

OPERATION MOTORMAN/ASSOCIATED NEWSPAPERS LTD

Lord Justice Leveson:

1. It is a matter of regret that I must, yet again, return to issues arising out of Operation Motorman. These arise because of the concern expressed by Associated Newspapers Ltd about the way in which the Inquiry is proceeding in relation to this evidence. In order to provide the context and so that the public can understand what is happening, it is necessary to rehearse the history in some detail.

Background

2. In 2003, the police were concerned about the activities of a private detective, Steve Whittamore. A search warrant was obtained and executed which also involved the assistance of the Information Commissioner who attended by one of his investigators, Alexander Owens. This was known as Operation Motorman and resulted in the seizure of the very substantial records of what Mr Whittamore had been up to. Looking at this data, it revealed what the then Information Commissioner, Richard Thomas, and Mr Owens considered was a vast amount of research for national newspapers which, prima facie, was 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.
3. Although no journalist was either prosecuted or, indeed, the subject of formal interview in relation to the Motorman material (for reasons that have been explored in evidence), there is no doubt that the Information Commissioner believed that a substantial number of the individual data searches conducted by Mr Whittamore for journalists will have involved obvious and clear breaches of the law for which no public interest appeared even remotely to be arguable.
4. What Price Privacy dealt with the matter under the heading "The Media" in this way:
 - 5.6 Journalists have a voracious demand for personal information, especially at the popular end of the market.

The more information they reveal about celebrities or anyone remotely in the public eye, the more newspapers they can sell. The primary documentation seized at the premises of the Hampshire private detective consisted largely of correspondence (reports, invoices, settlement of bills etc) between the detective and many of the better-known national newspapers - tabloid and broadsheet - and magazines. In almost every case, the individual journalist seeking the information was named, and invoices and payment slips identified leading media groups. Some of these even referred explicitly to 'confidential information'.

- 5.7 The information which the detective supplied to the newspapers included details of criminal records, registered keepers of vehicles, driving licence details, ex-directory telephone numbers, itemised telephone billing and mobile phone records, and details of 'Friends & Family' telephone numbers.
- 5.8 The secondary documentation seized at the same premises consisted of the detective's own hand-written personal notes and a record of work carried out, about whom and for whom. This mass of evidence documented literally thousands of section 55 offences, and added many more identifiable reporters supplied with information, bringing the total to some 305 named journalists.
- 5.9 Just as revealing were the interviews conducted with individuals whose privacy had been violated. As one would expect, they included a number of celebrities and others in the public eye such as professional footballers and managers, well-known broadcasters, a member of the royal household and others with royal connections, and a woman going through well-publicised divorce proceedings. But they also included people caught up in the celebrity circuit only incidentally, such as the sister of the partner to a well-known local politician and the mother of a man once linked romantically to a Big Brother contestant. Among this last group was a mother whose show-business daughter had featured in a number of lurid press stories about her private life and whose family was subject to intense media probing. Details of the mother's telephone calls and cars owned appeared among the private detective's ledgers and records of financial transactions.
- 5.10 A few of the individuals caught up in the detective's sights either had no obvious newsworthiness or had simply strayed by chance into the limelight, such as the self-

employed painter and decorator who had once worked for a lottery winner and simply parked his van outside the winner's house. This group included a greengrocer, a hearing-aid technician, and a medical practitioner subsequently door-stepped by a Sunday newspaper in the mistaken belief that he had inherited a large sum of money from a former patient.

5.11 A number of those interviewed reported subsequent media intrusion into their lives, after their details had been passed on to the press. All were emphatic that they had not willingly supplied information about themselves, nor would they have consented to its release. ...

5. Although somewhat out of order, it is worthwhile identifying some of what the Information Commissioner (Mr Richard Thomas) said on this topic when he gave evidence. He acknowledged that there could be cases where the public interest fully justified obtaining or mining personal data (with the result that no offence would be committed) and he also recognized that there could be questions concerned with the proof of intent or recklessness. In relation to the public interest, he gave the example of seeking the weekend telephone number of a minister who had recently resigned, but when he was asked questions by Mr Rhodri Davies Q.C. for News International and specifically referred to his evidence regarding the minister, he said (Day 14, 9 December pm page 107 line 3):

"But I have to say yet again, that was not typical, nothing like typical of the cases that we were seeing. And although you made the point that the majority of the cases were, in your language, only addresses or phone numbers, I would also say the vast majority were nothing to do with public interest considerations along the lines I've just mentioned."

6. He also spoke of the lack of awareness of data protection issues and gave evidence of his discussions with Mr Dacre, whose language might be interpreted to mean that he had been very concerned, presumably for his newspapers, about what was reported in What Price Privacy. Mr Thomas said (ibid, page 112 line 14):

"He [Mr Dacre] was very, very forthright on that occasion. I give him credit to that and he said, "You've really told us things we didn't know about before. We're now really cleaning up our act."

The Evidence from Operation Motorman

7. The Inquiry was proceeding on the basis of what had been reported in What Price Privacy and What Price Privacy Now although I was aware that substantial concerns had been raised by a number of press core participants about the validity and reliability of the data to which they had eventually received some access. On 30

November 2011, however, in answer to a notice under s. 21 of the Inquiries Act 2005, Mr Owens, the investigator initially involved in Operation Motorman who no longer worked for the Information Commissioner produced to the Inquiry a memory stick with comprehensive details of the information seized. For the purposes of this ruling, why he had kept that record is irrelevant but its broad accuracy was confirmed when the Information Commissioner subsequently produced Mr Whittamore's actual handwritten records.

8. What was now available for the Inquiry was the material that identified the names of the targets of the journalists for data research, the dates on which the work was undertaken, the type of information sought or obtained and the fees that Mr Whittamore had charged to identified newspapers for the services he had provided. It was analysed by newspaper (with different coloured files) and also provided the invoices which explained what had been done.
9. This material gave rise to a difficult issue for the Inquiry to resolve. On the one hand, while recognizing that some information might more easily (and legitimately) be obtained by newspapers from private detectives in this way, having seen precisely who was the subject of data research and noting the views of the Information Commissioners, this evidence undoubtedly spoke to the culture, practices and ethics of the press. Although some time ago, given that the sweep of the Inquiry encompassed repeated failures over very many years to deal with problems of press behaviour, it was undeniably relevant and highly so. On the other hand, I had no wish to breach the privacy of those whose personal information had been sought by unnecessarily identifying them in public and I did not want to take the time of the Inquiry by holding a detailed investigation unless it was necessary to do so. I was also conscious that the Editor in Chief of the paper identified as the largest user of Mr Whittamore's services (the Daily Mail) said he had taken steps after the publication of the reports entirely to ban the use of private detectives: in other works, he had taken steps to address what may have been, at least in part, breaches of the law by or on behalf of journalists at the papers for which he was responsible. That is relevant to overall assessment of the practices of the press but is not dispositive.
10. Suffice to say, I decided that if it were accepted that the material revealed prima facie breaches of s. 55 of the Data Protection Act 1998 by journalists, that would be sufficient to identify evidence of practices of the press which could form part of the essential narrative to the report. It was, however, essential to go that far, not least because of the interaction between the Information Commissioner and the Press Complaints Commission over the relevant period, which itself was extremely important when considering how the standards and press behaviour were approached in the period running both concurrently with and consecutively to the problems of interception of mobile telephone messages which itself ran for a number of years, ending with the commencement of the Inquiry.
11. In order to investigate how this matter might be taken forward, I arranged a private hearing of the Inquiry. I was extremely reluctant to take that course because I have throughout been extremely anxious to ensure that, to the limit that was possible and

appropriate (in the sense of being fair to everyone), everything the Inquiry did should be in public. I did not see, however, if that hearing were to be conducted in public, how I could identify the nature of the evidence so that core participants could identify the facts for themselves and, thereafter, encourage a frank exchange of views on the way forward. That I was prepared to deploy the evidence if it were necessary to do so was not, I believe, in doubt although given that I was concerned with the culture and practices of the press generally, I was less concerned with specific individual attempts to obtain data and those papers who featured only minimally in the Motorman papers were not the focus of my concern; it was extent and pattern of use, and it was the bulk users.

12. I have continued to hold to the view that the private hearing of 2 December should remain private and, on 13 March 2012, I stuck to it when ruling on an application to make public what had transpired. I then said that this private information was within the purview of the Information Commissioner. His decision as to appropriate disclosure deserved respect and, additionally, the 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 added that as I was not naming reporters under investigation for phone hacking, I considered it unfair to name other reporters who had not been the subject of criminal investigation.
13. I understood that the upshot of the private hearing (whether articulated at the hearing or subsequently) was that it was possible for the Inquiry to proceed on the basis that no positive case was to be mounted by core participants that the Motorman material did not reveal prima facie evidence of breaches by journalists of the Data Protection Act. I do not go further because Associated Newspapers Ltd communicated its view in an e mail from Mr Jonathan Caplan Q.C. (leading counsel who has throughout acted on its behalf) to Counsel to the Inquiry on terms that its contents are confidential to the Inquiry team and I am not, at least at this stage, prepared to go behind that confidence.
14. I am, of course, entitled to reach my own conclusions about the material (which is part of the record of the Inquiry) and, as I understand it, no submission has been made suggesting that I am in some way debarred or prevented from doing so. What I was (and remain) determined to avoid, however, is the possibility that a core participant wishes to argue that I cannot use the Motorman material to reach generic adverse conclusions about the practice in general of the press (perhaps because it would be wrong to conclude, even on the balance of probability, that breaches of s. 55 could have been established against journalists) without the evidence having been deployed in public. I thought that a way forward had been achieved which had the effect of achieving what I needed without the evidence needing to be called.
15. Before going on to deal with more recent events, I must emphasise that I had no wish to shut out any core participant from arguing whatever they wanted about the Motorman material and I have heard a number of arguments about it subsequently. What I have consistently said, however, is that unless there is sufficient common ground between the line that I might wish to take about the Operation Motorman

material and the core participants, or any of them, such that it is unnecessary to take the time (and breach the privacy of those who were the subject of Mr Whittamore's attention) to investigate the facts further, then publicly analyse the material is what I will do. I am not prepared to have the report of this Inquiry open to challenge on the basis that I did not allow the evidence to be tested or that it was not open to me on the evidence adduced to reach the conclusions that I might wish to reach because insufficient evidence was called to justify that conclusion when that evidence is available to be deployed.

The Evidence of Mr Dacre and the subsequent submissions

16. I turn to the evidence of Mr Paul Dacre, the Editor in Chief of the Daily Mail and the editor who was responsible for banning all use of private detectives after Operation Motorman was exposed in *What Price Privacy* and *What Price Privacy Now*. He dealt with this in the afternoon of 6 February after a specific opportunity had been afforded to him to take advice from Mr Caplan. I had asked whether he admitted the possibility that at least some of these enquiries could not be justified by the type of explanations for the enquiries of Mr Whittamore that he had previously provided. He responded (6 February 2012, pm page 56) as follows:

“... I don't want to bore you, but I do want to stress that this was ten years ago and it was a system being used by everybody. But from what we know now, I would accept there was a prima facie case that Whittamore could have been acting illegally. I don't accept that this is evidence that our journalists were actively behaving illegally. We have to know the facts, what it related to and whether it actually was provided, whether the information was actually provided.”

17. To say that there is prima facie evidence that Mr Whittamore was acting illegally is to assert what was blindingly obvious: he had, after all, been convicted of offences. Further, looking at the schedules of the type of information sought and reflecting on the views of the Information Commissioner, the character of Mr Whittamore's conduct appears to be beyond doubt and it is difficult to see what defence could have been mounted to any number of further allegations. As for the journalists, re-reading the words now, although I had not understood what he said in that way at the time (perhaps because I was conditioned by what I believed to be the attitude of all core participants reflected above), I recognize that it is at least arguable that Mr Dacre was, on behalf of Associated Newspapers Ltd, positively rejecting the view that there was prima facie evidence of breach by his journalists of s. 55 of the Data Protection Act. If that is right, it runs entirely counter to what I had understood the position to be following the private hearing.
18. This evidence was followed by interim submissions at the conclusion of Module 1 in which it was argued by Associated Newspapers Ltd that 50% of the transactions undertaken by Mr Whittamore were area and occupancy searches which could be conducted using data available for purchase from commercial sources so that journalists had no reason to doubt that they were carried out lawfully; ex directory

and conversion searches amounted to 28% of the transactions and were also available from commercially available databases. As for the remaining 22%, no assessment was made of the public interest defence that might have been available.

Subsequent Events

19. There is no doubt that I have continued to proceed on the premise that no positive case was being advanced that the Motorman material did not reveal prima facie breaches by journalists of s. 55 of the Data Protection Act. In my ruling of 1 May 2012, I put the matter this way (at para. 5):

“I have not permitted to be named reporters whom it is alleged used the services of the private detective, Steve Whittamore, whose records revealed what it is common ground is strong prima facie evidence of multiple requests (prior to his arrest in March 2003) by sections of the press for information the provision of which would constitute a breach of the Data Protection Act 1998.”

20. This converts the double negative into a positive but is intended to reflect a wider picture of the press than the line taken by Associated Newspapers Ltd; I also recognize that the inclusion of the adjective ‘strong’ goes further than has been conceded as common ground. It is also right to acknowledge that this error is compounded by incorrect references to Mr Caplan and (as I inaccurately recollected) Mr Dacre accepting strong prima facie evidence of breach of the Act. In a letter dated 14 June, solicitors for Associated Newspapers Ltd put the matter in this way:

“We understood the common position amongst the media CPs to be, including ANL, that the Whittamore books amounted to a prima facie case which has, in fact, never been investigated regarding possible offences/defences by journalists.”

21. That point is further emphasised by a further part of the letter which goes on:

“Even in the limited number of instances between 1997-2003 where there appears to be a prima facie case that information may have been obtained in circumstances that breached s.55, no journalist was ever interviewed by the ICO as to his/her knowledge regarding the legitimacy of what Mr Whittamore was being asked to do or as to what they actually asked Mr Whittamore to do, and no assessment has been made of any public interest defence or any other defence that may have existed.”

22. I recognize the admitted fact that there was no investigation by the Information Commissioner (for reasons that themselves will require analysis) but the fact that there was no consideration of the public interest defence does not mean that the overall circumstances do not lead to inferences about that issue. There is a very real difference between, on the one hand, admitting (or not advancing a positive case to

challenge) the existence of a prima facie case against journalists of breach of s. 55 and, on the other hand, admitting the existence of a prima facie case only against Mr Whittamore leaving open the contention that every single request of him made by the journalist was justifiable thereby giving rise to a public interest defence in each case. I repeat that there has been no specific investigation and, of course, no findings of criminal liability can be made (and none will be) but the only way to examine whether these individual requests could even start to be justified in the public interest (bearing in mind the view of the Information Commissioner to which I have referred above) would be by examining the evidence. It is that which, if it was unnecessary to do so, I was seeking to avoid for all the reasons that I have given.

Conclusion

23. One of three positions could be adopted by each of the core participants although the difference between the first two may be more semantic than real. The first position is that, whether or not the journalists or their newspapers appreciated the effect of s. 55 of the Data Protection Act 1998 (to pick up a further point made by Mr Dacre), it is conceded that there is prima facie evidence that journalists did act in breach of s. 55 by seeking information which, prima facie, could not be justified in the public interest. The second position is that the core participant does not want to advance a positive case contradicting the first position (which is what I had understood the position to be although I accept that I have mis-stated it). The third is that it is, in fact, challenged that there is a prima facie case against journalists that they acted in breach of s. 55 which, in my judgment, is the pursuit of a positive case.
24. The choice is very simple but the consequences of whatever choice is made must be understood. I go back to the very first discussion about the Whittamore material. Associated Newspapers Ltd must state which of the three positions I have outlined in paragraph 23 above it, in fact, adopts. In the event that it were to accept either the first or second of these positions, I would be content to proceed on the basis that there is no need to pursue the matter any further and I would in due course (as foreshadowed in paragraph 14 above) reach my own conclusions as to the culture practices and ethics of the press as a whole on the available material and on the basis of the arguments (and concessions) that have been put before me.
25. In the event, however, that Associated Newspapers Ltd were to adopt the third of these positions, the situation would be different because it would not be appropriate to reach a conclusion about the Whittamore material that one of the most significant core participants (and one of the largest users of Mr Whittamore's services) wished to challenge without deploying that evidence in public and allowing evidence to be led to support an alternative view to the effect that the investigations, so far as its journalists were concerned, could be justified by a reference to the public interest. I will, of course, hear argument from Associated Newspapers Ltd, but one possible outcome would be for me to adduce relevant evidence of what was happening with this private detective and allow it to submit evidence and make submissions. Whatever conclusions I then reach will be based on evidence that has been available to the public.

26. If I proceed in this way, a selection will have to be made of what are considered to be the most obvious examples from the Whittamore records. As I understand it, only Associated Newspapers Ltd has, at least arguably, put this point in issue and, in those circumstances, the evidence will be limited to that newspaper group and it will be open to it to provide evidence and make submissions challenging the proposition that the request falls within s. 55 and identifying what public interest could even arguably have been served by seeking this data. If necessary, I shall sit during August to deal with it.
27. I am very conscious that the core participants who complain that they have been the subject of illegal or unethical treatment have been very anxious to investigate and unlock the Whittamore material and I have no doubt that if I am required to take the latter course, I will receive no objection from that source. As for other core participants, given what I understood to be the consensus after the hearing on 2 December and the absence of other complaint, I have assumed that any core participant who did not specifically seek to argue the point, falls within the first or second of the positions reflected above.
28. This ruling does no more than bring out into the open a potential misunderstanding that must be resolved before I conclude the Inquiry. Because Mr Jonathan Caplan Q.C. who has represented Associated Newspapers Ltd throughout the Inquiry is not available during the week of 9 July, having a professional commitment out of the country, I have been asked to defer further argument until he is available. I will, of course, do so.
29. I add only that this ruling does not in any way affect the further ruling in relation to Operation Motorman which was handed down on 11 June 2012 and which remains operative. Both in relation to that ruling and to this, where evidence is required, it must take statement form. It is not appropriate for assertions of fact to be presented as submissions or argument.

10 July 2012