IN THE UNDERCOVER POLICING INQUIRY

SUBMISSIONS OF GUARDIAN NEWS AND MEDIA LIMITED
in response to the direction of 28 February 2018

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1. This Note is provided by Guardian News and Media Limited (**GNM**) on behalf of Rob Evans and Paul Lewis in response to the Chairman's direction of 28 February 2018 (**the Direction**). The Direction invited submissions on this "*question of law*":

> "*whether or not Rob Evans and Paul Lewis are entitled, as a matter of the civil law of confidence or misuse of private information, to publish further extracts from the report, in particular those which name individuals*".

As appears from the Direction: the *"report"* refers to the "*Lambert report*", said to be a *"45 page report written by Bob Lambert (HN10) dated May 1994"* and to have been referred to at pages 82-100 of the book *Undercover,* written by Mr Evans and Mr Lewis and published in 2013.

2. This Note contains:
   (A) A short summary of key principles of the law on breach of confidence and misuse of private information (paragraphs 3-10 below);
   (B) Submissions as to why the issue set out in the Direction should not be considered (or ruled upon) by the Inquiry (paragraphs 11-25 below).

A. The law of confidence and misuse of private information

3. The cause of action for breach of confidence has three required elements, in summary:
   (1) that information with the "necessary quality of confidence";
   (2) is communicated by the confider to a recipient in circumstances importing an obligation or duty of confidence; and

(3) the recipient uses (or threatens to use) that information to the detriment of the confider.[1]

The cause of action fails (and no injunction will be granted to restrain publication) where the information has lost its quality of confidence (for example, by being in the public domain) or where there is a "public interest" in publication that outweighs the duty of confidence[2]. The question whether or not publication is to be prevented (or restricted) depends upon all the facts and circumstances of the case.

4. The tort of misuse of private information had its origins in the law of confidence, but outgrew those confines under the influence of Article 8 of the European Convention on Human Rights (**ECHR**). This tort has two elements[3]:

(1) whether the claimant has a reasonable expectation of privacy in relation to the information in question;

(2) whether, in all the circumstances, the claimant's right to privacy has to give way to some competing consideration (such as the defendant's right to freedom of expression under Article 10)[4].

5. Consideration of whether there is an entitlement to publish private information requires consideration of Article 8 (respect for privacy) and Article 10 (freedom of expression) of the ECHR. Both of those rights are qualified (not

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1 This summary is based on the requirements stated in *Coco v Clark* [1969] RPC 41 at 47 (Megarry J); they have been applied in numerous breach of confidence claims in a range of contexts (including in relation to commercial, governmental and personal information). In addition to this cause of action, a duty of confidence may be imposed by contract: see, eg, *HRH Prince of Wales v Associated Newspapers* [2008] Ch 57 CA at [13], [28-30], [67-69].

2 Formerly referred to as the "*iniquity principle*", it is well-established that the publication of confidential information may be warranted in the public interest without proof of "*iniquity*": see, eg *AG v The Observer Ltd (No 2)* [1990] 1 AC 109 (*"Spycatcher"*) at 282-284 (Lord Goff) ("*..the principle extends to matters of which disclosure is required in the public interest..")*; *Lion Laboratories v Evans* [1985] QB 526 CA at 548, 550; *London Regional Transport v London Underground Ltd* [2003] EMLR 4 CA at [30-40] & [45-51] (Robert Walker LJ) and [55-58] (Sedley LJ); and, for a recent example of consideration of the principles, *Brevan Howard Asset Management v Reuters Ltd* [2017] EWCA Civ 950, [2017] EMLR 28 at [59-74] (Etherton MR, Longmore & Sharp LJJ).

3 The cause of action originated in *Campbell v MGN* [2004] AC 457 HL (see [13], [14], [21]); it was developed cases including *McKennitt v Ash* [2008] QB 73 (see [8] and [11]) and *Murray v Express Newspapers* [2009] Ch 481 CA (see [27]). That the cause of action is a tort was decided by the CA in *Vidal-Hall v Google Inc* [2016] QB 1003 at [51].

4 See, for example, *Weller v Associated Newspapers* [2015] EWCA Civ 1176, [2016] 1 WLR 1541 (Lord Dyson MR, Tomlinson and Bean LJJ) at [15].

absolute) rights. The way in which the courts approach a case in which those two rights are engaged is summarised as follows[5]:

> *"First, neither article has* as such *precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."*

As can be seen, the decision at each of stages 2, 3 & 4 is dependent on the facts and circumstances of the case: for consideration of the importance of each right, for assessment of the justification for interfering with each right, and to determine the outcome of the proportionality (ultimate balancing) test.

6. The European Court of Human Rights (**ECtHR**) has considered the approach to the publication of information in which Article 8 is engaged in many cases. The criteria to be considered in weighing Articles 8 and 10 have been conveniently set out in two ECtHR Grand Chamber decisions, handed down on the same day: *Axel Springer v Germany (**Axel Springer**)* and *Von Hannover v Germany (No 2) (**Von Hannover**)*[6]. The criteria can be summarised as follows:

   (a) the extent to which publication of the information would contribute to a debate of general (public) interest;

   (b) how well known the person concerned is and what is the subject of the report;

   (c) the prior conduct of the person concerned;

   (d) how the information was obtained: eg, the method of obtaining the information and its veracity (*Axel Springer)* or circumstances in which photographs were taken (*Von Hannover*);

   (e) the content, form and consequences of the publication;

   (f) the severity of the sanction imposed.

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[5] Lord Steyn in *Re S* [2005] 1 AC 593 HL at [17], applied in numerous cases. This "fact-specific" approach to the balancing exercise was recently confirmed and applied by the Supreme Court in *Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2017] 3 WLR 351: see [20-23] (Lords Sumption, Neuberger, Clarke, Reed & Baroness Hale); the minority (Lords Kerr & Wilson) agreed on that approach [38] (dissenting on a separate point, irrelevant for present purposes).

[6] *Axel Springer* [2012] EMLR 15 (publication of information) at [89-95] and *Von Hannover* [2012] EMLR 16 (publication of photographs) at [108-113].

7. The rights under Articles 8 and 10 of the Convention "deserve equal respect"[7]. It is important to note that the Article 10(1) right includes the right to "*receive and impart information and ideas".* The ECtHR has repeatedly stressed the high public interest in the media reporting on matters of public interest as a vital part of the Article 10 right to freedom of expression[8], including in reporting in relation to alleged police misconduct.[9] As the Grand Chamber noted[10]:

> *"The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all 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"…"*

8. Where a claimant seeks any relief which might affect the exercise of the Convention right to freedom of expression (such as an injunction to restrain publication of information), section 12 of the Human Rights Act 1998 (**HRA**) applies: see s12(1). Section 12 includes:

   (1) At s12(3): that no relief should be granted to restrain publication before trial unless the court is satisfied that the applicant is "*likely*"[11] to show that publication should not be allowed.

   (2) At s12(4): that the court must have "*particular regard to the importance of the Convention right to freedom of expression*" and, where the proceedings relate to "*journalistic material*", to:

   > *"(a) the extent to which—*
   > *(i) the material has, or is about to, become available to the public; or*
   > *(ii) it is, or would be, in the public interest for the material to be published;*
   > *(b) any relevant privacy code"*.

9. Under common law and in human rights jurisprudence an injunction restraining publication is an exceptional step which requires justification: the

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7 See *Axel Springer* at [87] and *Von Hannover* at [106]; and see paragraph 5 above.

8 See, eg, *Axel Springer* at [78-81] (and [82-84]); *Financial Times v UK* [2010] EMLR 21 at [62] (*"Article 10 protects a journalist's right—and duty—to impart information on matters of public interest provided that he is acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism."*)

9 *Voskuil v the Netherlands* (2010) 50 EHRR 9 at [70]; *Thorgeirson v Iceland* (1992) 14 EHRR 843 at [67].

10 *Axel Springer* at [79] and *Von Hannover* at [102].

11 On the meaning of "likely", see *Cream Holdings v Bannerjee* [2005] 1 AC 253 HL.

court will impose a restriction only if shown to be "necessary" and, if any order is made, its terms must be limited to no more than what is required[12]. The courts will not require a publisher to reveal what they intend to publish, since this would give rise to an appearance of censorship[13]. In relation to interim orders, the Court of Appeal has given guidance as to the practice to be followed (including as to notice and the form of any order)[14].

10. In short, whenever a court considers a claim to restrain publication on the grounds of breach of confidence or misuse of private information, the court must consider the specific facts and circumstances of the case. These include the identity of the claimant; the nature of the information; what is intended to be published; and the public interest in its publication. As Lord Clarke observed in *Re JR 38* [2016] AC 174 at [114]:

> "*The law is to be applied broadly, taking account of all the circumstances of the case. In Lord Steyn's famous phrase, in law context is everything*".

B. The Direction dated 28 February 2018

11. The question whether any person[15] would be "*entitled*" to publish the Lambert Report or any part of it – if any person were to be seeking to do so – cannot be answered in the abstract or at the level of principle or generality. It is a question of law that is highly fact-sensitive and that can be determined only on the basis of detailed consideration of specific facts and context.

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12 See, for example, Arlidge & Eady "Contempt of Court" (5th edition) at 6-8 (p449)ff; and *Mosley v UK (**Mosley**)* [2012] EMLR 1 (ECtHR) (rejecting a pre-notification requirement) at [117]: "*while art.10 does not prohibit the imposition of prior restraints on publication, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court".*

13 See Arlidge & Eady (note above) at 6-45 to 6-46 (p462-463), citing *Leary v BBC* (29 September 1989, CA); *B (A Child) Disclosure* [2004] EWHC 411, [2004] FLR 949 at [88-89] ("*It is wrong in principle to require the media to give prior notice of some proposed publication or broadcast. That is, on the face of it, a wholly unacceptable form of prior restraint. Worse than that, it is, on the face of it, a wholly unacceptable attempt at censorship.")*. See also *McKennitt v Ash* [2006] EMLR 10 (Eady J) at [40] and *Mosley* (note above) (rejecting a pre-notification requirement) at [121-132]. In *Mosley*, the ECtHR reiterated the "need to take particular care when examining restraints which might operate as a form of censorship prior to publication" [129] and stated that the "limited scope under art.10 for restrictions on the freedom of the press to publish material which contributes to debate on matters of general public interest must be borne in mind" [132].

14 Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1003.

15 The issue, as formulated in the Direction, refers specifically to Mr Evans and Mr Lewis: as to this, see paragraphs 16-17 below.

12. As a matter of civil law, if it were to be alleged by any person (or persons) that the Lambert Report, or any part of it, should not be published because it would constitute a breach of confidence and/or a misuse of private information, the court would need to consider all the facts and circumstances of that claim. These would include: who the claimant is; what information is the subject of their claim and what rights they have in relation to that information (whether a reasonable expectation of privacy and/or a right in respect of any confidential information); what the defendant has threatened to do (or has done); and, assuming the claimant has a relevant right (or rights), what competing factors (such as the public interest in publication of the information or the extent to which information has been made available to the public) need to be taken into account. The court would consider the important rights at stake (including the Convention right to freedom of expression) and s12 of the HRA and, before reaching its conclusion on the overall balancing test, would carry out an "intense focus" on the nature and extent of those rights (and any justification for interfering with them) in the context of the facts and circumstances before it.

13. If such a question were to arise in court proceedings, the court would determine the question as between the person(s) seeking to restrain publication and the person(s) seeking to publish. The proceedings would be conducted between the parties, with all the safeguards attendant on adversarial proceedings (through the Civil Procedure Rules) and with a right to appeal. If any order were to be made, persons affected by it would have the opportunity to seek the variation (or discharge) of the order. All this is required because the question to be determined by the court is one of civil liability (rights and obligations under civil law). It would not be appropriate for this Inquiry to seek to determine such a question: not only because of section 2 of the Inquiries Act 2005, but also because it falls outside the Terms of Reference of this Inquiry.

The Inquiry: Terms of Reference

14. The Inquiry was set up following a written statement in the House of Commons by (then) Home Secretary, Theresa May, on 12 March 2015[16], which explained that the role of the inquiry would be:

> *"to consider the deployment of police officers as covert human intelligence sources by the SDS [*Special Demonstration Squad*], the National Public Order Intelligence Unit and by other police forces in England and Wales. The inquiry will review practices in the use of undercover policing, establishing justice for the families and victims and making recommendations for future operations and police practice."*

15. The Inquiry was established under the Inquiries Act 2005. Its Terms of Reference were published on 16 July 2015[17] and were further explained by the (then) Chairman in his opening remarks of 28 July 2015[18]. As was made plain at the outset (and repeated since), the public concern that led to the Inquiry – and which underpins its focus – is about police conduct in the past and the need to ensure that, in future, undercover police operations are properly justified, managed and supervised[19] and lessons to be learned. The Inquiry is *not* charged with looking at what has been published in the past (or might be published in future) by any journalist, media organisation, or otherwise; moreover, it cannot determine any question as to any (potential) civil liability in relation to publication (past or future).

The Inquiry: section 2 of the Inquiries Act 2005

16. The Inquiry is bound by section 2 of the Inquiries Act 2005, which provides that:

> *"An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability."*[20]

Thus the Inquiry cannot determine any question of civil liability as to whether any person would be "*entitled*" to publish any part of the Lambert report. The *"question of law"* formulated in the Direction (quoted in paragraph 1 above)

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16 http://www.parliament.uk/documents/commons-vote-office/March%202015/12%20March%202015/31.HOME-Undercover-policing.pdf

17 https://www.ucpi.org.uk/wp-content/uploads/2016/06/Terms-of-Reference.pdf

18 https://www.ucpi.org.uk/wp-content/uploads/2015/07/Opening-Remarks.pdf

19 See, eg, the "*principles*" ruling of 3 May 2016 at [6]: https://www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf

20 For ease of reference and context, s2(2) provides that an inquiry panel is "*not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes."*

cannot be answered *without* determining civil liability: for the question of whether or not any person would be "***entitled"*** to publish ***"as a matter of the civil law of confidence or misuse of private information"*** would depend on whether the necessity for the imposition of a restraint on publication could be shown by reference to civil liability under either or both of those cases of action. The effect of s2 is that the Inquiry cannot rule on, or determine, the question posed.

17. The Direction frames the "*question of law*" by reference to two named individuals (Mr Evans and Mr Lewis), which focuses on *their* potential civil liability: as above, the question of whether or not they would be "***entitled"*** to publish, if they were to wish to do so, would depend on whether, by reference to *"the civil law of confidence or misuse of private information"*, the necessity could be shown for an order restricting publication[21]. But by reason of s2(1), the Inquiry is not entitled to determine any question as to their potential civil liability (or, as noted above, that of anyone else) – whether in their favour or against them[22].

18. The purpose of the statutory limitation in s2(1) is stated in the Explanatory Notes to the Inquiries Act 2005 at [8-9]:

"*Section 2: No determination of liability*

[8] The purpose of this section is to make clear that inquiries under this Act have no power to determine civil or criminal liability and must not purport to do so. There is often a strong feeling, particularly following high profile, controversial events, that an inquiry should determine who is to blame for what has occurred. However, inquiries are not courts and their findings cannot and do not have legal effect. The aim of inquiries is to help to restore public confidence in systems or services by investigating facts and making recommendations to prevent recurrence, not to establish liability or to punish anyone.

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[21] The book *Undercover* was published in 2013; it has not given rise to any claim under the law of confidence or misuse of private information against Mr Evans or Mr Lewis. In relation to the book and their other work as journalists in relation to reporting on matters concerning undercover policing, they seek to fulfil their duty to impart information on matters of public interest and are engaged in the exercise of the Article 10(1) right (see paragraph 7 above). It is not appropriate for them to say what journalistic material they had or have. In their work, proper regard is had to potential legal issues and the rights of others (privilege is not waived in relation to any legal advice).

[22] GNM notes that the Direction referred to possible *criminal* liability in relation to the publication of pages 82-100 of the book *Undercover*. This was raised by the Inquiry on its own account and considered without notice to Mr Lewis or Mr Evans (or GNM). Although this gave rise to concern, it is not necessary to address that aspect further in this Note, given the view stated (that no offence was committed) and the issue as formulated in the Direction.

> *[9] However, as subsection (2) is designed to make clear, it is not intended that the inquiry should be hampered in its investigations by a fear that responsibility may be inferred from a determination of a fact."*

It may be noted that, before the Inquiries Act 2005 was enacted, Sir Roy Beldam had conducted a "*Review of Inquiries and Overlapping Proceedings"* in 2002 which considered (but rejected) options for integrating criminal or civil proceedings into an inquiry; Sir Roy rejected an integrated approach, which would be impractical, could be unfair for the individuals involved, and would need to satisfy the requirements of article 6 of Schedule 1 of the Human Rights Act 1998. In its response at [4.8], the Government stated that it:

> "*agrees with Sir Roy's conclusions on this question, and does not believe that any attempt should be made to integrate inquiries with other proceedings"*[23].

19. The question of (potential) civil liability on the part of any person in relation to past or future publication of the Lambert report (or any part of it) is separate and distinct from the Inquiry's power to make orders under s19 of the Inquiries Act 2005. The Inquiry has power to impose restrictions on "*attendance at an inquiry"* (or part of an inquiry) and/or the *"disclosure or publication"* of any evidence or documents given, produced or provided to an inquiry: see s19(1). It is not necessary to set out the section which sets out the basis upon which such orders may be made: see s19(2)-(5). The principles relevant to such applications were stated by the (previous) Chairman in a "*principles*" ruling of 3 May 2016[24].

20. In the course of its work to date, the Inquiry has given rulings on a number of applications for anonymity by non-police core participants, risk assessors, and officers of the Special Demonstration Squad. Other applications are pending and are due to be considered at the hearing on 21 March 2018.

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[23] http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/consult/inquiries/inquiries.pdf and https://publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/606/4052502.htm

[24] Note 19 above. Part 6 of the ruling sets out "Conclusions and Summary of Findings" (pages 78-84); as noted at A.12 (in relation to the public interest balance under s19(3)(b)): *"It is not possible to state at the level of principle or generality where the public interest balance will rest. The Chairman will approach evaluation on a case-by-case basis according to the nature of the evidence received in support of the application";* and see Section C, concerning "*personal applications*" which are to be determined by reference to specific facts relevant to each application (C.2-4).

GNM notes that the Inquiry has recently considered the procedure by which anonymity orders are considered and (if appropriate) made[25].

21. GNM has made submissions on legal principles to the Inquiry in relation to anonymity applications, both through its involvement in group submissions by media organisations[26] and through individual submissions.[27] It would intend to continue to make or participate in such submissions, as appropriate.

22. The remit of the Inquiry is set by its Terms of Reference and undoubtedly includes the power to make orders under s19 of the Inquiries Act 2005. But the question of law formulated in the Direction – directed, as it is, to what two named individuals might (or might not) be entitled to do under the law of confidence or privacy in relation to unspecified future publication – cannot be answered in the abstract (for the reasons given above) and, even if it could, cannot be determined in the Inquiry (because of s2 of the Inquiries Act 2005).

23. GNM submits that the issue framed in the Direction is *not* one upon which the Inquiry should invite submissions or upon which it should rule. In relation to civil liability for breach of confidence and/or misuse of private information, there is a vital distinction between (1) a question as to general principles and (2) a question as to the (potential) legal liability of an individual.

    (1) The principles of the law of confidence and misuse of private information are well-established and (if and insofar as they are to be considered by the Inquiry) they can be considered as matters of general principle. GNM's submissions as to those issues of principle are set out above.

    (2) The potential civil liability (or entitlement) of Mr Evans and/or Mr Lewis in relation to publication are outwith the Terms of Reference for the Inquiry and, furthermore, a ruling upon such liability (or entitlement) is outwith the Inquiry's power by virtue of s2 of the Inquiries Act 2005.

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[25] https://www.ucpi.org.uk/restriction-orders-applications/anonymity-generic/

[26] See, for example, the media's submissions of 14 March 2016 (https://www.ucpi.org.uk/wp-content/uploads/2016/03/Media-Submissions-Restriction-Orders-140316-FINAL.pdf) and of 30 August 2016 (summarised in the Chairman's ruling of 13 September 2016 AT [4-8]: https://www.ucpi.org.uk/wp-content/uploads/2016/11/160913-ruling-NPNSCP-anonymity.pdf).

[27] Submissions of 4 October 2017, 20 November 2017, and 18 January 2018 (two sets).

Conclusion

24. GNM submits that the Inquiry cannot rule on questions of civil liability. Since the answer to the question posed in the Direction in substance (if not in form) would constitute such a ruling (particularly since the issue refers specifically to Mr Evans and Mr Lewis), GNM asks the Inquiry to decide not to consider that issue further. It was (rightly) not included in the list of issues circulated for Module 1 on 1 February 2018 (which focus on matters relevant to police conduct). That issue should not be added, or separately considered, now.

25. As with previous submissions, GNM is content to rely on what is set out in writing. As matters stand, it does not intend to make oral submissions at or to attend the hearing on 21 March 2018.

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8 March 2018