CO/11732/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

The Queen
(on the application of David Miranda)

Claimant

- and -

Secretary of State for the Home Department

1st Defendant

- and -

Commissioner of Police of the Metropolis

2nd Defendant

– and –

(1) Liberty;

(2) Article 19, English PEN and the Media Legal Defence Initiative; and,

(3) A coalition of media and free speech organisations (the National Union of Journalists of the United Kingdom and Ireland, MGN Limited, Independent Print Limited, Index on Censorship, the International Federation of Journalists and the Media Law Resource Center)

Interveners

WRITTEN SUBMISSIONS OF THE COALITION OF MEDIA AND FREE SPEECH ORGANISATIONS

A. Introduction and summary

1. By order of Laws LJ on 9 October 2013, the coalition of media and free speech organisations ("the coalition") were given permission to intervene in these proceedings. The coalition shares a common interest in protecting journalistic

freedoms and in particular the protection of journalistic sources. They include the national body which represents 30,000 working journalists in the UK, leading newspaper publishers and national and international campaigning organisations. A brief description of each of the interveners is provided at Appendix A.

2. The coalition recognises that the threat from international terrorism against the United Kingdom is real and that the national authorities, including the police and intelligence services, are obliged to take measures to protect the safety of the general public. Such measures can protect human rights, including the right to life under Article 2 ECHR. However, if the powers granted to the national authorities are too broadly defined they may undermine other fundamental freedoms and legal safeguards in a democratic society, including those that protect freedom of expression.

3. The coalition is intervening to support the argument that the use of Schedule 7 powers against persons in possession of journalistic material is incompatible with Article 10 ECHR. For this purpose, the coalition does not consider it either necessary or desirable for it to make observations about the evidence in this case, or the application of the relevant law to the facts. These are matters for the parties and will be fully addressed in their respective submissions.

4. In summary, the coalition makes the following submissions:

   (1) Freedom of expression is a fundamental right at common law and under Article 10 ECHR. Under Article 10(1) ECHR, the right to freedom of expression includes the freedom for every person to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) In order to be justified, any interference with freedom of expression must meet the requirements of Article 10(2) ECHR; it must be prescribed by law, necessary in a democratic society in pursuit of a legitimate aim and proportionate.

(3) The media plays a vital role of public watchdog in a democracy. In practice it is through the media that the public becomes informed about, and engages in debate about, important matters of public concern. One of the most important functions of the media is to hold to account those who exercise governmental or state power and to investigate allegations of official wrongdoing.

(4) The protection of journalistic sources is a basic condition for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.

(5) Access to journalistic material under UK law is governed by the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000. The touchstone for the applicability of these provisions is whether the person whose right to freedom of expression is engaged is in possession of journalistic material – material acquired or created for the purposes of journalism - not whether the person concerned is a "journalist".

(6) The Schedule 7 powers are, as applied to persons in possession of journalistic material, incompatible with Article 10 ECHR, for the following reasons:

(a) The Schedule 7 powers are not "prescribed by law" under Article 10(2) as they are not reasonably foreseeable in their application to persons in

possession of journalistic material. Neither Schedule 7 nor the Code of Practice for Examining Officers under the Terrorism Act 2000 makes any reference to journalists or other persons in possession of journalistic material. Accordingly, there are insufficient safeguards to prevent the arbitrary use of Schedule 7 powers against such persons.

(b) It is a fundamental principle of source protection that there must be independent judicial scrutiny of the process whereby a person is compelled to hand over journalistic material to the police. Yet in breach of this principle Schedule 7 empowers a police officer to require a person in possession of journalistic material to hand over that material to the police without any prior judicial scrutiny.

(c) The lack of prior judicial scrutiny means that Schedule 7 provides for no balancing act between the public interest in freedom of expression and protecting journalistic sources, and the public interest in protecting national security or preventing disorder or crime. Likewise, there is no possibility for a judge to consider, and rule upon, whether the exercise of Schedule 7 powers is necessary and proportionate in any given case.

(d) Schedule 7 in its application to persons in possession of journalistic material undermines the specific statutory protections governing police access to such material in the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000. Neither Schedule 7 of the Terrorism Act nor the guidance accompanying the Act provide any indication as to how this fundamental conflict is to be reconciled.

B. Applicable Law

Freedom of expression

5. Freedom of expression is a fundamental right at common law and has been described by Lord Steyn in ***R v Home Secretary ex parte Simms*** [2000] 2 AC 115 as "the primary right in a democracy, without which an effective rule of law is not possible" (p.125G). In the same judgment, Lord Steyn elaborated as follows (p.126F-G):

> "freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country".

6. In ***R v Shayler*** [2003] 1 AC 247, Lord Bingham explained why the right to freedom of expression is such an important safeguard against misuses of official power (para 21):

> "The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred. The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge."

7. In ***McCartan, Turkington Breen (a firm) v. Times Newspapers Ltd.*** [2001] 2 AC 277, Lord Bingham again emphasised the crucial importance of the media in giving practical effect to freedom of expression on behalf of the general public (p.290):

> "In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."

Article 10 ECHR

8. It is unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right: see s.6 Human Rights Act 1998.

9. Any person who claims that a public authority has acted, or proposes to act, incompatibly with Convention rights, may rely on those rights in any legal proceedings, if he is, our would be, a victim of the unlawful act: see s.7(1) Human Rights Act 1998.

10. Article 10 of the European Convention of Human Rights (the right to freedom of expression) provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

11. In ***Sunday Times v United Kingdom (No 2)*** (1992) 14 EHRR 229, the Court summarised the key Article 10 principles as follows (at para 50):

> a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.
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> (b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".
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> (c) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).
>
> (d) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 (art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the

> reasons adduced by the national authorities to justify it are "relevant and sufficient".

Source Protection under Article 10

12. In *Goodwin v United Kingdom* [1996] 22 E.H.R.R. 123 at [39], the European Court of Human Rights (ECtHR) recalled that freedom of expression constitutes one of the essential foundations of a democratic society and that safeguards to be afforded to the press are of particular importance. The Court explained:

> "Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

13. In *Ashworth Hospital Authority v MGN Ltd* [2001] 1 W.L.R. 515 at [101], Laws LJ emphasised the importance of the protection of journalist's sources as follows:

> "[…] The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source. […] In my judgment, the true position is that it is always prima facie (I can do no better than the Latin) contrary to the public interest that press sources should be disclosed; and in any given case the debate which follows will be conducted upon the question whether there is an overriding public interest, amounting to a pressing social need, to which the need to keep press sources confidential should give way."

'Prescribed by law'

14. An interference with Article 10 should have some basis in domestic law and the law should be adequately accessible and foreseeable. In *Sunday Times v The United Kingdom* [1979] 2 EHRR 245 at [49], the ECtHR reasoned:

> "49. In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

15. In *Gillan and Quinton v. The United Kingdom* (App No. 4158/05 [2010] 50 E.H.R.R. 45 at [77], the ECtHR referred to the content of the foreseeability requirement and stated:

> 77. For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise […]. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. [Citations omitted]

The need for judicial oversight

16. As referred to in detail in the Claimant's summary statement of facts and grounds (at [85] to [93]) in *Sanoma Uitgevers BV v The Netherlands* (App No. 38224/03) [2011] E.M.L.R. 4, the ECtHR found a violation of Article 10 in the absence of adequate legal safeguards to enable a judge or other independent and impartial judicial decision making body, prior to the handing over of any material that may result in the

identification of a confidential source, to come to an independent assessment as to whether the interests of a criminal investigation overrode the public interest in the protection of sources.

17. In *Telegraaf Media Nederland Landelijke Media B.V. and others v The Netherlands* (App No.39315/06) (2012) 34 BHRC 193, the ECtHR was prepared to accept that the interference complained of was foreseeable. In that case, the Court found that the second and third applicants, both journalists, must have been aware that information that had come into their possession was classified and that it had been unlawfully removed from the keeping of the intelligence services. The interference under sections 6(2)(a) and (c) of the Intelligence and Security Services Act 2002 (placing the applicants under targeted surveillance) was foreseeable as those provisions tasked the intelligence services to, *inter alia*, investigate persons who by their activities constitute a danger to the security of the State, and to promote measures to secure information which needs to be kept secret in the interest of national security (at [51] and [93]).

18. There was, however, evidence before the ECtHR that Ministerial authorization for the use of special powers was without prior review by an independent body with the power to prevent or terminate it (see [51] and [100]). Moreover, a *post factum* review, could not restore the confidentiality of journalistic sources once it is destroyed (at [101]). The Court thus found that in violation of Article 10, the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their journalistic sources (at [102]).

19. The Defendants submit that *Nagla v Latvia* (App. No. 73469/10) is authority for the proposition that there is no requirement for prior independent scrutiny before journalistic material is seized (see, First Defendant's Grounds at [76]). In that case, the

relevant Latvian law contained two procedures for access to journalistic material by investigating authorities: a standard procedure where judicial authorisation was required in advance (see [87]) and an urgent procedure where judicial authorisation had to be given the day after the search (see [88]). Both procedures therefore required judicial scrutiny. The Court was prepared to accept that judicial scrutiny the day after the seizure was acceptable but the Court held that there must be an independent review "carried out at the very least prior to the access and use of obtained materials" so that a Judge can undertake the requisite balancing exercise (see [88]). On the facts of that case it appears that while the judicial process happened the day after the materials were seized (12 May 2010) the materials remained in two sealed bags and were not examined until 17 May 2010; as such the judge could have prevented disclosure of the source. *Nagla* is thus further authority for the proposition that independent scrutiny is required before journalistic materials are examined.

Disclosure of journalistic sources in UK Domestic law

20. There are two main means by which UK domestic law seeks to protect journalistic sources. The first is by providing statutory protection for journalistic sources in section 10 of the Contempt of Court Act, which provides that subject to specific exceptions, no court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose, "the source of information contained in a publication for which he is responsible". This section therefore creates a qualified right to for journalists and persons responsible for a publication to refuse to disclose the identity of a source; it appears to have little relevance to the facts of the present case.

21. The second means by which UK law protects journalistic sources is by placing very strict safeguards around the circumstances in which the police can compel anyone in

possession of journalistic material to hand it over to them. Unlike the powers under Schedule 7, Terrorism Act 2000, access to journalistic materials are specifically regulated within the legislative regimes for search and seizure during criminal or terrorist investigations by the police. The Police and Criminal Evidence (PACE) Act 1984, which codifies the rights of police to search premises and seize evidence during criminal investigations, regulates applications for access to confidential journalistic material and other journalistic material under section 9 and Schedule 1; such applications are made to a circuit judge. Schedule 5 of the Terrorism Act 2000, regulates the conduct of terrorist investigations and requires approval of the application for disclosure of journalistic materials by a circuit judge.

22. Although there are differences in the detailed provisions of the two Acts, they both have in common a number of features. First, the touchstone for the applicability of the sections is that there is a person in possession of special procedure material, otherwise known as journalistic material. The meaning of journalistic material under PACE s. 13(1) is "material acquired or created for the purpose of journalism". This is further clarified in s13(2), which provides that "Material is only journalistic material for the purposes of this Act if it is in the possession of a person who acquired or created it for the purpose of journalism". Section 13(3) meanwhile provides that "A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes".

23. The effect of these provisions is that the law governing access to journalistic material does not only apply to journalists, but to "any person" who receives material from someone who intends that the recipient shall use it for the purposes of journalism. Neither is there any requirement to show that the journalistic material would, if seized, actually disclose any journalistic sources; the mere fact that it is journalistic material

suffices for the purpose of engaging the protections provided under PACE and the Terrorism Act.

24. It is submitted that these provisions concerning the definition of "journalistic material" are consistent with the Council of Ministers *Recommendation no R(2000)7 on the right of journalists not to disclose their sources of information*, principle 2, which makes it clear that the principle of source protection extends to persons other than journalists who by reason of their contacts with journalists acquire information about the identity of sources (Claimant's Grounds, para 80) and the wide definition of a journalistic source as being "any person who provides information to a journalist": see the *Telegraaph Media* case at [86] and *Nagla v Latvia* at [81].

25. While the detailed provisions differ in a number of respects, both PACE 1984 and the Terrorism Act 2000 put the burden on the police to establish that there are reasonable grounds for believing that the material that they are seeking is likely to be of substantial value to a criminal or terrorist investigation. If the court is so satisfied, the court must then balance the public interest in the material being made available for the criminal investigation against the circumstances in which the person in possession of the material holds it, which includes the public interest in the protection of journalistic sources.

C. <u>The Practice of Journalism and Source Protection</u>

26. Based on their collective experience, the coalitions wishes to draw to the Court's attention a number of features of modern journalism which are of particular relevance to this case.

27. The first is that journalism is a collaborative activity. This is most obviously the case in the context of broadcast journalism, where a reporter e.g. working overseas will typically be accompanied by a cameraman, a sound recordist, an interpreter, a driver and an administrative assistant or fixer, who has a good network of local contacts. If a journalist is meeting a confidential source, each of those persons may come to know the identity of that source. Furthermore, material capable of identifying the source is likely to be in the possession of many members of the team e.g. the driver may have an address that permits identification, even if he doesn't have the name.

28. The practice in such cases that every member of the team will refuse to provide information about the reporter's work and will rely on the principle of source protection if they are questioned by the police or other national authorities. It is self-evident that the principle of source protection could not work if it was confined merely to "journalists", but the same information could lawfully be obtained by questioning the driver or the fixer. It is also self-evident that "journalistic material" capable of identifying a source is not limited to a journalist's notes of an interview, or a cameraman's footage, but will embrace any material obtained or prepared for the purposes of journalism including names and addresses of interviewees, marked up maps, details of travel arrangements and so forth. Any one of these materials could identify a source.

29. But material may be journalistic material notwithstanding that neither the journalist nor any member of his team has had any input into it. When details of MP's expenses claims were leaked to the media, for example, those documents were journalistic material in the hands of those persons who possessed them for the purpose of journalism.

30. When a journalist works with a confidential source, it is normal practice to agree to source protection. What that typically means is that the journalist will promise not voluntarily to disclose the source's identity and to take such steps as are necessary to protect that identity. The general practice is that journalists in the UK do not promise a source that his or her identity will not be disclosed in any circumstances, because the Court possesses powers under s.10 of the Contempt of Court Act to compel a journalist to identify a source as well as powers to gain access to journalistic material. However, often a journalist will explain that there are strict legal safeguards in place which prevent a journalist from being required to hand over journalistic material and/or reveal the identity of a source, of which the most important is independent judicial oversight.

31. Journalism about international news stories involves teams of people having to travel around the world. The UK is both a major centre for a number of leading international broadcasters and newspapers, as well as a major international transport hub, with Heathrow being one of the busiest airports in the world. In 2012, for example, at Heathrow airport alone the number of passengers arriving or departing per day averaged 191,200 and the total reached 70 million. It is clear from this case that Schedule 7 powers may be exercised in international transit areas, away from access to legal and consular assistance which would be available upon entry to the UK.

32. Modern journalism relies very heavily on modern technology. Like everybody else, journalists and persons working with journalists communicate by email, use smartphones and record information on laptops. Although frequently journalists will go to great lengths to safeguard their material, they also know that if the UK police and/or intelligence agencies are able to examine their phones and or laptops, they will be able to build up a very comprehensive picture of their work, contacts and sources.

33. For all of these reasons, the use of Schedule 7 powers against persons who are journalists, who are working with journalists and/or who are in possession of journalistic material has a profound chilling effect that goes far beyond the facts of this case. It sends a signal to the rest of the world that the specific legal safeguards which apply to journalistic material and the identification of sources can simply be bypassed by the police using a different legal power to achieve the same ends. This has enormous potential to deter sources from cooperating with journalists, and/or providing journalistic material to persons, who are likely to transit through, or travel in our out of, UK ports.

D. Submissions

34. It is submitted that the exercise of Schedule 7 powers against journalists or against persons working with journalists and in possession of journalistic material is incompatible with Article 10 ECHR.

35. First, any interference must be "prescribed by law", it must be formulated with sufficient precision so as to enable a potentially affected person to regulate his conduct and it must provide adequate safeguards to prevent abuse. The Schedule 7 powers fail these tests. There is no reference at all in Schedule 7 or the Code of Practice for Examining Officers under the Terrorism Act 2000 to the position of journalists or those who are carrying journalistic material. The absence of any guidance of this kind makes it impossible for a journalist entering the UK to understand how Schedule 7 powers are likely to be applied to him and makes it likely that the powers will be applied in an arbitrary way.

36. Secondly, it is fundamental principle of source protection that there must be independent judicial scrutiny of the process whereby a person is compelled to hand

over journalistic material to the police. This is reflected not only in the Strasbourg case law (*Somona*), but also in domestic law and practice governing access to journalistic material under PACE 1984, s.9 and Schedule 1, and the Terrorism Act 2000, Schedule 5. But Schedule 7 mandates an examining officer with the power to compel a journalist to answer questions to hand over journalistic material that may identify a source, and then to retain and examine such material, without any independent scrutiny.

37. The lack of judicial scrutiny means that Schedule 7 provides for no balancing act between the public interest in freedom of expression and protecting journalistic sources, and the public interest in protecting national security or preventing disorder or crime. Likewise, there is no possibility for a judge to consider, and rule upon, whether the exercise of Schedule 7 powers is necessary and proportionate in any given case or to exercise judicial powers so as to ensure that sources are protected even if a person is compelled to hand over material e.g. by permitting a journalist to make limited redactions.

38. Fourthly, the use of Schedule 7 powers against journalists or those in possession of journalistic material undermines the legal safeguards in PACE 1984 and the Terrorism Act itself in relation to access to journalistic material. Again, neither the Terrorism Act itself nor the Home Office Code of Practice addresses how this conflict is to be reconciled.

39. A very important consideration in relation to freedom of expression generally and source protection specifically is whether use of Schedule 7 powers is likely to have a "chilling effect" on freedom of expression. It is submitted that the use of Schedule 7

against persons in possession of journalistic material is very likely to have a profound chilling effect:

a. There is no requirement that an officer must have reasonable grounds of suspicion that a journalist or a person in possession of journalistic material is involved in acts of terrorism before the powers to question and retain journalistic information may be exercised.

b. Journalists or persons with journalistic material may be stopped and required to provide information that identifies their sources.

c. There is no judicial or other adequate independent scrutiny required before the exercise of the powers under Schedule 7 to enquire as to the necessity and proportionality of disclosure of a journalist's source; nor is there any other power that could prevent disclosure of a source once material has been seized.

d. Any property on the journalist or the person in possession of journalistic material can be searched and retained, including electronic material on their laptops, mobile phones or other portable storage devices.

e. The Act makes no distinction between private, journalistic or otherwise privileged property or information held by the journalist or person in possession of journalistic material.

f. Journalists or persons in possession of journalistic material are exposed to the threat of criminal liability for refusing to answer questions or refusing to provide information and documents which may reveal their sources.

g. Journalists or the persons in possession of journalistic material may be detained for up to 9 hours.

40. Any person with journalistic material either entering or leaving the UK or travelling between ports in the UK now faces the prospect that their journalistic material may be seized, not by reference to carefully defined legal powers and with the sanction of a judge who has weighed the competing interests in the balance, but by an examining officer under sweeping powers that don't contain safeguards for journalists and require no independent legal scrutiny. This state of affairs is incompatible with their Article 10 rights and it is respectfully submitted that the Court should make a declaration of incompatibility under s.4 of the Human Rights Act in respect of Schedule 7.

Guy Vassall–Adams
Tim Cooke-Hurle
Doughty Street Chambers

Jamie Beagent
Leigh Day

APPENDIX A: THE INTERVENERS

1. The **National Union of Journalists** is the national union representing the interests of journalists in the UK and Ireland and has 30,000 members. Founded in 1909, the NUJ represents the interests of its members in the UK and abroad including staff, casuals and freelance journalists, working in newspapers, broadcasters, publishing houses and online publishers. The NUJ takes source protection issues very seriously and has made many representations to Government consultations and to Parliamentary Committees concerning e.g. the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000.

2. **MGN Limited** is the publisher of the Daily Mirror, the Mirror on Sunday and www.mirror.co.uk.

3. **Independent Print Limited** is the publisher of The Independent, The Independent on Sunday and www.independent.co.uk.

4. **Index on Censorship** is an international organisation that promotes and defends the right to freedom of expression. The organization was initially founded in 1972 to publish the untold stories of dissidents behind the Iron Curtain and its mandate has subsequently expanded to cover the whole world. Currently Index on Censorship is focusing its work on a number of priority countries around the world which include Azerbaijan, Bahrain, Belarus, Brazil, Burma, Egypt, India, Russia, Tunisia and Turkey. In the UK, Index played a key role in the Libel Reform Campaign which saw the Defamation Act 2013 being passed into law.

5. **The International Federation of Journalists** is the world's largest organisation of journalists, representing approximately 600,000 journalists in more than 100 countries. The IFJ supports independent trades unions of journalists and promotes international action to defend press freedom. The IFJ is the organisation that speaks for journalists within the United Nations system and within the international trade union movement.

6. The **Media Law Resource Center** ("MLRC") is a non-profit association founded and based in the United States with membership of some of largest news and information providers in the world and in all forms of media, as well as media and professional trade associations representing newspaper, magazine and book publishers, broadcasters, journalists, authors and photographers. MLRC's law firm wing, the MLRC Defense Counsel Section, has more than two hundred member firms engaged in defending the press and journalists. The MLRC provides resources to help its members to defend press freedom including a daily newsletter, analyses, practice guides and international conferences.