

Leveson Inquiry

Second Witness Statement of Richard Thomas CBE

1. This Witness Statement addresses specific questions raised in the Inquiry's letter to me dated 20 September 2011.
 1. Please confirm that the 305 journalists exposed by Operation Motorman had asked Mr Whittamore for a total of 13,343 different items of information.
 2. Please confirm that when the Information Commissioner analysed these 13,343 requests, (a) 1,998 of them were considered to be too vague to allow for any definitive conclusion, but (b) the remaining 11,345 were all assessed as being either certainly or very probably in breach of section 55 of the Data Protection Act 1998.
 3. Subject to 2 above, without analysing the 11,345 requests item by item, please set and explain the basis of the Information Commissioner's conclusion that these requests [were] either certainly or very probably in breach of section 55.
 4. Please confirm that when the Information Commissioner analysed the requests from the ten most active journalists, it found that between them they had paid Mr Whittamore to obtain 3,291 pieces of information where were certainly or very probably in breach of section 55 an estimated £164,537.50.
2. I need to start by saying that the staff who were directly involved in the Operation Motorman investigation are no longer employed at the ICO. The level of detail raised in these questions was outside my personal knowledge.
3. I was however aware that, after the publication of What Price Privacy? in May 2006, Lord Ashcroft made a Freedom of Information request to the ICO seeking more detail about the 305 journalists mentioned in that report. I recall that being told this was a difficult request which required careful consideration, in particular the impact of section 59 of the Data Protection Act. That section imposes a statutory bar preventing the Commissioner and his staff from disclosing information obtained under the Act which relates to an identified person or business unless it is made with "lawful authority" as defined. Section 44 of the Freedom of Information Act 2000 provides an absolute exemption if disclosure "is prohibited by or under any enactment".

4. I recall being told that correspondence exchanged with Lord Ashcroft and/or his solicitors had led to the conclusion that the bulk of information requested should be disclosed to him, but without identifying the journalists or the publications in question.
5. The original file dealing with Lord Ashcroft's request appears to have been disposed of in line with the ICO's retention policy some years ago. However, the ICO has located a final or near-final draft of the disclosure letter to Lord Ashcroft drafted by Phil Taylor, the ICO solicitor directly involved in these matters. That draft dated 8th November 2006 is attached to this Statement as **Exhibit RJT 47**. The information set out in this draft letter corresponds very closely to material subsequently published on the internet by Lord Ashcroft at

<http://lordashcroft.com/pdf/WhatPricePrivacyFolAreply.pdf>.

6. The draft letter at Exhibit RJT 47 states, amongst other matters that:
 - There were "13,343 transactions recorded in the source material";
 - Of these, 5,025 were identified "as transactions that were (of a type) actively investigated in the Motorman enquiry and.....positively known to constitute a breach of the DPA 1998."
 - A further 6,330 "represent transactions that are thought to have been information obtained from telephone service providers and are likely breaches of the DPA. However, the nature of these is not fully understood and it is for this reason that they are considered to be probable illicit transactions".
 - The balance of 1988 lack sufficient identification and/or understanding of their nature to determine whether they represent illicit transactions or otherwise.
 - Estimates were made of the probable values of the transactions undertaken by the ten most active journalists. The basis for the estimates is stated in the draft letter. The sums set out in the table at the end of the draft produce an estimated total minimum sum of £117,410 paid for illicit information and a maximum sum of £164,537.50.
7. An internal briefing note dated 6th November 2006 supplied the raw data on which the draft letter was clearly based. It also shows an estimated total minimum sum (i.e. not just paid by the "top ten") of £300,435 and a maximum of £547,160. This note is attached as **Exhibit RJT 48**. (It should be noted that this note contains the names of the "top ten" journalists which have not hitherto been placed in the public domain. The note also contains an error - discovered and acknowledged in early 2007 (see Exhibit RJT 29) - in mis-attributing some of the News of the World transactions to the Sunday Times.
8. There are very minor variations between some of the figures set in the draft letter and briefing note and those set out in the Inquiry's letter, but

they can otherwise be confirmed by reference to what is set out in that draft.

9. Beyond what is stated in the draft letter I do not have any information to explain the basis for the conclusion that these requests [were] either certainly or very probably in breach of section 55. I can however speculate that the analysis expressed in that draft reflected:

- (a) Whittamore's guilty pleas to the specimen charges;
- (b) the level of detail about each transaction contained in the workbooks and other materials seized;
- (c) the confidential personal data was of a type which could not have been obtained legitimately; and
- (d) this was an assessment which was primarily about the "obtaining" offence (section 55(1)(a)) which was the principal focus of ICO attention.

10. I stress that this is my speculation about how the conclusions in the draft letter were reached. When *What Privacy Now?* was published a month later, it was stated (page 8) that "The Commissioner recognises that some of these cases may have raised public interest or similar issues, but also notes that no such defences were raised by any of those interviewed and prosecuted in Operation Motorman".

5. Please explain the basis of your decision(s) (a) not to place the names of the 305 journalists, or at least some of them, into the public domain; alternatively, [not] to furnish their names to their employers so that internal investigations might be conducted, and (b) not to bring any prosecutions under the Data Protection Act against any of them.

11. It is easier and more helpful to answer these two questions in time order, addressing (b) first.

Prosecuting Journalists

12. Paragraph 6.7 of *What Price Privacy?* records how corruption charges were given precedence. The evidence pointed to unauthorised supply of information from (inter alia) the Police National Computer (PNC). With the police in the lead, the case was referred to the Crown Prosecution Service who charged four people (including Whittamore) with corruption offences which carry a possible custodial sentence. Ultimately two of the accused pleaded guilty to corruption charges and to specimen offences under section 55 of the DPA – see Transcript, Exhibit RJT 49.
13. Separate proceedings under the DPA alone had been launched by the ICO against Whittamore and other private investigators. When the CPS prosecution resulted in nothing more substantial than a conditional

discharge, external Counsel advised the ICO that it would not be in the public interest to continue with the separate proceedings as the court would not be able to impose any greater penalty. Those proceedings were accordingly withdrawn.

14. Paragraph 6.8 of *What Price Privacy?* goes on to conclude "...nor could the Information Commissioner contemplate bringing prosecutions against the journalists or others to whom confidential information had been supplied". In fact, I am not aware that any consideration was actively given to prosecuting journalists by the ICO or the CPS when the initial charges were laid. This would doubtless have reflected:

(a) the more serious matters of corruption on the part of a civilian police employee, by a civil servant working inside DVLA and by staff inside telephone companies;

(b) the focus on those at the heart of the organised trade in confidential personal information - i.e. private investigators and their agents - where an analogy might be drawn with targeting drug dealers; and

(c) the much greater challenges in bringing a successful prosecution under section 55(1)(b) - the "procuring" offence. The act of procurement is harder to prove than the act of obtaining or disclosing. It must then be proved that the person acted knowingly or recklessly in procuring the disclosure without consent. And a journalist is much more likely at least to attempt to rely upon the public interest defence.

15. The outcome of the actual prosecutions, and the advice received from Counsel, extinguished any remaining possibility (however theoretical) of prosecuting journalists.

Naming Journalists

16. Page 8 of the ICO's second report (*What Price Privacy Now?*) records that the information provided in response to the Freedom of Information request (from Lord Ashcroft) did not identify the 305 journalists or the publications. This decision was based on the interplay between section 59 of the Data Protection Act and section 44 of the Freedom of Information Act - see paragraphs 3 and 4 above. After further consideration, however, we decided we could identify the publications in that second report. As was recorded in the report, this disclosure was considered to be in the public interest and, in the context of a special (statutory) report to Parliament, consistent with the Commissioner's functions under the DPA.

17. It was a difficult decision to identify the publications and the decision did not extend to identifying the journalists. Having reached the view that we could not publish the names of individuals within a Parliamentary report (which was itself privileged), no question subsequently arose of disclosure of those names whether to their employers or into the public domain. When asked about this later, I responded that the names had been

obtained under search warrant powers, that the journalists had not been prosecuted let alone convicted, that they had had no chance to defend themselves and that their names constituted their personal data which the ICO always treats with the greatest care. It should be added that it would doubtless have been a straightforward matter for any proprietor conducting an internal investigation to discover identities themselves by checking back on documented payments which their company had made to Mr Whittamore.

18. Although we decided that we could not identify the 305 journalists, we did take the view that "They know who they are" and paragraph 7.21 of *What Price Privacy?* concluded "**The Information Commissioner will not hesitate to take action against any journalist identified during the Motorman investigation who is suspected in future of committing an offence.**" In effect, although a line was being drawn in the sand, a clear warning was sent to these journalists and to other customers such as law firms and insurance companies. This was part of the deterrent effect we were trying to build.

Transcript of Proceedings

19. The ICO does not hold an official transcript of the proceedings before HH Judge Samuels QC sitting at Blackfriars Crown Court on 15th April 2005. There is however a very full file note made by Phil Taylor, the ICO solicitor who attended the hearing. This is attached as **Exhibit RJT 49**.

Correspondence with PCC

20. The only reply to my letter of 8th December 2004 to Sir Christopher Meyer has already been supplied to the Inquiry – his short letter to me of 15th December (Exhibit RJT 8). The words attributed to Mr Toulmin in fact appeared in an *earlier* e-mail, dated 20 April 2004, from him to Phil Jones, Assistant Commissioner at the ICO. This (with Phil Jones's reply) is attached as **Exhibit RJT 50**. This refers to the advice note under discussion at that time which had "run into the sand" when I wrote in December (Exhibit RJT 7).

I believe the facts in this Witness Statement are true,



Richard Thomas CBE
16 October 2011