The Leveson Inquiry

culture, practices and ethics of the press

APPLICATION FOR CORE PARTICIPANT STATUS, 4 MAY 2012

Lord Justice Leveson:

1. This is an application under Rule 5 of the Inquiry Rules 2006 ("the Rules") by Mr James Eadie Q.C. on behalf of the Government for core participant status in relation to Module 3 of Part 1 of the Inquiry which is concerned with the relationship between the press and politicians. In my ruling of 5 April 2012, I made it clear that it covered "the relationship between national newspapers and politicians along with its impact on media policy, cross media ownership" and as being "concerned with any consequences of the relationship on the creation or implementation of policy at the highest level …" (see para. 2). The module is due formally to start next week although some evidence which crosses each of the modules was heard last week including the evidence of Rupert and James Murdoch.

2. I requested applications for core participant status for this module some considerable time ago and, following a hearing, that ruling dealt with those that I had received. This application is, therefore, late but given that I have previously heard late applications (see the ruling in relation to Module 1 dated 2 November 2011, following earlier rulings on 14 September and 4 October) and on the basis that here, as in those cases, the module has not formally been opened, I am prepared to address it on its merits.

3. In reality, it is an application somewhat unusual in form. The advantages of core participant status include the right to make an opening and closing statement (see Rule 11) and the right to suggest questions to counsel to the Inquiry, or if he declines to do so, to make application for permission to ask such questions: Rules 10(1) and (3). In fact, Mr Eadie does not currently seek to take advantage of these rights in the Inquiry but the reason for his application is to be found in the way in which the Inquiry facilitates core participants to exercise their rights that the rules provide by making available in advance, under strict rules of confidentiality, copies of statements that witnesses have provided and which will form the basis of their evidence. For those who are not core participants, the witness statements only become available when published on the Inquiry website after the conclusion of the evidence of the witness and, because of the enormity of the task, some exhibits have not yet been posted. Thus, those who are not core participants simply do not know what a witness is about to say until he or she says it and it is streamed live. Although, as I shall explain, this has caused some difficulties, until recently, they have not been serious.

4. At this stage, it is appropriate to explain the approach of the Inquiry to those who are giving evidence. In order that witnesses can be prepared for matters that might be raised during the course of oral evidence, it has been the practice of counsel to the Inquiry to meet witnesses before they give evidence both to identify areas of questioning and to provide sight of any document (whether produced by another witness or obtained from a publicly available source). The purpose of such meetings is to put witnesses at their ease but also to permit them to familiarise themselves with a document they may or may not have seen and prepare to deal with it. This is not only a matter of fairness to the witness but, in addition, to underline that the process of giving evidence is neither a test of memory nor an attempt to trick or trap. As far as I am aware, the practice has worked well. Usually, these meetings have been on the morning of the hearing but they have occasionally taken place the day or a few days before the evidence is due to be given.

5. The evidence is then given although its presentation has not, in a few cases, been without difficulty. Inevitably in a fast moving Inquiry, witnesses must attend out of order and it has occurred that some witnesses have given evidence before the Inquiry has received evidence from another witness yet to come so that it has not been possible to put allegations not then known to the Inquiry let alone warn about questions. That has led to some complaints that allegations made by a later witness cannot be challenged and have led to unfairness. Generally, it has been possible to arrange for the complaining witness to provide a further statement which has been put into the record so that the challenge becomes public knowledge and can be referred to.

6. On at least one occasion, with a particularly public figure who has not yet given evidence, I accepted that this was not sufficient and although I have encouraged witnesses to include rebuttal in any statement being prepared or to supplement that statement if already served, I have recognised that the lapse of time before correction can itself cause injustice. I therefore publicly referred to the challenge to the evidence pending the rebutting evidence. Again, in the main, adopting a pragmatic solution to ensure as fair a representation of the evidence as possible, I believe that an appropriate balance has been kept and it has not been necessary to interpose witnesses early or take other steps to preserve their position.

7. On Tuesday 24 April 2012, James Murdoch gave evidence and produced a series of e-mails passing between him and a public affairs employee of News Corporation named Frederic Michel. In accordance with the usual procedure and subject to the confidentiality undertaking, core participants had seen the statement and the e-mails in advance. They had not been seen in advance by the Secretary of State for Culture, Media, Olympics and Sport, the Rt. Hon. Jeremy Hunt M.P., who was directly affected by them: he is not a core participant and thus was not entitled to sight of them. As soon as the evidence was given, however, the e-mails were published on the Inquiry website and the confidentiality undertaking lapsed. Newspaper core participants with journalists within the confidentiality circle had obviously been alert to the nature of evidence that might be given and I have noted (although I say no more) that articles quoting parts of the e-mails and passing comment on their contents appeared very quickly after they became public. In any event, within

minutes, the e-mails were the subject of massive publicity. There were immediate calls for the Secretary of State to answer questions surrounding them although he was neither the author nor the recipient and the writer had made it clear that although he referred to Mr Hunt by name, his contact was, in fact, with one of his special advisers.

8. I do not pass comment on the content of the articles, the nature of the media reporting or the subsequent Parliamentary exchanges although I was sufficiently concerned about what had happened overnight to make a statement at the opening of the Inquiry on the following morning, prior to the matter being raised in Parliament. I said this:

> "I understand entirely the reason for some of the reaction to the evidence yesterday, and in particular, to the emails about which Mr Murdoch was asked, but I am acutely aware, from considerable experience, that documents such as these cannot always be taken at face value and can frequently bear more than one interpretation. I am absolutely not taking sides or expressing any opinion, but I am prepared to say that it is very important to hear every side of the story before drawing conclusions. In due course we will hear all the relevant evidence from all the relevant witnesses, and when I report, I will then make the findings that are necessary for me to fulfill the Terms of Reference…"

9. It is clear from what happened on that occasion that the module that concerns the press and politicians contains a new dynamic that the Inquiry has not previously experienced. To such extent as issues of contemporary politics are raised, it is obviously unrealistic to expect political and press reaction not to be immediate particularly where the press have had legitimate forewarning of the evidence, even if that forewarning was for the different purpose of preparing to assist the Inquiry and the terms of the confidentiality undertaking scrupulously observed.

10. It has not only been the press. It has happened that a core participant who is a politician has used material from the disclosed evidence (which was, in fact, later corrected) publicly to challenge the Prime Minister; an apology has been received by the Inquiry for what was, in that case, a total disregard of the terms of the confidentiality agreement but even if the question had been withheld until the statement was published, there was almost no time for the information (wrong, as it turned out to be) to be checked and the question dealt with.

11. I say at once that it seems to me to be wrong and unfair to allow issues such as this to be dealt with in this way. I have observed that core participant status is not intended to provide an advantage to core participants and so permit them to analyse material before it is available for publication and publish articles and comment after the information has become public but before those who are not core participants have had the opportunity to assimilate what has happened. I could equally have said that it is not intended to represent a trap for unsighted witnesses who are not core

participants and will not have had the same advantage of forewarning. It seems to me that a witness who is likely to be the subject of potentially damaging evidence which will generate what may well be legitimate political commentary ought also to be aware of the broad nature of that evidence in advance of it being given so that, if questions are asked and it is necessary and appropriate that answers be provided before the witness himself or herself gives evidence, at the very least, the witness will have been in the same position as those who have been given sight of the material because of their core participant status albeit that the information can only be used after it has entered the public domain.

12. That brings me to this application. What Mr Eadie seeks is legitimately to achieve some degree of notice. He puts the matter in this way:

> "Recent events have underlined and brought into sharp focus the desirability of the Government, in fairness to those who are to give evidence, having advance sight of evidence submitted to the Inquiry. That is not merely a matter of fairness to them, ensuring that they are not disadvantaged as compared to other witnesses. It is hoped that it may assist the Inquiry by providing the witnesses with at least some time in their busy schedules to consider the materials and evidence of others on similar or related topics to those on which they will be giving evidence. Further, Ministers, and ultimately the Prime Minister, as the Head of the Government are accountable to the public and to Parliament. Again recent events have served to highlight the need on occasions for the Government to respond very quickly to material which has been released. Both the Secretary of State for Culture, Media and Sport and the Prime Minister have been required to respond urgently in the House of Commons to concerns over matters raised by the Inquiry. That process would be assisted by the sort of access to the materials that Core Participant status would involve."

13. It follows from what I have said that I have sympathy with the broad thrust of this submission but, before moving on to deal with the application in the context of the legal framework, it would be remiss if I did not deal with the suggestion that might otherwise be made that this application is made in order to assist in the preparation of evidence. So that it is entirely clear, within the slightly extended deadline which I have allowed to some witnesses, both the Prime Minister and the Secretary of State for Culture Media and Sport have today submitted their primary statements to the Inquiry. Indeed, save in one case, all the other Ministers whom Mr Eadie has now named have provided a statement. The last statement is due this afternoon. Although supplementary statements may be necessary, there can be no question of access being sought for the purposes of preparing evidence.

14. Whatever my views of the fairness of the matter, I must, however, address the question of law, that is to say, whether the application which Mr Eadie makes is within Rule 5 of the Inquiry Rules. The Rule provides:

> "(1) The Chairman may designate a person as a core participant at any time during the course of the inquiry, provided that person consents to being so designated.
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> (2) In deciding whether to designate a person as a core participant, the chairman must in particular consider whether –
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> > a. The person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;
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> > b. The person has a significant interest in an important aspect of the matters to which the inquiry relates; or
> >
> > c. The person may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report."

15. The first question is whether the application can be made by the Government. Albeit in the context of a different rule, I have recently given a ruling on the meaning of the word 'person' in these regulations and I have no reason to believe that the same analysis does not apply to Rule 5. I then said:

> "I have no doubt (and the contrary was not suggested) that the concept of a 'person' in Rule 13 of the 2006 Rules includes both an individual and a body corporate or unincorporate. Although there is no definition within the 2005 Act or the 2006 Rules, a proper reading of the Interpretation Act 1978 makes it clear that "[i]n any Act, unless the contrary appears" (section 5) "person includes a body of persons corporate or unincorporated" (Schedule 1). The Interpretation Act 1978 applies to subordinate legislation including the 2006 Rules by virtue of section 11."

16. As Mr Eadie frankly concedes, by our unwritten constitution, the government of the United Kingdom has no independent existence in law. It operates through a number of persons, no doubt including both individuals and other legal entities. He argues, however:

> "There is clearly a very considerable degree of common interest amongst those who lead the Government, namely the Prime Minister, Deputy Prime Minister and other senior Ministers. Further, the concern of Government is that there is real potential for misunderstanding and presentational issues

> in relation to Core Participant status, with risks of unfair or inaccurate singling out of those individually identified. It is thus made explicitly clear that the purpose of this application, in substance on behalf of the Government, is solely to ensure that fair and appropriate access is secured to the relevant materials for the reasons set out above. It reflects no other concern on the part of any of those Ministers who are to assist the Inquiry with their evidence."

17. I accept this submission in its entirety but, with respect, it misses the point. In this regard, the legislation does not provide me with discretion to grant core participant status outside the terms of the Rules and I will not do so. In the same way that I required applications from each person who sought core participant status as someone who complained that they were the victims of press illegal or unethical conduct and also required that they be listed, so it appears to me that I must do the same in this case. Before coming to who that could be, however, it is worth considering the purposes within the rules.

18. Mr Eadie refers to my ruling of 5 April 2012 when I spoke of Module 3 (at para 2) as covering "the relationship between national newspapers and politicians along with its impact on media policy, cross media ownership" and as being "concerned with any consequences of the relationship on the creation or implementation of policy at the highest level …" and (at para 5) of core participant status being "only for those far more involved in or responsible for the subject matter of the module than as a witness to specific events" which he submits must include government ministers responsible for policy, particularly where, as here, the most senior ministers are seeking to assist the Inquiry with their evidence. He also makes the submission:

> "It is the Government that bears ultimate responsibility ('at the highest level') for policy on (among other things) media ownership and regulation. This includes its role to date in framing and applying policy, including the taking of individual decisions, under the existing legislative framework. It includes questions about how these matters are handled within Government, the allocation of responsibilities and the processes and procedures which apply. It also includes the Government's role in 'the creation or implementation of policy' for the future."

19. I see force in both these arguments although, in the normal course of events, it is usual for ministers to await the recommendations of an inquiry such as this and then to determine the appropriate policy to pursue. On the other hand, I am prepared to recognise that the profile of this Inquiry and the time frame within which it and any subsequent policy decisions have to be considered and to operate might be such that there would be value in expressing policy objectives rather more fully than would usually be the case. That would entirely properly provide me with some of the insight which they bring to the issues and could assist my consideration of the recommendations I shall make. I appreciate that Mr Eadie does not presently

visualise assuming this responsibility but it would remain open for him (or any core participant) to do so. In the circumstances, I am entirely content that the application falls within Rule 5 which, in any event, does not provide an exhaustive list of the relevant considerations and which it seems to me can also encompass the other features to which I have referred.

20. Reverting to the identity of the applicant or applicants, in the light of the way in which the application is put and these reasons, it would be quite wrong for anyone to seek to identify other motives for this application. Having said that, I have no doubt that I cannot accede to an application made by "the Government". Anticipating that decision and not seeking to persuade me that it is incorrect in law, Mr Eadie has identified the applicants as the Prime Minister, the Deputy Prime Minister, the Secretary of State for Business, Innovation and Skills, the Secretary of State for Culture, Media, Olympics and Sport, the Secretary of State for Education, the Lord Chancellor and Secretary of State for Justice, the Home Secretary and the Chancellor of the Exchequer. No significance is to be attached to the order of that list which simply follows the order of names that Mr Eadie provided. I grant these applications. They will collectively be known as Government Core Participants.

21. I move on to the control of access to the material that is placed on the document management system and made available to core participants. With appropriate tact, Mr Eadie observes that it will be for the Inquiry to decide whether it considers it necessary for Ministers of the Crown personally to provide confidentiality undertakings and submits that it is not necessary given that they clearly understand the need for confidentiality and are content to maintain it. What Mr Eadie may not have appreciated is that there have been real issues about loss of confidentiality and on more than one occasion I have had to address the issue publicly. On 12 March 2012, I dealt with it in this way:

> "It is important to emphasise that early sight of these statements is subject to the strict conditions of confidentiality that that I imposed using the powers set out in Section 19 of the Inquiries Act 2005. Further, all those within the core participants and their legal representatives who have access to documents on the Inquiry's document management system Lextranet have signed confidentiality undertakings. Against that background, therefore, any leak is very disappointing and a matter of concern. Everyone has spoken about the difficulty of pursuing an investigation aimed at identifying who is responsible for the leaks that have occurred, but unless it stops, I shall consider restricting the ways in which the statements are made available. This could include requiring anyone who wishes to read statements in advance for the purpose of suggesting lines of enquiry for counsel to pursue to do so in the Inquiry offices rather than by having access to the Lextranet system. In the meantime, I require all those who have been authorised to access the Lextranet to sign a declaration in standard form that the requirement of

> confidentiality is understood and that the signatory has not been responsible for passing any information contained within any statement to anyone who has not signed the confidentiality agreement. I appreciate the limitations of this step, and recognise that it might be considered somewhat offensive by 99 per cent of those who are following faithfully the requirements of the Inquiry, but it is the least that I can do to bring home how seriously I view unauthorised disclosure of information and how much more seriously I shall view it as the Inquiry proceeds. The Inquiry team is itself perfectly prepared to lead the way in signing such a declaration, although I do not believe for one moment that that is where the problem lies. In addition, should any core participant wish to add a person to the confidentiality circle, agreement must be obtained from the Inquiry solicitor before a confidentiality undertaking is signed and approved."

22. Confidentiality undertakings were signed by all those within core participant teams who have any access to the Lextranet system; they were signed by every member of the Inquiry team including counsel; they were signed by those in the company responsible for managing the system who place documents upon it. In the same way that I do not for one moment believe that my team have leaked documents, I do not believe that a Minister of the Crown would do so and I am sure that to such extent as they entrust others to assist them, they will also be reliable. It is not, however, the point. As I have approved the identity of everyone who wishes to have access to the system and required each to sign an undertaking, I see no basis for treating anyone else differently. I mean absolutely no discourtesy either to ministers or those who will have to assist but the rule must apply to everyone.

4 May 2012