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Secrecy, the Media and the State: Controlling and Managing Information about Terrorism and Security

Lawrence McNamara *

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Introduction

Information about terrorism offences is, inevitably, tightly controlled by the state, whether it relates to the preparation or commission of offences or to the actions of the authorities tasked with combating terrorism. These are matters of great public interest and the media’s fourth-estate role in informing the public is extremely important in terrorism matters. Traditions of media freedom characterise and sustain open, informed public debate—the basis of the public’s ‘right to know’—and the ability to effectively access and report information is a mainstay of those traditions. It is surprising then that journalists’ experience of reporting on terrorism has received little attention and has not been the subject of sustained empirical work. Yet it warrants close attention because, as Cram has noted, ‘while some additional degree of restraint is inevitable and justified’, limits on media freedom ‘constitute a threat to expressive freedom, putting at risk the informed scrutiny of government policy and executive conduct’.¹ The media experience is especially significant as governments increasingly pursue laws that enable information to be kept secret in an ever-widening range of circumstances.² The legal changes are accompanied by an acute political caution regarding the release of information.

This chapter examines how practices of information control and access in the United Kingdom affect the media when reporting on terrorism and security. It does so by looking at the experiences of journalists who have covered terrorism matters. It uses journalists’ words to convey their experiences and interactions with those who work within legal institutions

and with Muslim communities affected where terrorism matters arise, as Muslim communities have increasingly become ‘suspect communities’ in the post 9/11 landscape. After briefly outlining the research and its methodology, three areas are addressed: first, journalists’ access to information in the period following terrorism arrests, but prior to charges being laid; second, access to information once a matter reaches the courts; and third, the ways journalists may be required to reveal information to the authorities.³

It will be suggested that where terrorism and security is in issue, the public right to know about what is happening in our communities and what is being done by [140] our state is neither adequately protected nor appropriately respected. There is no doubt that both institutions and the individuals within them face very difficult challenges and numerous obstacles as they try to carry out their work, but these challenges can and must be met more effectively—and must not be hindered by laws and practices that embed secrecy and distrust as the norm—if democratic accountability is to be pursued.

Methodology and context: The ‘Law, Terrorism and the Right to Know’ project

The research for this chapter was undertaken as part of the ‘Law, Terrorism and the Right to Know’ research programme. Running from 2009–13, the project explored how governments and courts deal with security-related information, and the relationships between the state and the media. It examined matters such as how different parties involved in controlling and communicating information understand and draw connections between principles of open justice, the rule of law, public accountability and national security. It explored how information can be selectively and strategically presented or concealed, how access can be controlled, and what the effects of these processes might be.

The project included around 70 confidential research interviews conducted over 18 months in 2010–12. Interviewees were drawn from the judiciary and courts, government, policing, legal profession, and—most relevantly for this chapter—journalists, media lawyers and editorial decision-makers. Most interviews were UK-oriented, though a small number were conducted in Australia and the United States with individuals from those countries.⁴

Sixteen print and broadcast journalists were interviewed. Some had long experience in reporting on terrorism matters for UK outlets (both national and regional) and some had also reported for international outlets. They included journalists with many years' experience in terrorism and related areas such as crime, home affairs and court reporting. In a few instances interviewees had covered only one terrorism matter, but had done so in depth.

The political and legal context in which the interviews were conducted is noteworthy. First, the Leveson Inquiry into the Culture, Practice and Ethics of the Press ran for a year from November 2011.⁵ Although it dominated the headlines, it was not a significant point of reference in the interviews. As the next section explains, although it provides some information about the issues, for the most part it was not concerned with police-media relationships in the terrorism context. Secondly, and this was a point of reference in interviews, legislation was being debated that would increase secrecy in civil proceedings. This was occurring against the background of increasing scepticism about the propriety or legality of the ways authorities have operated in combating terrorism. The archetypal cases were actions against the British government by former Guantanamo Bay detainees returned to the UK without having been charged, but the provisions in the Bill that would become the Justice and Security Act 2013 applied to all civil [141] proceedings. They would overcome the Supreme Court's decision in *Al Rawi v The Security Services*⁶ that closed material proceedings could not be used in civil actions. With journalists less willing to accept at face value claims made by the authorities (especially about the actions of the state), and expanding secrecy laws that would prevent scrutiny, the issues under discussion were very much in the minds of interviewees. Consequently, interviewees were often very reflective about both their experiences and what the current debates might mean for the future.

Journalists' access to information after arrests

Terrorism activities come into the media and public eye when arrests are made. Only very occasionally are arrests made after an act of violence has been committed. Most arrests are made when the authorities suspect individuals possess materials or are engaged in activities that are preparatory to committing a terrorist act. There may be simultaneous arrests in different cities. As such, arrests will not be predictable and it may be unclear for some time exactly who has been arrested on what basis. As journalists struggle to get a reliable picture of what has happened and what is suspected, they will be heavily reliant in the first instance

on information from police. However, that information may be minimal, and journalists will want to test its accuracy and completeness. This, it was explained by interviewees, can be very, very difficult.

To verify information they have been given and to obtain further information not generally available, the ‘critical thing’ for journalists is ‘sources, having their trust so they will talk to you, and then making an assessment of what they tell you’.⁷ In terrorism and security matters, both the trust and assessment aspects are difficult because ‘journalists are distrusted by police and by the Muslim communities where arrested persons will often live or will have family or other connections’.⁸ Media relationships with police and communities are tested in these circumstances, and especially before anyone is charged or where no charges are made.

Relationships with police and security services

The *Leveson Inquiry* revealed that around the time of the 7/7 London bombings in 2005⁹ there was a close relationship between police and crime reporters. Police would brief journalists off the record on the basis that there was ‘an overwhelming public interest’ in conveying to the public any terrorist threat to the UK, though without prejudicing investigations or trials.¹⁰ With one exception, it appears that information about terrorism investigations was never leaked to the media.¹¹ Rather, information would generally be provided to the media only in order to prevent a report being published that may adversely affect an investigation.¹² As such, even while Leveson was critical of the close relationship between some police and some journalists, and there was much discussion of how unattributable or off-the-record briefings are problematic, there is nothing in the *Leveson Inquiry* to suggest that journalists ever found it easy to obtain information about terrorism investigations. [142] On the whole, the *Leveson Inquiry* does not tell us a great deal about the media experience of terrorism reporting. What, then, do journalists say about their dealings with the authorities when reporting on terrorism?

All journalists reporting on terrorism matters have interactions and relationships with the police, via both police press offices and individual contacts, but most do not have direct relationships with the security services.¹³ When arrests have taken place, the authorities are a key source of information, but journalists are ‘entirely vulnerable to being misled and really you have to cultivate contacts who you trust greatly’.¹⁴

The limited sources of information and the vulnerability were regularly raised. One journalist thought there was:

a huge problem about total reliance on government interpretation of intelligence and evidence presented in the early days of an investigation. ... [T]he media can quite easily be, and has been, persuaded to follow a particular course of enquiry which has later transpired not to be [correct].¹⁵

Terrorism cases operated differently. Police contacts were not a fruitful avenue of information because, unlike the general run of criminal matters, including serious crime: 'It's different because ultimately it's controlled by MI5, so even your usual police contacts don't want to say anything. They might claim they don't know anything.'¹⁶ For another: 'We couldn't get out anything out of anyone. The police just locked down like you would not believe. Usually on big stories they do have their protocols in what they can say but they will usually give you something—and we had nothing to go on.'¹⁷ Journalists are aware of the difficult position police may be in and want to maintain ongoing good relationships; while obviously seeking information from police, 'I don't want to compromise them either.'¹⁸

The information shutdown can be sweeping. One journalist recalled not being able to find out in what street in a regional city some arrests had occurred overnight. There was no information coming in as there usually would be from, for example, neighbours in the street. The police did not arrive with flashing lights and so, even if neighbours had woken up and looked out the window they would not have thought much of it; as a result, 'it happened without anyone seeming to know about it' and so the next day was a matter of 'traipsing round, just hoping to stumble across it'.¹⁹ Another described what happens once the street or house is located:

It wasn't like normally—there was no police line of officers outside in uniform. [But] it was quite obvious. ... For instance there were a couple of properties in an area which has got a high BME [black, minority and ethnic] population, with a couple of middle class white guys stood outside the door dressed very well. ... [It] makes everything harder because it is, in one sense, obvious that it's that property. But [the police] won't confirm it. Neighbours are talking, but [143] it's hard. You've got to give your readers something, but how do you confirm? Because [the police] won't confirm this, they won't confirm that.²⁰

The 'lack of information fuels speculation', which is unnecessary and counter-productive.²¹

The police may also provide some steer. The following is a typical example:

[They] will, sort of, give you on a scale of 1-to-10 how serious these arrests are. ... Police are quite understanding of [our needs]. If it's a biggie, then we are going to need to deploy a satellite truck, producers, camera crews. We're asking, really, because of the logistics involved. We have limited resources. [If] we throw everything up to a raid in Birmingham and it turns out one bloke with some dodgy DVDs, then it's not worth it. If it's three or four guys building a bomb, then it's going to be major news, it's probably going to lead our bulletins. We need to ... gauge that. [Arrests] come up on the wires, [my news desk will ask] me, 'Should we send on this?' ... I need to answer that almost instantly.²²

There was some very strong criticism of press officers in the counter-terrorism units:

They release very short on the record statements which may or may not be true. But then what the public and civil society is oblivious to is that then you get all the off the record briefing. And it can [come from] senior cops, and it can be spooks [security services officers]. But actually a lot of the time it's press officers disguised as senior police sources and they use that off the record briefing to twist and slant news coverage beyond what the [on the record] statement has already done.²³

To that journalist, 'all state sponsored press officers' have a function which 'essentially is kind of a barrier between the people who hold information, the truth if you like and those who are trying to get it out. They are not enablers they are kind of preventers'.²⁴ Other interviewees did not characterise that so strongly, but there was much scepticism of the way police officers present facts:

The largest obstacles are officialdom itself, the uneasiness that exists within the relationship between official press officers and the media. There is a default position, there's a complete unwillingness to share information. That means that journalists like myself look elsewhere and we try to forge unofficial relationships as much as possible.²⁵

Not all police forces or counterterrorism units were seen to be the same. One journalist saw some as simply unhelpful, and others, although they perhaps provided more information, were misleading: 'I don't know if I believe anything [144] that [X Police Force] say to me, certainly about counterterrorism operations.'²⁶ Regardless of the differences across units or forces, the one-sidedness of information at the time of arrests inherently raised great difficulties:

It is very hard to test information that you are being spoon fed and it is so sensitive by nature that it is almost impossible. [T]here is an acceptance of credibility which you can't afford really to go behind. ... A bit later on [you] are in a better position to question some of the facts that you were given at the time. This is usually [through] information which emerges through the lawyers working for the suspects and a better picture emerges.²⁷

The scepticism is endemic and more acutely felt where the security services are concerned: 'The instinctive position of the security forces is to provide the media with something that they believe will serve their own purposes.'²⁸ Of course, this is not necessarily any different from the approach taken by anyone dealing with the media; in all circumstances, 'you're kind of constantly aware that [everybody you speak to has] got their own agenda'.²⁹ Nonetheless, the security services seemed more able than the police to entice journalists into believing what they were told. The way an experienced journalist searches for words helps illustrate both the difficulty of obtaining information and the vulnerability to being misled when dealing with the security services:

If I wasn't sure of something, I would say, 'If I were to say this, would that be accurate?' And they would say, 'Well, it's not a million miles wide of the mark', or something like that. So it's a sort of ... almost ... it's not a game, but it's ... it's ... it's ... it's a testing process. I think it's ... I think it's quite ... potentially ... not dangerous but ... unwise for ... you know, young reporters who are starting out doing this beat to appreciate what the, you know, what the ... what the pitfalls are. And they may be more vulnerable to spinner ... spinnery, which happens, you know, than I would.³⁰

One was:

'a bit suspicious of some of my colleagues closeness to the security services. Some ... sound like mouth pieces for various agencies. You have to be constantly on your guard at getting too close to these people, about being sucked into their world and feeling like, 'Oh, you know, well I owe him a favour,' and all this, that and the other.'³¹

The difference between dealing with the security services and the police was that the former could and would shut people out if they so chose, and there was little or no recourse:

The police are kind of big enough and ugly enough to have an argument with and fall out with and then you build bridges with them. ... With MI5, they [145] only speak to certain journalists. ... We haven't had a big falling out yet but I get the feeling that if you piss them off then they cut you off. And I know there are certain journalists that they don't talk to who write about their worlds continually. And to my

mind, that's unhelpful because that is not an open or two way kind of thing. I mean, they don't really fucking tell you anything anyway. They tell you what they want to tell you and they have stuff they want to push. But when you go in with a direct question you get, you get almost non-answers really. I find it a quite unsatisfactory relationship.³²

There were suggestions that the security services should hold open, on-the-record briefings for journalists. 'If they did,' I asked, 'Could those be trusted?' 'No,' was the response, 'Because you can't trust anything. But at least we know who said it and when.'³³ The scepticism about the agencies' dealings with the media was not a criticism, as such, of the agencies' work. There was acceptance that the security services are managing difficult issues, have had great success in disrupting plots, and often are unable to secure recognition. For example, where a case does not proceed to court and information does not come out—it either ends up in closed proceedings in the Special Immigration Appeals Commission, or a plot is disrupted before there is sufficient evidence to charge a person with an offence—then there is a well-recognised effect on the security services: 'It's a problem for them ... because they don't, they can't, show any results. ... [But] when they get a result they're very keen to make a big show of it.'³⁴

Relationships with Muslim communities

With information from the authorities tending to be minimal and, on occasion, even misleading, there is a great need to supplement, test and verify what is made available by the state. To do that, sources in local communities where arrests have occurred will be crucial. There is now an established literature on British Muslim communities as suspect communities and, within that, documentation of media coverage of those communities and how such coverage is perceived within them.³⁵ The experience of journalists' is consistent with that literature. Journalists frequently engage with Muslim communities, either with families or neighbours of those arrested or at a more representative level through organisations or perhaps someone respected in the community the defendant calls home. Responses were unequivocal: when engaging with Muslim communities journalists found a 'huge, huge', 'massive' lack of trust of members of the media and thought they were seen by many 'as the enemy'.³⁶ Faced with the media, Muslim locals would '[shut] up shop or [be] withdrawing into themselves.'³⁷

Importantly, journalists were unsurprised by this; in fact, they thought it understandable and justifiable that communities were ‘pretty cynical about the media’.³⁸ Journalists themselves saw the media as having contributed to the environment of distrust through a lack of in-depth analysis, knee-jerk reactions, and tendencies to sensationalise.³⁹ ‘You can’t really blame the Muslim community,’ said one. ‘They do get an awful kicking and they’re rightly suspicious I think.’⁴⁰ Said another, ‘I [146] think they see the media as part of the prosecution, you know, a part of the Islamophobia that is evident in British society.’⁴¹

When asked about whether it is possible or appropriate to speak of ‘the Muslim community’, one respondent argued that it was not because there were differences across ethnic backgrounds, age groups and strands of belief, but that, nevertheless, ‘All those communities, I’m pretty sure, feel under the same kind of pressure.’⁴²

You’re fighting the mindset, which is really difficult, because the community feels itself under siege, under attack, victimised, stereotyped. I’m not talking about families whose sons are in jail for terrorist offences, I’m talking about the community as a whole.⁴³

A raid resulting in arrests will combine with subsequent media presence to fuel community caution and cynicism. First the police arrive:

Police raids do have a big impact on the community, especially when [those arrested are] subsequently released when they haven’t got the evidence to charge them, but also, the reason why it happens. ... It’s ... disruptive ... it’s to break up the cell. So they know they’re being watched.⁴⁴

Next, the media descends:

It’s very difficult to build relationships and trust with people that you just sort of parachute into their neighbourhood for a couple of days and, and bang on every door and have cameras everywhere and then you bugger off to the next circus. People like myself should probably be spending more time investing in people in those communities.⁴⁵

The journalists in the pack are not only from outside the communities, but their relationship with Muslim communities is also ‘as white journalists, to be brutally honest’ and when a person is charged ‘my job would be to look at background and I will go out to that house and knock on the neighbours doors but you tend to find (a) animosity, (b) mistrust’.⁴⁶

How, then, can journalists build relationships of trust? They need to put in time, just as they would in building any relationship.⁴⁷ It is a slow process: '[T]hey weren't prepared to do anything without long conversations about what I was going to do with the information and how I felt the information might be used.'⁴⁸ They 'have to go into the community—that is the only way to do it'.⁴⁹

Gone are the days when you can pick up the phone and speak to people who represent ... members of [a] Muslim community and expect to get ... a meaningful answer. You would [now] get a 'no comment' or a platitude that is a summary of what you knew already. You won't get the kind of in-depth analysis or intelligence that perhaps you are looking for.⁵⁰

[147] While 'it's not impossible' to build relationships, whether by 'show[ing] a degree of empathy and understanding' or 'just [being] persuasive', it is:

more difficult [as] all the tabloids turn up with huge wedges of cash basically saying, 'Let me buy your story.' And it will normally work with the white neighbours next door who've got some stuff to slag off about them. But for the actual Muslim communities—for the kernel of the story—that doesn't work.⁵¹

One (white British) senior journalist described an approach not seeking to develop sources directly:

Getting the contacts within the Muslim community is really, really difficult, because there is an inbuilt mistrust of ... outsiders, non-Muslims, those who work for [major media]. And there is a natural reluctance to have anything to do with people like me. Not because of who I am or what I've done, but because of what I represent in their eyes.⁵²

Instead, contacts and relationships were built by Muslim colleagues, and that was productive:

They refused to meet me. [Among the reasons], I think they would have been concerned that if I'd interviewed them I would have given them a much, much harder time. But in a way, that's no bad thing. They gave extremely frank, blunt interviews with my colleagues, which they would not have done with me, because I would have had to challenge them, and they would have probably clammed up.⁵³

The ‘tendency for reporters [to] always work in packs’, the dynamic of media presence and competition for stories does not make it easy for journalists to build individual relationships over time. A good example of how news desk demands affect relationship-building was explained by a journalist who had secured an interview against the odds:

[O]ne guy ... had spent [two days] outside the mosque being interviewed ... [Only once] everyone had gone ... we just started chatting. And I think it was because it was no longer the pack that he kind of opened up ... [But] if you are in that pack and you are all roaming around the streets looking for quotes, you’re always going to find it really, really hard. But the thing is that’s what the news desk wants. They don’t want to be behind the competition so they will want everyone to kind of work together. They’ll be a bit nervous about someone saying, ‘Right I’m going off on my own to do my own thing.’⁵⁴

The experience of reporting on terrorism arrests is unlike crime reporting generally. The authorities reveal less information, either formally or informally. What [148] is revealed is less likely to be reliable and, with communities less prepared to provide information to the media, it will be more difficult to test. Few things will be clear or certain; the circumstances do not lend themselves to any other outcome. Once charged, a person will be brought before the courts and then any information obtained and reported will be (hopefully) more reliable.

The legal process: Obtaining information after charge

Where a person is charged with terrorism offences in England or Wales, his or her first court appearance is at Westminster Magistrates’ Court in London.⁵⁵ That appearance is the media’s first opportunity to see the charge sheet (although there are no systematic processes in place to provide it) and it is also the first time the Crown Prosecution Service (CPS) reveals the allegations. Ideally the police leading the operation provide a press statement that usually includes a contribution from the CPS. An excellent example was a press release by West Midlands Police in December 2010, which listed names, ages and addresses of those charged, along with particulars of the offence, and comments from the CPS.⁵⁶ That level of information was thought by journalists to be useful and appropriate, but was also said to be the exception rather than the rule.

The first appearance will dispel or confirm pre-charge speculation about the allegations, though reports will inevitably be one-sided. The allegations can be reported and, driven by

editorial demands, there may be ‘a tendency towards spectacular writing, towards hyperbole’⁵⁷ or ‘a tendency to go for the hottest line you can and sometimes to ignore inconvenient facts in order to promote the best story’.⁵⁸ Defence lawyers will not have a great deal of information and will tend to say little or nothing at all. It would not be unusual for defence lawyers (with no objection from the Crown) to seek reporting restrictions on details regarding their clients. Where a group is arrested and some members are charged and some released, the releases will garner little attention. It is the case against those who are charged that is of interest.

Information will rarely come out until trial. While journalists ‘might get the odd leak’, they ‘don’t get anything until [they] hear it in court usually’.⁵⁹

Criminal trials

Trials are about contested versions of events. The Crown has alleged a person has committed criminal offences and the accused person has pleaded not guilty. However, not every issue is contested. On the contrary, much will be uncontested and a ‘much more firm’ factual picture will emerge:

Agreed statements, admissions, facts that are just completely indisputable. ... You get the amounts of money. [You get] the travel patterns—he went here, he went there. [You get] the emails. All of that stuff comes out and that’s gold dust really.⁶⁰

[149] The authorities will almost certainly be pleased that this kind of uncontested information is in the public domain, even if it is many months after the arrests. At trials journalists will ‘get to see sensitive material’⁶¹ and will hear first-hand accounts:

No matter how many miles you walk and no matter how many people you speak [to at the end of the day] the best stuff always comes out. [Y]ou’ve got the defendant speaking for themselves, or the defendant’s mother speaking. You’ve got the cops speaking. You’ve got a cop saying, ‘Well, I broke down the door and this is what I saw.’⁶²

This, for reporters, is a part of democratic public scrutiny: ‘That stuff only ever comes out in court and court reporting is so important it is fundamental to our democracy.’⁶³ With most organisations financially pressed, sitting through a long-running case was described as ‘a

luxury' and was worrying because in court: 'Instead of getting the embellished stuff and the spin and the bullshit you get ... what they have to tell the jury. That's limited to an extent but you do get more facts and I think more reliable information.'⁶⁴

For major trials, including terrorism trials, embargoed media briefings by police and the CPS will also be important, enabling reporters to 'learn more about the background [to the case and] to question about what [investigators] did and what they didn't do and why they did it. And that can be very useful'.⁶⁵ That said, these briefings are a way for the state to parade its strengths. The journalist continued:

[I]f you want to learn more about [what] investigators would like to conceal about their investigations then you really will find it a lot more difficult because you'll be met with, generally, denial, obfuscation, people misleading you, sometimes people threaten you. Trying to learn the truth about that [can be] extraordinarily difficult and certainly ... one place where you should go is listen to the legal argument that precedes trials in which lawyers try to argue about what will be admissible in evidence. Much of [that] will be heard in camera and it seems to me, from what I know now, that they will be heard in camera effectively to conceal evidence of official wrongdoing. But some of it will come out. ... Sometimes it is possible [to find one or two people there who will indicate to you something of what was said in camera]. But you also have the problem of sometimes people will deliberately leak something to you in order to give you a misleading impression of what's been said in camera.⁶⁶

Reporting the courts

In spite of the value of press and public scrutiny of criminal trials, and even though journalists generally consider the Judicial Communications Office to be a useful point of access to basic information, reporting the courts is not easy.⁶⁷ Journalists described feeling unwelcome, and being treated 'as a nuisance'⁶⁸ and as 'second [150] class citizens'.⁶⁹ They were critical of poor press facilities and a lack of awareness of media needs.⁷⁰ There were strong criticisms of the lack of access to materials:

We are sitting in a court trying to report a case and the entire courtroom will have documents in front of them that they're reading from, which we're not given access to. They will skip through these documents, they'll refer to paragraph seven and they'll flick back to paragraph six. ... And we won't have any idea what they're talking about.⁷¹

Most journalists reported little contact with judges, one describing the judiciary as ‘invisible’ and having no contact ‘whatsoever, except when they tell you off’.⁷² The criticisms may not be entirely justified, or at least do not present the full picture. First, these perceptions are markedly out of kilter with judicial views of the media’s role and reporting on terrorism cases.⁷³ Generally, the judiciary takes the view that the media has an important and valuable role in reporting on terrorism cases. Judges tended to see themselves as doing their best to accommodate media interests, though they were largely of the view that the courts were not providers of information for the media, but adjudicators where the media may want access to material. They should not be ‘entering into the ring to take part in a boxing match’; rather, they should be ‘the umpire’.⁷⁴

Second, the media can request material from the Crown and so the judiciary’s perception of its role makes some sense in this context. A protocol agreed by the CPS, the Association of Chief Police Officers (ACPO) and media bodies enables the media to request prosecution material.⁷⁵ Journalists criticised police selectivity in the material provided. For example, only extracts of terrorist training videos shown in court would be released; parts that suggested the accused were incompetent were not made available.⁷⁶ Still, the police and the CPS have been described as ‘pretty even-handed’⁷⁷ and on the whole the protocols provide a good pathway to accessing prosecution material, even though ‘we get a boiled down, cut down version of what we want’.⁷⁸ Sitting alongside the protocols are more recent Criminal Procedure Rules that allow access to documents.⁷⁹ The courts have held that these rules are important and a fundamental aspect of securing effective open justice.⁸⁰

Relationships with defence lawyers

With scepticism about information supplied by the state, and difficulty in obtaining information through the courts, do defence lawyers play an important role? To some extent, the answer is yes. Not every defence lawyer deals with or is helpful to the media; some ‘are great, very helpful and very talkative’, while others are ‘very unhelpful’.⁸¹ The former can be important sources, even while they work within legal and ethical constraints. They may provide information that is not restricted, but that is not easily accessible. Journalists, though, are still rightly cautious. Some defence lawyers, it was said, have ‘sophisticated media strategy plans, [151] [are] very experienced and know exactly what to say and when to say it’.⁸² Some may ‘manipulate’ journalists.⁸³ They are ‘not stupid’ and they are not naive;

rather, they ‘will talk when it is in their interest’.⁸⁴ On one view, this makes them no different from prosecution or police; whatever the party, ‘self-serving documents’ will be passed on to the media.⁸⁵

At heart, though, lawyer-journalist relationships are simply professional, each acting with their respective interests in mind. Lawyers are acting for a client and—not without reason—are usually cautious. They can be ‘very wary’ because ‘there is a tendency [and we are guilty of this] to cover the prosecution and not the defence’.⁸⁶ The reciprocal position was expressed well by a lawyer who said that it is easy to be on one’s guard against ‘less friendly elements of the press’ and ‘more difficult to be guarded with [those you trust a lot]’ but:

still at the back of my mind is, ‘You are a journalist. What if I let something slip?’ Can I really? [That person] is just going to get this out there. And they are good at their job. They are good at getting stuff out of you even when you don’t really think you are saying that much.⁸⁷

Journalists are reporting on matters of public interest and while they may be friendly with lawyers, that does not stop them reporting: ‘I just have to make a difficult phone call at 10 o’clock at night and say, you know, “I’m sorry. I’m going to shit all over your client tomorrow.”’⁸⁸ On both sides, trust is the central issue to the relationship. It is an acceptance that journalists and lawyers have different roles, but that they can co-exist. This was captured well by a journalist who said there are lawyers ‘who will not mislead me. They may not be in a position to tell me the whole [story] because they’re bound by the court, but they will not mislead me, and will not if possible allow me to mislead myself, to make wrong assumptions’.⁸⁹

While journalists’ main challenges will ordinarily lie in obtaining information, they may also be challenged by the legal requirement to disclose to the authorities information they have obtained. This challenge cannot go unremarked because the laws are a component part of the state’s management and control of information. The fact that it is less visible than the difficulties associated with obtaining information does not render it less important.

The other side of the coin: journalists’ obligations to disclose information

Journalists are not immune to or unfamiliar with demands for information. Journalistic materials can be sought using a ‘production order’ obtained under the Police and Criminal

Evidence Act 1984 (UK) (PACE) or, in terrorism matters, under the less demanding provisions on the Terrorism Act 2000 (UK).⁹⁰ However, these established procedures are only engaged when the state requests material. There is no general obligation in British law for anyone to provide information to the authorities.

[152] Terrorism legislation changes that general position. Under s 38B of the Terrorism Act 2000, a person who has information ‘which he knows or believes might be of material assistance’ in preventing an act of terrorism or apprehending or prosecuting an offender must disclose that information to the authorities. A failure to do so carries a punishment of up to five years imprisonment. It is a defence if a person has ‘a reasonable excuse’ for not disclosing, though ‘reasonable excuse’ is undefined. The offence existed in Northern Ireland from the mid-1970s but it was always controversial.⁹¹ It was not a part of the Terrorism Act 2000—it was expressly rejected—but was inserted in 2001 after the 9/11 attacks in New York City.⁹² The provision is aimed at families, friends and others close to people who are planning or have committed offences, but it can clearly apply to others, including journalists.

The Independent Reviewer of Terrorism Legislation, David Anderson QC, has remarked upon this potential application in his annual reports.⁹³ In the academic literature, only Clive Walker has paid substantial attention to the laws, also observing the potential application.⁹⁴ Anderson concludes that the fears ‘have not been realised in practice’, noting that there have been no prosecutions of journalists and, though he indicates that police may tend to give communities ‘a firm reminder’ of the implications of failing to disclose information, he does not indicate that police approach journalists in this way.⁹⁵ He does, however, consider that ‘there is no doubt that some journalists have the availability of s 38B well in mind: whether it has a chilling effect on their activities is something that would repay study’.⁹⁶ This chapter cannot accommodate a detailed discussion of s 38B, but three brief observations may be made.

First, the research interviews—not only with journalists, but also with lawyers—indicated very clearly that this section is having an effect on the media. Although prosecutions to date have only been against family and friends, there is nothing in the legislation or the case law to suggest a media prosecution is out of the question.⁹⁷ It was clear that in-house lawyers, external lawyers and journalists are all acutely aware of the possibility that journalists may be prosecuted. Interviews revealed that at least two journalists had sought legal advice on s 38B

from outside their organisations. I was told nothing that indicated police or security services have threatened journalists with prosecution, or even highlighted this particular power, but that should not lead to an inference that prosecution is unlikely. Rather, it is more likely that the authorities know that the media will disclose information. Certainly, the interviews left no doubt that disclosures have been made by media organisations on a number of occasions.

Second, although s 38B was considered when the CPS drafted guidelines for prosecution of cases likely to affect the media, it is not in the list of offences to which the guidelines apply.⁹⁸ Given the media awareness of the issue, the effects it has had, and the judicial statements that makes it clear it is a serious offence, there was and remains a strong case for inclusion.⁹⁹ While it may not be ‘likely’ in the sense that it will be frequently prosecuted, it seems no less likely than some of the other offences in what is quite a long list.

[153] Third, the research interviews strongly suggest that s 38B is unnecessary where the media is concerned. There is little (if any) doubt that journalists and media organisations would disclose information in the circumstances contemplated by the Terrorism Act 2000. This does not mean an exemption or media-specific defence is appropriate. Instead, repeal of the section would be a better path.

So, can it be said that there is a chilling effect? That is, are journalists changing their behaviour and self-censoring what they written or stepping back from asking investigative questions that may place them in difficult positions? At this stage, no, but if there was a prosecution, then that would almost certainly change. There would be a very high risk that journalism would become more cautious than it needs to be. Unless there were clear grounds and a very strong evidentiary and public interest case for prosecution, a chilling effect would seem inevitable.

Conclusion

Where terrorism and national security are concerned, openness should be the default position. Unless there are good reasons for secrecy, the state should disclose information about terrorism and security. At certain times and in relation to a limited range of issues, secrecy may of course be essential where national security matters are concerned. Even among the most robust proponents of free speech and openness in the UK, and among the most trenchant

sceptics of government behaviour, that proposition is widely accepted. But openness should be the presumptive starting point.

However, as this chapter has suggested, the deck is stacked against openness. At formal and informal levels, information remains largely in the control of the state. Within Muslim communities the mainstream media faces great challenges in building trust, with those challenges arguably substantially a product of the media's own making. Journalists—even very experienced journalists with good contacts—find it very difficult to get reliable information and, importantly, to test the information they are given by the authorities. Even if imperfect, the courts are absolutely crucial avenues for obtaining information of great public interest. In terrorism and security matters, where information will be closely guarded by the state, the ability to adequately report court cases is essential if scrutiny of government is to be effective, if the threat of terrorism is to be understood, and if the public is to have confidence in the way that such threats are addressed. Things could and should be improved, but the main struggle at present is to ensure that open justice is not trumped by an all-encompassing—whether necessary or not—national security priority. In the words of a journalist interviewee, ‘national security is an easy umbrella to put up to deflect what you think is going to be troublesome rain’.¹⁰⁰

Are journalists reckless about managing information relating to terrorism and security? The answer is, resoundingly, ‘no’. Do journalists view their roles uncritically? Again, clearly, ‘no’. An accountable and responsible state should not fear the media where national security or natural justice are at issue. In the practice of [154] journalism, as it emerged in the research interviews, the public interest in openness and the application of open justice principles are of vital importance, but it is ultimately secondary and will yield to primary priorities of natural justice and the public interest in national security. However, state controls over information currently make the gulf between these primary and secondary commitments unacceptably and unhealthily wide. There is still considerable scope to maintain and improve access to information before either natural justice or national security is threatened.

** Lawrence McNamara is Senior Research Fellow and Deputy Director at the Bingham Centre for the Rule of Law. The Bingham Centre is a part of the British Institute of International and Comparative Law, an independent research institute in London. Prior to joining the Bingham Centre in 2012 Lawrence was a Reader*

in Law at the University of Reading in the United Kingdom (2007–12) and held academic posts in Australia from 1997–2007. He has published and presented widely on matters relating to media law, security and the regulation of speech.

¹ I Cram, 'Regulating the Media: Some Neglected Freedom of Expression Issues in the United Kingdom's Counter-Terrorism Strategy' (2006) 18 *Terrorism and Political Violence* 335, 336.

² Most notable in the UK is the Justice and Security Act 2013.

³ Interviews have been given randomised codes in the format 'LTRK-XXX' and references to interviews are in this form so that the range of interviews drawn upon can be seen. Beyond this, for reasons of confidentiality, interviewees are not identified other than in general terms.

⁴ For earlier work on the Australian experience, see L McNamara, 'Closure, Caution and the Question of Chilling: How Have Australian Counter-Terrorism Laws Affected the Media?' (2009) 14 *Media and Arts Law Review* 1.

⁵ Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (November 2012) vols 1–4 (*Leveson Inquiry*).

⁶ *Al Rawi v The Security Services* [2011] UKSC 34. This sat alongside other litigation that sought to secure the disclosure of executive documents under the *Norwich Pharmacal* principles: see especially *Binyam Mohamed v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65, [2010] EWCA Civ 158.

⁷ LTRK-129.

⁸ LTRK-168.

⁹ On 7 July 2005, four suicide bombers detonated devices in central London; three exploded on the underground and a fourth on a bus. Fifty-two people died and hundreds were injured.

¹⁰ *Leveson Inquiry*, above n 5, vol 2, p 797, para 2.59 (evidence of former Metropolitan Police Service Assistant Commissioner Peter Clarke); see also vol 2, p 794, para 2.47 (evidence of journalist Sandra Laville).

¹¹ The exception was the plot to behead a British soldier. Arrests were made and it appeared that one outlet had advance knowledge, and details of allegations were also subsequently leaked more widely: see, for example, 'Police Chief's Fury over "Labour Leaks on Beheading Plot"', *Daily Mail* (London, 9 February 2007) 2; Steve Bell, 'Terror Leaks: Both Home Office and Police Implicated' (cartoon), *The Guardian* (London, 26 April 2007) 33. An internal investigation did not uncover the source of the leak: *Leveson Inquiry*, above n 5, vol 2, p 802, para 2.80.

¹² *Leveson Inquiry*, above n 5, vol 2, pp 783–5, paras 2.10–2.18.

¹³ A useful examination of media and security services relationships can be found in R Dover and M Goodman (eds), *Spinning Intelligence* (Hurst & Co 2009). Among numerous excellent chapters is one by BBC security correspondent Gordon Corera (pp 57–70).

¹⁴ LTRK-124. See also LTRK-129.

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¹⁵ LTRK-153.

¹⁶ LTRK-163.

¹⁷ LTRK-132.

¹⁸ LTRK-163.

¹⁹ LTRK-181.

²⁰ LTRK-163.

²¹ *ibid.*

²² LTRK-137.

²³ LTRK-168. Hopefully this pattern will change following publication of College of Policing, 'Guidance on Relationships with the Media' (May 2013) <<http://www.acpo.police.uk/documents/reports/2013/201305-cop-media-rels.pdf>> accessed 22 September 2014. This document sets out to clarify a number of issues, including those relating to on-the-record, non-reportable, and embargoed briefings, as well as when and how unattributable statements may be made.

²⁴ LTRK-168.

²⁵ LTRK-137.

²⁶ LTRK-124.

²⁷ LTRK-153.

²⁸ *ibid.*

²⁹ LTRK-126.

³⁰ LTRK-129.

³¹ LTRK-126.

³² *ibid.* (This person also cautioned that their contact with MI5 had been quite limited.)

³³ LTRK-168.

³⁴ LTRK-126.

³⁵ See, for example, J Lewis, P Mason and K Moore, 'Images of Islam in the UK: The representation of British Muslims in the National Print Media 2000–2008' in J Petley and R Richardson (eds), *Pointing the Finger: Islam and Muslims in the Contemporary UK Media* (One World 2011) 40–64. For a good example of how communities perceive that coverage, see G Mythen, S Walklate and F Khan, "'I'm a Muslim But I'm Not a Terrorist': Victimisation, Risky Identities and the Performance of Safety' (2009) 49 *British Journal of Criminology* 736, 742–3.

³⁶ LTRK-126; LTRK-129.

³⁷ LTRK-153; see also LTRK-168.

³⁸ LTRK-153.

³⁹ For example, LTRK-126, LTRK-129, LTRK-168, LTRK-131, LTRK-153.

⁴⁰ LTRK-126.

⁴¹ LTRK-153.

⁴² LTRK-129.

⁴³ *ibid.*

⁴⁴ LTRK-129.

⁴⁵ LTRK-126.

⁴⁶ LTRK-157.

47 LTRK-126.
48 LTRK-153.
49 *ibid.*
50 *ibid.*
51 LTRK-168.
52 LTRK-129.
53 *ibid.*
54 LTRK-168.
55 ‘Protocol on the Management of Terrorism Cases Issued by the President of the Queen’s Bench Division’ (2nd edn, Courts Service 2007) para 5.

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56 Copy on file with author. For an insight into the CPS perspectives, see S Hemming, ‘The Practical Application of Counter-Terrorism Legislation in England and Wales: A Prosecutor’s Perspective’ (2010) 86 *International Affairs* 955.

57 LTRK-168.

58 LTRK-131.

59 LTRK-153.

60 LTRK-126.

61 LTRK-153.

62 LTRK-131.

63 *ibid.*

64 LTRK-126.

65 LTRK-124. LTRK-137 commented that these briefings were ‘excellent’. This practice was established in 2005 by former Director of Public Prosecutions Ken Macdonald: *Leveson Inquiry*, above n 5, vol 2, p 798, para 2.62.

66 LTRK-124.

67 Journalists and media lawyers generally viewed the England and Wales Judicial Communications Office and the England and Wales courts’ approach to media relations as being less helpful and less effective than the far more organised system used in Scotland, though they noted consistently that this was in part a resourcing issue and that the Scottish justice system is far smaller than that of England and Wales.

68 LTRK-137.

69 LTRK-131.

70 LTRK-126, LTRK-131.

71 LTRK-131.

72 LTRK-126.

73 For background to the courts’ approach to developing media relations, see generally Select Committee on the Constitution, *Relations between the Executive, the Judiciary and Parliament* (2006–07, HL 151) ch 4.

74 LTRK-180.

75 CPS, *Protocol for Working Together: Chief Police Officers, Chief Crown Prosecutors and the Media* (October 2005) <www.cps.gov.uk/publications/agencies/mediaprotocol.html> accessed 22 September 2014. See also Association of Chief Police Officers Communication Advisory Group, *Guidance 2010* (November 2011) section 5 <<http://www.acpo.presscentre.com/imagelibrary/downloadMedia.aspx?MediaDetailsID=238>> accessed 22 September 2014.

76 LTRK-137.

77 LTRK-126.

78 LTRK-137.

79 Criminal Procedure Rules (UK), r 5.8.

80 *R (on the application of Guardian News and Media) v Westminster Magistrates Court* [2012] EWCA Civ 420.

81 LTRK-126. See also LTRK-131.

82 LTRK-153.

83 LTRK-124.

84 LTRK-168.

85 LTRK-153.

86 LTRK-137.

87 LTRK-182.

88 LTRK-126.

89 LTRK-124.

90 For a comparative analysis of the Australian and UK positions see L McNamara, ‘Proxies for the Authorities: Using Media Information in the Investigation and Prosecution of Terrorism Offences’ in A Lynch, N McGarrity and G Williams, [157] *Counter-Terrorism and Beyond: The Culture of Law & Justice after 9/11* (Routledge 2010) 173–198; L McNamara and S McIntosh, ‘Confidential Sources and the Legal Rights of Journalists: Re-thinking Australian Approaches to Law Reform’ (2010) 32(1) *Australian Journalism Review* 81. Closed material procedures may soon be available for production order proceedings under the PACE: Gill Phillips, ‘Another Backdoor Attempt to Restrict Essential Protection’, *Media Lawyer* (30 January 2014).

91 See, for example, Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism* (Cm 3420, 1996) vol 1, para 14.16–14.23, which also summarises previous reviews. The Home Office Consultation Paper, *Legislating Against Terrorism* (Cm 4178, 1998) received 20 responses regarding its proposal to omit the provision from the permanent terrorism legislation that would become the Terrorism Act 2000 (UK). Twelve supported the retention of the offence in permanent legislation and seven said it should be discarded: Home Office, *An Analysis of the Responses to the Government’s Consultation Paper* (Cm 4178, 1998) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265689/4178.pdf> accessed 22 September 2014. Prior to 2000, terrorism laws were enacted or revised on four occasions: in 1974, 1976, 1989 and 2000. The Government did not propose the law in 1974 or 1976. The Bill did include it in 1989, albeit as retention of an existing law rather than introduction of a new law.

92 Anti-Terrorism, Crime and Security Act 2001 (UK), s 117.

93 David Anderson, *Report on the Operation in 2010 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, July 2011 (The Stationery Office, London) 6.24–6.25; David Anderson, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (June 2012), 6.10, 6.19; David Anderson, *The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (June 2013), 7.13.

⁹⁴ Clive Walker, *Terrorism and the Law* (OUP 2011) ch 3.

⁹⁵ Anderson, above n 93, *The Terrorism Acts in 2012*, 7.13–7.14.

⁹⁶ Anderson, above n 93, *The Terrorism Acts in 2011*, 6.19.

⁹⁷ See, for example, *R v Sherif* [2008] EWCA Crim 2653; *R v Girma* [2009] EWCA Crim 912.

⁹⁸ The CPS put interim guidelines out to consultation and the submission that drew attention to s 38B was the author's own. While other points in that submission were apparently taken up in preparation of the final guidelines, this one was not. For final guidelines see DPP, 'Guidelines for Prosecutors on Assessing the Public Interest in Cases Affecting the Media' (13 September 2012), with listed offences at Annex A <http://www.cps.gov.uk/legal/d_to_g/guidance_for_prosecutors_on_assessing_the_public_interest_in_cases_affecting_the_media/>.

⁹⁹ *R v Sherif* [2008] EWCA Crim 2653; *R v Girma* [2009] EWCA Crim 912.

¹⁰⁰ LTRK-137.