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Sunday Times
29.10.06

THE SUNDAY TIMES

A curb on free speech

It is reassuring to learn that Richard Thomas, the information commissioner, is fighting on the side of the angels against the "surveillance society". These are the state agencies that hold a growing body of personal and possibly inaccurate information on even the most inoffensive members of the public. It is comforting, too, to hear him lambast the high street banks, as he did in an interview yesterday, for leaving their customers' financial records in bin bags on the pavement, vulnerable to identity thieves. One can but applaud his horror that a father was on police records as a suspected paedophile for five years after a dinner lady overheard his daughter say, "My dad bonked me last night", when she meant that he had tapped her on the head with an inflatable hammer.

Mr Thomas, one could think, is a man determined to expose malpractice and to cut the mighty down to size. Much less cheering, however, are his views on a matter of overwhelming importance that he did not talk about in his interview: the role of the press in protecting the public by exposing the abuses of the powerful. Newspapers had already been doing this for centuries when he took up his post four years ago. This duty of the media is vital in the struggle to maintain an open society. Yet Mr Thomas would send reporters to prison for fulfilling it. His record in opening up the public sector to scrutiny as enforcer of the Freedom of Information Act – the other hat that he wears in a masterful piece of Whitehall doublethink – is disappointing. And his position in data protection is entirely on the side of those with something to hide.

In a little noticed report to parliament this year, he highlighted how people's personal details – "who they are, where they live, who their friends and family are, how they run their lives" – now form part of a trade in "confidential personal information" that was made illegal under the Data Protection Act 1998. He says that "much more illegal activity lies hidden under the

surface". This can consist of obtaining "someone's current address, details of car ownership, an ex-directory telephone number or records of calls made". The commissioner states that he "will not hesitate to prosecute journalists identified in previous investigations who continue to commit these offences". In saying this he is echoing the Department for Constitutional Affairs, which has responsibility for the law. If he and the department have their way, they calculate that one journalist a year could go to prison for breaches of the Data Protection Act. The maximum penalty is two years.

To a Whitehall lawyer such as Mr Thomas, appointed to his post by No 10, this might seem entirely just: the law is broken, punishment is due. To a newspaper or television company considering an investigation into political or commercial chicanery, it is the criminalisation of free speech. "Where someone lives, who they are, who their friends and family may be" is hardly confidential information. It is common currency that is easily discovered by talking to neighbours, looking at the electoral register or searching the Land Registry, as anyone is entitled to do. To propose imprisonment for reporters – and insurers, solicitors and private investigators – who obtain such details would be laughable if it were not so sinister.

It is equally true that journalists are not above the law and newspapers can already be fined an unlimited amount for breaches of the Data Protection Act. But the threat of imprisonment will curtail free speech even if the journalist can argue a defence of public interest, something that is a notoriously prone to different interpretations by different judges. Mr Thomas is complicit in placing another brick in the wall that the state is building to protect itself from unwanted scrutiny. This newspaper's front page story today on cash for honours is precisely the sort of investigation that political parties would prefer not to happen. Mr Thomas is doing his bit to help them.

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Times - 1/11/06

Hands off whistle-blowers, we need them

If this new law on privacy goes through, investigative journalists could go to jail while crooks walk free



MAGNUS LINKLATER

I DON'T SUPPOSE that it has anything to do with the cash-for-honours scandal, and the questions that are leading ever closer to Downing Street, but some curious steps are being taken to limit the scope of investigative journalism. A government that has proclaimed itself firmly as a champion of free speech, introducing a Freedom of Information Act and appointing a commissioner to enable the citizen to penetrate the corridors of power, appears on the point of introducing a privacy law by the back door.

It could all too easily prevent investigative journalists looking at personal data in pursuit of a public-interest story; deter whistle-blowers from revealing malpractice; and blow wide open the confidentiality that protects the journalist and his source. The calculation is that, if these measures — jail sentences rather than unlimited fines for the misuse of private data — go through, at least one journalist a year could go to jail for breaches of Section

55 of the Data Protection Act 1998 (DPA). The architect of this bureaucratic coup d'état is the Information Commissioner himself, Richard Thomas. His job is to ensure freedom of information from government sources. Last week he gave his first full-scale interview to *The Times*, revealing the powers that he is using to guarantee that access, while at the same time protecting the interests of the public.

On Monday the Department for Constitutional Affairs, under Lord Falconer of Thoroton, the Lord Chancellor and advocate of freedom of information, completed a consultation process on a document entitled *Increasing Penalties for Deliberate and Wilful Misuse of Personal Data*. This was the direct offspring of Mr Thomas's earlier report to Parliament, *What Price Privacy?* Both documents propose that anyone who obtains, holds or discloses "personal data" without the consent of the "data controller" should be sent to prison for up to two years rather than face an unlimited fine, as at present.

The report suggests that "personal data" includes who people are, where they live, who their friends and families are and even their phone numbers. This is the very essence of journalism — but Mr Thomas wants to go still farther. He believes that not only journalists, but solicitors, insurance companies, banks and local authorities should be deterred from obtaining personal data about council tax

defaulters, debtors and common. He believes that the DPA has had only limited success so far, and that "much more illegal activity lies hidden under the surface". This may include obtaining current addresses, details of car ownership, ex-directory telephone numbers or records of telephone calls made. And he states unequivocally that he "will not hesitate to prosecute journalists identified in previous investigations who continue to commit these offences". The Department for Constitutional Affairs, which has responsibility for the law, envisages that a number of journalists now operating could find themselves in breach of the Act and liable to imprisonment.

The public, of course, may not be hugely sympathetic towards those journalists who disguise themselves as Arab sheikhs, gain access to private documents, or record conversations with hidden mikes. But many legitimate investigations start with precisely the personal details that Mr Thomas is talking about, and many of them can be easily discovered by talking to neighbours, searching the electoral register

or using already published documents. Hitherto, journalism has been largely protected from the full rigours of the DPA but prison sentences for breaches of Section 55 will have a massive "chilling effect" on free speech. The reporter will be deemed to be indulging in criminal activity unless he or she can persuade a judge that the outcome of their inquiries is indeed in the public interest. Not only may judges take varying views of what constitutes public interest, but the investigation may still be at a tentative stage, when proof one way or the other is hard to demonstrate.

Evidence of the way that the commissioner's mind is working came some four years ago when *The Sunday Times* first began inquiring into the financial affairs of Lord Levy, now at the centre of the cash-for-honours affair. A High Court injunction was sought by Lord Levy to prevent publication of details about his tax affairs, only for that to be turned down in court. The commissioner then invited the newspaper editor to be interviewed under caution in connection with Section 55 of the DPA, even

though the judge had already declared the story to be in the public interest. Nothing came of it then, but the new proposals would make it almost certain that any new attempt to head off a similar investigation through the threat of prison could easily succeed.

It is a strange and disturbing initiative. The DPA already contains substantial powers to protect personal data, and the Information Commissioner has brought only 25 prosecutions over the past four years — most of which have resulted in small fines. And there seem to be contradictions within the Act itself. Other sections actually uphold the right of journalists to investigate fraud. At the very least these confusions should be cleared up.

As presently framed, the proposals would mean not only that journalists and whistle-blowers would be at risk of imprisonment, but that insurance investigators inquiring into fraud would be equally liable. The bank clerk who suspects that an account may conceal a major drug deal; the secretary who stumbles on a cash-for-questions scandal; the civil servant who believes that there is corruption within a planning department — all these are legitimate areas for inquiry. Yet all these, under the proposed new penalties would not only be curtailed, they would also be ruthlessly punished. To call this upholding freedom of information is laughable. Mr Thomas should either withdraw his proposals or rename his office.

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As set to S. Times - 21/10/06

I welcome your support for my concerns, as Information Commissioner, about a surveillance society and about banks which are careless with customer's financial records. I am also glad that you recognise that journalists are not above the law.

But I fear you do protest too much to describe as the "criminalisation of free speech" my call for stronger sentences to deter journalists (and many others) who engage private investigators to obtain personal information by bribery, impersonation and similar means which have been illegal since 1994. You are right that unlimited fines can be imposed under the Data Protection Act, but – as my report, What Price Privacy?, made clear – this has done nothing to deter an underworld market which is now so active that we have been able to construct a tariff for details of mobile phone records, criminal records, banks statements and similar private information going way beyond mere names and addresses.

As enforcer of the Freedom of Information Act – not a "Whitehall lawyer" by the way - I fully recognise the importance of exposing the state to maximum scrutiny. My report stressed the importance of retaining the public interest defence to the existing crime. It is quite clear that journalists covering such stories as "cash for honours" have nothing to fear. But my duty to protect the public means that I must target those who are illegally buying or selling personal information without any conceivable public interest defence. I regard free speech as a bedrock of society. But freedom of speech is not freedom to break the law where there is no public interest justification.

Times 2/11/06

Rights to privacy and knowledge

Sir, I do not expect to make many friends when my duties as regulator include enforcing freedom of information against sometimes reluctant government departments and upholding the privacy rights of individuals against a sometimes intrusive press.

But is Magnus Linklater seriously defending journalists and others when they engage investigators who use bribery and impersonation to obtain personal information where that cannot be justified by public interest considerations (Comment, Nov 1)?

No one is proposing new law. What is needed — as spelled out in my report, *What Price Privacy?* — are tougher sanctions to deter a widespread market in buying and selling financial, health, criminal and similar records, which is already illegal.

RICHARD THOMAS
Information Commissioner

Gambling danger

Sir, For vulnerable individuals, gambling on the internet and other remote gambling via interactive television and mobile phone, provide convenience gambling 24 hours a day ("Online casinos 'used to launder cash,'" Nov 1). Offline gambling