IN THE MATTER OF THE LEVESON INQUIRY

WITNESS STATEMENT OF CHRISTOPHER GRAHAM

I, Christopher Graham, of [redacted]

Introduction

I make this statement in response to the Notice issued by Lord Justice Leveson under section 21(2) of the Inquiries Act 2005. The facts in this statement are within my own knowledge or obtained from reading the documents relating to this matter.

For ease of reference this statement has been marked up with page numbers or references to documents in the bundle submitted with this statement.

This statement covers a period from the prosecution in the Operation Motorman case in 2004 through to the publication of the What Price Privacy? and What Price Privacy Now? Reports in 2006 to the present date **(documents 8 and 9)**.

This period covers the tenure of two Information Commissioners, Richard Thomas CBE, who was in post from 2002 until June 2009 and my own tenure. While this statement provides the factual background, much of the commentary from the time of his tenure will be provided by Richard Thomas in his own witness statement. I have worked closely with Richard Thomas in providing him with access to documentation to support his own witness statement to the Inquiry.

1. Who I am and a brief summary of my career history.

1.1 I became Information Commissioner in succession to Richard Thomas at the end of June 2009.

1.2 Before that I had been Director-General of the Advertising Standards Authority ("ASA") from 2000 and before that I had been a BBC journalist and manager.

1.3 I joined the BBC as a News Trainee in 1973, straight from university. I worked for the Corporation as a talks, news and current affairs producer in both radio and television. I have experience of working in news and current affairs journalism at local, regional and national level in TV and radio. I worked briefly for a Channel 4 production company, producing A Week in Politics. Apart from that, my journalistic experience was exclusively with the BBC. I was a producer on several news and current affairs programmes. As a BBC Manager, I was Assistant Editor of TV News Programmes and then Managing Editor. I was appointed Managing Editor of BBC News Programmes

for both TV and radio. Moving on from news and current affairs, I was appointed Deputy Secretary and then Secretary of the BBC, working closely with the Chairman and the Director-General. In this capacity I was also responsible for the Programme Complaints Unit.

1.4 In 2000, I left the BBC to join the ASA. The ASA is the independent self-regulatory body promoting legal, decent, honest and truthful advertising by advertisers, agencies and media. When I started, the ASA was responsible for advertisements in non-broadcast media only. But with the advent of Ofcom and the Communications Act 2003, I led the initiative to create a one-stop shop for advertising standards including advertisements on TV and radio as well as in paid-for space online. I was Chair of the European Advertising Standards Alliance from 2003 to 2005. In these roles, I was a strong advocate of effective self-regulation, with clear industry codes and independent complaints resolution by a two-thirds majority lay Council.

2 A description of the Information Commissioner's Office covering its origins, status, history, organisation, remit, authority and powers.

2.1 As Information Commissioner, I have responsibility for promoting and enforcing the Data Protection Act 1998 ("the Act") **(document 2)** and the Freedom of Information Act 2000 ("FOIA") **(document 3)**. The post is independent from government and upholds information rights in the public interest, promoting

openness by public bodies and data privacy for individuals. I do this by providing guidance to individuals and organisations, resolving problems where I can, and taking appropriate action where the law is broken.

2.2 An independent data protection regulator was first established by the Data Protection Act 1984. At that time the regulator was called the Data Protection Registrar. The name of the office was changed by the Act to the Data Protection Commissioner, and again to the Information Commissioner when the FOIA came into force.

2.3 The Information Commissioner's data protection enforcement powers are laid out in Part V of the Act **(56 to 69)**. These powers include the power to serve enforcement notices to compel "data controllers" (those bodies who determine the purposes for which and the manner in which personal data are to be processed) to take steps or cease actions in order to protect personal data, and information notices to compel a data controller to provide information relevant to an investigation. In April 2010, under Part VI of the Act, the Information Commissioner also acquired the power to levy a civil monetary penalty where there has been a serious breach of the duty to comply with the data protection principles that could result in substantial damage or substantial distress to an individual **(77 to 80)**.

2.4 However, some of these powers are modified when it comes to the processing of personal information for the purposes of journalism. I lay out how these powers work in relation to the press in my answer to question 3, below.

2.5 The Information Commissioner's role in regulating the use of personal data has evolved over the years. The role was originally intended primarily as an educator, ensuring data protection compliance by promoting good practice. Significant enforcement powers of the Commissioner, such as civil monetary penalties, have been introduced by amendment over the last few years, partly in response to high profile data losses. Section 51 of the Act **(69 to 70)** sets out the general functions of the Information Commissioner. These are generally about promoting good practice rather than punishing poor practice. This educator function is still central to how I approach my role as Information Commissioner.

3 The steps which the Information Commissioner's Office takes, in general terms, to discharge its regulatory function.

3.1 In this section I focus on how the Act operates in relation to the regulation of the press.

3.2 The starting point is that the obligations in the Act apply to all data controllers, including the press and other media organisations. These obligations include compliance with the data protection principles – eight enforceable principles of good information handling

practice – and respect for the rights of individuals, including the right of individuals to find out what information is held about them **(99 to 103)**. As mentioned above, the Act gives the Information Commissioner a range of powers to enforce these obligations.

3.3 However, the Act also provides for a range of exemptions from compliance with certain obligations where those obligations potentially conflict with other important public interests. One of these public interests is the interest in preserving the right to freedom of expression. The Act approaches this potential conflict by defining the "special purposes" at section 3 of the Act **(26)** as the purposes of journalism, artistic purposes and literary purposes. The Act sets out, in section 32, an exemption from some obligations where personal data are processed only for the special purposes and other conditions are met **(52)**.

3.4 Furthermore, the enforcement powers of the Information Commissioner are significantly restricted or modified in relation to processing for the special purposes. The Act largely leaves it to individuals to pursue their own action if they want to enforce their rights, including their right to compensation, post publication.

3.5 However, section 55 of the Act, which was the focus of the What Price Privacy? and What Price Privacy Now? Reports, and which addresses the unlawful obtaining or disclosure of personal data by any person, currently

applies in the same way to journalists as it does to other persons **(76)**.

3.6 Section 55 of the Act makes it an offence knowingly or recklessly, and without the permission of the data controller, to obtain, disclose or procure the disclosure of personal data. It is commonly know as the "blagging" offence. Journalists are not provided with a specific defence under the Act at present, although there is a general "public interest" defence where the obtaining, disclosing or procuring was justified as being in the public interest. There is provision for a further defence to the section 55 offence, introduced by section 78 of the Criminal Justice and Immigration Act 2008 ("CJIA") **(342)**. This is specifically directed at circumstances where a person acted for the special purposes, including journalism, with a view to the publication by any person of journalistic, literary or artistic material, and in the reasonable belief that the obtaining, disclosing or procuring was in the public interest. However, this provision has not as yet been commenced.

3.7 As to how the Act applies to journalism more generally, there is the exemption in section 32 of the Act (the "special purposes" exemption) that provides that the processing of personal data solely for special purposes will be exempt from any or all of the following, provided that conditions are met:

- all the data protection principles (except the duty to keep data secure),
- the right of subject access,
- the right to prevent processing of personal data,

- the rights in relation to automated decision-making and
- the rights of rectification, blocking, erasure and destruction

3.8 The conditions that must be satisfied in order for section 32 to apply are:

- the processing must be undertaken with a view to the publication by any person of any journalistic, literary or artistic material,
- the data controller must reasonably believe that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and
- the data controller must reasonably believe that, in all the circumstances, it would be incompatible with the special purposes for him to comply with the particular provision from which he claims an exemption..

3.9 When considering whether the data controller's belief that publication would be in the public interest was, or is, a reasonable one, regard may be had to his compliance with any code of practice which is relevant to the publication in question and has been designated by order. The codes that have been so designated are those published by the Press Complaints Commission ("PCC"), the Ofcom code and the Producers Guidelines published by the BBC.

3.10 The section 32 exemption is different from other exemptions in the Act in that it is largely based on the reasonable belief of the data controller. This means that it is not the Information Commissioner's *judgement* about where the public interest lies or whether the provisions of the Act are compatible with journalism that counts and he has limited power to investigate or challenge the data controller's opinion.

3.11 The Information Commissioner has specific and limited powers to investigate whether the section 32 exemption is being properly applied. The first step is to establish whether processing is for the special purposes and whether it is linked to the publication of journalistic material. In order to ascertain this section 44 of the Act allows the Information Commissioner to serve a "special information notice" on the data controller, but only in two circumstances:

- when the Information Commissioner receives a request for assessment, or
- where certain court proceedings have been stayed on the basis that the data controller claims, or it appears to the court that, the processing under consideration is for special purposes and the Information Commissioner has reasonable grounds for suspecting that the personal data are not being processed only for the special purposes or that the data are not being processed with a view to publication of journalistic material by the data controller for the first time **(184)**.

3.12 In the context of the Inquiry's interest in the hacking or interception of voicemails by the press, it appears that

the information was gathered for journalism purposes with a view to the publication of journalistic material, (whether or not the gathering was done by lawful means). In such cases, the Information Commissioner is not able to issue a special information notice to initiate any investigation in to compliance with the data protection principles, until a complaint is made by an affected person.

3.13 Where the Information Commissioner does have power to issue a special information notice, it is limited to seeking solely that information which is necessary to ascertain whether the personal data in question are being processed only for the purposes of journalism and to ascertain if they are being processed with a view to future publication of material that has not previously been published by the data controller. A special information notice does not require the recipient to provide certain communications between client and his legal adviser, nor does it require the recipient to provide any information to the Information Commissioner that would reveal evidence that he had committed an offence other than an offence under the Act, and so expose him to proceedings for that offence (section 44(9)).

3.14 The next step for the Information Commissioner is to decide whether he can issue a determination under section 45 of the Act. Under this section, if it appears to the Information Commissioner that personal data are **not** being processed solely for journalism or that they are **not** being processed with a view to future

publication by any person of material not previously published by the data controller **(66 to 67)** he may make a determination in writing to that effect. Such a determination does not take effect immediately and can be challenged before the first tier tribunal and then through the higher courts if appealed.

3.15 The Information Commissioner cannot:

- issue an information notice to require the data controller to provide him with any other information, (section 46(3)), or
- issue an enforcement notice, (section 46(1)) or
- exercise his powers of entry and inspection provided under Schedule 9 of the Act (Schedule 9 paragraph 1(2)) **(127 to 131)**

with respect to processing of personal data for journalism unless he has first made a determination, under section 45 of the Act.

3.16 As a result, where the Information Commissioner believes that the personal data are being processed for journalism with a view to the publication of journalistic material previously unpublished by the data controller, he is limited to issuing a assessment under section 42(2) of the Act or a monetary penalty (see paragraph 3.18). He has no further investigatory or enforcement powers.

3.17 The way in which the Act operates in this connection means that it is only rarely that the Information Commissioner is likely to be in a position to serve an enforcement notice where personal data are processed

for journalism (for example where he has issued a section 45 determination that the data are not being processed only for journalism, or that the processing is not with a view to publication of material previously not published by the data controller). To date we have not issued any enforcement notices in which the provisions of section 32 are relevant. Such enforcement action is in any case concerned with correcting ongoing non-compliance or with bringing about future compliance rather than punishing a data controller for breaches that have already taken place.

3.18 If enforcement action can be justified, section 46 places additional restrictions on when an enforcement notice can be served **(67)**. Normally an enforcement notice can be served where the Information Commissioner is satisfied that a data controller has contravened or is contravening any of the data protection principles. In the case of enforcement in relation to information being processed for journalism, no enforcement notice can be served until the section 45 determination has taken effect and a court has given leave to serve the notice. Before granting leave, the court must be satisfied that there is a matter of substantial public importance at stake.

3.19 Additionally, since April 2010 there has been the possibility of issuing a civil monetary penalty under section 55A of the Act for a serious breach of the duty to comply with the data protection principles, where this would be likely to cause substantial damage or distress. However, given the limitations on the investigatory

powers available to the Information Commissioner as outlined above, it will in practice be difficult for the Information Commissioner to establish whether the processing was in breach of the principles or whether the exemption at section 32 of the Act applied such that the processing was exempt from compliance with any or all of the data protection principles except the seventh principle.

3.20 This section of my evidence is necessarily lengthy and complex, as the provisions of the Act relating to the processing of personal data for journalism are challenging to both interpret and apply. In essence the investigative and enforcement powers at the Information Commissioner's disposal exist to enable me to ascertain whether personal data are being processed for purposes other than journalism and to act in relation to those other purposes, rather than enabling me to regulate the actual processing of personal data for journalistic purposes.

3.21 Indeed, it is evident to me from the records of consultations held with the then Data Protection Registrar that the relevant provisions of the Act were drafted in a way that, whilst enabling the UK to meet its obligations under Article 9 of the EU Data Protection Directive (95/46/EC) (the "Directive") **(document 1)**, the maximum possible opportunity was taken to create a special regime for the media and to afford the greatest protection to the media which the Directive permits. The Government were particularly keen to ensure that there could be no prior restraint put on

journalism. It is certainly apparent to me that had Parliament intended to give the Information Commissioner a significant role in overseeing the processing of personal data for journalistic purposes, it would have provided him with a very different and much simpler legal framework within which to do so.

3.22 The legislative framework largely leaves it to individuals to take their own action to assert the rights provided by the Act in relation to the processing of personal data for the special purposes. As Information Commissioner, section 53 of the Act gives me the power to provide assistance to individuals in such cases **(73 to 74)**. I may only provide this assistance where I am of the opinion that the case involves a matter of substantial public importance. There have been no applications for such assistance since I took up post in June 2009. One application was received previously but no that assistance was provided. Furthermore, section 13 of the Act provides that where data are processed for the special purposes an individual can claim compensation for distress alone (in other cases there must also be damage) where a data controller has failed to comply with certain requirements of the Act. However, the power of data subjects to seek redress through the courts is also more limited where the data in question is being processed for journalism.

3.23 Section 32(4) of the Act makes special provision for the conduct of proceedings that have been commenced by a person seeking subject access, compliance with a section 10 notice to prevent processing, compliance

with section 12(1) or 12(2)(b), rectification, blocking or erasure of data, or compensation for breach of any of the requirements of the Act, where the data to which the proceedings relate may be subject to processing for the purposes of journalism.

3.24 If at any time in those proceedings the data controller claims, or it appears to the court, that

- the data in question are being processed only for the special purposes, and
- with a view to publication of journalistic material which had not been previously published by the data controller at the point in time 24 hours prior to the data controller making that claim within the proceedings or the court coming to that view,

the court must stay the proceedings until the data controller either withdraws that claim, or a section 45 determination by the Information Commissioner comes into effect.

3.25 As the Information Commissioner can only make a determination under section 45 where he believes that the personal data are either **not** being processed for the special purposes or **not** with a view to the publication of journalistic material not previously published by the data controller, in many cases the Information Commissioner will not be in a position to make a section 45 determination, leaving the proceedings stayed indefinitely.

3.26 I also have the duty under section 51 of the Act to issue guidance and promote good practice. This duty is not

specific to the press, journalism or other special purposes. I am aware that during my predecessor's time in office significant efforts were made to provide advice to the PCC in relation to guidance we were encouraging the PCC to produce for journalists, focusing on the section 55 offence. So far as I am aware, the PCC did not go any further than producing general, high level guidance on journalism and the Act at the time and we have not received any further approaches to discuss such guidance during my time in office.

4 The Information Commissioner's Office's experience of regulating the media, in particular in relation to phone hacking, computer hacking, "blagging", bribery and/or corruption.

4.1 The Information Commissioner has no significant role in the oversight of any aspect of phone hacking, interception of communications, bribery or corruption.

4.2 In relation to offences under the Regulation of Investigative Powers Act 2000 ("RIPA"), the Computer Misuse Act 1990 ("CMA") or any bribery or corruption legislation, the Information Commissioner has no formal role in the prosecution of such offences, or in overseeing any other aspect of the Acts which govern them. There are a number of other regulators and law enforcement agencies that do have such a role. As Information Commissioner I cooperate with those organisations where we can help each other discharge our respective responsibilities.

4.3 The Inquiry will probably be aware that the first data protection principle states that processing of personal information must be fair and lawful. Any personal information which has been obtained in the course of committing a criminal offence under another piece of legislation would also be deemed to have been obtained in breach of the first data protection principle.

4.4 However, it must be remembered that the prosecution of a criminal offence (outside the laws I regulate as Information Commissioner) in practice falls to the Crown Prosecution Service ("CPS") as the prosecuting authority. A breach of the data protection principles is not a criminal offence. In some circumstances, such as an allegation of unlawful processing, I have to rely on the police and CPS to indicate whether they consider that an offence under another relevant Act has been committed before I can properly assess whether there has also been an associated breach of the data protection principles on which I might act. On the other hand if my office comes into possession of evidence which suggests that an offence has been committed under other legislation, I would pass this directly to the police or suggest to a complainant that he or she does so.

4.5 In any case, as outlined in answer to question 3, where an offence has been committed in obtaining personal information for journalistic purposes an exemption from the first data protection principle will apply where the processing is solely for the purposes of journalism and

the conditions in paragraph 3.8 can be satisfied.

4.6 It is possible that, in some circumstances, personal data could be obtained in a way that suggests the commission of offences under both another Act and under section 55 of the Act. The investigation of offences which carry a custodial penalty takes precedence over the investigation of offences, such as those under the Act, which do not. Usually, the police will take the lead in investigating where offences that carry a custodial penalty are suspected. They can consider the offence under section 55 of the Act as part of their investigation if they choose to do so. Whilst my office will pass relevant information on to the police to assist them in any investigation, it does not make good sense for us to run our own investigation in parallel. Only where it is clear that no offences under RIPA or the CMA are going to be prosecuted will my office consider pursuing a prosecution under section 55 of the Act.

4.7 This approach is attributable, in part, to my office's experience in seeking to prosecute offences under section 55 of the Act in relation to "Operation Motorman". We found that where other offences that carried custodial penalties were being prosecuted in a related CPS prosecution, "Operation Glade", the offences under section 55 of the Act were seen as less serious. Where the sentence for these other offences was a conditional discharge, we were advised that in the Motorman case the courts were likely to be disinclined to impose any greater sentences in relation to the

offences under section 55 of the Act.

4.8 This experience informed our decision not to prosecute any of the journalists involved in these cases. We were concerned that even if we were successful in securing convictions the sentencing would be minimal. External legal advice at the time suggested that for this reason it would not be in the public interest to pursue possible prosecutions. This was also because of the difficulty in proving that the journalists involved knew that the information they were seeking could only be obtained by unlawful means. Furthermore the broad scope given to the public interest in journalism, such as in Campbell v Mirror Group Newspapers[1], suggested to us that a successful prosecution would be unlikely.

4.9 It was the outcome of these cases that contributed to my predecessor deciding to present the What Price Privacy? and What Price Privacy Now? Reports to Parliament in 2006. These called for, among other things, custodial sentences for offences committed under section 55 of the Act.

5 Response to the Information Commissioner's 2006 reports and our assessment of that response.

5.1 As stated earlier, my predecessor, Richard Thomas, was Information Commissioner at the time of the 2006 Reports and their aftermath, so is better placed than I to provide commentary on the response to them. In addition, the What Price Privacy Now? Report provides

[1] [2002] EWHC 499 (QB)

some detail on how each of our recommendations in What Price Privacy? were taken forward.

5.2 The Department of Constitutional Affairs ("DCA") opened a consultation on 24 July 2006 on increasing penalties for deliberate and wilful misuse of personal data. The DCA published their response on 7 February 2007 **(document 5)**. An overwhelming majority of respondents from across the public and private sectors, and members of the public, agreed that custodial sentences were necessary and that they would provide a deterrent to the wilful misuse of personal data. The Government also agreed, and had in place plans for sentencing guidelines to ensure that only the most serious offenders received a custodial sentence.

5.3 The Criminal Justice and Immigration Bill was introduced to Parliament on 26 February 2006 with clause 75 explicitly providing custodial sentences for offences under section 55 of the Act. This clause made its way through the House of Commons and the provision was still in place when the Bill reached the House of Lords on 11 January 2008. However, by the time the Bill received Royal Assent on 8 May 2008, this clause had been diluted to an Order making power, in section 77 of the CJIA, allowing the Secretary of State to introduce custodial sentences by negative resolution **(342)**. My understanding is that this was due to the introduction of Government amendments at the time.

5.4 When I took up post in 2009 I was, and remain, a firm advocate of the availability of a custodial penalty for

section 55 offences. I also remain an advocate for the strengthened public interest defence for journalists that was introduced in section 78 of the CJIA **(342)**. As a former journalist, I am alive to the concern that the threat of custodial sentences might be seen as having a chilling effect on legitimate journalism.

5.5 Early on in my time as Information Commissioner I formed the view that the unlawful trade in personal information was a real and present danger to individual privacy - and, since 2006, it has not had much to do with the behaviour of the press.

5.6 I was therefore very hopeful when in October 2009, following the exposure of a section 55 racket in mobile phone customer information, the Ministry of Justice ("MOJ") consulted again on the introduction of custodial sentences. My understanding at the time was that the Government was persuaded of the case for custodial sentences and that the Secretary of State intended to lay the necessary Statutory Instrument in early January 2010 so it would have enough time to complete the Parliamentary process and come into force before an election, which was expected to be in May 2010. The consultation closed in November 2009 **(document 6)** but a formal response to it from the MOJ is still awaited.

5.7 The introduction of a custodial penalty for offences under section 55 of the Act remains a key aim of my office. Both my predecessor and I have continued to make the argument over the years since the What Price Privacy? Report was published. This has included

references in several of our annual reports, which are laid before Parliament, and further submissions to the MOJ **(document 7)**. I must stress that the driver for custodial sentences is neither wholly nor mainly the conduct of the press. As is demonstrated by recent prosecutions the unlawful trade in personal information involves a very much wider range of players

6 My views on the strengths and weaknesses of the Information Commissioner's Office and, in particular, my views on the steps that might be taken to improve the regulatory framework and effort.

6.1 The Information Commissioner's Office was never intended to play a major role in the regulation of the press. From the recital to the Directive from which the Act is derived, through to the debates in Parliament during the passage of the Data Protection Bill, it is clear that while data protection law is designed to protect information privacy, it was also specifically designed not to impinge on the processing of personal data for the purposes of journalism.

6.2 Indeed, in respect of the enforcement of the provisions of the Act, ministers were clear in Parliament that they saw the enforcement role of the Information Commissioner as very limited. Lord Williams of Mostyn, at the time the Parliamentary Under-Secretary of State for the Home Office, stated that, when it comes to processing by the press, "The Bill puts the onus for taking enforcement action on the individuals concerned

rather than the commissioner".[2]

6.3 Lord Williams also pointed out that the purpose of the exemption for special purposes was so that, provided the criteria in section 32(1) were met, "there can be no challenge on data protection grounds to the processing of personal data for the special purposes".

6.4 When the Bill came to Committee Stage in the House of Commons, George Howarth MP, at the time the Under Secretary of State for the Home Department, explained that the rationale behind the exemption for the special purposes, and the limitations on the Information Commissioner's powers was that "We think it right that there should be no possibility of challenge to processing for the special purposes, prior to publication".[3]

6.5 While both ministers spoke about the exemption for the special purposes and the powers of the Information Commissioner being limited prior to publication, the courts have established that the exemption in section 32 of the Act is not confined to pre-publication.[4]

6.6 There is a distinction to be drawn between the general provisions of the Act which regulate the processing of personal data, and which are supported by civil enforcement powers, and the specific criminal offences

[2] The Parliamentary Under-Secretary of State, Home Office (Lord Williams of Mostyn), 2 Feb 1998 Lords Hansard, paragraph 441 and 442.
[3] The Parliamentary Under-Secretary of State for the Home Department (Mr. George Howarth), Standing Committee D, Data Protection Bill [Lords], Common Hansard, 21 May 1998, 4.45pm
[4] See the comments of Lord Phillips MR at paragraph 128 in the case of Naomi Campbell v Mirror Group Newspapers, [2002] EWCA Civ 1373

that are created under the Act. While the Act is not designed to provide extensive regulation of the media, the criminal offence under section 55 does still apply to journalists. It is right that it should do so. While I support the enhanced defence that a journalist would be able to plead if the amendment in section 78 of the CJIA were commenced, it is right that, where a criminal interference with privacy is involved, members of the press are subject to the same basic regime as other professionals and members of the general public.

6.7 I understand the argument that the introduction of a custodial penalty could be seen to have a chilling effect on the media. Despite understanding that concern, I am not persuaded that the perceived threat is a real one. If the argument ever had validity, that has been removed through the enhanced defence that journalists would enjoy under section 78 of the CJIA. It should also be borne in mind that I am not seeking to criminalise activity that is not already criminal; I am only seeking to increase the penalty available to tackle the "modern scourge" of data theft that has actually very little to do with journalism. The enhanced defence involving 'reasonable belief' does, in my view, provide an adequate reassurance that investigative journalism would not be adversely affected by any increased penalty. In this context I am happy to give an assurance that I will not seek to prosecute journalists who are genuinely pursuing enquiries in the public interest, even if those enquiries do not ultimately bear fruit.

6.8 The fact that there is a public interest in a free press being able to go about its business is reflected in the treatment of the "special purposes" under the Act. However, it cannot be the case that any and every activity carried out in the name of journalism should be regarded as exempt from the provisions of the Act. Indeed, I do not believe that that extreme position is seriously advanced by any significant strand of opinion within the journalistic profession. There will, in certain circumstances, always need to be a judgment around the public interest in particular stories. This point is explicitly provided for in the various journalistic codes, for example the PCC Editors' Code, Ofcom Code, BBC Producers' Guidelines, and so on. This is also the position reflected in the recitals to the Directive itself. The balance to be struck between Article 8 and Article 10 of the Human Rights Act 1998 has to be considered on a case by case basis. The inevitable tension between "the right to privacy" and "freedom of expression" demands that the issues at stake in each situation are properly evaluated. I observe in passing that making judgments on where the balance of the public interest lies on the facts of each case is something that the Information Commissioner is called upon to do under both the Act and the FOIA.

6.9 One of the main difficulties in the current regulatory regime is its complexity. I am not an advocate of statutory regulation of the press but the Directive only provides for member states to introduce exemptions from its provision "for the processing of personal data carried out solely for journalistic purposes....if they are

necessary to reconcile the right to privacy with the rules governing freedom of expression". It is therefore inevitable that UK law has a limited role in regulating the processing of personal data by the press if it is to properly implement the Directive.

6.10 The way in which the Act bears on the processing of personal data by the press is complex. Not surprisingly, given the extensive nature of the relevant provisions in the Act, individuals can sometimes expect the Act to deliver more for them in this context than it is capable of doing and they are unsure who else to approach for matters related to processing by journalists. It is not easy to explain, in clear and simple terms, to individuals what their rights are, what my role is, as Information Commissioner, in enforcing these rights, and what the role of other statutory regulations, non-statutory regulations and the police are. Not surprisingly, given the extensive nature of the relevant provisions in the Act, individuals can sometimes expect the law to deliver more for them in this context than it is capable of doing.

6.11 Although the task is not an easy one, greater effort is needed to clarify and simplify the law and the role of those who regulate the processing of personal data by the press to ensure that, in line with good regulatory practice, the system is clear, simple, user-friendly and effective. It may be that forthcoming proposals from the European Commission on revision of the EU legislative framework for data protection will provide the necessary impetus to achieve this.

The contents of this statement are true to the best of my knowledge and belief

Signed:

Dated: 16 September 2011