Lee Taylor

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Mr Richard Thomas
Information Commissioner
Wycliffe House
Water Lane
Wilmslow
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1 November 2006

Dear Mr. Thomas

What Price Privacy?- **Response from the Periodical Publishers Association**

Further to your letter of 10 May I now enclose a cross-industry response to the paper "What Price Privacy" on which we have been working with other Press interests. The letter suggests that, working with the Office of the Information Commissioner, **there is more the magazine and newspaper industry** can do to make people who might come into contact with personal data aware of data protection law, and distribute simple guidance.

I also enclose a cross-industry response to the Department for Constitutional Affairs consultation on proposed custodial sentences for breaches of section 55 of the Data Protection Act (DPA). In the submission we are argue strongly that the proposals to change the Act will impinge very seriously on every aspect of journalism and the arguments we set out need to be considered in that context.

PPA considers the proposed introduction of custodial sentences for breaches of s.55 of the DPA chilling and threatening to the work of the Press. The changes would mean that journalists undertaking routine inquiries who breach its terms ***unintentionally*** could be sent to prison for up to two years – **fundamentally changing the nature of the DPA in a way which is inimical to press freedom and undermines freedom of expression.**

Notwithstanding these **deep concerns and reservations,** and **in the hope that reconsideration will be given to the proposed custodial sanctions,** PPA responds to the three requests in your letter as follows:

1. We will **continue to publicise the report** to our members through written communication and our website, however we should point out that, as a trade association we can only "advise" and are not ourselves in a position to "regulate".
2. We will state that PPA in no way condones any breach of the law – including offences under section 55 of the Data Protection Act - and our members will be reminded of this. Publishers are concerned to go further than the law requires in many areas: the editors' Code includes a range of ethical requirements that exist above and beyond the law without seeking to replicate it. Editors must take account of that Code, as well as legal requirements, when deciding what to publish.

INVESTOR IN PEOPLE

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3. We will continue to urge both the Advertising Standards Authority, and its underpinning Code of Advertising Practice, and the Press Complaints Commission, with its underpinning Editors' Code, to keep the terms of the Code under such review, and would be ready to receive any further representations from the Information Commissioner – as with other interested parties - on the issue

PPA and the rest of the industry remains committed to continuing dialogue with the Information Commissioner, and would be pleased to have an early meeting to discuss how to take forward the initiatives identified in the industry response.

I trust this meets the requirements of your letter?

Yours sincerely,

Ian Locks
Chief Executive
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RJT 24

RESPONSE TO ICO PAPER, *WHAT PRICE PRIVACY?*

This response to the Report by the Information Commissioner presented to Parliament on 10th May 2006, *What Price Privacy?*, is made on behalf of the Newspaper Publishers Association, the Newspaper Society, the Periodical Publishers Association, the Scottish Newspaper Publishers Association and the Society of Editors.

We are grateful for the opportunity to comment and to take part in this important, continuing debate. The newspaper and magazine industry takes these issues very seriously, and an intra-industry group covering all parts of the print media has been looking extensively into this area of public policy. We would welcome continuing dialogue.

We are also responding to the consultation paper issued by the Department for Constitutional Affairs about the possible imposition of prison sentences on those found guilty of misusing personal data for profit. A copy is attached to this submission for information.

Against the background of evidence presented in the Report, it is clear that there remain a number of issues for all those organisations approached by the Information Commissioner to tackle.

As far as the media is concerned, these are principally ones of spreading greater awareness and understanding of data protection issues and the potential consequences of breaching the law.

Following an earlier consultation, some advice was offered to editors through the publication of a Guidance Note by the Press Complaints Commission.

There is more that the industry can do – not least because data protection law is very complex and requires straightforward explanation to all those who might come into contact with personal data.

Working with the Office of the Information Commissioner, we would propose to:

(1) encourage individual publishers to draw the information contained in *What Price Privacy?* to the attention of senior management;

(2) distribute through the industry associations to each of their members simple guidance prepared by the ICO about the terms of the Act, and ask them to disseminate it to their journalists; and

(3) assess what further steps needed to be taken to publicise this guidance once that exercise has been completed.

Given that there are many thousands of journalists in the United Kingdom working across different parts of the industry, this programme is a substantial undertaking and should go some way to correcting the problems caused by lack of knowledge of data protection law.

At the same time, the industry is aware that the situation needs constant review. The Code Committee will keep the terms of the Code under such review, and would be ready to receive any further representations from the Information Commissioner – as with other interested parties - on the issue.

Finally, the Information Commissioner asks a number of different organisations whether they would condemn illegal acts. No newspaper publisher would condone any illegality. Indeed, publishers are concerned to go further than the law in many areas: the editors' Code includes a range of ethical requirements that exist above and beyond the law without seeking to

replicate it. Editors must take account of that Code, as well as legal requirements, when deciding what to publish.

The industry remains committed to continuing dialogue with the Information Commissioner, and would be pleased to have an early meeting to discuss how to take the initiatives identified above forward.

October 2006

RESPONSE TO DCA CONSULTATION PAPER CP 9/06 on increasing penalties for deliberate and wilful misuse of personal data

made on behalf of the Newspaper Publishers Association, Newspaper Society, Periodical Publishers Association, Scottish Newspaper Publishers Association, Society of Editors

RESPONSE TO DCA CONSULTATION PAPER CP 9/06 on
Increasing penalties for deliberate and wilful misuse of personal data

INTRODUCTION

On 21st July 2006, the Government launched a consultation about whether those who misuse personal data for profit should be imprisoned for up to two years. This consultation accompanies a review of the operation of the Data Protection Act [DPA] by the Information Commissioner, *What Price Privacy,* published in May 2006.

A response to the consultation paper on behalf of the Newspaper Publishers Association, the Newspaper Society, the Periodical Publishers Association, the Scottish Newspaper Publishers Association and the Society of Editors is attached, along with answers to specific questions posed. A summary of its main points – outlining why the proposal should be rejected – is set out here. A copy of our response to the ICO paper, *What Price Privacy?*, is also attached.

* * * * * * * * * * * *

In understanding the case against the proposed penalties, it is important to remember that the scope of the DPA covers most routine and entirely legitimate journalistic practices. Proposals to change the Act therefore impinge very seriously on every aspect of journalism and the arguments set out here need to be considered in that context.

Custodial sentences would fundamentally change the nature of the Act

1. Introducing custodial sanctions for breaches of Section 55 of the DPA - which would mean that journalists undertaking routine inquiries who breach its terms *unintentionally* could be sent to prison for up to two years - fundamentally changes the nature of the DPA in a way which is inimical to press freedom and undermines freedom of expression.

2. Before such sweeping changes with potentially very damaging consequences can be justified, a clear case ought to be made out about whether there is sufficient mischief to warrant it, and why the present law or the application of it is inadequate. That case has not been made. [1]

A disproportionate response

3 Since the Data Protection Act was implemented, there have over eight years been relatively few complaints under it, fewer prosecutions brought to Court, and only a handful of serious cases.

4. Most prosecutions have taken place in Magistrates Courts - where there is a £5,000 ceiling for fines across all cases - with only 5

[1] One national newspaper publisher – Guardian News and Media – takes a different view on the question of the scale of the problem from other NPA members and the other associations. A separate note from them is attached at the end of this submission.

brought by the Information Commissioner serious enough to warrant trial in the Crown Court.

5. These statistics suggest either that there is no problem serious enough to warrant changing the nature of the Act – or that there is a problem with the way prosecutions are being brought. If evidence can be produced to show the problem *is* serious, there is scope for deploying a different deterrent simply by increasing the maximum fine in the Magistrates Court, or sending more alleged offenders to the Crown Court where unlimited fines can be imposed. Either way, the imposition of custodial sanctions is a response disproportionate to the apparent size of the problem.

6. Claims that there are multiple prima facie breaches of the Act which do not get to Court need to be treated with caution. Many of these may be where the information gleaned was in relation to a legitimate journalistic inquiry for which there would have been a public interest or other defence. This is impossible to tell without examination of the facts, and an explanation from those involved.

Chilling impact on investigative journalism

7. The European Court of Human Rights has itself made clear that it "considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression ... only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as for example in the case of hate speech."

8. However, the DPA's terms are so all embracing – and potentially catch so many everyday journalistic practices – that the threat of

imprisonment would unacceptably restrict press freedom and the right to free expression.

9. There would as a result be a serious "chilling effect" on investigative journalism - particularly as it is often impossible to decide whether the Act has been breached until an investigation has been completed - as well as on the protection of confidential sources. Journalists would adopt a "safety first" approach which would run counter to the public interest.

Conflict with Article 10 of the ECHR

10. The Human Rights Act - with its special emphasis on Article 10 rights to freedom of expression - provides the legal framework in which the DPA is interpreted.

11. However, imposition of a custodial sentence for breaches of the DPA might well fall foul of Article 10 of the ECHR - particularly in view of the fact that no "pressing social need" can be made out for such disproportionate penalties. This proposal clearly does not give enough weight to Article 10.

"Public interest defence" inadequate if custodial sanctions imposed

12. There is a public interest exemption in Section 55 of the Act - but such a defence would be inadequate if criminal sanctions were introduced for breaches because of its uncertainty.

13. Ascertaining whether a public interest defence may apply to a story is often extremely difficult - if not impossible - until an investigation is at an advanced stage, by which time a journalist

may already have committed an offence. Furthermore, where a number of journalists are working on a story, there may be no one person with enough information to make appropriate value judgements about the public interest.

14. The flaws of this defence would become extremely pressing if severe penalties were imposed and would require an overhaul of the legislation.

Serious impact on confidentiality of sources

15. Given that the ability to demonstrate a public interest is often bound up with the identity of a source, another damaging impact of the proposal would be to put a journalist in the position of having to decide whether to face prison, or reveal a source and expose him or her to possible prosecution and imprisonment. This would further inhibit investigative journalism and conflict with the provisions of the editors' Code of Practice.

Out of step with Europe and America

16. If implemented, this proposal would introduce into the UK one of the most draconian press regimes in Europe.

17. Only in France - where there is no heritage of investigative journalism - do such sweeping powers exist. In Italy and Germany, Courts do have the powers to impose prison sentences, although in each case damage and harm have to be proved - something which considerably reduces the scope of their data protections regimes, but which is not suggested here. In Ireland there is no sanction of imprisonment, and in other countries - such as the Netherlands and

Finland - sanctions are almost exclusively compensatory. No similar sanctions exist in the US.

18. Given the global aspect to most media operations, this sort of custodial regime would place the UK media at a considerable international competitive disadvantage.

Conclusion - an alternative way forward

19. Given the importance of this issue for press freedom and the public's right to know, an overwhelming case for change needs to be made out before custodial sentences for breaches of the Act are introduced. No case has been made out. Such a change would produce a serious chilling effect on investigative journalism - including on the confidentiality of sources. It could well fall foul of the European Court, and would clearly upset the balance between the rights to privacy and free expression in the ECHR. It would mean an overhaul of the legislation as the existing public interest defence would be inadequate. It would put the British media at a serious competitive disadvantage, and be out of step with media law in most of Europe and America.

20. Even if there is evidence of a problem with illegal data gathering - and claims that there are cases which have not been brought to Court have to be treated with caution because many of them would contain a public interest defence - then there are alternative ways forward. Increased fines, and greater use of prosecutions in the Crown Court, would provide an adequate deterrent, and have not as yet been tested.

21. Similarly, given that there is obviously an issue concerning education of journalists about the terms of the Data Protection Act, the newspaper and magazine industry is keen to work with the Information Commissioner to help provide journalists with easily accessible, plain language guidance on the subject. Furthermore, the industry will keep the terms of the editors' Code under review and assess whether changes need to be made at any point. A number of proposals are outlined in our response to *What Price Privacy?*

October 2006

CONSULTATION PAPER CP 9.06

"Increasing penalties for deliberate and wilful misuse of personal data"

The Right of Free Speech

Freedom of expression, as protected by Art 10(1) of the European Convention on Human Rights, is one of the essential foundations of a democratic society (*Handyside v UK* (1976) 1 EHRR 737); accordingly any restriction must be convincingly established under Art 10(2) (*Barthold v. Germany* (1985) 7 EHRR 383, at 403), the burden of proof being on the party seeking to justify the interference (*Sunday Times v UK (No 2)* (1991) 14 EHRR 229)

Article 10(1) and (2) of The European Convention on Human Rights read as follows:-

> (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 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 rights or reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

From the above it can be seen that free speech is a fundamental human right. It applies to ideas and information that may offend, shock or disturb and even to information which may hurt or damage individuals but the publication of which is in the public interest e.g. the "public interest" defence now recognized as the *Reynolds* qualified privilege defence in libel actions.

Restrictions directed against the media should be particularly closely scrutinised, since it has a special place in any democratic society as a purveyor of information and public watchdog (e.g. *Prager and Oberschlick v Austria* (1995) 21 EHRR 245 (para 34)); In assessing whether any interference with the right of free speech is 'necessary' under Article 10(2), particular regard must be had to the importance of the role of the press in securing the objectives of Article 10(1): *Observer and Guardian v. UK* (1992) 14 EHRR 153, para. 59. The safeguards to be afforded to the press under Article 10 are of

'particular importance' as the press has a pre-eminent role in a State governed by the rule of law: *Jersild v. Denmark* (1994) 19 EHRR 1, para.31; *Castells v. Spain* (1992) 14 EHRR 455, para.43.

The restrictions set out in Article 10 (2) must therefore be construed strictly and their "necessity" must be convincingly established. In short, a "pressing social need" *must* exist before any restriction on free speech is contemplated. The next question which any government must consider is, "is the restriction on free speech proportionate to the problem which has to be tackled?" Before these questions are even contemplated or legislation drafted, clear and convincing reasons must be given for the proposed course of action and the legislature must have based its case on an acceptable assessment of the facts?

Before accepting the Information Commissioners Report, "What Price Privacy", The Department of Constitutional Affairs (DCA) should not forget the recent Declaration by the Council of Europe Committee of Ministers which on 2nd March 2005 adopted the following guidelines on "freedom of expression and information in the media in the context of the fight against terrorism". In fighting terrorism, perhaps the most serious current threat to western democracies, the Committee called on Member States in particular:

- **Not to introduce any new restrictions on freedom of expression and information in the media unless strictly necessary and proportionate in a democratic society and after examining carefully whether existing laws or other measures are not already sufficient.**
- **To respect, in accordance with Article 10 of the European Convention on Human Rights and with Recommendation No. R (2000) 7, the right of journalists not to disclose their sources of information; the fight against terrorism does not allow the authorities to circumvent this right by going beyond what is permitted by these texts.**
- **To respect strictly the editorial independence of the media, and accordingly, to refrain from any kind of pressure on them.**

Bearing in mind Article 10 and the above Declaration, the media believes that the DCA and Information Commissioner (IC) must make out an extremely strong and compelling case – in short establish that there is a clear "pressing social need" – before increasing the penalties for breaches of s. 55 of the Data Protection Act 1998 (DPA) from unlimited fines to prison sentences. This is said because it cannot be denied and is even stated explicitly in the DCA Consultation Paper that one of the central purposes in introducing prison sentences for breaches of s. 55 is to deter journalists from obtaining, handling or in a worst case scenario actually buying personal data from those who either leak it or have built a business around its dissemination.

The media will therefore submit that neither the IC nor the DCA have made out a case for increasing the penalties in this area. It will be argued that unlimited fines, like fines for contempt of court, are a perfectly adequate

remedy and deterrent against journalists and newspapers interfering in the administration of justice and publishing articles which give rise to a substantial risk of serious prejudice to someone's trial. Not only will it be argued that there is no pressing social need for this proposal but that if implemented it will have a profound "chilling effect on free speech" and be incompatible with Article 10 of the European Convention on Human Rights as incorporated into the Human Rights Act 1998.

The role of the media in a modern pluralistic society

At the outset it should be remembered that the media plays a vitally important part in a modern pluralistic society and anything which has a "chilling effect" on free speech particularly investigative journalism will come under the closest legal scrutiny. In *McCartan, Turkington Breen (a firm) v. Times Newspapers Ltd.* [2001] 2 AC 277, Lord Bingham said, at p.290:

> "The proper functioning of a modern participatory democracy requires that the media be *free, active, professional and inquiring* (emphasis added). 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* (emphasis added) than is necessary to promote the legitimate object of the restriction. Sometimes the press takes the initiative in exploring factual situations and reporting the outcome of such investigations. In doing so it may, if certain conditions are met, enjoy qualified privilege at common law, as recently explained by this House in "Reynolds v. Times Newspapers Ltd [1999] 3 WLR 1010."

Lord Bingham went on to refer to the press as "the eyes and ears of the public to whom they report". Any interference with that role and in particular the press's role as the Fourth Estate must of its nature be based on very compelling evidence.

It is for these reasons that the Grand Chamber at the European Court of Human Rights unanimously stated in *Cumpana and Mazare v Romania [17 December 2004]*:

> "Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention *only* [emphasis added] in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as for example, in the case of hate speech or incitement to violence...

> ...Such a sanction, by its very nature, will inevitably have a chilling effect" (at §§115-116)

Imposing prison sentences, rather than unlimited fines, on journalists who wittingly or unwittingly breach s. 55 of the DPA is, the media would submit, more than likely to fall foul of Article 10 of the European Convention on Human Rights. Indeed it was the relative moderation of the sanctions - fines and damages - in *Chauvy v France [29 September 2004]* another European case, which were important factors in preventing a breach of Article 10. By imposing two year or even six month prison sentences for breaches of s. 55, the UK Government would be inviting an application to the European Court of Human Rights on the first occasion that a journalist was imprisoned.

No "pressing social need" for change

According to the IC, there is a widespread and organised undercover market in confidential personal information" and among the culprits are "many journalists looking for a story", "finance companies and local authorities wishing to trace debtors; estranged couples seeking details of their partner's whereabouts of finances". And yet there have been only 26 prosecutions under s. 55 of the DPA by the ICO in the last 4 years. Of these, only 5 were deemed sufficiently serious to warrant prosecution in the Crown Court where unlimited fines can be imposed (this from an average of 180 complaints per year for alleged breaches of s. 55 of the DPA).

This is an incredibly small number of prosecutions with fines, which have only twice exceeded £5,000, remaining remarkably low. This suggests that the magistrates trying these cases have not deemed them "serious" offences and the offenders should pay relatively small fines. There have also been other cases, as in December 2001, where two directors were convicted of attempting unlawfully to procure information from various sources. They were conditionally discharged for two years and ordered to pay costs of £1,000 plus there own costs.

These facts suggest that the IC's report has either grossly exaggerated the scale of the problem or his department should have been pressing for more prosecutions to be dealt with in the Crown Court where substantial fines could have been imposed. It should be remembered that the Attorney General regularly prosecutes newspapers for contempt of court and in November 2004 fined the Daily Star £60,000 for contempt of court following a short report of the surrender to bail of two footballers who had been accused of rape. The newspaper like others had been warned that identity was an issue in the case and the footballers should not be named in any report. The newspaper by mistake named the two men. Fines of this kind, even for

innocent mistakes, have a clear deterrent effect.

"Proportionality" and the imposition of prison sentences

The fundamental irony of the present proposal is that in its Consultation Paper, "Increasing penalties for deliberate and wilful misuse of personal data" the DCA says "prison should be reserved for ***serious, violent and dangerous offenders*** [emphasis added]". Those trading in personal data are hardly "violent or dangerous" offenders and are more likely to be seen as tortfeasors, creating a serious nuisance or like trespassers intruding on someone else's civil rights and private life. And to call them "serious offenders" would be a gross misuse of the adjective "serious". They are far more likely to be seen in the same category as shoplifters. It was only this summer that the Sentencing Advisory Panel declared that "jail should be reserved for cases with "aggravating" factors such as violence" and should not normally be for shoplifters. The panel went on to say that jail should be reserved for "seriously persistent" shoplifters and then they should only be imprisoned for up to eight weeks.

The simple fact remains that for the infringement of other people's privacy rights, there are a myriad of *civil* and *criminal* remedies. These are set out in the Appendix hereto. It should be noted however that they usually apply to specific information or to identifiable individuals in particular circumstances. In addition to these legislative provisions and the criminal and civil remedies under the DPA, there is a developing law of privacy or rather the "misuse of private information" see *Naomi Campbell v MGN [2004] 2AC 457.* Indeed, there are infinitely more civil cases now for privacy injunctions and damages for the misuse of private information than there are prosecutions under s. 55 of the DPA. And yet the DCA is considering sending journalists to prison who may have breached this section by receiving, obtaining or holding a document which could be a breach of s. 55. The DCA's consultation paper even concedes that one person will be sent to prison each year if custodial sentences are introduced for breaches of s.55. If this is one investigative journalist, looking into an allegation of corruption by a civil servant, it will be one journalist too many. In short, the proposal that journalists should be sent to prison for up to two years for obtaining personal data about someone without a data controllers consent is grossly disproportionate to any perceived problem which might exist in this area of law.

Prison sentences and the "chilling effect" on free speech

The threat of prison sentences for journalists wittingly or unwittingly breaching s. 55, rather than a fine against the newspaper or television station, is not only disproportionate but it will also have a profound "chilling effect"

on investigative journalism. The European Court of Human Rights came to the same conclusion in *Malisiewicz-Gasior v Poland* at §68. The moment a journalist is leaked what could be a sensitive document which might have been sent to him in breach of s. 55 he will have to think very carefully before conducting a full investigation into the document and what it may on its face disclose.

This "chilling effect" will impact particularly seriously on investigative journalists and those journalists who are trusted by confidential sources to investigate leaked documents with the utmost discretion. Whether the leaked document (e.g. a bank statement, a telephone bill, a tax demand, a copy vehicle registration document) comes in a brown envelope or is handed to the journalist by a trusted source who believes a particular data subject is up to no good, it will of its very nature leave the journalist susceptible to a criminal sanction and up to two years in prison if it has been obtained without the data controller's consent.

So while the document may on its face beg serious questions about the bona fides or activities of the data subject and require investigation, the very act of investigating the document and its contents may alert the data subject and either lead to hugely expensive *Norwich Pharmacal* type applications as in *Hodge v Carratu International plc [2006] EWHC 1791* or lead to a complaint to the IC and him obtaining a search warrant to find out what documents a newspaper might have. The threat of a possible prison sentence for investigating leaked personal data, which clearly needs analysis and investigation, is a grossly disproportionate proposal to a problem which has never been proven.

It also appears to run counter to the spirit of the Public Interest Disclosure Act 1998 which was brought in to protect whistleblowers from detrimental treatment or victimisation from employers as long as they were acting in the public interest when they blew the whistle on what they "reasonably saw" as wrongdoing. If a whistleblower cannot prove that his disclosure falls within one of the qualifying disclosures he might not only lose protection under the Act but also have breached s. 55 of the DPA if it involves the unauthorised disclosure of personal data. Under the new proposals misguided whistleblowers could end up in prison under the new penalties in the DPA.

Journalistic protection and the public interest defence to s. 55

At present journalists are exempt from most types of ***civil*** liability under s. 32 of the DPA so long as the journalist holds a reasonable belief that the publication or potential publication on which he/she is working is or will be in the public interest. However, the journalistic exemption in s. 32 does NOT protect a journalist who is prosecuted under s. 55 for a criminal offence,

however strong that journalist may believe that what he is doing is in the public interest. In order to trigger the public interest defence in s. 55 the journalist *must* prove that what he has done or is working on is "justified as being in the public interest". The fact that journalists are protected from civil liability but not properly protected from criminal liability under s. 55 is anomalous, since the exemptions from both civil and criminal liability must both be based on Article 9 of the Directive which the DPA implements.

Further, in the foreword to its Consultation Paper the DCA stresses that a public sector worker who acts in the reasonable (but mistaken) belief that he has a legal right to deal with personal data in a particular way will not be guilty of an offence under section 55. This *should* apply equally and with particular force to a journalist who performs a task as the "eyes and ears of the public" and is exercising the right to freedom of expression.

In his report, the ICO recognises the importance of freedom of expression and acknowledges that any increased penalty *"should not"* fetter the media in the lawful pursuit of their stories: see ICO Report #7.17, also #7.21. But under section 55(2)(d), a journalist has to prove that the information obtained/disclosed/procured was in the public interest. This is far too narrow to give proper protection to investigative journalists who may not know until much later in the day if the investigation they are carrying out is *actually* in the public interest.

On the practicality of the public interest defence, there is little information as to how the public interest defence is operating in practice in this field. It will however be critically important if the IC is determined to bring prosecutions against journalists. There are therefore obvious difficulties with such a defence. Too often, what is in the public interest is viewed with the benefit of hindsight which a journalist working on a breaking story will not have. As some would say, what is in the public interest may depend on which side of the bed the judge got out that morning.

Indeed, ascertaining whether a public interest defence may apply is very difficult until a story or investigation is at an advanced stage, by which time offences may already have been committed. At the time of the investigation, it may *appear*, reasonably to the journalist, that the procurement of information is justified in the public interest; however, on further investigation, this may turn out not to be the case. Further, there is often no single person with all the information on a story who can make the appropriate assessment of public interest. In such cases, even if the journalist had been acting in pursuit of a story of legitimate public interest and in the reasonable belief that the inquiries were justified, he would not have a defence under this subsection and could be sent to prison if the penalties under s. 55 are increased.

The protection of journalistic sources – s. 10 Contempt of Court Act

Further, while there may be a notional but unsatisfactory "public interest" defence to breaches of s.55 of the DPA, proving the public interest defence may often be bound up with willingness of a source or whistleblower to come forward and be identified. It may only be the source of the information who can say that the document or information was obtained quite properly or with the Data Subject's consent. If the source is unwilling or unable to come forward the journalist may find it difficult if not impossible to prove that the story was in the public interest and from a reliable source.

The Younger Report into Privacy (1972, Cmnd. 5012) recognised this problem when asked to consider a public interest defence for a general tort of invasion of privacy. It quoted the Press Council submission (at §215(e)):

> "One of the difficulties concerning the proposed defence is that in order to test the bona fides of the newspaper...the plaintiff should be in a position to require the newspaper to disclose its sources...It is clear that in many of the cases in which the newspaper would want to avail themselves of the defence of "Public Information" the information would have come from persons "in the know" on the express understanding that the source should not be revealed. It could therefore be that if the law required the disclosure of sources in order for a newspaper to avail itself of this defence, the defence would be generally ineffective."

Statutory protection is of course given to journalistic sources. This is found in s. 10 of the Contempt of Court Act 1981:

> "No court may require a person to disclose, nor is any person guilty of contempt 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."

This fundamental principle and the need to protect journalistic sources has been upheld in numerous cases in particular *Goodwin v UK* [1996] ECHR 17488/90. In that case, the European Court of Human Rights stated:-

> "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."

Again Laws LJ said in *Ashworth Hospital v MGN Ltd* [2001] 1 WLR 515, CA that:

> "The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source. The suggestion (which at one stage was canvassed in the course of argument) that it may be no bad thing to impose a 'chilling effect' in some circumstances is in my view a misreading of the principles which are engaged in cases of this kind. In my judgment, the true position is that it is always prima facie ... 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."

The recent case of *Hodge v Carratu International plc,* which concerned an application by the Claimant for disclosure of the name of the person or company who had instructed the Defendant company, Carratu International, to investigate the claimant and obtain financial information about him, demonstrates just how difficult life could become if this kind of situation was transposed into a newspaper context. Instead of Carratu International having to disclose who instructed it, a journalist, like in the Interbrew case, might be ordered by the court to disclose his source either under a disclosure order or to prove that there was no breach of s. 55 and/or the story was actually in the public interest. Just as Carratu International could not name the firm of solicitors who instructed it, so too no newspaper journalist could name an anonymous source in similar circumstances. As Lord Woolf said in Ashworth,

> "Any disclosure of a journalist's sources does have a chilling effect on the freedom of the press. The court when considering making an order for disclosure in exercise of the Norwich Pharmacal jurisdiction must have this well in mind.... The fact is that information which should be placed in the public domain is frequently made available to the press by individuals who would

> lack the courage to provide the information if they felt that there was a risk of their identity being disclosed. The fact that journalists' sources can be reasonably confident that their identity will not be disclosed makes a significant contribution to the ability of the press to perform their role in society of making information available to the public. It is for that reason that it is well established that the courts will normally protect journalists' sources from identification."

The importance of people being able to go to the media as the Fourth Estate is already written into our statute books. One probable effect of the proposed amendment would be to put a journalist in the position of having to decide whether to go to prison himself or reveal his source and condemn his source to prosecution and imprisonment. That is currently a possible, but rare, situation. It could become infinitely more common if the current proposals are implemented. For this reason, there is a very serious tension between the proposed amendment and section 10 of the Contempt of Court Act 1981, together with the policy considerations which underlie it.

Any new law must pass the test of "legal certainty"

Personal data is an incredibly wide concept. "Personal data" now includes not only information processed electronically but also relevant filing systems. Personal data is the staple diet of most journalists and they retain huge amounts of it.

As any journalist will know it is usually extremely easy to obtain people's addresses from the electoral roll or Land Registry and telephone numbers can often be obtained from next door neighbours or friends without any subterfuge or deceit. Indeed, there is a mass of personal information which can be obtained by journalists without in any shape or form breaching s. 55 of the DPA. However, the IC and DCA clearly see the introduction of prison sentences as a way of frightening off journalists from even finding out peoples' addresses, car registration numbers, their telephone numbers and even the number of people in a particular family. This will create gross uncertainty and have an obvious chilling effect on journalism.

For instance, it has been suggested in legal circles that obtaining details of someone's address from the electoral register could constitute an offence under s. 55 of the DPA because the electoral register was not set up for that purpose. This would obviously make a non-sense of ordinary investigative work which is done every day by private investigators, process servers and risk assessors.

As was stated in the *Goodwin* case,

> "The relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail....." *Goodwin v UK 27 March 1996*

The IC's current proposals would go much further than the recommendations of the Calcutt Committee and have a very serious chilling effect on investigative journalism and would therefore be wholly disproportionate to any problem which might exist in this area.

Without major changes to the DPA and giving journalists the same protection as public sector workers – the reasonable grounds to believe that the story is in the public interest defence - then the imposition of prison sentences for breaches of s. 55 will not only be disproportionate but also lacking in legal certainty.

Finally it is worth remembering the words of Lord Nicholls in Reynolds v TNL when he said: *"Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication."*

Submission made by the Newspaper Publishers Association, the Newspaper Society, the Periodical Publishers Association, the Scottish Newspaper Publishers Association and the Society of Editors

October 2006

APPENDIX
STATUTORY PROHIBITIONS ON DISCLOSURE

For a comprehensive list, please see: **"Review of Statutory Prohibitions on Disclosure"** published by the DCA in 2005. It was published specifically with reference to the Freedom of Information Act 2000, although provides an extremely useful overview of the myriad prohibitions of disclosure under certain circumstances.

It is almost impossible to provide a complete list of those statutes which protect personal information. The list given below is intended to be an overview of those most applicable to the type of information which would fall under the DPA or the law of confidence.

Access to Justice Act 1999, section 20 (legal aid information)
Communications Act 2003, section 393
Broadcasting Act 1990, section 196 (to be amended under FOI section 75)
Human Fertilisation and Embryology Act 1990, section 33
Criminal Appeals Act 1995, sections 23; 25
National Minimum Wage Act 1998, sections 15; 16
Postal Services Act 2000, schedule 7 paragraph 1
Bank of England Act 1998, Schedule 7 paragraph 1(3)
Census Act 1920, section 8
Civil Aviation Act 1982, section 23
Child Support Act 1991, section 50
European Communities Act 1972, section 11
Finance Act 1989, section 182
Financial Services and Markets Act 2000, section 348
Local Government Act 1974, section 32
National Savings Bank Act 1971, section 12
Official Secrets Act 1989, sections 1-6
Police Act 1997, section 124
Regulation of Investigatory Powers Act 2000, sections 19, 54
Rehabilitation of Offenders Act 1974, section 9
Sexual Offences (Amendment) Act 1992, section 1
Social Security Administration Act 1992, section 123
Telecommunications Act 1984, section 94; 101

Wireless Telegraphy Act 1949, section 5
Abortion Regulations 1991, regulation 5
Adoption Agencies Regulations 1983, regulation 14
National Health Service (Venereal Disease) Regulations 1974, regulation 2
National Health Service Trusts and Primary Care Trusts (Sexually Transmitted Diseases) Directions 2000, paragraph 2
Adoption Rules 1984, rule 53(3)
Enterprise Act 2002

In the wider context, and depending on the circumstances both the Theft Act 1968 and the Protection from Harassment Act 1998 are prohibitions on obtaining information (in addition to some of the above provisions) and therefore relevant to the journalistic process.

The majority of the above Acts only apply to certain information and certain persons (mostly officials and employees).

INCREASING PENALTIES FOR DELIBERATE AND WILFUL MISUSE OF PERSONAL DATA

ANSWERS TO QUESTIONS POSED BY THE DEPARTMENT OF CONSTITUTIONAL AFFAIRS

Question 1.	Do you agree that custodial penalties should be available to the court when sentencing those who wilfully abuse personal data (i.e., knowingly or recklessly obtain, disclose or seek to procure the disclosure of such data without the consent of the data controller)? Please give reasons for your answer.
Comments:	We do not agree that custodial sentences should be introduced. Unlimited fines in the Crown Court are a perfectly adequate remedy. For the following reasons we believe that the imposition of prison sentences for breaches of s. 55 of the DPA would be incompatible with s. 4 of the Human Rights Act 1998. • First, the Information Commissioner and the Government have not made out a case for draconian new criminal penalties. While the Information Commissioner states in his Report, that there is a "widespread and organised undercover market in confidential personal information", he then goes on to state in paragraph 1.12 that "prosecutions brought under the Act have generally resulted in low penalties: either minimal fines or conditional discharges (para 1.12). Between November 2002 and January 2006, only two out of 22 cases produced total fines amounting to more than £5,000". On any basis that cannot and does not demonstrate that there is a "pressing social need" to deal with rising crime in this area through draconian new penalties. • Second, before any interference with Article 10 rights - the right to free speech - Government must demonstrate that there is a "pressing social need" for the law to be tightened up. As there have only been two fines of more than £5,000 over four years, it simply cannot be argued that the penalties are not high enough and there is a "pressing social need" to impose two year prison sentences in this area. • Third, any measures introduced must be "proportionate" to the legitimate aim pursued. In the attached paper, we set out arguments as to how and why prison sentences for breaches of s. 55 would be wholly disproportionate to the problem of there being a market in personal data, *if* one exists. • Fourth, there are already numerous other criminal and civil remedies designed to protect data subjects from having data about them disclosed without their consent – see the Appendix to the attached paper. Indeed, the civil tort of "the misuse of private information" is a developing area of the law and victims of press intrusion are increasingly able to obtain High Court relief by way of

	injunctions and damages to prevent breaches of their Article 8 right to a private life.

Question 2	Do you agree that custodial penalties will be an effective deterrent to those who seek to procure or wilfully abuse personal data (i.e., knowingly or recklessly obtain, disclose or seek to procure the disclosure of such data without the consent of the date controller)? Please give reasons for your answer.
Comments:	Custodial sentences would be a wholly disproportionate deterrent to any problem that might exist in this field. Indeed, as is stated in the DCA Consultation paper the principal reason for introducing prison sentences is for these sentences to be a "larger deterrence" to those knowingly or recklessly disclosing confidential personal information without the consent of a data controller. This aim of creating a "larger deterrence" will be seen as the Government introducing a serious "chilling effect" on free speech and legitimate investigative journalism. As is set out in the attached paper, journalists are always being leaked personal data which the source or leaker believes needs close analysis and possible exposure. The Public Interest Disclosure Act 1998 was introduced to protect whistleblowers but this proposal seems designed to stop investigative journalism and all or any leaks of personal data particularly when it may not be easy at an early stage in an investigation, to know if the information leaked to a journalist is or is not in the public interest. In short, custodial sentences will have a "profound chilling" effect on free speech, very seriously curtail legitimate investigative journalism and stop the Fourth Estate unmasking scandals like "cash for honours". As such it will be seen as the Government trying to stop the media carrying out its legitimate function as watchdog on public malpractice and/or impropriety.

Question 3	A)	Do you agree that the custodial penalties are of the right length?
	B)	If not, why not, and what do you suggest should be the maximum custodial penalty available to the courts (a) on summary conviction and (b) on conviction on indictment?
Comments:	As we do not agree that custodial sentences should be imposed, we certainly do not agree that two year sentences or even six month sentences in the Magistrates Court are appropriate. As is stated in the attached paper, the Sentencing Advisory Panel have recently recommended that shoplifters should not normally be sent to prison. Even less should journalists, credit controllers, insurance investigators, solicitors, risk assessors and others be sent to prison for obtaining personal information on someone's ability to pay a debt or if their insurance claims is or is not a fraud on an insurance company. Unlimited fines are clearly appropriate in the Crown Court and a £5,000	

	fine would seem appropriate in the Magistrates Court.

Question 4	Do you agree that a guideline issued by the Sentencing Guidelines Council is necessary for this offence in England and Wales?
Comments:	If the proposal is implemented by the Government, the media believe that the Data Protection Act 1998 will need serious amendment so that the journalistic defences and exemptions in s.32 of the Data Protection Act are extended to breaches of s. 55, the criminal offence. In other words, an honest belief by a journalist that he or she is acting in the public interest should be a defence to any offence which carries a prison sentence. At the same time, the Sentencing Guidelines Council should undoubtedly issue recommendations in relation to prison sentences and when and in what circumstances they might be appropriate.

Appendix

Guardian News & Media

Guardian News & Media ("GN&M") takes a different view of some of the issues discussed in the NPA's response to the DCA's Consultation paper *Increasing penalties for deliberate and wilful misuse of personal data.* Nevertheless it unreservedly supports the NPA's opposition to custodial sentences for journalists who are found by a court to have breached section 55 of the Data Protection Act ("the Act"). GN&M regards the imprisonment of journalists as a wholly disproportionate sanction. The creation of a newsgathering offence, punishable by imprisonment, is repugnant to free speech. The practice of putting journalists in jail for activities undertaken in the course of their work is something more commonly associated with authoritarian regimes inimical to press freedom.

Section 55 of the Act is not limited to the unlawful trade in confidential information. The offence concerns the obtaining, procurement, or disclosure, of personal data without the consent of the data controller and it has the potential to extend, for example, to unsolicited information provided to journalists (a common occurrence) and to information provided by confidential sources in the course of an investigation where no money is paid.

The defences provided by the Act offer cold comfort to a reporter embarking on a serious piece of investigative journalism. A journalist must show that the obtaining, disclosing or procuring of personal data, "was necessary[2] for the purpose of preventing or detecting crime" or that "the obtaining, disclosing or procuring was justified in the public interest"[3]. Journalists cannot predict with any certainty the outcome of a criminal investigation that might follow publication of a story, so they are already travelling in uncertain territory. There

[2] Emphasis added
[3] S55 (2) (a) (i) and s55 2 (d) Data Protection Act 1998

is simply no guarantee that a court, looking at a situation with the benefit of hindsight, will share a reporter's view of what was "necessary" and/or in the "public interest", at the time of publication. To add a custodial sentence to the mix will require journalists to be brave or foolish enough to risk losing their liberty in order to put information about a matter of public concern into the public domain. Inevitably, even in circumstances where they are almost certain that a public interest defence will prevail, journalists will err on the side of caution rather than a risk a custodial sentence. The result will be that important stories on matters of public interest will not be published.

GN&M does not condone the trade in confidential information via private investigators. The Information Commissioner's report: *"What Price Privacy? The unlawful trade in confidential information"*[4] contained striking prima facie evidence that many national newspapers may be habitually breaking the law by paying private detectives for information about people in public life and those associated with them. This is extremely concerning.

The Press Complaints Commission ("PCC") Code of Practice allows for a degree of intrusion into privacy where an editor can display a clear public interest. We believe that apparent intrusions brought to the attention of the PCC by the Information Commissioner should be investigated. Any resulting, adverse, adjudications would have to be published, by the relevant newspapers, prominently, in accordance with the PCC code.

Action on the part of the PCC and a greater willingness on the part of criminal courts to impose substantial fines (as they are already entitled to do under the current legislation) are more proportionate responses to the problem.

[4] May 2006