

Claimant
IM Cobain
First
IMC-1
9 April 2019

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

Claim No: CO/1052/2017

B E T W E E N:

THE QUEEN
on the application of
THE NATIONAL COUNCIL FOR CIVIL LIBERTIES

Claimant

- and -

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendants

FIRST WITNESS STATEMENT OF IAN MARK COBAIN

I, IAN MARK COBAIN, of [REDACTED] will say as follows:

1. I make this statement in connection with the Claimant's ("Liberty") challenge to the Investigatory Powers Act 2016 ("IPA"). I understand that this claim addresses the lack of protections required in relation to the powers in the IPA for journalists, in particular surrounding the confidentiality of journalistic sources and materials, so that the press can play its vital role of informing the public and holding those in power to account in a free and democratic society. I have seen the evidence that the Defendants have submitted and the documents they have produced that bear on these matters. My statement responds to that evidence and those documents.
2. The facts and matters in this witness statement are within my own knowledge (unless I indicate otherwise) and are true. Where they are not within my knowledge, I indicate

the source of my belief and understanding and believe those facts and matters to be true.

3. I am authorised by Liberty to make this statement. In making this statement, I do not intend, and am not authorised by Liberty, to waive any privilege.
4. There is now produced and shown to me, and I exhibit, a consecutively paginated bundle of documents marked "IMC-1", divided into various tabs, containing the documents to which I refer. I refer to these documents in the format [IMC-1/x] where "x" is the page number.

MY WORK AS A JOURNALIST

5. I am a journalist and have worked in this role for around 37 years, since 1982.
6. I currently work as an investigative journalist for "Middle East Eye", an online publication at <www.middleeasteye.net>, which has been my main occupation since September 2018. Before that, I worked from June 2005 at *The Guardian*, a leading UK newspaper. Before working at *The Guardian*, I was the Chief Reporter and Home Editor of *The Times*, another leading UK newspaper. In this latter role I was effectively the senior UK news editor.
7. I am a member of Liberty, but am not an active member. I do not necessarily support the stance that Liberty takes in relation to every matter with which it engages. I am also a member of the National Union of Journalists.
8. Over the years my journalistic work has been recognised with a number of awards. I have received the Martha Gellhorn Prize for Journalism in 2009, the Paul Foot Award in 2009, and two Amnesty International Media Awards in 1993 and 2009. I have also received the Human Rights Campaign of the Year Award from Liberty for my investigation into Britain's complicity in renditions and the use of torture after the September 11 attacks in 2001 and the TotalPolitics Debut Political Book of the Year Award for my book *Cruel Britannia* published by Portobello in 2012.
9. I have reported on six wars, including the 1991 Gulf War, the war in Afghanistan and the second Iraq war from 2003.

THE IMPORTANCE OF A FREE PRESS IN A DEMOCRATIC SOCIETY

10. I believe that there is a significant public interest in having a free press in a democratic society. The essential function of the free press is to provide to the community — including the electorate — information that they would not otherwise have.
11. The public would not know about a great many matters if journalists did not report them. The work of journalists like me includes holding governments to account, through a combination of informing the public (often of matters that politicians and government officials would rather the public did not know) and challenging incorrect government statements and narratives. This work has become even more important in recent years as various politicians and leaders across the world attempt to discredit the facts reported by journalists.
12. A free press is also important to the proper functioning of a democracy. The better informed people are, the better the opportunity they have to participate in public debate, engage with important issues facing society, and make informed decisions as to who they elect to public office.
13. I believe that one example of the important role of a free press is the impact that my work, and that of other investigative journalists, has had in informing the public of the United Kingdom's complicity in extraordinary rendition and abuse of detainees since the World Trade Centre attacks of September 11 in 2001. Many in our society would regard this rendition and abuse as (to put it mildly) malpractice and shocking to the public conscience.
14. I have, over the last 14 years, spent much of my time investigating and writing about aspects of the UK's involvement in extraordinary rendition and detainee abuse.
15. Examples of some of the articles I have written on these subjects are as follows:
 - (1) On 2 August 2005 I wrote my first article concerning the torture of Binyam Mohamed (co-authored with Stephen Grey) [IMC-1/1-2].¹
 - (2) In 2009 I wrote a number of articles on what, at the time, appeared to be a policy which facilitated the United Kingdom's involvement in the rendition and connivance at the torture of terrorism suspects and the awareness of this policy

¹ Available at <<https://www.theguardian.com/uk/2005/aug/02/terrorism.humanrights>>.

by the then Prime Minister: these were published on 16 March 2009 [IMC-1/3-6],² 19 March 2009 [IMC-1/7-8],³ and 18 June 2009 [IMC-1/9-12].⁴

(3) Following the fall of the Gadhafi regime in Libya, I began reporting upon evidence which showed the United Kingdom's role in the detention and rendition to Libya of Abdel Hakim Belhaj and his wife Fatima Boudchar and Sami al-Saadi and his wife Karima al-Saadi, where Mr Belhaj and Mr al-Saadi were both tortured. I published numerous articles on these topics, including those published on 24 October 2011 [IMC-1/13-15]⁵ and 8 April 2012 [IMC-1/16-23].⁶

16. In these cases, the Intelligence and Security Committee of Parliament, public inquiries and litigation have subsequently confirmed that these events in fact occurred, even though they were sometimes initially denied or subject to "neither confirm nor deny" by the security services and other parts of the UK Government.⁷ For example:

(1) The UK courts have now ruled that the UK security services became involved in or participated in Binyam Mohamed's mistreatment in detention through facilitating it.⁸

(2) The coalition government eventually agreed to publish the "Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of

² Available at <<https://www.theguardian.com/world/2009/mar/16/azhar-khan-torture-egypt>>.

³ Available at <<https://www.theguardian.com/politics/2009/mar/19/mi5-torture-allegations-gordon-brown>>.

⁴ Available at <<https://www.theguardian.com/politics/2009/jun/18/tony-blair-secret-torture-policy>>.

⁵ Available at <<https://www.theguardian.com/world/2011/oct/24/britain-family-gaddafi-legal>>.

⁶ Available at <<https://www.theguardian.com/world/2012/apr/08/special-report-britain-rendition-libya>>.

⁷ For example, then Secretary of the Foreign and Commonwealth Office Jack Straw said to the House of Commons Foreign Affairs Committee on 13 December 2005:

"Unless we all start to believe in conspiracy theories and that the officials are lying, that I am lying, that behind this there is some kind of secret state which is in league with some dark forces in the United States, and also let me say, we believe that Secretary Rice is lying, there simply is no truth in the claims that the United Kingdom has been involved in rendition full stop, because we have not been, and so what on earth a judicial inquiry would start to do I have no idea. I do not think it would be justified."

House of Commons, Foreign Affairs Committee, *Minutes of Evidence*, 13 December 2005 (Question 23) available at <<https://publications.parliament.uk/pa/cm200506/cmselect/cmfaff/768/5121304.htm>>.

⁸ See, for example, the Divisional Court's judgment in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2008] EWHC 2048 (Admin) at paragraph 87.

Intelligence Relating to Detainees" (the "**Consolidated Guidance**").⁹ The then Prime Minister David Cameron MP also launched the Gibson Inquiry to "look at whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11".¹⁰ Following publication of the Consolidated Guidance, the Divisional Court in the case of *R (Equality and Human Rights Commission and Al Bazzouni) v Prime Minister* ruled that it should be amended to ensure it could no longer be relied upon as justification for the facilitation of "hooding".¹¹

- (3) The Guidance and the conduct of the security services more generally in relation to detainee abuse and rendition has recently been criticised in the Intelligence and Security Committee reports of June 2018.¹² One of those reports found: evidence that UK personnel were directly involved in detainee mistreatment administered by others on two occasions; that it appeared that UK personnel had witnessed detainee mistreatment on 13 occasions and that there were 25 recorded incidents where UK personnel were told that detainees had been mistreated; that SIS or MI5 the UK had made or offered to make a contribution to renditions in three cases; and that SIS or MI5 suggested, planned or agreed to renditions by others in 28 cases (and in further cases provided intelligence to enable rendition or failed to take action to prevent rendition, including of British nationals or residents).¹³
- (4) In May 2018, the Prime Minister acknowledged publicly and apologised for the UK Government's role in the rendition of Abdel Hakim Belhaj and his wife Fatima Boudchar. The letter the Prime Minister sent to Mr Belhaj and Ms Boudchar

⁹ The July 2010 version of the Guidance is available at <<https://www.gov.uk/government/publications/uk-involvement-with-detainees-in-overseas-counter-terrorism-operations>>.

¹⁰ House of Commons, *Hansard*, 6 July 2010, volume 513, column 176 available at <<https://hansard.parliament.uk/commons/2010-07-06/debates/10070631000002/TreatmentOfDetainees>>.

¹¹ *Equality and Human Rights Commission and Al Bazzouni v Prime Minister* [2011] EWHC 2401 (Admin) at paragraphs 94–95.

¹² Intelligence and Security Committee, *Detainee Mistreatment and Rendition: 2001–2010* (20 June 2018, HC 1113); Intelligence and Security Committee, *Detainee Mistreatment and Rendition: Current Issues* (28 June 2018, HC 1114).

¹³ Intelligence and Security Committee, *Detainee Mistreatment and Rendition: 2001–2010* (20 June 2018, HC 1113) 2–3.

(read out by the Attorney General in the House of Commons) included the following:¹⁴

“The UK Government’s actions contributed to your detention, rendition and suffering. The UK Government shared information about you with its international partners. We should have done more to reduce the risk that you would be mistreated. We accept this was a failing on our part.

Later, during your detention in Libya, we sought information about and from you. We wrongly missed opportunities to alleviate your plight: this should not have happened.

On behalf of Her Majesty’s Government, I apologise unreservedly. We are profoundly sorry for the ordeal that you both suffered and our role in it.”

17. It would not have been possible for me to publish on these and other public interest topics, and it is not possible for journalists to carry out their function more generally, unless sources are willing to give us information.
18. Journalists must, to carry out their function, be able to maintain confidentiality over sources and the information they provide. Even where some information is published, it is often necessary to keep other information from a source confidential because its disclosure in full would enable that source to be identified.
19. Maintaining the confidentiality of sources and the information they provide is essential to ensuring that they give information to journalists, from whom information flows to the public. Sources often provide information knowing that others would not be pleased by this. They often face, and know they will face, retribution for disclosing information. This might be anything from a change to their relationship with their employer to losing their livelihood, pension, or their liberty or life, depending upon the nature of the activities or misconduct they are seeking to expose or other information they provide, who it relates to, and the power that party has. Despite these risks, sources nevertheless disclose information. Often, they need journalists to offer them as much protection as is possible.

¹⁴ House of Commons, *Hansard*, 10 May 2018, volume 640, column 927 available at <<https://hansard.parliament.uk/commons/2018-05-10/debates/B9AD50CD-9D54-41DA-A18B-1526E7658593/BelhajAndBoudcharLitigationUpdate>>.

20. To take one example, I believe that exposing state malpractice, such as the complicity and active involvement in extraordinary rendition and connivance at torture I mention above, to be of the utmost public interest. Exposure of state malpractice, however, is also the area where whistle-blowers can face severe consequences and therefore where protecting their identity and (at least parts of) the information they provide is paramount.

THE CHILLING EFFECT OF THE POWERS IN THE IPA

21. I am aware that journalistic material and the identities of journalists' sources may be obtained by the state through covert digital surveillance by the interception of communications, receipt and analysis of communications data, "interference" with equipment (hacking) and by interrogating bulk personal datasets, pursuant to powers under the IPA.

22. I am concerned at the impact of the powers given to the Government under the IPA on the ability of journalists to fulfil their functions of informing the public and exposing the truth, including state misconduct.

23. I have read that Mr James Dix in paragraph 95 of his first witness statement ("**Dix 1**") says that the IPA provides "strong protections in relation to the use of investigatory powers for the purpose of identifying or confirming a journalistic source, and for the obtaining of confidential journalistic information". For the reasons below, I disagree with Mr Dix's opinion that these protections are "strong". In a number of places, I consider that the protections are too narrow and fail to accord with the reality of the practice of journalism.

24. More generally, however, when he discusses journalistic protections (in particular in paragraphs 95-105 of Dix 1), it is striking that Mr Dix fails to address the chilling effect of the IPA powers.

25. By "chilling effect", I mean the effects that:

- (1) sources will be discouraged from providing information to journalists due to fear that the state will find out their identity or the information they have provided; and
- (2) journalists will be discouraged from pursuing sources or otherwise obtaining information because they are aware that the state may find out the source and the information provided.

26. Fear of surveillance has this chilling effect on both journalists and sources, as is apparent. This is caused by the existence of the powers the IPA confers, not by their exercise in individual cases (which is generally unknown outside Government).
27. The existence of powers such as those under the IPA means that sources are discouraged (chilled) from providing information to journalists for fear of their identity being revealed or becoming known to the state. Powers such as those under the IPA mean that this can now happen without the source's or the journalist's knowledge of this. In my experience, potential sources are more aware of the potential for surveillance because of Edward Snowden's disclosures, the IPA and disclosures made around the time of the IPA being considered by Parliament about the extent of the secret surveillance it authorises. In recent years a number of sources have refused to communicate with me over email or text, requiring that we speak face to face. This happened to me less frequently before Mr Snowden's disclosures and the coming into force of the IPA.
28. I am not a lawyer but, as a journalist, I understand that there are a number of statutory safeguards that prevent or limit the extent to which journalists can be compelled to produce journalistic material. For example, section 10 of the Contempt of Court Act 1981 is headed "Sources of information" and says:
- "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."
- I understand that this provision would prevent a journalist being required (for example, by a summons) from disclosing the source of information in a piece they publish, unless the Court had decided in advance of the disclosure being given that the disclosure was necessary in the public interests specified. The effect of powers such as those conferred by the IPA is to render provisions such as section 10 largely redundant. Information that, itself or with other information, reveals a source or the information they have given can be collected, stored and accessed without any public interest test being applied in advance. Further, it may well be that a source's identity becomes known to the state before any safeguard is applied.
29. Once the source's identity is known to the state, the damage is done.

30. The existence of these powers therefore means that some people who would otherwise be sources do not provide information at all. It also means that some of those who do become sources live in perpetual fear that their identity will be ascertained.
31. It is impossible to identify the extent to which a particular potential source is discouraged from contacting a journalist because of the chilling effect I have described above. However, I have seen this chilling effect first hand. Two recent examples of this are as follows:
- (1) I was relatively recently put in touch with a potential source in relation to a national security issue. The person putting us in touch did so by providing me with the source's contact details in writing. The third party was not willing to email or text me the source's details. The source initially seemed willing to speak to me and we exchanged text messages. I asked in one message whether the source used Signal, so that we could move our conversation over to that communication method. The source terminated the correspondence saying they no longer wished to discuss the matter and I have not heard back since.
 - (2) I was contacted by telephone in 2012 by a source, who began to speak about racial and Islamophobic discrimination occurring in the exercise of powers under Schedule 7 of the Terrorism Act 2000. This concerned him because the practices may have resulted in real threats being missed. Once I realised what the source was beginning to describe, I informed them that we needed to speak in a more secure manner. The source immediately terminated the call and did not contact me again.
32. I am aware of and abide by the National Union of Journalists Code of Conduct, which states that a journalist must protect the identity of sources who supply information in confidence and (all) material gathered in the course of her or his work [IMC-1/24].¹⁵ Similarly, the Independent Press Standards Organisation (IPSO) Code of Practice states that journalists have "a moral obligation to protect confidential sources of information" [IMC-1/25-31].¹⁶ However, given powers such as those under the IPA, whilst I can assure a source I will not intentionally release their identity, it is impossible

¹⁵ This is available at <<https://www.nuj.org.uk/about/nuj-code/>>.

¹⁶ This is available at <<https://www.ipso.co.uk/editors-code-of-practice/#ConfidentialSources>>.

for any source using digital communications or electronic devices to know that their identity will remain confidential.

33. I am aware of at least two cases where it has been reported that the police used surveillance powers to identify a journalist's source. One was the Metropolitan Police Operation Alice investigation into the "plebgate" affair involving Mr Andrew Mitchell MP, where the Investigatory Powers Tribunal ("IPT") has confirmed that this occurred (and found that proper safeguards were not in place).¹⁷ The other was Kent Police's Operation Solar, relating to the trial of former Minister Chris Huhne and his wife for perverting the course of justice.¹⁸ Given these activities I have no doubt that officers of the state have, and will continue to, seek to identify journalists' confidential sources and the evidence I have seen in the context of this current litigation confirms that.
34. In consequence of the wide secret surveillance powers under the IPA (and other powers and practices that have become public, in particular with the disclosures made by Edward Snowden), and given that I am often inquiring into sensitive areas of action by the United Kingdom and other states, I work on the basis it is possible that my communications, communications data and equipment may be subject to interception, retention or hacking and any such information subject to further analysis. I have attempted to adjust my behaviour accordingly.
35. Mobile phones and laptops are key tools for any journalist. However, I now generally avoid email, telephone calls and SMS or other messaging services where I seek to protect a source's confidentiality. I have, on occasion, used an "air-gapped" laptop (that is, a laptop that is not and has never been connected to the internet or any network), to minimise the possibility of interception and hacking. I use encrypted messaging services (such as Signal), but I have no great confidence in them, in particular because the intelligence and security services' powers to hack devices could be used to get around encryption. Indeed, Dix 1 in paragraph 182 seems to be saying that the Government does exactly this, when he says that "[e]quipment interference ... provides a wider range of tools to access the communications of criminals that might otherwise be out of reach of traditional interception". I now spend much more time communicating face to face or in other ways that can help to avoid digital surveillance.

¹⁷ See the IPT's decision *News Group Newspapers Ltd v Commissioner of Police of the Metropolis* [2015] UKIPTrib 14_176-H at paragraphs 1 and 129.

¹⁸ See Home Affairs Select Committee, *Eighth Report — Regulation of Investigatory Powers Act 2000* (3 December 2014, HC 711) at page 3 and paragraph 5–6.

Working without using a mobile telephone or email means I take much longer to prepare a piece and have to travel more (which has its own costs).

36. Many of the sources I have spoken to in recent years are also aware of modern surveillance capabilities. They have also on occasion changed their behaviour in consequence of this. For example, I have on a number of occasions left my mobile phone at home or in a different place from where I have met with a source and the source has done the same thing, at a source's or my own instigation. In my experience this is a recent phenomenon. I do this because I am concerned about the possibility of my location being tracked or my phone being hacked into and used to eavesdrop on a conversation. I expect that sources leave their phones for the same reason.

DEFINITIONS IN THE ALLEGED SAFEGUARDS FOR JOURNALISTIC SOURCES AND INFORMATION

37. I have been provided with the First Witness Statement of Joanna Cavan of Government Communications Headquarters ("GCHQ") dated 5 February 2019 and its exhibit, the GCHQ "Compliance Guide (2018)". I have also been provided with copies of provisions relevant to journalists in the IPA and in its accompanying codes of practice.
38. As I explain below, I consider that there are two main problems with these provisions and documents:
- (1) Certain terms are defined or explained in the GCHQ Compliance Guide (and in the IPA and the associated codes of practice) in a manner that is too narrow or which suggests that the protections for journalists' sources and the information sources provide are applied only sparingly.
 - (2) These definitions, explanations and documents do not reflect the reality of modern journalism or show a proper understanding of the life of a working journalist.
39. While a judge, or a nurse, or a shopkeeper may have periods during their day when they are working and periods when they are not, that is not the case for an investigative reporter. I am working all the time that I am awake. Any information given to me may be used by me for journalistic purposes. Any person who speaks to me, and even those who do not speak to me, may be a confidential source. I may only realise well after I receive information that it is relevant to something I am working on.

And a refusal to answer a question may say as much as an answer, depending on the circumstances. The documents to which I refer below do not reflect these basic realities of journalism.

Definition of "source of journalistic information" too narrow

40. The definition of "source of journalistic information" contained in section 263 of the IPA and the accompanying comments in the GCHQ Compliance Guide fail to reflect the reality of journalism. They are too narrow.

41. The definition in section 263 is as follows:

"source of journalistic information' means an individual who provides material intending the recipient to use it for the purposes of journalism or knowing that it is likely to be so used" [my emphasis].

Provisions in the IPA use this definition to determine if particular protections apply.¹⁹

42. The GCHQ Compliance Guide (on page 142) supplements this as follows:

"Any individual acting as an intermediary between a journalist and a source should be treated as if he or she is a source."

43. The definition in section 263 of the IPA is too narrow and the GCHQ Compliance Guide does not remedy this, for the following reasons:

(1) First, in my professional experience, it is often the case that sources provide information confidentially but without intending or knowing that it is likely that it is to be used for journalism. Every time someone tells me something that is interesting, it is possible that it may inform my journalism. Examples of this that I have encountered or been made aware of, and which would therefore not appear to be included in the definition, are as follows:

(a) Where there is inadvertent disclosure, for example, where a sensitive document is sent by mistake to a journalist. I can recall immediately two

¹⁹ For example, under section 114 of the Act, where a purpose of a targeted equipment interference warrant is to "is to identify or confirm a source of journalistic information", then the application must contain a statement to that effect and the warrant may be issued only if the person considers that handling "arrangements" under the Act include "specific arrangements" for handling, retention, use and destruction of communications or information that identify sources of journalistic information.

occasions where this has happened to me. Two different government departments (at different times) sent me documents in error, which I later relied upon. (These events were unconnected.)

- (b) Communications disclosing information that the source does not themselves realise to be valuable for journalistic purposes. For example, a government Minister or official may tell me about something that they do not consider to be interesting to me as a journalist, (say) a comment (which is benign from the Minister's perspective) about a meeting between two other Ministers, but because of my own knowledge of other facts, I am aware it is a significant fact relevant to a story I am investigating. That Minister or official would not intend for me to use that information for the purpose of journalism and would not know it was likely that I would use the information for that purpose. Similarly, the relevance to my work of information a source tells me may become apparent only after some time has elapsed.
- (c) As mentioned, the questions that people and organisations decline to answer can themselves be interesting or even telling. The refusal to answer can underpin reporting. In these cases, a confidential source can be, and has been, someone who does not provide information to me in response to a request.

- (2) Secondly, I doubt that it would be possible for someone reading my electronic communications to ascertain whether a source positively intended or knew that it was likely (rather than, say, possible or unlikely) that information they provide to me would be used for journalism. As I explain below, the reality is that relationships with sources often develop slowly and without me regarding an individual as a source until (for example) a particular disclosure is made.

- 44. A definition of "journalistic source" that would accord with the reality of journalism would include anyone who provides, or fails to provide on request any piece of information to a journalist, including suggesting other possible sources of information and providing context, analysis, corroboration or contradiction (intentionally or unintentionally) through their words or actions.

Journalistic material and confidential journalistic material

- 45. The GCHQ Compliance Guide (at pages 140–141) states:

“Journalistic material is material acquired or created for the purposes of journalism. Confidential Journalistic Material (CJM) is:

- i. in the case of a communication, journalistic material which the sender of the communication holds in confidence, or intends the recipient to hold in confidence; and
- ii. in any other case, journalistic material which a person holds in confidence.”

46. I am also aware of the definitions contained in section 264 of the IPA:

“Journalistic material

(2) ‘Journalistic material’ means material created or acquired for the purposes of journalism.

(3) For the purposes of this section, where—

- (a) a person (“R”) receives material from another person (“S”), and
- (b) S intends R to use the material for the purposes of journalism, R is to be taken to have acquired it for those purposes.

Accordingly, a communication sent by S to R containing such material is to be regarded as a communication containing journalistic material.

(4) For the purposes of determining whether a communication contains material acquired for the purposes of journalism, it does not matter whether the material has been acquired for those purposes by the sender or recipient of the communication or by some other person.

...

Confidential journalistic material

(6) “Confidential journalistic material” means—

(a) in the case of material contained in a communication, journalistic material which the sender of the communication—

- (i) holds in confidence, or
- (ii) intends the recipient, or intended recipient, of the communication to hold in confidence;

(b) in any other case, journalistic material which a person holds in confidence.

(7) A person holds material in confidence for the purposes of this section if—

- (a) the person holds it subject to an express or implied undertaking to hold it in confidence, or
- (b) the person holds it subject to a restriction on disclosure or an obligation of secrecy contained in an enactment.”

47. I consider these definitions to be too narrow and again not to reflect the reality of journalism in several respects:

- (1) I often acquire material initially not held for the purposes of journalism but which, in light of further information I receive, becomes part of the source material for a story. It is unclear to me whether and (if at all) at what stage in its life this material becomes "journalistic material" and "confidential journalistic material". I may not initially have acquired it for the purposes of journalism and the source may not have intended me to use it for the purposes of journalism (when it was first provided), so it appears not to be "created" or "acquired" for the purposes of journalism and thus would not be "journalistic material" on these definitions. There may well not be any expectation of confidence at that stage, as I explain below, so it may not be "confidential journalistic material" on these definitions.
- (2) In relation to "confidential journalistic material", I am unsure how it would be possible, simply from reading communications, to decide whether the sender of a communication (or someone who has information) themselves holds it in confidence or intended it to be held in confidence under section 264(6), in light of the definition in section 264(7). Knowledge of an express or implied undertaking to hold in confidence or a statutory restriction on disclosure or obligation of secrecy (obviously) requires significant knowledge about a person and their circumstances, the nature of the relationship between the journalist and their source, and the circumstances in which a particular piece of information is passed. The effect of this restrictive definition seems to me to be that much material will be treated as not being "confidential journalistic material" simply because such knowledge is absent (not because the material does not fall within these definitions).
- (3) More generally, the requirement for an "express or implied undertaking to hold [material] in confidence" (or an intention that such an undertaking will apply) for it to be "confidential journalistic material" is overly narrow and fails to reflect the reality of journalism:
 - (a) First, even when a source expects confidential treatment, it is not necessarily the case that I would consider that an "undertaking" (even an implied undertaking) to keep material confidential. This suggests to me something in the nature of a legal obligation. The reality is much less clear cut. For example, I have experience of an acquaintance becoming a

source as our relationship has developed. It would be difficult to say at what point the individual became a confidential source, that is, expected me to keep their information and identity confidential. These matters often become clear over time after a number of conversations, as a result of which the need for sensitivity emerges. The relationship between a journalist and source can be as delicate – and as difficult for a third party to comprehend – as any other relationship.

- (b) Secondly, it is rare for any source, other than lawyers, to mark their emails to me “private and confidential” or with other words to that effect. I will therefore often not know whether something should be kept confidential until I have read the email and the same would apply to any third party reading such an email.
- (c) Information is often given to me where the recipient intends it to be published (ie used for journalism), at least in part. For example, I have been given documents by sources intending that I publish their contents. It is unclear whether in those circumstances communications from sources to me would fall outside the definition in section 264(6)(a)(ii) altogether. Alternatively, the definition may require dissection of which “material” in a “communication” is intended by the source to be published and which is intended to be kept confidential. I have on occasion declined to publish information I have been given as I am concerned that publication could put individuals at risk. I would hold those documents in confidence until such a time as any such risk has passed. However, even if I do that, it seems that on this definition the documents sent to me with the intention that their contents are published would not be “confidential journalistic material”.²⁰ I would expect that this kind of analysis would be almost impossible to carry out with any accuracy simply by reading the communications.
- (d) There are occasions on which I have been provided with information by a source who has expressly said that there is no need for any confidentiality (as to their identity or otherwise) but who, later, asks me to keep their identity or part of the information confidential. There have also been occasions where I have kept a source’s identity confidential despite their express wish to be identified, because I have not been sure that they have

²⁰ Unless the sender holds them in confidence.

fully grasped the possible consequences of being identified. I have, for example, done this in a situation where sources were people who have suffered trauma or who have other mental health issues. I have also seen situations where sources realise the full implications of their actions (for them, their families, and their livelihoods or liberty, for example) only after they have provided me with information. When this realisation hits, or when I explain why confidentiality may be important, they may request confidentiality. Anyone looking at the original communication would conclude that there was no express or implied undertaking of confidentiality or intention that confidentiality be maintained.

Exclusion for material created for a criminal purpose is too wide

48. The GCHQ Compliance Guide (at page 141) states:

“Where material is created or acquired with the intention of furthering a criminal purpose, the IP Act states that the material is not to be regarded as having been created or acquired for the purpose of journalism. As one example of this, if material is created for the promotion or glorification of terrorism according to the UK legal standard, the material cannot be regarded as journalistic material for the purposes of the IP Act.” [my emphasis]

49. Similarly, the Equipment Interference Code of Practice states in paragraph 9.79:

“Where material is created or acquired with the intention of further a criminal purpose, section 264(5) states that the material is not to be regarded as having been created or acquired for the purpose of journalism. For example if a terrorist organisation creates videos for the promotion or glorification of terrorism (according to the UK law), the material cannot be regarded as journalistic material for the purposes of the Act and will not attract the safeguards set out in sections 113, 114 and 195.” [my emphasis]

50. This purports to reflect the exclusion from the definition of “journalistic material” in section 264(5) of the IPA:

“(5) For the purposes of this section—
(a) material is not to be regarded as created or acquired for the purposes of journalism if it is created or acquired with the intention of furthering a criminal purpose, and
(b) material which a person intends to be used to further such a purpose is not to be regarded as intended to be used for the purposes of journalism.”

51. I am not a lawyer. However, I believe that the example given in the GCHQ Compliance Guide and the Bulk Equipment Interference Code of Practice in fact goes further than section 264(5)(a) of the IPA. They suggest that material created and intended by its creator to further a criminal purpose cannot ever be considered to be journalistic material, even if a copy provided to a journalist was not acquired for that purpose. Thus, if A creates material to further a criminal purpose (for example, a government policy that authorises torture or a document that glorifies terrorism) and B finds a copy and passes it to J, a journalist, so that J can publish it, according to the GCHQ Compliance Guide and the Code of Practice, B's copy and communication to J is not "journalistic material".
52. This is an arbitrary and odd limitation on "journalistic material". In this example, material which is created to further a criminal purpose is in practice journalistic material where a copy is given (by an innocent party) to a journalist. Indeed, this is how most whistleblowing disclosures occur.
53. During my career, I have been provided with material which was arguably created to further criminal purposes by state agents, from torture to misconduct in public office, usually by someone other than the wrongdoer. It is vital to journalists being able to expose government and other wrongdoing that communications of this kind from sources (including whistle-blowers) are treated as confidential, and are accorded special protections.
54. In addition, these definitions would exclude from the definition of "journalistic material" a communication which is itself an offence, such as a disclosure contrary to a 1 of the Official Secrets Act 1989. However, I do not consider that, just because the disclosure is (considered by the Government to be) an offence, the safeguards that would otherwise apply to a journalist's source and materials should not apply at all. It may of course be the case that requiring disclosure could be more easily justified in those circumstances. But in my view the safeguards should still apply.

Definition of "journalist"

55. I understand that "journalism" and "journalist" are not terms that are defined in the IPA. It is striking that no effort to include a positive definition of "journalist" is made in the GCHQ Compliance Guide either.
56. The GCHQ Compliance Guide (at page 140) states:

“An assessment of whether someone is a journalist (for the purposes of the Act) should be made on all the facts and circumstances available at the time. Consideration should be given, in particular, to the frequency of the individual's relevant activities, the level of personal rigour they seek to apply to their work, the type of information that they collect, the means by which they disseminate that information and whether they receive remuneration for their work. The fact that a person uses social media tools to communicate does not, in itself, indicate that the person is a journalist or that he or she is likely to be holding confidential journalistic material as defined in the Act.”

57. Journalism has changed substantially, perhaps more dramatically in recent years, in part because of reduced press (ie paper publication) circulation and the emergence, and proliferation, of on-line publications that readers can access with and without payment.
58. I consider that the factors listed in the GCHQ Compliance Guide will tend to lead to the arbitrary exclusion of many people who ought to be regarded as journalists, as I explain below:
 - (1) The Guide lists as a factor “whether they receive remuneration for their work”. Many journalists (regrettably) must work for free, for example, to break into the industry at the start of their careers until they can gain paid work. This does not mean their work is any less worthy of special journalistic protections.
 - (2) The Guide refers also to “the frequency of the individual's relevant activities”. In the past, the majority of people I would consider to be journalists were “staff journalists”, that is, employed full-time as journalists by publishers. In my experience, however, it is now the case that more (if not most) journalists work as freelancers or have in addition a non-journalism job to make ends meet. Journalism may not be the sole or even the predominant work a journalist does. For example, the economist/financier Bill Browder's journalistic work has led to corruption being exposed and the US Magnitsky Act. The Secret Footballer began writing articles in *The Guardian* when he was still a professional footballer and through his work he exposed aspects of the game, and the business around football, that would otherwise not have reached a wider audience. In these cases, the potentially low frequency of publication and the fact that it is done alongside other things should not mean that their journalistic work does not receive special protection.

- (3) The Guide refers to “the means by which they disseminate that information”. There are now a number of online-only publications through which journalists publish their work. For example, as mentioned, I now work for Middle East Eye, a website which has only been in existence since 2014. There is a great deal of good investigative journalism done by other websites including, for example, “Spinwatch” (<spinwatch.org>). Again, dissemination online or otherwise than through print media does not mean that journalistic content should not be protected as such.
- (4) The Guide refers to “the level of personal rigour they seek to apply to their work”. This seems to me a subjective and nebulous factor. It is also difficult to see how any serious attempt to assess rigour could be made without, for example, reviewing at least some of the research which underpins a particular publication and for that matter a number of a journalist’s publications.
59. In addition, once more, it would be extremely difficult to apply these factors in any case where a journalist is not the immediate target of interception/hacking but, for example, their communications are being read as part of bulk collection or surveillance directed at other people.
60. The GCHQ Compliance Guide and the Code of Practice contrast with the simple and clear definition adopted by the Interception of Communications Commissioner in a 2015 report of “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication”.²¹

SUGGESTION THAT PROTECTIONS SHOULD NOT APPLY TO METADATA

61. The GCHQ Compliance Guide states at page 164:

“We assess it as highly unlikely that systems which only, or predominately, contain metadata are ever likely to contain LPP, CJM or JSM, so no technical measures are required for these. However, metadata systems must have procedural safeguards in place, approved by Mission Policy, to ensure that confidential material is appropriately handled in the unlikely event that it is queried or encountered in such systems.”

²¹ Interception of Communications Commissioner’s Office, *IOCCO Inquiry into the Use of Chapter 2 Part 1 of the Regulation of Investigatory Powers Act (RIPA) to Identify Journalistic Sources* (4 February 2015) [6.31].

62. I am not a lawyer, so do not comment on the legal issues this part of the Guide raises. But in practical terms, the mere fact of a communication to a journalist could be enough to infer the other party is a source, if other facts are known. Communications data can therefore be used to identify a confidential journalistic source. For example, in the Chris Huhne and Mitchell cases referred to above I understand that it was through metadata that police forces identified journalists' confidential sources.²²
63. If someone wished to find out who the source was for a story I had published, depending on the nature of my investigation there may well be many weeks or months of contact prior to publication. Looking at my metadata, which may well reveal where the person I communicate with works (for example, by their email address), could identify a source or a pool of people who may be a source for the story in question, as well as my sources on many other stories.

ABSENCE OF PRIOR INDEPENDENT AUTHORISATION

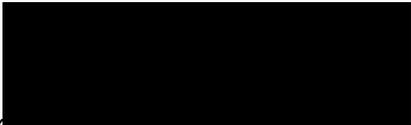
64. Finally, I have read paragraph 117 of the Defendants' Detailed Grounds of Resistance in respect of the Claimant's ECHR Challenge.
65. I understand from this that the Defendants say that there is no requirement for prior independent authorisation even where material is "selected for examination" with the intention of revealing a journalistic source or obtaining confidential journalistic material. I am shocked by this.
66. As I have said above, once the state knows who a journalistic source is, the damage is done.
67. If the safeguards in place permit deliberate use of intercepted and hacked information, communications data and bulk personal datasets to identify journalistic sources or obtain confidential journalistic material without authorisation from an authority which is independent of the state agents who wish to obtain it, those safeguards are worth very little. They will do nothing to dampen the chilling effect of the IPA powers.

²² See the IPT's decision in *News Group Newspapers Ltd v Commissioner of Police of the Metropolis* [2015] UKIPTrib 14_176-H at paragraph 25 in relation to the Mitchell "plebgate" case and Interception of Communications Commissioner's Office, *IOCCO Inquiry into the Use of Chapter 2 Part 1 of the Regulation of Investigatory Powers Act (RIPA) to Identify Journalistic Sources* (4 February 2015) [3.3], which mentions the Huhne case.

68. Especially where the authorising party must determine whether there is an overriding public interest for interception or examination to reveal a source, prior independent approval of any surveillance of a journalist — and clarity that prior approval must take place — is in my view a particularly important safeguard.

I believe that the facts stated in this witness statement are true.

Signed:

A black rectangular box redacting the signature of the witness.

Name: Ian Mark Cobain

Date:

9/4/19