the paper: it is only intended to address the specific journalists that Mr Sherborne's clients have identified who are still in their employment. Nor would it be to require titles to prove in general terms the history of their retention or destruction of information acquired from Mr Whittamore, in the absence of specific and recent evidence of use. I am not in any event requiring that any of this be done either by Mr Sherborne or the individual titles but I will, of course, consider anything that emerges from the exercise (in addition to the information which Mr Dacre for Associated Newspapers Ltd offered to provide in writing) and it will form part of the evidence.

12. Needless to say, although names can be submitted in documents for the Inquiry, for public purposes, names will be redacted for the reasons that I have previously given: names of targets and journalists will (when in redacted form) be referenced by letters so that it will be possible for the public to track any answer that might be provided in connection with any allegation.

13. Having said that, however, I do not consider it necessary or desirable for the Inquiry itself to initiate any further detailed investigation of this matter. First, the questions of corporate governance which are engaged by the question of the subsequent history of the Motorman information is already the subject of evidence from the relevant titles which it is not necessary for me to take further.

14. Second, I do not consider it proportionate to my purposes to instigate a detailed and time consuming exercise to look comprehensively at the state of information obtained

from Mr Whittamore and still held (some ten years on) by journalists: such an exercise would inevitably descend to the level of 'who did what to whom' and beyond; it would have to involve an analysis in each case of any potential public interest justification for the original enquiry as well as an investigation into what has happened to the information in the years that have passed. Furthermore, it would not sufficiently advance the task of preparing recommendations for the future.

15. Although I recognise that those affected could well be justified in seeking reassurance on this issue, that is not the task of the Inquiry: the Information Commissioner has made it clear that a fast track method of discovering the extent to which personal information was obtained is available and the appropriate route of investigation must be through him.

16. I ought to deal with two final points. First, it is suggested (entirely correctly) that although a number of journalists were interviewed under caution, none was charged and all are entitled to the presumption of innocence. That is not, however, a total answer to a charge of failure of corporate governance. There are many cases in which sufficient evidence cannot be adduced for criminal purposes because of the right to decline to answer questions together with the burden of proving guilt to the very high standard that the law rightly requires. That is not to say that the absence of prosecution (and the fact of the presumption of innocence) means that the issue of compliance with ethical standards does not arise. To be fair, I do not believe that any title has advanced a submission contrary to this proposition but it does serve to underline why the corporate response to any possibility of potentially criminal behaviour (whether it be breaches of the Data Protection Act 1998, the Regulatory Investigatory Powers Act 2000, the Computer Misuse Act 1980 or, indeed, any other offence) is relevant to any consideration of culture, practices and ethics.

17. The second point is quite different. I do not, for one moment, underestimate or minimise the legitimate concern of Mr Sherborne's clients in relation to what are both proved and said to have been to invasions of their privacy and the alleged culture which has permitted such invasions to pervade parts of the present media landscape not only for them but for others as well. I equally understand why it might be thought that Operation Motorman provides better evidence of that culture than interception of mobile telephone messages because it undeniably extends beyond one title.

11 June 2012