

<p>1 Thursday, 26 January 2012 2 (10.00 am) 3 LORD JUSTICE LEVESON: Mr Jay, I have noticed in some 4 newspapers this morning that it is suggested that I have 5 reserved my decision in relation to core participant 6 status for a number of individuals. I did not think 7 that I had done that. I thought I had given rulings. 8 Is there any lack of clarity about that? 9 MR JAY: It was certainly my understanding. The 10 applications were rejected. 11 LORD JUSTICE LEVESON: The individual applications? 12 MR JAY: Yes. 13 LORD JUSTICE LEVESON: That was my intention, but if there 14 is any doubt about it, doubtless it will be brought to 15 my attention. Thank you. 16 MR JAY: Sir, there is the issue which was left open 17 yesterday of any possible appeal against the Divisional 18 Court ruling. 19 LORD JUSTICE LEVESON: Yes. Mr Caplan, can you assist? 20 MR CAPLAN: I can, sir, and can I confirm that it is not the 21 intention of Associated Newspapers to take the matter 22 any further. 23 LORD JUSTICE LEVESON: Thank you very much. In those 24 circumstances, I will direct that the application made 25 by the National Union of Journalists should be</p> <p style="text-align: center;">Page 1</p>	<p>1 LORD JUSTICE LEVESON: Thank you very much for the work 2 that's been put into this, and indeed for facilitating 3 during the course of last year the provision of 4 information relevant to the work of your predecessor. 5 A. Thank you. 6 LORD JUSTICE LEVESON: It's obviously been work for your 7 office which was not originally planned. 8 A. Indeed, but the Information Commissioner's office is 9 very glad to help the Inquiry in any way we can. 10 LORD JUSTICE LEVESON: Thank you. 11 MR JAY: You, Mr Graham, are the current Information 12 Commissioner and have been since late June 2009. 13 Previously you enjoyed a career in journalism, 14 broadcasting and then as Director General of the 15 Advertising Standards Authority; is that right? 16 A. Indeed. 17 Q. Unlike Mr Thomas, I don't believe you have a legal 18 background? 19 A. I'm not a lawyer. 20 Q. Can I ask you, please, about the handover from 21 Mr Thomas. Presumably you were advised of the key 22 issues that were concerning the office at that time; is 23 that correct? 24 A. Indeed. And I had to brief myself on the key issues in 25 my application for the position. It was a</p> <p style="text-align: center;">Page 3</p>
<p>1 circulated to core participants under the usual 2 confidentiality agreement, and submissions in writing 3 about the direction that I should take should be made by 4 close of business on Monday. I will then rule during 5 the course of next week in writing. I would have 6 thought that it's unlikely to require oral exposition, 7 but if I take a different view, I will make that clear. 8 I am led to believe that there may be some 9 journalists who were not prepared even to submit 10 statements until they were aware of the decision of the 11 Divisional Court and the conclusion of that challenge. 12 If there are any further statements, they will be 13 circulated in the normal way, with the usual 14 confidentiality, until rulings can be made. 15 MR JAY: Sir, may I call Mr Christopher Graham, please. 16 MR CHRISTOPHER GRAHAM (sworn) 17 Questions by MR JAY 18 MR JAY: Make yourself comfortable, please, Mr Graham and 19 first of all tell us your full name. 20 A. Christopher Sydney Matthew Graham. 21 Q. Thank you. You've provided the Inquiry with two witness 22 statements, dated respectively 16 September of last year 23 and 20 January of this year, signed and dated by you. 24 Is this your true evidence to the Inquiry? 25 A. It is.</p> <p style="text-align: center;">Page 2</p>	<p>1 long-drawn-out process. Even after being identified by 2 the selection panel, I then had to go before the Justice 3 Committee. So there was plenty of time for me to 4 acquaint myself with the issues and the concerns around 5 the illegal access to personal information, whether by 6 journalists or the much wider problem of information 7 going missing from databases anyway. I think I was 8 questioned about that both at the job interview and the 9 Select Committee, and of course before I took up my 10 position, I had conversations with Richard Thomas. 11 Q. In relation to press and journalism, what were the key 12 issues facing your office in late June 2009, at least as 13 explained to you by Mr Thomas or ascertained by you from 14 your own research and perception? 15 A. I can't say it was the top of the list, the top 16 priority. I was aware there was an outstanding issue of 17 the commencement or the non-commencement of Section 77 18 and 78 of the Criminal Justice and Immigration Act, 19 where there was a sword of Damocles hanging over the 20 press. If there was any repetition of the behaviour 21 that Operation Motorman had uncovered that would be 22 accessed pretty quickly. But I have to say that there 23 were many other priorities facing the office. I think 24 the Select Committee questioned me mainly about the 25 backlog in freedom of information cases. It's important</p> <p style="text-align: center;">Page 4</p>

<p>1 to bear in mind that the Information Commissioner is 2 responsible both for the right to privacy and the right 3 to know, and the Freedom of Information Act was I think 4 a higher priority at that point than the Data Protection 5 Act.</p> <p>6 But then I had a wake-up call in week two, because 7 the Guardian front page and Nick Davies' story brought 8 the whole issue to my attention. I was very quickly 9 contacted by the Select Committee and I had to get up to 10 speed on that issue.</p> <p>11 Q. "That issue" being specifically?</p> <p>12 A. At that stage it was briefing myself on what had and 13 hadn't gone on in the period up to 2006 when my 14 predecessor had published "What price privacy?" and 15 "What price privacy now?". But the issue quite quickly 16 became of wider concern, because there was data going 17 missing all over the place. There was the leak of the 18 membership list of the British National Party, which was 19 posted on the Internet, and that I was reminded in 20 September 2009 by the judge in Nottingham Crown Court, 21 who imposed a rather modest fine, as it tends to happen 22 on these occasions for a Section 55 offence, and the 23 judge said it had come as a surprise to him to find that 24 he couldn't impose a custodial penalty.</p> <p>25 Q. You gave evidence to the Select Committee Culture, Media Page 5</p>	<p>1 of campaigners, that if there was evidence of further 2 breaches of Section 55 by the press, it would have been 3 drawn to my attention, and it hasn't been.</p> <p>4 But I must stress that that doesn't mean that 5 Section 55 isn't being breached. It's being breached 6 every day, and my frustration is that I'm faced by the 7 press, who say they ain't misbehaving, but they are 8 flatly opposed or have been opposed to the introduction 9 of a more effective penalty for these offences because 10 they say it will have a chilling effect on investigative 11 journalism.</p> <p>12 As a former journalist, I'm not in favour of 13 something that's going to have a chilling effect on good 14 investigative journalism, but we are facing a problem of 15 not being able to get the courts and society to take 16 seriously this very modern threat of personal 17 information going missing from databases because members 18 of staff are misbehaving, selling information, it's 19 being blagged from them. It isn't just about the press.</p> <p>20 In fact, I went to the Society of Editors conference 21 in 2009 and said it's so not about you. It's about NHS 22 workers, it's about private investigators, it's about 23 bank clerks, and it's frustrating not to be able to deal 24 with that real challenge, which the Information 25 Commissioner's office is concerned to deal with, because Page 7</p>
<p>1 and Sport on 2 September 2009. We'll come back to that 2 very soon. Your witness statements make it clear that 3 you did not believe that the press was significantly 4 involved in breaches of the Data Protection Act really 5 between 2006 and 2009, true that was before your time, 6 and certainly between 2009 and today's date, and by 7 implication had learnt lessons from the 2006 reports. 8 Is that a fair impression to be gathered from your 9 witness statements, Mr Graham?</p> <p>10 A. I can only speak of what's in my own knowledge, and 11 I can only speak of those aspects of press conduct that 12 fall within the responsibilities of my office, and 13 that's primarily Section 55. I know that the Inquiry 14 was triggered by concerns about hacking of phones and 15 hacking of emails, these are criminal offences that 16 don't come under the Information Commissioner's office, 17 but Section 55 certainly does.</p> <p>18 I can't prove a negative. All I can say is I've 19 seen no further evidence beyond what we published in 20 2006, and that of course was about behaviour before 21 2003, when Mr Whittamore's office was raided, and much 22 of it related to activity between 1999 and 2003.</p> <p>23 I simply offer a view that this is an issue of such 24 high salience, many investigative journalists working in 25 the area, great rivalry between newspaper groups, lots Page 6</p>	<p>1 we're constantly met by the press saying, "This is 2 terrible, the sky is falling, the sky is falling".</p> <p>3 It really isn't. Section 77 would provide the 4 opportunity for a broader range of deterrent sentences 5 than just a fine, and Section 78 gives the press 6 a stronger public interest defence, because it's based 7 on reasonable belief.</p> <p>8 Q. Yes.</p> <p>9 LORD JUSTICE LEVESON: How many private inquiry agents have 10 you searched in the last five years?</p> <p>11 A. We were investigating -- there are some ongoing 12 investigations, and perhaps I shouldn't say too much 13 about that, but that side of our work is very active.</p> <p>14 What I haven't done is to go back to Mr Whittamore 15 and say, "How's it going on these days?" I don't 16 believe the courts do that. If somebody is sentenced 17 and punished, we move on. I don't think it falls to the 18 Information Commissioner to go and have a look see ten 19 years later to see whether he's a reformed character.</p> <p>20 MR JAY: I just want to test some of those propositions, not 21 in relation to Section 77 and 78, we hear what you say 22 about that and that is clear, but were you aware that 23 the Express Group were still using JJ Services, 24 Mr Whittamore's alter ego, at least until 2010?</p> <p>25 A. I wasn't until I heard it in evidence I think last week. Page 8</p>

<p>1 Q. Yes. A number of newspaper groups have given evidence 2 to the Inquiry that they used search agencies, which 3 they're careful to distinguish from private detectives 4 or private investigators, and these search agencies 5 obtain addresses, telephone numbers and similar sorts of 6 personal data. Does your office know the methods these 7 search agencies deploy, in particular whether they're 8 lawful? 9 A. I'm certainly aware of the information which I think was 10 in the witness statement from News International, which 11 referred to a service where you could access 12 ex-directory numbers on the web. We were certainly 13 aware about that. One of the services, I think the 14 GB Group, got going about 2002, so after many of the 15 Whittamore offences, if there were offences, were 16 committed. 17 This is simply a phenomenon of the online world. If 18 I'm ex-directory, I probably don't think too much about 19 giving out my number when I am booking a flight or 20 buying something online, and I really ought to read the 21 privacy notice rather more carefully than most of us do, 22 because that information may be shared and it will be 23 claimed that I've given my consent. Consequently, 24 a database of many millions of numbers may arise. So 25 just being ex-directory to British Telecom doesn't get</p> <p style="text-align: center;">Page 9</p>	<p>1 this and speaking for the wider public, why doesn't it 2 work the other way round? Why don't you have to tick 3 a box that makes it clear you are happy that your 4 personal data is shared? Why do you have to tick a box 5 to say that you're not happy? It doesn't seem right 6 Mr Graham. 7 A. No, the opt-in, opt-out debate is raging all the time. 8 We've had proposals from the European Commission 9 yesterday about a completely new regime for data 10 protection. In many cases you do have to tick to opt 11 in. 12 All I would say is the information that websites 13 provide is typically deeply obscure. I mean Google, for 14 example, have changed their privacy policy. I noticed 15 on the search engine yesterday, it said, "Do you want to 16 know more about our privacy policy?" and at that moment 17 I didn't particularly want to do that, but it turns out 18 that it's a huge change which aggregates all the various 19 Google search engines and any information that you give 20 to one can be shared with everybody. Big issue, which 21 my office is now engaging with. So this is -- 22 LORD JUSTICE LEVESON: Could I ask you just to slow down 23 a bit, because what you're saying is being recorded and 24 we want to make sure we get it accurately. 25 A. Indeed.</p> <p style="text-align: center;">Page 11</p>
<p>1 you very far. 2 Is it lawful? The information should be processed 3 fairly, and if you make a subject access request or you 4 apply to the company and say, "I don't want you to go on 5 providing my number", our evidence is where these cases 6 have been raised with us that the companies are quite 7 good about withdrawing that information and making 8 changes. So on the face of it, not unlawful. 9 Q. There are two points there. The first point, as you 10 say, if you're booking up a flight or obtaining any sort 11 of service these days on the Internet, you have often to 12 tick specifically a box which makes it clear that you 13 don't want your private information to be shared with 14 others. That's the position. 15 A. Yes. 16 Q. And that box may be quite hidden away, or certainly not 17 patent on the web page you're looking at. Is that also 18 correct? 19 A. That is correct, and it's one of the priorities of the 20 Information Commissioner's office to help consumers 21 understand how the world works and to get data 22 controllers to treat their consumers as adults, and to 23 give them the information. I mean, this is the next 24 phase of data protection. 25 Q. Yes, but just speaking back for the personal interest in</p> <p style="text-align: center;">Page 10</p>	<p>1 MR JAY: The second point is why assume that a search agency 2 has obtained this information because consumer X, such 3 as me, has failed to tick the relevant box, the 4 information, the personal data has been transmitted to 5 the search agency and the search agency is therefore 6 processing it lawfully? It may be that the search 7 agency has obtained the information unlawfully in the 8 first place. How do we know? 9 A. It wouldn't be fair processing if you were -- if you 10 hadn't got the consumer's consent. I say the consent is 11 very often claimed because of something deep in 12 a privacy policy. 13 I absolutely recognise the problem that you 14 describe, but it's a different order to the sort of 15 thing that we were dealing with with Section 55. 16 I wasn't very convinced by the evidence from some other 17 newspaper groups, who seemed to say that because they 18 could, in 2011 or 2012, get the information that they 19 were seeking from Mr Whittamore from some online source 20 which they believe was lawful, it couldn't be an 21 offence, it couldn't be a Section 55 offence, could it, 22 to get Mr Whittamore to use the dark arts to provide the 23 information from an earlier age. 24 I say in my second witness statement that that's 25 rather akin to saying that because second-hand cars are</p> <p style="text-align: center;">Page 12</p>

<p>1 available for sale, it's therefore not an offence to 2 take and drive someone's motor. It's just 3 a non sequitur.</p> <p>4 Q. I understand that point, Mr Graham, and it's a very fair 5 point, but to go back to Mr Whittamore, who is probably 6 still trading as JJ Services, is this the position: you 7 don't know one way or the other whether he's using 8 lawful means or unlawful means; is that right?</p> <p>9 A. I don't know anything about Mr Whittamore's business 10 except what I heard last week in relation to the 11 Express.</p> <p>12 If one was dealing with -- if at the time one was 13 dealing with newspapers who are saying, "Well, in good 14 faith we had bought a product from this person, so we 15 can't be blameworthy, can we?" I would simply observe 16 that if you are dealing with a receiver of stolen goods, 17 you shouldn't be surprised if the goods that you 18 purchase are stolen. But I don't know whether that's 19 happening now and I'm not sure that it's the job of the 20 Information Commissioner, faced by all the other things 21 we're being asked to do, to go back and check on 22 something that was happening ten years ago.</p> <p>23 Q. No, I'm not asking you to check what happened between 24 the late 1990s and 8 March, I think it is, 2003. The 25 question relates to what Mr Whittamore may have been</p> <p style="text-align: center;">Page 13</p>	<p>1 anything wrong. The evidence we've had is that 2 companies like GB Group are very ready to respond to 3 subject access requests and to amend the record. If you 4 say, "That's a mistake, I didn't intend you to have that 5 information", they take it down.</p> <p>6 Q. But that suggests that you're leaving this to the 7 consumer primarily to sort this out, rather than you as 8 regulator to take a proactive line with these search 9 agencies, and more specifically JJ Services, who, after 10 all, have quite intrusive powers and may not be 11 exercising them fairly and properly in all cases. Do 12 you accept that?</p> <p>13 A. There are two jobs. One is to arm the consumer, to 14 educate and empower the consumer to exercise their 15 information rights and to help them to assert them.</p> <p>16 The other responsibility is to educate the industry 17 and to help online providers to understand that we are 18 living in a world where all our information is online, 19 and the Information Commissioner expects them to respect 20 people's privacy and stick to the law, but a regulator 21 has to intervene on the basis of evidence, and if we 22 simply set off on a whole series of fishing expeditions, 23 we couldn't cover the territory and I think it would be 24 a misapplication of resources.</p> <p>25 If I'm presented with the evidence, Mr Jay, I will</p> <p style="text-align: center;">Page 15</p>
<p>1 doing since then. You do have power under the Act, 2 Section 43, simply to ask him, in the first instance, 3 what methods he's using, don't you?</p> <p>4 A. But surely a regulator should act on the basis of 5 current prima facie evidence?</p> <p>6 Q. I'm not quite understanding your answer. Are you saying 7 you don't have power or are you saying you do have power 8 but you don't wish to exercise it?</p> <p>9 A. I'm saying that if evidence is brought to my attention 10 of continued misbehaviour, particularly in the light of 11 a suspended sentence, it would be my responsibility to 12 go back and enquire, but it's not my responsibility -- 13 I think it would be quite wrong -- if I started probing 14 when I have no reason to believe that anything's wrong.</p> <p>15 Q. We'll come back to that when we look at the relevant 16 section. The same point relates to the search agencies, 17 there are presumably quite a large number. One of them 18 was mentioned in evidence when Mr Thomas answered 19 questioned posed by News International. I think it's 20 a company called GB Group, but there are others who 21 carry out similar activities. You could ask them, could 22 you not, of the methods they use to gather their data? 23 Do you accept that?</p> <p>24 A. We do this all the time, but there's no reason to 25 believe that in that particular case they're doing</p> <p style="text-align: center;">Page 14</p>	<p>1 send in the troops.</p> <p>2 Q. You're not like a journalist going on a fishing 3 expedition. You're a regulator with proactive powers 4 and obligations the font of which starts off with 5 Section 51 of the Act and you have a range of specific 6 powers ranging from Section 40 to Section 50. You could 7 deploy those, couldn't you?</p> <p>8 A. Yes but you're asking me to do a mystery shopping 9 expedition on the basis of no smoke.</p> <p>10 LORD JUSTICE LEVESON: But --</p> <p>11 A. We are -- if I could just finish the point -- engaged in 12 a series of investigations at the moment of abuse of 13 personal information. That's what my office does all 14 the time. This Inquiry is particularly concerned about 15 what may have happened to Mr Whittamore. This Inquiry 16 is particularly interested, because it's been put in 17 evidence, into the activities of some of these 18 identification management businesses. Well, fine, but 19 that isn't very high up my priority list of regulatory 20 action.</p> <p>21 But if any information came my way suggesting there 22 was abuse, then we would go into action.</p> <p>23 LORD JUSTICE LEVESON: Could I just ask this, and it's to 24 understand it rather than anything else: how will 25 a consumer know if his or her personal data is being</p> <p style="text-align: center;">Page 16</p>

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<p>1 bandied about? I'm not targeting Mr Whittamore at all, 2 I simply don't know, as you say, but absent that search, 3 which was generated for different reasons, none of this 4 material would ever have come to light. So because of 5 a concern, I think it was through DVLA, I can't quite 6 remember, so the search was organised, and then 7 a veritable Aladdin's cave of material was revealed. 8 A. Indeed. 9 LORD JUSTICE LEVESON: And it just concerns me that I simply 10 do not know whether somebody has got hold of my personal 11 data, and I don't know how I would ever find out, and 12 therefore, if I never find out, I don't know to make the 13 complaint. 14 A. We have very frequent applications, sir, from citizens 15 and consumers who have reason to believe that 16 information they believed was secret has got out into 17 the public domain, and sometimes that relates to the 18 sort of activity that was highlighted in the Motorman 19 files and sometimes it's much more sort of day-to-day 20 and current, and we're able to assist consumers and 21 citizens to make subject access requests under the Data 22 Protection Act to find out what information people have 23 and to get it corrected. 24 The second thing is that since April of 2010, we've 25 had the power to impose a civil monetary penalty of up</p> <p style="text-align: center;">Page 17</p>	<p>1 and it really starts off with the health sector and with 2 the financial services and credit and so on. I do have 3 to pick my targets, so I would be inclined to wait until 4 I saw more evidence of current abuse than I have at the 5 moment. 6 Q. This was a point which the Select Committee brought up 7 with you on 2 September. In the further bundle of 8 documents you supplied, under cover of your second 9 witness statement, you'll see the transcript of evidence 10 to the CMS Committee. 11 A. Indeed. Is that tab -- 12 Q. I think it's in the other bundle, 14. 13 A. Yes, I have it. 14 MR DAVIES: I'm sorry to interrupt, but the reference to 15 a second witness statement of Mr Graham is a surprise to 16 us. 17 LORD JUSTICE LEVESON: Oh? 18 MR DAVIES: Because I'm afraid we have never received such 19 a statement. 20 LORD JUSTICE LEVESON: It is a statement dated 20 January of 21 this year and it responds effectively to some of the 22 evidence that has been given. 23 MR DAVIES: I can understand why it had been prepared, but 24 unfortunately I don't believe it's reached us, and we've 25 done such checks as we can within the last ten minutes</p> <p style="text-align: center;">Page 19</p>
<p>1 to £500,000 for serious breaches of the data protection 2 principles and this is beginning to have a very salutary 3 effect, both on public authorities and on commercial 4 companies. They realise that the Information 5 Commissioner has teeth. 6 I don't think we're going to get very far if we 7 invite the Information Commissioner to apply 8 a scattergun approach and just go around checking 9 different websites and different inquiry agents on the 10 off-chance they might be breaching the law, when we have 11 quite enough work following up on leads with some 12 suggestion that people have been breaking the law. 13 LORD JUSTICE LEVESON: I understand the point. 14 MR JAY: I'm not sure it would take that long, though -- 15 A. It would. 16 Q. -- to formulate a letter which went out to all these 17 search agencies to ask them a series of specific 18 questions in relation to their modus operandi and 19 invited responses. Depending on the quality of the 20 response, you would then be able to determine whether or 21 not further investigation was necessary. Do you accept 22 that possibility? 23 A. Well, I certainly hear what you say, and our list of 24 regulatory priorities at the moment, our information 25 rights strategy has listed the priorities that we have,</p> <p style="text-align: center;">Page 18</p>	<p>1 without eliciting any reference to or knowledge of it. 2 LORD JUSTICE LEVESON: Well, hm. Can we do a check from 3 this room as to whether it's on the system? We're doing 4 it now. 5 MR JAY: Mr Graham, under tab 14, if you look at the 6 pagination at the top right, it's EV353, please. 7 A. Indeed. 8 Q. The question on the bottom right, question 1869 from 9 Mr Hall, are you with me? 10 A. Yes. 11 Q. "In previous questions from various members of the 12 Committee you then try to establish the scale of the 13 abuse that journalists carry out in this field, and the 14 evidence you have submitted to the Committee is that 15 there is no evidence you can see about whether this is 16 an ongoing practice." 17 And then you answer: 18 "There is no evidence that we hold beyond the 19 evidence which contributed to ..." the 2006 reports. 20 "Question: I just want to be clear that that is 21 what you said. 22 "Answer: I have not got anything else, so I cannot 23 help you further. 24 "Question: So your evidence to the Committee is 25 that the practice of private investigators continuing in</p> <p style="text-align: center;">Page 20</p>

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<p>1 some illegal activity is ongoing and is a serious 2 problem? 3 "Answer: Yes." 4 Who are the private investigators in general that 5 you are referring to there, Mr Graham? 6 A. I was referring to the recent cases of concern. I don't 7 remember the specific example. But just before I went 8 before the Select Committee, we'd had the BNP case, 9 which was Section 59, and we had given evidence 10 previously, I mean my predecessor, Richard Thomas, had 11 been before an earlier stage of the inquiry and we had 12 prosecuted under Section 55 various inquiry agents. I'm 13 sorry I don't have the detail to hand. 14 The point I was trying to make to the committee was 15 that they were -- you will see earlier on, they were 16 constantly talking about hacking and I was explaining 17 that that wasn't what we did. I was concerned -- 18 because it's a breach of the Regulation of Investigatory 19 Powers Act and is prosecuted by the police. But we had 20 been concerned about Section 55 in relation to the press 21 in Operation Motorman. 22 I should say in passing, I've reread "What price 23 privacy?", and it is about much more than the behaviour 24 of the press. There are only five pages of the 41 pages 25 that deal with the press -- Page 21</p>	<p>1 precise terms, what's your answer? 2 A. We were talking at cross purposes at the committee 3 because they were talking about the hacking case and 4 I was talking about the blagging case and we'd be in 5 danger of talking at cross purposes here if we confused 6 the two. 7 All I'm saying is I don't have evidence beyond what 8 we published in 2006. That evidence was itself 9 historic. But I was surprised to hear the evidence from 10 the Express, and the Express saying, "We had no reason 11 to believe that a supplier was going to behave in 12 a reprehensible way". I would simply comment to this 13 extent: Richard Thomas in his evidence referred to the 14 counsel in the Operation Glade trial and said that the 15 journalists who had been questioned were tricky, 16 well-armed and well-briefed, effectively a barrel of 17 monkeys. 18 The impression I get, from statements like the one 19 we heard from the Express, is that if we're talking 20 monkeys, it's see no evil, hear no evil. 21 Q. Mm. 22 A. But I have to say that I see no evidence, so I can't -- 23 I can't comment. 24 Q. There's a recurring theme here, might it be said, that 25 in relation to the whole issue of phone hacking, the Page 23</p>
<p>1 Q. We know that, the question was -- 2 A. It's relevant. That was the point I was making to the 3 committee. 4 Q. Then Mr Hall carries on: 5 "But we do not know who the clients are any more? 6 "Answer: Well, we know some of the clients because 7 of the example we have given. 8 "Question: But they are not journalists? 9 "Answer: We have not got any further evidence of 10 journalistic involvement beyond 2006. 11 "Question: Does that strike you as the news 12 industry having actually cleaned up its act or as 13 confirming the evidence that we have been given in this 14 Committee that the government case was a one-off, rogue 15 journalist acting ultra vires without the knowledge of 16 his editor?" 17 That, if I could just say, that related to 18 a different case. It's possible that the question could 19 have been framed in these terms, that the newspaper 20 industry was saying in relation to phone hacking it's 21 cleaned up its act; that was untrue. The newspaper 22 industry is saying it's cleaned up its act post 2006. 23 How do we know whether that's true, given that we do 24 know it didn't clean up its act in relation to phone 25 hacking? Do you see, if you put the point in those Page 22</p>	<p>1 argument was: it's one rogue reporter, it's not 2 systemic. That argument, subject to the view of this 3 Inquiry, may not be correct, putting it at its absolute 4 lowest. 5 When we look at the position the press have adopted 6 in this Inquiry, they're saying precisely that: see no 7 evil, hear no evil, et cetera. We don't know one way or 8 another whether these search agencies are acting 9 lawfully or unlawfully, but we're not going to find out. 10 The question really I have for you is: why don't you 11 find out, as the regulator? 12 A. Right, so the Information Commissioner started this 13 whole thing off in 2006 and called for action to deal 14 with the unlawful trade in personal information, part of 15 which involved the press. We now have a judicial 16 Inquiry, which is charged with investigating the whole 17 area and the Prime Minister in the Commons on 13 July, 18 if I can quote, because this struck me: 19 "We should have made more of these reports [he's 20 referring to the Information Commissioner's reports] 21 which included some very important detail about what was 22 going wrong in data handling, data theft and the rest of 23 it. We must ensure that the Inquiry asks the question: 24 why were they ignored, and what are we going to do now?" 25 We seem to be in a completely circular debate, where Page 24</p>

<p>1 the absence of evidence of wrongdoing is puzzling, but 2 in the absence of evidence of wrongdoing, somebody ought 3 to go and find some wrongdoing, and it had probably 4 better be the Information Commissioner. 5 LORD JUSTICE LEVESON: I don't think it's fair to 6 characterise what I'm trying to do in that way, 7 Mr Graham, with great respect. I would put it rather 8 differently. I do not know whether the sort of search 9 that produced the Whittamore material, if conducted 10 today, would or would not produce any similar material. 11 It is said, and I've heard much evidence to this effect, 12 that it would not. But with great respect, neither do 13 you. 14 Now, I appreciate your point that absence of 15 evidence does not mean that there is something going on, 16 but equally, absence of evidence does not mean that 17 something isn't going on. We simply don't know what we 18 don't know. Is that fair? 19 A. Indeed. This is Donald Rumsfeld territory, I suppose. 20 But, sir, the terms of reference as I read them 21 published on 20 July include the Inquiry being charged 22 with finding the extent to which there was a failure to 23 act on previous warnings about media misconduct, and we 24 do seem to be in an Alice in Wonderland world where -- 25 or Alice in Wonderland meets catch 22, where the</p> <p style="text-align: center;">Page 25</p>	<p>1 Freedom of Information Act, I can list any number of 2 tasks that my office should be spending its time on. 3 Here is an Inquiry. What about the Press Complaints 4 Commission? There are lots of ways of establishing the 5 truth, but I come back to the point I made earlier that 6 there's been so much feverish activity over the past two 7 years in relation to this with the various newspaper 8 groups, with the journalists, with the books written on 9 the subject, with the campaigning groups. If the best 10 that critics can do is to turn up further evidence of 11 what was going on between 1999 and 2003, it doesn't 12 amount to much. 13 Q. Please leave that issue to one side, okay? We're not 14 looking, at the moment, at what I've called archeology. 15 A. All right. 16 Q. We're looking at the present. Can I just direct your 17 attention to your powers under the Data Protection Act 18 and suggest to you that this could all be done quite 19 straightforwardly? Your general power -- this is in 20 your first witness statement, tab 62 of the bundle we've 21 prepared, where you've included the whole of the Data 22 Protection Act. It's page 08046 on the unique numbering 23 system we're using. Your general duties are under 24 section 51, aren't they, Mr Graham? 25 A. Could you just repeat that reference? I'm at tab 3 of Page 27</p>
<p>1 Information Commissioner having sounded the alarm, the 2 Inquiry, among the difficult tasks that it has, has been 3 asked to establish why there was a failure to act on the 4 previous warnings, the government says it can't 5 implement Section 77 because there's a judicial inquiry, 6 and Mr Jay is putting to me that it's somehow up to 7 Information Commissioner to find out what's going on. 8 I find that puzzling. 9 MR JAY: The question does not relate to historical 10 excavation of what might have happened or what did 11 happen between the late 1990s and 2003. The question is 12 directed to the present. 13 A. Sure. 14 Q. It's really Lord Justice Leveson's question. He put my 15 question in a slightly different way, probably more 16 clearly: we don't know one way or the other. We do know 17 that the press have come up with arguments, rogue 18 reporter defence. They themselves accept they don't 19 know one way or the other. You are the regulator. You 20 have power to find out. Do you accept that? 21 A. Yes, but I repeat that I do think that given the many 22 responsibilities that the regulator has, particularly at 23 the moment with the revision of the European Directive, 24 with concerns about privacy on the O2 system, on the 25 Google system, with the post legislative scrutiny of the</p> <p style="text-align: center;">Page 26</p>	<p>1 the first bundle. Is this right? 2 Q. It's the whole of the Data Protection Act. 3 A. Yes. 4 Q. It's under 62 of mine but it may be tab 3 of yours. Do 5 you have that section? 6 A. I have the Act in front of me. 7 Q. If you look at the pagination at the bottom right -- 8 A. MOD? 9 Q. Yes. You should be looking at the last five numbers, 10 08046. 11 A. Okay. 08046. Yes, "General Duties of the 12 Commissioner", yes. 13 Q. "It shall be the duty of the Commissioner to promote the 14 following of good practice by data controllers and in 15 particular so to perform his functions under this Act as 16 to promote the observance of the requirements of this 17 act by data controllers." 18 So that is your main function -- 19 A. Absolutely. And of course in order to do that you have 20 to be fairly selective of the targets that you tackle. 21 Q. Section 55 is the criminal section, as we know. 22 Section 32 might be an important section. It's 08029, 23 which creates a special exemption for journalism, 24 literature and art; is that correct? 25 A. Yes. And this is what I describe as the significant Page 28</p>

<p>1 carve-out for the media from many of the provisions of 2 the Data Protection Act.</p> <p>3 Q. That's the proposition I was going to test with you, 4 Mr Graham. Can we establish first of all that 5 Section 32 is completely irrelevant to the criminal 6 offence under Section 55 --</p> <p>7 A. Absolutely. A journalist charged with involvement in 8 a Section 55 offence might like to pray in aid 9 Section 32. It wouldn't get him anywhere. Section 32 10 concerns the civil offences. Section 55 is about the 11 criminal offences.</p> <p>12 Q. Absolutely. If you look at the language of section 32, 13 and I tried this one out with Mr Thomas, but I'm going 14 to have another go with you: 15 "Personal data which are processed only for the 16 special purposes are exempt from any provision to which 17 this subsection relates ..."</p> <p>18 Those are the provisions listed in Section 32(2).</p> <p>19 A. Yes.</p> <p>20 Q. "... if (a) the processing is undertaken with a view to 21 the publication by any person of any journalistic 22 material."</p> <p>23 A. Yes.</p> <p>24 Q. The point I put to you is this: if you imagine the 25 proposition, which the newspaper organisations have</p> <p style="text-align: center;">Page 29</p>	<p>1 and that kills the story. That's called journalism.</p> <p>2 Q. Yes, but what may happen is that the journalist contacts 3 the subject, the subject gives his or her version of 4 events, and it's that version of events which finds its 5 way into the journalistic material. Are we agreed?</p> <p>6 A. Yes, it's the version of events rather than the 7 ex-directory number.</p> <p>8 Q. That's right, and that's why the ex-directory number and 9 the processing of that number has nothing to do with the 10 publication of journalistic material. Isn't that the 11 correct analysis?</p> <p>12 A. I appreciate that it's your view. It's not something 13 that I've given great consideration to.</p> <p>14 Q. I'm not expressing a view; I'm just making --</p> <p>15 A. You're putting a proposition which I don't immediately 16 recognise.</p> <p>17 Q. I wouldn't put the argument if I thought it was 18 completely wrong, obviously, Mr Graham, but I'm just 19 putting it out for consideration and seeing your 20 response to it. Have you obtained leading counsel's 21 advice on Section 32?</p> <p>22 A. Certainly I haven't and I'm not aware that the office 23 did before my time. But isn't this angels dancing on 24 the head of a pin? Parliament clearly intended, and 25 it's in my first witness statement, that there should be</p> <p style="text-align: center;">Page 31</p>
<p>1 advanced, that they need to obtain ex-directory numbers 2 in order to contact the subject of an article before it 3 is published in order to obtain comment on the proposed 4 publication --</p> <p>5 A. Mm.</p> <p>6 Q. -- that cannot, as a matter of language or logic, be 7 within Section 32(1)(a) because the processing of the 8 relevant personal data, namely the obtaining of the 9 ex-directory number and then storing it, is not with 10 a view to publication of that data in any journalistic 11 material. Do you see that?</p> <p>12 A. It's not with a view to the publication of the data, but 13 it is with a view to publication, and as an 14 ex-journalist, I must say that I think the process of 15 approaching subjects for checking out a story is 16 absolutely essential, and I would be very concerned if 17 newspapers weren't trying to contact people. The 18 question is: do they contact people lawfully?</p> <p>19 Q. If you look at Section 32(1)(a), what is being 20 published, Mr Graham?</p> <p>21 A. The activity is for the purpose of the preparation of an 22 article for publication, and some may make it into the 23 paper and some may not. And indeed when the journalist 24 has made the phone call, it may be there's a perfectly 25 satisfactory explanation for the thing he's checking out</p> <p style="text-align: center;">Page 30</p>	<p>1 a significant carve-out for press activity, which indeed 2 is in line with the recitals to the directive which the 3 Act implements. So if the point is put to me that 4 Section 32 covers the writing of this piece, but it 5 doesn't cover the obtaining of the evidence, I find 6 that, well, a challenging distinction about which 7 I would need to think further.</p> <p>8 Q. It may spring from the language of Section 32(1)(a) 9 before we even get to Section 32(1)(b). It is a simple 10 linguistic approach, which may or may not be consonant 11 with the policy and objects of the Data Protection Act. 12 But it's relevant to section 43. If you look 13 forward to 08039.</p> <p>14 A. Yes.</p> <p>15 Q. "(1) If the Commissioner -- 16 "(a) has received a request ..." but that doesn't 17 apply here, so park that one. 18 "(b) reasonably requires any information for the 19 purpose of determining whether the data controller has 20 complied or is complying with the data protection 21 principles ..."</p> <p>22 Then I paraphrase: you may serve a notice on the 23 data controller requiring the data controller to provide 24 you with specified information relating to the request 25 or to compliance with the principles.</p> <p style="text-align: center;">Page 32</p>

<p>1 So that means that if we fall outside Section 32, 2 because Section 32 disapplies virtually all -- 3 A. Yes. 4 Q. -- of the data protection principles save the seventh 5 principle, if we don't fall within Section 32 and you 6 have some basis, or you reasonably require, in fact it 7 says, any information, you can serve a notice for 8 example on JJ Services, or on any search agency, asking 9 them to provide any information relating to the request 10 or to explain whether or not they are complying with the 11 principles. That's very straightforward, isn't it? 12 A. Yes. 13 Q. Why haven't you done that? 14 A. We're talking current rather than historic. 15 Q. Yes. 16 A. We're also talking hypothetical, but nevertheless -- 17 Q. We're not talking hypothetical because we know Express 18 were using JJ Services until at least 2010. We also 19 know that newspaper organisation, and they're in good 20 company, because others do as well, are using search 21 agencies systematically. You could fire off, under 22 Section 43, a number of information notices in like 23 terms to all these people to find out how they're 24 comporting themselves. 25 A. Yes.</p> <p style="text-align: center;">Page 33</p>	<p>1 that there should be action against the suppliers and 2 the dealers, rather than acting against the users. 3 Q. But hasn't the focus of the office been far too much on 4 the issue of activating Section 77 and Section 78, which 5 involves political ramifications, rather than the 6 straightforward activation of your powers under the Act? 7 Wouldn't you accept that? 8 A. No, because the problem that I've been looking at since 9 2009 is the problem of information going missing from 10 databases. It's a general problem. And the courts are 11 imposing such modest sentences that it's not 12 a disincentive. We have had in the past seven months 13 four prosecutions in the magistrate's court and the 14 going rate is about £100 an offence. So my focus has 15 been on trying to get through this log jam of 16 a stand-off between -- and I think this does concern the 17 Inquiry -- the politicians and the newspapers over 18 something that the newspapers say they're not doing 19 anyway. 20 So I think it's absolutely right that I've been 21 spending my time on that, but I assure you, my 22 investigators are deeply into all sorts of 23 investigations and abuses, but I haven't asked them to 24 drop everything and go and see how Mr Whittamore is 25 getting on.</p> <p style="text-align: center;">Page 35</p>
<p>1 Q. Do you accept that? 2 A. I'm interested in the point you're putting to me. 3 I wonder where "reasonably requires" comes in. 4 Q. It's not reasonably believed that any contravention has 5 occurred. "Reasonably requires any information" would 6 include inquiring whether or not there is compliance 7 with the data protection principles, wouldn't it? 8 A. So it's a spot check, if you like? 9 Q. Yes. 10 A. Mr Jay, I simply say Parliament has given the 11 Information Commissioner all sorts of responsibilities, 12 and I'm applying my resources in those areas where 13 I have reason to believe there may be misconduct, and 14 what you've described to me doesn't compel me to start 15 scattering around Section 43 notices. 16 Q. It doesn't compel you, no, but there's certainly a power 17 for you to do it, isn't there, Mr Graham? 18 A. Yes, there is. I accept that. 19 Q. And you also knew that Parliament, speaking as it were 20 as the mouthpiece of the nation in September 2009, was 21 specifically concerned with this issue, weren't they? 22 A. Yes, indeed, and I put the -- I gave evidence to that 23 committee, but I also reminded them that there was the 24 outstanding matter of acting on the 2006 report, because 25 the Information Commissioner's office had taken the view</p> <p style="text-align: center;">Page 34</p>	<p>1 Q. Can I suggest this, Mr Graham, that your difficulty, 2 possibly, with persuading Parliament, or indeed the 3 executive, is that in the absence of evidence that 4 offences are being committed, people are saying, "Why do 5 we need to impose a custodial sentence?" It might be -- 6 A. But the reason -- 7 Q. Let me just complete the thought. It might be said that 8 the better way to proceed is to get the evidence, or at 9 least to go down the line of inquiry. You start with 10 Section 43. It takes you half a day to formulate your 11 pro forma request of the search agencies, Mr Whittamore, 12 and if necessary the newspaper groups. You wait and see 13 what evidence comes back. Some of the evidence may be 14 unclear, or incomplete, so you serve a further notice. 15 If something untoward is there, then you can activate 16 your other powers, including your enforcement powers. 17 If the evidence is not there, then you publish that 18 fact. But isn't this fairly basic, Mr Graham? 19 A. With respect, the pressure that I've been applying is 20 very much evidence-based. You say there are no offences 21 being committed. There are many, many offences being 22 committed. It just doesn't happen to include newspapers 23 at the moment, so far as I can see. I don't think it's 24 going to strengthen my case if I add further cases. The 25 previous government accepted the need to respond to the</p> <p style="text-align: center;">Page 36</p>

<p>1 T-Mobile loss of customer data, and had a consultation 2 in the autumn of 2009 about activating Section 77 and 78 3 of the Criminal Justice and Immigration Act, and then it 4 all went quiet. Why did it go quiet? Because the press 5 went into full defence mode again saying this is an 6 absolute outrage, it would chill investigative 7 journalism, and by the way, we don't do that sort of 8 thing.</p> <p>9 We just can't seem to get past -- I'm hoping very 10 much this Inquiry will do that -- we can't get past the 11 government saying "Love to help you, but Lord Justice 12 Leveson is looking at all of this".</p> <p>13 Q. Is it your position that notwithstanding what I've 14 attempted to do, show that there is a basic way through 15 this, get the evidence base by using Section 43, that 16 you're still not going to do it, Mr Graham? Is that the 17 position?</p> <p>18 A. I think I've made my point to the government and to 19 Parliament. I've been supported by the Justice Select 20 Committee. It's simply a question of the orders being 21 placed for commencement. When the political will is 22 there --</p> <p>23 Q. I'm not interested in the statutory instruments, I'm 24 interested in your powers. When I said you're still not 25 going to do it, I mean you're still not going to serve</p> <p style="text-align: center;">Page 37</p>	<p>1 feel is right?</p> <p>2 A. If I could just say, I'm not pleading poverty. Every 3 organisation has limited resources. We're actually 4 quite well resourced on the data protection side. But 5 every regulator has to make choices and to focus on the 6 areas of greatest concern and abuse, and it usually 7 begins with some evidence of things going wrong or else 8 a programme of checking sector by sector. I'm not going 9 to get the massive expansion of resources that would 10 allow me to do everything that the various parties who 11 have an interest in this Inquiry would like.</p> <p>12 I had a letter last night, and no doubt this will be 13 coming up later in the evidence, saying why have I not 14 made contact with every individual whose name is 15 mentioned in the Motorman file? And part of the answer 16 to that is going to be I would have to take on 17 a veritable army of extra people. I'm also going to say 18 I don't think it's necessary, but this isn't practical. 19 All regulators have to pick their battles, prioritise 20 their resources, and I just need some evidence of there 21 being a problem before I divert resources to do it.</p> <p>22 LORD JUSTICE LEVESON: And in relation to the penalty point, 23 there are two aspects to it. First of all, you believe 24 that for the real cowboys who are misusing data, there 25 ought to be the potential in the courts to pass</p> <p style="text-align: center;">Page 39</p>
<p>1 or consider the serving of information notices under 2 Section 43; is that right?</p> <p>3 A. I'm saying that the regulatory priorities of the 4 Information Commissioner's office must be concerned 5 about the current problems where there is evidence of 6 abuse. We're absolutely flat out on a whole range of 7 issues, whether it's car insurance or these cases of 8 information security in the health service, in local 9 government, issuing civil monetary penalties, dealing 10 with freedom of information requests and so on. You're 11 not dealing with a complacent regulator who can't be 12 bothered to exercise his powers. I'm just saying --</p> <p>13 Q. I think the answer to my question is no, you're not 14 going to do it?</p> <p>15 LORD JUSTICE LEVESON: I think we can take a pause here and 16 let me see if I've understood the position.</p> <p>17 First, your office has many statutory 18 responsibilities which engage you, you have a very great 19 deal to do in connection with those statutory 20 responsibilities, and much material which you believe 21 properly should lead to enforcement or other action?</p> <p>22 A. Indeed, sir.</p> <p>23 LORD JUSTICE LEVESON: You have, along with many other 24 government bodies, limited resources within which to do 25 it, so you deploy your resources as effectively as you</p> <p style="text-align: center;">Page 38</p>	<p>1 a custodial sentence?</p> <p>2 A. Yes.</p> <p>3 LORD JUSTICE LEVESON: That's in short?</p> <p>4 A. Not just a fine, and for the real cowboys it might well 5 be a custodial penalty, but I'm really concerned to 6 access the full range of penalties available to the 7 courts to make the punishment fit the crime.</p> <p>8 LORD JUSTICE LEVESON: And you're concerned about the size 9 of fines, and the problem with that, of course, is that 10 bodies that could recommend or talk about the size of 11 fines, such as the Sentencing Council, are concerned 12 that if the legislation is about to change, there's no 13 point in doing a lot of work on that, if suddenly the 14 whole thing is going to be altered, and therefore what 15 you're trying to do is to break the Gordian Knot?</p> <p>16 A. Exactly.</p> <p>17 LORD JUSTICE LEVESON: To break into it. I understand. 18 And to Mr Jay's proposition that it would involve no 19 great exercise of your powers to monitor what has 20 happened in the ten years since Motorman, you identify 21 the other competing demands upon your time and the need 22 to deploy your team most effectively?</p> <p>23 A. Indeed. But I hasten to say, sir, that if 24 a recommendation of your Inquiry was that I should 25 consider deploying my resources that way, of course I'd</p> <p style="text-align: center;">Page 40</p>

<p>1 have to take it very seriously.</p> <p>2 LORD JUSTICE LEVESON: I understand that. I understand</p> <p>3 that.</p> <p>4 Now, the position in relation to Mr Rhodri Davies'</p> <p>5 point is, I am told, that the statement which we've got</p> <p>6 and which I've seen was received on Friday and was not</p> <p>7 circulated, in error. But it was received on Friday.</p> <p>8 I don't know whether you've seen it, Mr Caplan?</p> <p>9 MR CAPLAN: We haven't had it either.</p> <p>10 LORD JUSTICE LEVESON: What I would like to do is I'm going</p> <p>11 to take the break early and just pause so that you can</p> <p>12 read it. If you need further time, then I will</p> <p>13 interrupt Mr Graham's evidence, with due apologies to</p> <p>14 him, and move on to something else, so that you can read</p> <p>15 it rather more leisurely than ten minutes would give</p> <p>16 you.</p> <p>17 I don't think you will find anything that is of</p> <p>18 sufficient concern to you. It addresses some of the</p> <p>19 concerns that have been raised about access to material,</p> <p>20 it deals with Ms Hartley's evidence on access. It</p> <p>21 contains an explanation, and I think it's not fair to</p> <p>22 say regret, so I don't think it will cause trouble, but</p> <p>23 I think if we just take five minutes for you to see it,</p> <p>24 then you can look through it and see whether you need</p> <p>25 any more time.</p> <p style="text-align: center;">Page 41</p>	<p>1 is as well that that was repeated at a Society of</p> <p>2 Editors conference at Stansted in November 2009; is that</p> <p>3 correct?</p> <p>4 A. That's my recollection.</p> <p>5 Q. And your second statement makes it clear that the offer</p> <p>6 was taken up somewhat belatedly by the Guardian Media</p> <p>7 Group, first of all in February 2011; is that correct?</p> <p>8 A. Yes.</p> <p>9 Q. And then it wasn't until the announcement of the Inquiry</p> <p>10 that there was a rash of approaches to your office; is</p> <p>11 that correct?</p> <p>12 A. Indeed.</p> <p>13 Q. As part of the wave of approaches, Associated, I think</p> <p>14 Express and News International contacted your offices;</p> <p>15 is that right?</p> <p>16 A. Yes, and also the public -- the publishers at one of the</p> <p>17 magazines, the magazine Closer, I think, Bauer.</p> <p>18 Q. Whether or not that's a coincidence may be open for</p> <p>19 consideration. But can I deal with the issue which</p> <p>20 I know Hacked Off have raised with you and are keen that</p> <p>21 I put, which is in effect the individuals in the</p> <p>22 Whittamore notebook should be written to and advised</p> <p>23 that their data has been unlawfully accessed, that the</p> <p>24 nature of the data should be given to those individuals</p> <p>25 and if not the journalists, then the newspaper</p> <p style="text-align: center;">Page 43</p>
<p>1 MR CAPLAN: May I just mention one other matter, it's really</p> <p>2 a correction. Mr Graham, I think it was a slip of the</p> <p>3 tongue, said that he was unaware that Associated</p> <p>4 Newspapers had continued to use Mr Whittamore until</p> <p>5 2010.</p> <p>6 LORD JUSTICE LEVESON: He meant the Express.</p> <p>7 A. I meant the Express. I apologise.</p> <p>8 LORD JUSTICE LEVESON: All right. Very good. Right, we'll</p> <p>9 just have the break now, so that that can be done.</p> <p>10 Thank you very much.</p> <p>11 (11.00 am)</p> <p>12 (A short break)</p> <p>13 (11.14 am)</p> <p>14 LORD JUSTICE LEVESON: Mr Davies, Mr Caplan and those others</p> <p>15 concerned, I am sorry that you did not have this</p> <p>16 statement in advance. If you are in difficulty, then</p> <p>17 I shall cope with it.</p> <p>18 MR JAY: Mr Graham, may I move on to some different topics,</p> <p>19 one is related.</p> <p>20 At the Select Committee hearing on 2 September 2009</p> <p>21 you extended an offer to newspaper organisations, if so</p> <p>22 advised, to come and look at the Operation Motorman</p> <p>23 material. That's clear from EV353. We needn't --</p> <p>24 A. Yes.</p> <p>25 Q. -- dig it up. It's clearly stated there. Your evidence</p> <p style="text-align: center;">Page 42</p>	<p>1 organisation who procured that information should be</p> <p>2 named to the victims. What is your response to that,</p> <p>3 Mr Graham?</p> <p>4 A. I did deal with this in my evidence to the Select</p> <p>5 Committee back in September 2009, and of course a fair</p> <p>6 number of individuals have had access to the Motorman</p> <p>7 material, either through subject access requests,</p> <p>8 "I think I may be in the file, I want to check, I want</p> <p>9 to see, I want to get it corrected", or indeed as</p> <p>10 a result of court orders, where litigants in various</p> <p>11 civil actions have persuaded the court that they ought</p> <p>12 to see the material.</p> <p>13 When I went before the Select Committee in 2009, it</p> <p>14 was apparent to me that a number of members of the</p> <p>15 committee had a very good understanding of what was in</p> <p>16 the Motorman files. I suspected at the time that that</p> <p>17 might have come from some of the material which had been</p> <p>18 released under court order. Members seemed to be</p> <p>19 particularly well briefed. And at that point, I formed</p> <p>20 the view that the Section 59 position where we had not</p> <p>21 been making available information in -- to the newspaper</p> <p>22 groups certainly needed to change.</p> <p>23 So far as the individuals are concerned, I'm still</p> <p>24 very ready for subject access requests by those who may</p> <p>25 be concerned. The difficulty about simply contacting</p> <p style="text-align: center;">Page 44</p>

11 (Pages 41 to 44)

<p>1 everybody lies in the nature of the dossiers themselves. 2 Mr Jay, you've seen them. I don't know whether all the 3 core participants are in that position, but these are 4 notebooks, and sometimes the information contained in 5 them is deeply obscure. I said in my witness statement 6 that the individual who made the notes must have had 7 a perfect understanding of what he was intending, but it 8 isn't always clear. That partly explains why there's 9 sometimes a discrepancy between the spreadsheets that 10 we've compiled and the notebooks. 11 If you said to me, "You ought to notify everybody 12 whose name appears in the Motorman files", I'd be hard 13 pressed to do that. It isn't just a question of 14 resources, it's it isn't immediately clear who is being 15 referred to, because it isn't just celebrities, it's all 16 sorts of people who may or may not be part of a story 17 concerning a celebrity or whatever it is; it's just 18 a name. Sometimes it's just a surname. 19 I think Richard Thomas put the point very well in 20 his response to you on this matter, when he said: if, 21 having established the identity of the individual and 22 their address, we wrote to them to say simply, "Your 23 details appear in the Motorman file, we can't tell you 24 why", that might be an even greater breach of privacy 25 than the original offence, because there would be</p> <p style="text-align: center;">Page 45</p>	<p>1 involving NHS workers and bank workers, I was told that 2 nothing could be done about it because this was a matter 3 now before the Leveson Inquiry. 4 The learned judge has -- the Chairman has said it's 5 finding a way of cutting through the Gordian Knot, and 6 the suggestion to me was that I could use my audit 7 powers to cut through the Gordian Knot and provide an 8 even better evidence base. I'm not sure it's really 9 about evidence. 10 Another way of cutting through the Gordian Knot is 11 for this Inquiry to conclude that that particular 12 proposal, commencing a provision in an Act of Parliament 13 which has been properly debated, is a matter for 14 government and that the Inquiry wouldn't wish to be seen 15 to be holding things up. There seems to be a dialogue 16 with the deaf at the moment. 17 Q. The penultimate question -- 18 LORD JUSTICE LEVESON: Would I have to conclude, or reach 19 some conclusion, to the effect that I did not accept the 20 proposition that implementing these provisions would 21 have the chilling effect that is contended? 22 A. If you took the view, sir, that Section 78, which 23 applies a reasonable belief test to the public interest, 24 was strengthening the position of the press, then that's 25 good to go. But the dilemma we are in is that our press</p> <p style="text-align: center;">Page 47</p>
<p>1 a suggestion that there's no smoke without fire. Other 2 members of the family might see the letter and say, 3 "Hey, what's going on?" and I couldn't tell them any 4 more than a name appears in a file. 5 It would be a phenomenal undertaking. Just because 6 there's a name, John Smith, I would then have to work 7 out which John Smith. The example I gave to the Select 8 Committee was Ziggy Stardust, that's a bit easier to do, 9 but there are an awful lot of very anonymous names and 10 it simply isn't practical. 11 However, if Hacked Off and their lawyers are 12 representing particular individuals, then that's what 13 we're here for: subject access requests, off we go. 14 Q. Some miscellaneous questions now, Mr Graham. I think 15 you told one of the seminars that your understanding of 16 the position in relation to the statutory instrument 17 which might activate Section 77 and Section 78 is it's 18 the position of the government that they're awaiting the 19 outcome of this Inquiry; is that right? 20 A. The -- I mean, yes. The situation basically is that 21 there was a consultation, there has to be a consultation 22 under the Act, in the autumn of 2009, and we've never 23 had a response to that consultation. And the new 24 government wasn't particularly keen to proceed. 25 When I started drawing to their attention the cases</p> <p style="text-align: center;">Page 46</p>	<p>1 friends say that they're not doing this anyway, so why 2 should concerns about press freedom, which are in any 3 case misguided -- and I say this as a proud former 4 journalist -- in any case misguided, those 5 considerations shouldn't be seen to be holding up 6 something which I need to deal with the many breaches of 7 Section 55 which are going on all the time. 8 LORD JUSTICE LEVESON: That's a different point, because 9 it's unlikely that I am going to be able to assert or 10 that I would want to feel it's necessary to assert this 11 is not happening, or to the contrary, that this is 12 happening. I am looking at the culture, practices and 13 ethics of the press, and I'm not looking at specifics. 14 A. Yes. 15 LORD JUSTICE LEVESON: The specifics are, to some extent, 16 prohibited from me because of the distinction between 17 parts one and two of my Inquiry, and the ongoing 18 criminal investigation. Now, that might bite 19 specifically on RIPA-type offences, but doesn't 20 necessarily exclude any offences that arise from 21 a police investigation. 22 That's one issue, but if I am going to have to be 23 able to say that I don't think this -- ignoring the fact 24 whether they're doing it or not -- I don't think it in 25 any sense chills the freedom of the press, then that</p> <p style="text-align: center;">Page 48</p>

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<p>1 probably is a conclusion that is going to have to wait 2 for the Inquiry, isn't it? 3 A. Yes. 4 LORD JUSTICE LEVESON: I'm merely thinking about what 5 I could do and when, depending upon the view that I have 6 formed. 7 A. Indeed. I understand the difficult position that the 8 Inquiry is placed in. 9 Another way of tackling the Gordian Knot is for the 10 press, who are so convinced of their rectitude, to get 11 together with the Ministry of Justice and say, "Okay, we 12 accept that Section 77 and Section 78 should now be 13 activated because we're not doing it anyway and the 78 14 defence is okay by us." 15 LORD JUSTICE LEVESON: Well, I'm not going to enter into the 16 debate that the press might have with the government. 17 I have enough difficulties with the debate that the 18 press are having with me, without entering into another 19 debate. But that's the issue, in any event. All right. 20 MR JAY: Your ideas for future press regulation, Mr Graham, 21 in particular having regard to your experience with the 22 ASA. Are there any ideas that you'd like to share with 23 the Inquiry? 24 A. It's obviously a personal view born of experience, but 25 I was for eight or nine years the Director General of</p> <p style="text-align: center;">Page 49</p>	<p>1 very concerned to explain to the new boy that 2 I shouldn't be seeking to adjudicate all the time, it 3 should be a word in the ear. The industry would follow 4 the lead that the regulator gave; it didn't need to be 5 done so publicly and so formally. And I disagreed. But 6 I was told that I should look at the way that 7 Lord Wakeham runs the Press Complaints Commission, and 8 I think there may have been a bit of a parting of the 9 ways there. 10 As an observer, and a friendly observer, I think 11 it's a huge mistake to have serving editors serving on 12 the Press Complaints Commission. I think the editors 13 should write the code, and be prepared to be judged on 14 the titles' observance of it, and then it's up to 15 a demonstrably independent and effective Press 16 Complaints Commission to apply that code. That was the 17 model in the advertising standards business, that is 18 widely respected, and it's something to which the media, 19 the non-broadcast media, of course are involved in 20 through their membership of the Committee of Advertising 21 Practice, so I don't see why it's such a difficulty when 22 it comes to the PCC. 23 MR JAY: Thank you very much, Mr Graham. 24 LORD JUSTICE LEVESON: You don't have a problem, though, 25 Mr Graham, or you didn't have a problem when you were</p> <p style="text-align: center;">Page 51</p>
<p>1 the Advertising Standards Authority, which is an 2 effective self-regulatory body. Of course, I can't 3 speak for the ASA these days, I'm two and a half years 4 out of it and there have been all sorts of changes in 5 structure and so on. But I simply offer the view that 6 I gave at the seminar, which preceded this stage of the 7 Inquiry, and that is for self-regulation to be credible, 8 it has to be effective, and it has to be so structured 9 that the public can have confidence that those who are 10 being regulated are not just looking after their own 11 interests. 12 The difference between the Advertising Standards 13 Authority and the Press Complaints Commission in my day 14 was that there was a much greater separation of function 15 between the investigatory and adjudicatory side, the 16 Advertising Standards Authority, and the code writing 17 side, the Committee of Advertising Practice and latterly 18 the Broadcast Committee of Advertising Practice. A lay 19 majority on the ASA council with the minority of 20 experienced industry people not being the equivalent of 21 serving editors. 22 I don't know whether it had always been that way 23 with the ASA. When I came in in 2000, a number of the 24 newspaper trade associations, who of course are part of 25 the tripartite advertisers, agencies and media, were</p> <p style="text-align: center;">Page 50</p>	<p>1 the Director General of the ASA, in relation to 2 non-participation? 3 A. Well, no, because that was -- I don't know how I could 4 apply this point to press content regulation. The 5 beauty of the advertising system was that the three legs 6 of the stool, the advertisers, the agencies and the 7 media, had a mutual interest in the credibility of 8 commercial communication. They were all in it together. 9 And so if an advertiser said, "Well, two fingers to the 10 ASA, I'm taking no notice of you", they simply didn't 11 get space in the papers. 12 I've been searching for what is the equivalent 13 principle that binds all the participants in the 14 newspaper business together. You would hope that it 15 would be about a search for truth, and an editorial 16 independence, and all those good things. It seems to be 17 about being allowed to continue drinking in the 18 last-chance saloon and the politicians wouldn't dare to 19 do anything else. 20 I'm not in favour of statutory regulation of the 21 press, and I'm speaking purely personally here, but 22 self-regulation will only survive if it's credible. If 23 it's lost the confidence of the public, then something 24 has to give, and different arrangements have to be put 25 in place. But if you don't have credibility, you can</p> <p style="text-align: center;">Page 52</p>

<p>1 make all the speeches you like about self-regulation, 2 and you get back to the observation of the LSE professor 3 who said, being a sceptic, that self-regulation in some 4 circumstances had as much relationship to regulation as 5 self-righteousness does to righteousness. 6 MR JAY: Thank you. There may be some more questions. 7 MR DAVIES: I wonder if I could just raise two points with 8 Mr Graham? 9 LORD JUSTICE LEVESON: Please. 10 Questions by MR DAVIES 11 MR DAVIES: Mr Graham, my name is Rhodri Davies. I appear 12 for News International. I wanted to ask you about two 13 things. The first is custodial sentences in Section 55, 14 which you've talked about a lot. As I understand the 15 problem, the problem that you want to attack at the 16 moment is what you've called the modern scourge of data 17 theft, and as far as you know at the moment that's not 18 a problem with the press, it's the banks, the NHS and so 19 on? 20 A. We were always, I think, at the ICO looking at it from 21 the point of view of the suppliers and the dealers 22 rather than the users. As I've said ad nauseam, I have 23 no evidence as to use, but I am concerned that I don't 24 have effective powers to deal with what is a modern 25 scourge just because we do everything online. We're all Page 53</p>	<p>1 of the courts being limited to fines and then dealing 2 with people who are of limited means and can only be 3 fined about £100, and the court doesn't have the option 4 of doing anything about a community sentence or tagging 5 or curfew or whatever else might be involved. It's just 6 the going rate is £100. It happened again the week 7 before last. It's nothing. 8 MR DAVIES: The political problem, if I can call it that, 9 that you have in getting the existing legislation into 10 force is what we might call the perceived effect on the 11 press. It's not the bank clerks who are campaigning 12 against this; it's the perceived effect on the press 13 which is your problem? 14 A. My problem is the press. It's not the perceived effect 15 on the press, it's the behaviour of the press, worrying 16 away at a penalty designed to deal with a problem which 17 they say doesn't apply to them, and I say, "If it 18 doesn't apply to you, get out of the way." 19 Q. Isn't the way through this, which might perhaps satisfy 20 both parties, simply to exempt from the threat of 21 a prison sentence anyone who is acting for the special 22 purposes of journalism, artistic or literary matters, 23 using the phraseology in Section 32? 24 A. How much of a good deal do you guys want? Excuse me, 25 sir, for being heated about this, but you fought Page 55</p>
<p>1 very vulnerable. 2 Q. So the practical target you want to hit at the moment is 3 the people who leak data from NHS databases, banking 4 records and so on? 5 A. Yes. I would also say the sort of people Mr Whittamore 6 and his friends were ringing up. 7 LORD JUSTICE LEVESON: It can't be limited to that, can it? 8 Because if there was no market, then there would be no 9 worth doing it. 10 A. Indeed, sir, but the fundamental principle that we were 11 dealing with in this report all those years ago was that 12 those who were in a position of trust in the health 13 service or the phone companies or the DVLA didn't see 14 passing on information for sums of money as being 15 particularly serious. Certainly the penalties that were 16 imposed were not enough to disincentivise it, even if 17 you got caught, and the whole attitude of society and 18 the courts to this modern phenomenon, because we're now 19 in the information age, was that it was no worse than 20 pinching the office stationery. 21 So I'm not looking to jail lots of people. I can't 22 imagine that a journalist going about his or her 23 business with a proper story and a good public interest 24 reason for doing it would be in any trouble with the ICO 25 or with the courts, but I want to deal with the problem Page 54</p>	<p>1 everyone to a standstill back in 2006/7. You did it 2 again in 2009/10. You've got so many privileges and 3 exemptions. It's perfectly possible for a journalist to 4 do a decent job legally. There is Section 78 on the 5 statute book, applying the reasonable belief of the 6 journalist that what they were doing for publication was 7 in the public interest. It's going to be very difficult 8 for anyone to strike that down, but there are some 9 people who believe that that's more generous to the 10 press than really should have been the case, but that 11 was the deal. 12 Now, if I understand it, you're sort of coming back 13 for more -- on behalf of your clients. 14 Q. What I'm trying to do, Mr Graham, is to point out 15 a route through the problem, or one that bypasses the 16 Gordian Knot, and I'm not quite understanding why this 17 solution is not acceptable to you. 18 A. Well, this isn't a negotiation about these things, but 19 it sounds to me as if the representatives of the press 20 want to be somehow above the law. Surely a free press 21 operates within a framework of law, and a vibrant and 22 healthy press, challenging those in authority and doing 23 the job that it should be doing and the job that 24 I joined the profession to do, operates within the law. 25 Yes, okay, you sometimes have to apply the dark arts to Page 56</p>

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<p>1 get the story, and then you're accountable for it. And 2 if you're really in trouble, that's the mitigation that 3 you put to the court. But we can't keep having more and 4 more carve-outs and reductions and special cases, 5 surely.</p> <p>6 Q. The point is, Mr Graham, that prison sentences do have 7 a more chilling effect than the lesser sanctions 8 available to the court --</p> <p>9 LORD JUSTICE LEVESON: Is that right, Mr Rhodri Davies? I'd 10 be very interested to see evidence about that, because 11 one thing is for rock solid certain: interception of 12 communications did have a custodial sentence attached to 13 it, and it didn't seem to have stopped a great deal of 14 activity.</p> <p>15 MR DAVIES: Well, that certainly was true-up to 2006/7, 16 I entirely understand that.</p> <p>17 LORD JUSTICE LEVESON: I'm not, I think, trying to make 18 a cheap point. I'm not doing that at all. But I am 19 concerned about the evidence base for the assertion. 20 I'm not stopping you, I understand the point, and of 21 course you can pursue it.</p> <p>22 MR DAVIES: Well, I think -- really, what I'm putting to 23 you, Mr Graham, is your own assumption, which is that if 24 the sentences available for breach of Section 55 are 25 increased and the range of sanctions available to the</p> <p style="text-align: center;">Page 57</p>	<p>1 been consulted by GB Group when they started, and while 2 that doesn't provide a Good Housekeeping seal of 3 approval, it does at least indicate that there was 4 a responsible data controller seeking to establish what 5 the rules were, and we have seen evidence of information 6 being corrected and numbers being withdrawn in relation 7 to subject access requests.</p> <p>8 But as I said earlier, just because that information 9 is available online quite lawfully doesn't provide 10 a cover for obtaining the same information through 11 unlawful means.</p> <p>12 Q. Yes. So we may be in the position that a journalist can 13 lawfully obtain an ex-directory telephone number from 14 GB Group or one of their competitors?</p> <p>15 A. If somebody has either shared their number with 16 a provider and isn't particularly concerned about 17 whether or not it's shared more widely, or there's 18 simply been a mistake and that individual hasn't 19 withdrawn the number from the service, yes, that's 20 certainly the case.</p> <p>21 Q. But if that number is not available on a database 22 lawfully held by GB Group or someone else, then would it 23 be your position that if a journalist wanted to obtain 24 that number in order to contact someone to contribute to 25 a story or to put a story to them, that would be</p> <p style="text-align: center;">Page 59</p>
<p>1 court is widened, then you think that that will have 2 a beneficially chilling effect on people who would 3 otherwise contemplate a breach of Section 55?</p> <p>4 A. It would have a beneficially chilling effect on DVLC 5 workers handing out car numbers and addresses based on 6 those car numbers in exchange for money. It will have 7 a beneficial chilling effect on health workers who 8 apparently think it's perfectly okay to access someone's 9 medical records in order to find the telephone numbers 10 of their in-laws, who they're having a fight with, or 11 the bank clerk in Haywards Heath who thinks it's fine to 12 look at someone's bank records in order to provide the 13 case in her husband's defence in a sex attack trial. 14 That's what we're dealing with. What's that got to do 15 with the press? If you're not doing this stuff, get out 16 of the way.</p> <p>17 Q. Yes. I entirely understand those problems. 18 Can I just ask you about one other thing, which is 19 perhaps not unrelated. Ex-directory telephone numbers. 20 Mr Jay asked you about the databases such as GB Group, 21 and as I understand your evidence, your position at the 22 moment is that have you no reason to think that they 23 operate unlawfully?</p> <p>24 A. It's actually better than that. I was reminded in the 25 break that the Information Commissioner's office had</p> <p style="text-align: center;">Page 58</p>	<p>1 a public interest ground for obtaining the data?</p> <p>2 A. Because of the need to contact the individual for 3 a quote?</p> <p>4 Q. Yes.</p> <p>5 A. Yes. So why would you not do the old basic journalistic 6 stuff of ringing around and getting the number? I'm 7 amused to see, for example, that my second statement has 8 helpfully redacted the address of the office of the 9 Information Commissioner. I think that's taking privacy 10 a little far.</p> <p>11 Q. Yes.</p> <p>12 A. If you want to contact me, you don't need my home 13 number. You ring up the office and you say, "It's 14 urgent we speak to Mr Graham, please contact him, tell 15 him to ring us", and that's what reporters do. You 16 don't have to ring up a private investigator to bribe 17 someone at the Driver and Vehicle Licensing Centre to 18 get details.</p> <p>19 Q. Suppose it's a retired civil servant who is not on good 20 terms with his ex-office.</p> <p>21 A. Then you might well in that case have a public interest 22 defence. I'm not quite sure where this is going because 23 you can't generalise from the specific. I didn't notice 24 many of them in the Motorman dossier, by the way.</p> <p>25 Q. There is at least one, actually.</p> <p style="text-align: center;">Page 60</p>

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<p>1 A. I must have missed that. Actually, Mr Davies, you raise 2 that point. You'll see in the transcript of the Select 3 Committee hearing that I was embarrassed by questioning 4 from Mr Farrelly, the MP, who was talking about the case 5 of Peter Kilfoyle, the former minister, who was 6 apparently incandescent that he hadn't been informed by 7 the Information Commissioner's office that the Mail, 8 I think, had been trying to get hold of his home number. 9 I was flustered and I said I'd better go and find out 10 more about this, and when I looked at the file, this was 11 on the weekend that he had resigned from the government. 12 It was a Sunday night, and news desks, very reasonably, 13 I felt, wanted to get hold of his information. 14 So I wrote to the Mr Kilfoyle and said, "You're very 15 welcome to exercise your subject access request, come 16 and view the material and so on but that's what it's 17 about", and I heard no more. 18 That's an example of a manifestly defensible use of 19 that service. 20 LORD JUSTICE LEVESON: But is it? Why wouldn't a journalist 21 simply have been able to contact the relevant ministry 22 from which he had resigned and say, "We are very keen 23 that Mr Kilfoyle have the opportunity to make some 24 comment. Could you please ask him to phone us?" 25 A. Perhaps they tried that, I don't know. But if someone's</p> <p style="text-align: center;">Page 61</p>	<p>1 I presently believe, and then people can make 2 submissions in due course. 3 I presently believe that the new potential provision 4 contains both subjective and objective elements, so not 5 only must the journalist believe that it's in the public 6 interest to do so, but there must be reasonable grounds 7 for that belief. Thereafter, if I follow up your 8 earlier question, the Information Commissioner would 9 have to decide whether there was evidence to rebut that 10 defence before he thought of bringing a prosecution. 11 If he thought of bringing a prosecution because he 12 thought he could rebut the defence, it would be open to 13 the journalist to advance the defence in court. If the 14 court decided against the journalist, then it would have 15 to decide on a scale how grave the particular offence 16 was, and in my experience of sentencing criminal cases, 17 which extends over 27 years, I don't think you'll find 18 that there would be any question of a mandatory sentence 19 in those circumstances at all. 20 MR DAVIES: Yes, all right. I think I have ventilated the 21 two points I wanted to raise. 22 LORD JUSTICE LEVESON: Thank you very much indeed. 23 MR DAVIES: Thank you very much. 24 A. Thank you. 25 LORD JUSTICE LEVESON: Mr Graham, thank you very much</p> <p style="text-align: center;">Page 63</p>
<p>1 just stormed out of the government, the ministry's not 2 going to be terribly helpful in putting you in touch 3 with the ex-minister. 4 LORD JUSTICE LEVESON: Do you think not? 5 MR DAVIES: So that is a situation, Mr Graham, where, as 6 I understand it, you think that the journalist might 7 very well have a public interest defence? 8 A. I say it's arguable, anyway. 9 Q. It's arguable. That's the difficulty, isn't it? 10 Because once we're into the territory of it's arguable, 11 and it's a prison sentence if you're wrong, do we not 12 have a chilling effect? 13 A. But all you have to advance is the reasonable belief 14 that the story you're pursuing was in the public 15 interest. Really, if you can't make that case, you 16 shouldn't be in journalism. It's a very, very good 17 increased defence for journalists. 18 Q. I'm just wondering how far that goes. So you say if 19 there's a reasonable belief that the story you're 20 pursuing is in the public interest, then that would be 21 a public interest defence to obtaining an ex-directory 22 telephone number? 23 LORD JUSTICE LEVESON: I'm not going to allow you, 24 Mr Davies, to use the opportunity to try and tie the 25 Information Commissioner down. Let me say what</p> <p style="text-align: center;">Page 62</p>	<p>1 Yes, Mr Barr. Do I gather from the fact that there 2 are two chairs that we are having two witnesses 3 together? 4 MR BARR: We are, sir. Good morning. It's going to be 5 Google first, and the witness statement by Google has 6 been provided by Ms Daphne Keller, but in communications 7 with Google, it's become clear that in order for the 8 Inquiry to have the full benefit of answers from 9 a broad-ranging experience at the company, it's going to 10 help if Mr David John Collins sits with Ms Keller and 11 they answer from their collective expertise. 12 LORD JUSTICE LEVESON: Thank you. 13 MR BARR: Please could I call Ms Keller and Mr Collins. 14 MR DAVID JOHN COLLINS (sworn) 15 MS DAPHNE KELLER (sworn) 16 Questions by MR BARR 17 MR BARR: Ms Keller, could I start with you first, please. 18 Could you tell the Inquiry your full name? 19 MS KELLER: My full name is Daphne Hija de Primavera Keller 20 Q. And could you confirm that the contents of your witness 21 statement are true and correct to the best of your 22 knowledge and belief? 23 MS KELLER: Yes, they are. 24 Q. You tell us that you are the legal director and 25 associate general counsel for Google Inc. and you've</p> <p style="text-align: center;">Page 64</p>

<p>1 been an associate of Google for seven years. 2 Mr Collins, could you give the Inquiry your full 3 name? 4 MR COLLINS: David John Collins. 5 Q. You tell us that you are the vice-president of global 6 communications and public affairs? 7 MR COLLINS: For Europe, Middle East and Africa, yes. 8 Q. Could you give us a little bit more information about 9 your professional background in new media, please? 10 MR COLLINS: Yes. I've worked at Google for five and a half 11 years. I advised the company on predominantly public 12 policy issues and before that I've spent between 10, 11 13 years in public policy and communications. 14 LORD JUSTICE LEVESON: I know, Ms Keller, I'm right in 15 saying that you've come from America to give evidence. 16 I'm very grateful to you. I gather from where you're 17 posted you've probably not come from America. 18 MR COLLINS: I've come from Victoria in London. 19 LORD JUSTICE LEVESON: Then I won't extend the same thanks 20 to you, but I certainly will thank Ms Keller for taking 21 the time to come. 22 MS KELLER: I'm happy to be here. 23 MR BARR: Before I descend into the detail, could I ask you 24 some broad questions about Google's approach to privacy 25 in principle? Can I start with a document which is at</p> <p style="text-align: center;">Page 65</p>	<p>1 how they can then access, delete and/or remove that 2 data. 3 Secondly, choice, so when the user is using the 4 product, they have a very granular level of choices 5 about what settings they want to make using that 6 product. 7 Thirdly, control, and this is really important, so 8 when the user is using the product, they have -- 9 ultimately they have the control over how that data is 10 being used. If I may give an example, if I open 11 a Google account and I want very personalised search 12 results, most relevant to me, I can turn that setting 13 off and on at any stage. It's not Google that sets it, 14 it's the user. 15 So to go back to the principles, they really are 16 transparency, choice and control, and just to emphasise 17 it, the headline in the register is not representative 18 of either Eric's view or the company's view on privacy. 19 Q. Over the page at tab 22, there's a BBC News item no 20 doubt with the unwelcome headline "Google ranked worst 21 on privacy" and it's reporting back in 2007 that 22 a rights group, Privacy International, rating a lot of 23 media companies, had rated Google worst on privacy. I'm 24 very conscious that that's an article which is now some 25 years old. You've provided to us a copy of the current</p> <p style="text-align: center;">Page 67</p>
<p>1 tab 21 of the bundle. It's an article in a publication 2 called The Register, which was published on 7 December 3 2009. I think I need only read the headline. It quotes 4 the Google chief executive officer, Mr Eric Schmidt, 5 with the summary: 6 "Only miscreants worry about net privacy." 7 The quotation being: 8 "If you have something that you don't want anyone to 9 know, maybe you shouldn't be doing it in the first 10 place." 11 Can I ask, is that representative of Google's 12 approach to privacy in principle? 13 MR COLLINS: It's -- I think I'll answer in two ways, if 14 I may. It's not representative of -- the headline is 15 not representative of the point that Eric Schmidt, now 16 our chairman, was making. The obvious point that he was 17 making was if you share information online, you are 18 sharing it, and it's then shared and it's out there 19 online. But obviously the headline is not 20 representative of our privacy principles. 21 Google takes privacy extremely seriously, and it's 22 governed by essentially three broad principles. 23 Firstly, transparency, so making it incredibly clear to 24 the user, someone accessing our services, what data is 25 being collected, how the data is being stored, but also</p> <p style="text-align: center;">Page 66</p>	<p>1 Google privacy policy, which is dated 20 October 2011, 2 and I understand that there is a further privacy policy 3 which is shortly going to supersede the existing policy. 4 Is it fair to say that Google has made considerable 5 efforts in recent years to concentrate on privacy and 6 its approach to privacy? 7 MR COLLINS: Absolutely. If I can refer to the BBC News 8 article that you mentioned, I think if you spoke to 9 Privacy International now, their view of Google and 10 privacy would be very, very different to the view that 11 they had then. I would also not have agreed with their 12 position then, and I think I remember having 13 conversations with them at the time -- 14 LORD JUSTICE LEVESON: I'm sure you do. 15 MR COLLINS: -- but their view would be very different now. 16 I think it's right to say that Google has always 17 taken privacy very, very seriously, it's not just taken 18 privacy seriously from a very strict legal compliance 19 position, it's taken privacy seriously because 20 ultimately the trust that we have with our users is 21 incredibly important. 22 Over time, the way in which our privacy governance 23 model is built, and the way that then that plays out in 24 the engineering or product design decisions that we 25 make, has certainly improved and improved over time, we</p> <p style="text-align: center;">Page 68</p>

17 (Pages 65 to 68)

<p>1 make a very big effort at that. I'm very happy to go 2 into some of those processes if you like now, or later 3 on. 4 MR BARR: What I would like to ask you about that is: what 5 consultation has there been with the United Kingdom in 6 formulating the forthcoming privacy policy? 7 MR COLLINS: The forthcoming privacy policy, that will be 8 announced this week. We talked to the ICO beforehand, 9 we talked to many data protection authorities around the 10 world, plus also privacy advocates, activists, 11 beforehand. But it's important to emphasise not just 12 because of this privacy policy change. We have an 13 ongoing dialogue, a very regular dialogue, with many of 14 them throughout the whole of the year. The reason why 15 we do that again isn't because there's a legal 16 obligation to do it, it turns out there isn't, it's 17 because we want the benefit of their wisdom. Google 18 does not have all of the wisdom on privacy. We want to 19 hear from other people to make sure that we get the 20 decisions right, and we welcome the input that we get. 21 Q. There was a well publicised problem when Google Street 22 cars accidentally collected some private data. That 23 resulted in the Information Commissioner's office here 24 looking into the matter. It concluded there had been 25 a breach of the law, but that it was accidental, and it Page 69</p>	<p>1 privacy report, no doubt dealing with the matters you've 2 just outlined, and the overall conclusion that I'm 3 looking at reads: 4 "The audit has provided reasonable assurance over 5 the accuracy and findings of the privacy report as 6 provided by Google Inc. to the Information Commissioner. 7 It has also provided reasonable assurance that Google 8 have implemented the privacy process changes outlined in 9 the undertaking." 10 It went on to identify some scope for further 11 improvement and records the fact of improvements which 12 had taken place. 13 Are those recommended improvements matters which 14 have been taken into account in the October policy in 15 the forthcoming new March privacy policy? 16 MR COLLINS: Well, to go back to one of the core elements of 17 the audit report was the construction of the privacy 18 working group, and absolutely that was -- the privacy 19 working group was very much part of the privacy policy 20 change that we announced this week, which of course is 21 part of an ongoing process of improving our privacy 22 policies. 23 I just, if I may, sir, just outline very briefly 24 what those -- what we are trying to do this week with 25 our privacy policy change because it's very relevant to Page 71</p>
<p>1 exercised its discretion not to take legal proceedings. 2 But as a result, I think I'm right to say that Google 3 submitted to a data protection audit report? 4 MR COLLINS: Yes, we did, and it's important to emphasise 5 that we profoundly regretted that incident. As soon as 6 we discovered the incident, we announced it very, very 7 publicly and we immediately contacted the ICO in the UK 8 but also data protection authorities around Europe and 9 around the rest of the world. Part of the agreement 10 that we reached with the Information Commissioner's 11 office was to submit ourselves to an audit, which we 12 obviously did, and the ICO audit report makes clear that 13 we made a number of very significant changes and 14 improvements to our privacy governance model internally. 15 I think one of the most important of those was the 16 construction of what we call our privacy working group, 17 headed by a director. That brings together the 18 different functions internally to ensure that our 19 privacy principles are being constantly enacted 20 internally and we've welcomed the Information 21 Commissioner's audit as affirmation that we were heading 22 in the right direction on the specific issues that they 23 raised. 24 Q. The audit we have in the bundle at tab 10, dated August 25 of last year. It was obviously reporting on a Google Page 70</p>	<p>1 the idea that we discuss our privacy policies with 2 outside parties. 3 Part of the feedback that we had had from data 4 protection authorities was that we had too many privacy 5 policies. It turned out that we had over 70 covering 6 our different products. Each of those privacy policies 7 was accurate, it gave users really useful information, 8 but the fact that there were so many of them probably 9 didn't help the average user understand exactly what 10 those privacy policies were intended to do. 11 So we took that feedback on board and produced one 12 simplified privacy policy, and we were very pleased 13 yesterday that Viviane Reding, the European Commissioner 14 in charge of privacy, who published new regulations 15 around online privacy yesterday, said that she applauded 16 it, so I think it's very much a product of the feedback 17 that we've had, the privacy principles that we -- that 18 govern our approach on privacy, and also the fact that 19 we take privacy very seriously. 20 Q. Thank you. That's all I want to ask you about privacy 21 in principle. If we could move now to look at the 22 corporate structure of Google and Google's operations in 23 the United Kingdom, Ms Keller, you tell us in your 24 witness statement that in the United Kingdom Google has 25 over 1,000 staff working on advertising sales, software Page 72</p>

<p>1 development and other functions in London and 2 Manchester. They're employed by a subsidiary company, 3 Google UK Limited, which is incorporated under English 4 and Welsh law. Importantly, however, your search engine 5 services are owned and operated by Google Inc., which is 6 a Californian company, isn't it? 7 MS KELLER: Yes, that's correct. 8 Q. You tell us a little bit about in practice where your 9 computer servers are actually based, and there's an 10 exhibit which tells us where the various data centres 11 are. It's right, isn't it, that none of them are in the 12 United Kingdom? 13 MS KELLER: Yes. The list of data centres that we submitted 14 is correct. None of those are in the UK. 15 Q. Although Google Inc. is an American company and your 16 servers are located outside of our jurisdiction, you 17 tell us that that's Google policy to operate your 18 UK-directed services consistently with UK law, and users 19 of your service will be familiar with the address 20 google.co.uk. Is that the vehicle for achieving that 21 aim? 22 MS KELLER: It's a vehicle for achieving a larger product 23 aim, which is providing a search service which is 24 particularly useful for users in the UK, so that the 25 google.co.uk service is tailored to be as relevant and</p> <p style="text-align: center;">Page 73</p>	<p>1 Q. That becomes relevant because you go on to tell us 2 a little bit about your removals policy in relation to 3 your website. I'm going to explore that in some detail 4 in a moment, but before I do that, it might be helpful 5 if we explore in the most summary terms what it is that 6 the Google search engine does. I'm going to try what 7 I'm sure is a rather ham-fisted summary, and you can 8 tell me whether, broadly speaking, I'm correct. 9 Is it right that your service works by first of all 10 crawling through Internet web pages, indexing those 11 pages and then, when a user enters search terms, drawing 12 from the index using algorithms those sites which you 13 think best match the search terms that the user has 14 inputted? 15 MS KELLER: That sounds perfectly right. 16 LORD JUSTICE LEVESON: I'm not sure about the word crawling 17 given the speed at which it operates, but ... 18 MR BARR: I'm certainly going to quit while I'm ahead there, 19 sir. 20 If we move on now to removal, if someone applies for 21 something to be removed from the search engine, what 22 they're in fact asking you to do is to remove it from 23 the index that I've just mentioned? 24 MS KELLER: Right. They're asking us to remove it from the 25 search results that they'll see if they enter a search</p> <p style="text-align: center;">Page 75</p>
<p>1 useful as possible for UK users. So, for example, if 2 you were to search for "football" on that service, it 3 would show results about Manchester United or about what 4 Americans would call soccer, whereas a search for 5 "football" on our US-directed service, on .com, is going 6 to turn up results for US football. 7 Really, it's, as I said in the written statement, on 8 the UK service we structure it to comply with UK law. 9 This is where the UK law-based removals happen, but it's 10 not just about that, it's about providing a service 11 that's the best for UK users. 12 And I would add that we try very actively to channel 13 users to that service, so if someone -- if a UK user 14 types in the google.com web address in their browser, we 15 automatically redirect them to .co.uk because we think 16 that's the best service here and that's the one that we 17 operate in compliance with UK law. 18 Q. But it is possible for a user here to log onto 19 google.com, isn't it? 20 MS KELLER: Yes. 21 Q. And that is a different site? 22 MS KELLER: That is the site that we operate as targeted to 23 the United States and it's operated in compliance with 24 US law, much as the google.de site is the site targeted 25 to Germany and operated under German law, and so forth.</p> <p style="text-align: center;">Page 74</p>	<p>1 term that would have brought up that web page as 2 a result. 3 Q. I see. Can I ask exactly how that works? If someone 4 wants to complain about a search result which is being 5 thrown up because the content of the web page which is 6 being offered is, for example, defamatory, how does 7 a user go about doing that? 8 MS KELLER: Yeah, so I'm glad to explain that. I think 9 I can clear up a lot about how that works. 10 Let me start by saying that obviously Google is not 11 the Internet so what I'm going to describe isn't a way 12 to make a website come down. What we are doing is 13 reflecting in our index the content that came from these 14 third-party sites that are put up by someone else that 15 we have no editorial control over and so forth. We're 16 just attempting to sort of neutrally index them. So the 17 process I'm going to describe is the way to stop 18 a search result from showing up on Google, on sort of 19 our little corner of the Internet, but it doesn't change 20 the fact that it's out there and that a user might find 21 it by following a link, you know, from Facebook or 22 Twitter or from an email. 23 So there are two basic processes that I'll go 24 through and each has a different public-facing tool that 25 can be used to get something removed from Google's</p> <p style="text-align: center;">Page 76</p>

<p>1 search results.</p> <p>2 The first is a process for webmasters, so this is</p> <p>3 for the actual operator of the website, the newspaper in</p> <p>4 the case of a news website. If a webmaster puts</p> <p>5 something up and does not want it to appear in our</p> <p>6 search index, it's really important to us to make sure</p> <p>7 that we honour that intention. It's a fundamental tenet</p> <p>8 of our business and I think of every big search engine,</p> <p>9 of every responsible search engine's business to honour</p> <p>10 that webmaster's intent.</p> <p>11 In the first place, if they don't want it indexed,</p> <p>12 there's a technical standard they can use to say, "Hey,</p> <p>13 Google, don't put me in your search results".</p> <p>14 LORD JUSTICE LEVESON: That's for a particular story or a</p> <p>15 particular web page?</p> <p>16 MS KELLER: It's for any particular page, or for an entire</p> <p>17 site. The webmaster can choose, at whatever level he or</p> <p>18 she wants to, to say whether or not something should be</p> <p>19 indexed in our search results.</p> <p>20 But supposing they didn't do that, they published</p> <p>21 something and they want to retract it, the sort of</p> <p>22 slowest and easiest option is they just take it down off</p> <p>23 of their website, and the next time we crawl the</p> <p>24 website, the next time we visit it, our results will be</p> <p>25 refreshed and we'll show that it's gone, or that the</p> <p style="text-align: center;">Page 77</p>	<p>1 indexed and has no other relationship with, other than</p> <p>2 being an indexer, and the individual who is the victim</p> <p>3 of, say, defamation on that site wants to get it taken</p> <p>4 down and the webmaster isn't responding, for example,</p> <p>5 then they can come to Google, using the tool that's</p> <p>6 called -- I think it's called "removing content from</p> <p>7 Google", the one we had a screen shot of it in our</p> <p>8 evidence submission, and that also is just sort of you</p> <p>9 fill out a form, you name the url, you can tell us which</p> <p>10 product -- which Google product you're talking about,</p> <p>11 what the basis is, and click a button and submit it, and</p> <p>12 that comes in to a team in Mountain View and we review</p> <p>13 it and we take things down in compliance with UK law.</p> <p>14 I should also elaborate that although we think it's</p> <p>15 sort of best for people to use that site, because it's</p> <p>16 a very efficient process, it automatically gets added to</p> <p>17 a queue for review, we really have our ears open</p> <p>18 everywhere to pick up complaints. So if somebody were</p> <p>19 to send a paper letter, say, to the UK entity, they</p> <p>20 would send it to me in Mountain View and we would follow</p> <p>21 up and apply UK law.</p> <p>22 And so that is the mechanism for getting web search</p> <p>23 removals in the UK.</p> <p>24 The final thing I would add there is of course we</p> <p>25 get complaints that are in the form of somebody saying,</p> <p style="text-align: center;">Page 79</p>
<p>1 page has different text now.</p> <p>2 Assuming that there's a more urgent need than that</p> <p>3 to take it down, we offer a public-facing tool that's</p> <p>4 called the cache removal tool, and I don't think that</p> <p>5 was in the evidence we submitted but I'm happy to get</p> <p>6 you the url or a screen shot.</p> <p>7 The webmaster can go to that tool, type in the web</p> <p>8 address, a little more information and click a button</p> <p>9 and say, "Google, get this out of search results as soon</p> <p>10 as possible", and we do that, we get it out quickly.</p> <p>11 If that, for some reason, were to fail, we have</p> <p>12 people who can help to accelerate this, because, as</p> <p>13 I said, it's really important for us to do what</p> <p>14 webmasters want, to not index them if they don't want to</p> <p>15 be indexed, and also I would say that for a person who</p> <p>16 is the victim of defamation or of bad content online,</p> <p>17 this is by far the best option because it means you've</p> <p>18 gone to the webmaster, they've taken down the content</p> <p>19 where it sits, they've solved the problem at its root,</p> <p>20 and at that point getting it out of Google's index is</p> <p>21 sort of clean-up.</p> <p>22 That's the first scenario.</p> <p>23 The second scenario, and what I think that you've</p> <p>24 heard about here, is if the content is appearing on</p> <p>25 a website, again a third-party website that Google</p> <p style="text-align: center;">Page 78</p>	<p>1 "Hey, take that site out of your index, it's defaming</p> <p>2 me", but what we also get, and what is better, I think,</p> <p>3 as a policy matter, is people sending us court orders --</p> <p>4 not against us, but orders against third parties,</p> <p>5 saying, "Look, Google, I went to court and a judge</p> <p>6 looked at the facts of this case, a judge weighed</p> <p>7 a public interest defence" or whatever other complex</p> <p>8 questions of law might be raised there, "and the judge</p> <p>9 said that this is defamatory", and it's our clear policy</p> <p>10 to honour those court orders and to process removals</p> <p>11 based on that, and it's very helpful to us because it</p> <p>12 takes us out of the sort of looking at this "he said,</p> <p>13 she said" situation.</p> <p>14 We submitted in our evidence the Metropolitan</p> <p>15 Schools case, where Mr Justice Eady discusses exactly</p> <p>16 this issue, the sort of difficulty of having</p> <p>17 a technology intermediary confronted with making</p> <p>18 a decision about a defamation claim.</p> <p>19 LORD JUSTICE LEVESON: A judgment rather than a clear</p> <p>20 answer.</p> <p>21 MS KELLER: So receiving --</p> <p>22 LORD JUSTICE LEVESON: Yes.</p> <p>23 MS KELLER: If we can get a judgment from a court, that's so</p> <p>24 much better because it tells us what to do.</p> <p>25 LORD JUSTICE LEVESON: Yes, I understand. What you want to</p> <p style="text-align: center;">Page 80</p>

20 (Pages 77 to 80)

<p>1 avoid having to do is yourself making a judgment, 2 because you're not in a position to do that. 3 MS KELLER: Yeah, if we can. 4 LORD JUSTICE LEVESON: But do I gather that each of the 5 examples you've given me requires the knowledge of 6 a url? 7 MS KELLER: Yes. Yes, they do. 8 LORD JUSTICE LEVESON: So if somebody were to come to you 9 and say, "Listen, I've been hideously defamed, and as 10 a result a story has gone around the world about me and 11 I can prove that it's in breach of my privacy rights or 12 whatever, but I can't identify every url, that would 13 take me forever because I can't find them, or whatever", 14 actually you can only work on urls? You can't then do 15 your own search to find out where it is? 16 MS KELLER: We do get people coming and asking for that, and 17 as you can imagine, we are not in a very good position 18 to look at every url and figure out -- 19 LORD JUSTICE LEVESON: I understand, I understand. 20 MS KELLER: The thing -- yeah, so getting urls is sort of 21 the starting point, and lets us know a person in 22 a position to make judgment -- and maybe it's just the 23 complainant, you know, the person being defamed has 24 looked at this and said, "This is one of the ones that's 25 bad, and this is one that's bad, and here, Google, take Page 81</p>	<p>1 the United States and the same question about what 2 information should be accessible to jurors. I have not 3 heard a proposal more technically tailored than the idea 4 that one might disappear content from the entire 5 Internet or from the entirety of Google search results 6 so that no person can see it in order to protect this 7 one juror from violating a sworn obligation not to go 8 look for it. So as a technical matter, I'm not aware of 9 any proposals that narrowly get off that one juror. 10 As a legal matter, I've heard a little bit about 11 this UK case, where I believe the juror was found in 12 contempt. There are legal obligations on the jurors 13 already and consequences for going out and doing this, 14 so I should hope that the answer lies there. 15 LORD JUSTICE LEVESON: Yes, that's how we're dealing with 16 it, but I'm interested that the same problem arises in 17 the States. There isn't a technical way through, is 18 what you're saying to me? 19 MS KELLER: Not that I know of. 20 LORD JUSTICE LEVESON: All right. I apologise for that, but 21 it's rather topical. 22 MR BARR: Certainly no need to apologise, sir. 23 You explained that it is useful to you, when 24 receiving a complaint from a third party about content, 25 deciding whether to remove it from the index, to have Page 83</p>
<p>1 it down". 2 LORD JUSTICE LEVESON: I'm going to interrupt one more 3 minute, Mr Barr, and go down a bit of a siding for the 4 Inquiry, perhaps, but I can't resist the opportunity. 5 In this country, there is a real issue about what 6 juries learn in criminal cases, and before Google and 7 before this ability to search, it's true that you could 8 go to a newspaper archive and flick back through all the 9 old pages and find out about the criminal history of 10 a defendant, and find out what it was said he'd done or 11 not done, but of course nobody did that. 12 But now, where we don't necessarily allow our jurors 13 to know about background history of our defendants, it's 14 very easy for somebody to go on a search engine, type in 15 the name of the defendant and then find all sorts of 16 details, and you may be aware that only this week, in 17 this country -- you may not be aware, but Mr Collins may 18 be -- a juror got into a great deal of trouble for doing 19 just that during the course of a trial and so disrupting 20 the trial. 21 Now -- I'm sorry to everybody else -- is there 22 anything that can be done about that problem, or is that 23 just in the too difficult box because of the reasoning 24 you've just explained? 25 MS KELLER: Yeah. I think -- so we have the same issue in Page 82</p>	<p>1 a court judgment. Can either of you recall coming 2 across a case where a complainant had submitted 3 a decision of the Press Complaints Commission? 4 MR COLLINS: I'm not aware of one. 5 MS KELLER: No. 6 LORD JUSTICE LEVESON: Would that be sufficient? 7 A regulator -- that raises a question, but if there was 8 a regulator who made an order saying that the newspaper 9 had infringed the privacy in this way or that way, would 10 that be sufficient for your purposes? 11 MS KELLER: To be honest, I'm not familiar with the Press 12 Complaints Commission, so we would have to look at it if 13 it came. 14 LORD JUSTICE LEVESON: All right. 15 MR BARR: Can I ask you then about the case which you would 16 rather not see but presumably do sometimes see, which is 17 when a person writes in and says, "Look, your search 18 engine is throwing up results directing users to 19 defamatory material about me. I say it's defamatory 20 because ..." and that's all you get. Do you have 21 a legal team who will consider that, applying UK law and 22 deciding whether or not in their opinion it is 23 defamatory? 24 MS KELLER: Yes. We operate in a regulatory framework that 25 includes things like the E-Commerce Directive and Page 84</p>

<p>1 implementing legislation for that, and we follow 2 a notice and take down system. 3 So if we receive a notice without a court order, 4 which we certainly do, then we look at it and we apply 5 UK law for the UK service, obviously, as best we can. 6 That's me, that is my team in Mountain View doing that, 7 but of course taking extensive advice from outside 8 counsel and counsel in the UK. 9 Q. Can I ask -- you touched upon it in your answer, you 10 said taking down from the UK site or from the UK search 11 engine. Does that mean that when you make a search on 12 google.co.uk for the defamatory article, it won't be 13 produced by the search? 14 MS KELLER: (Nods head). 15 Q. But if you deliberately circumvent the automatic 16 redirection and go to google.com, you will still be able 17 to find the defamatory material? 18 MS KELLER: Assuming that it is lawful under US law and we 19 haven't received a complaint under US law, assuming 20 those things, then yes. 21 Let me talk a little bit about why I think that is 22 the right outcome as a policy matter. We -- you can 23 imagine a world in which we or other Internet companies 24 undertook to apply all countries' laws to all versions 25 of our service, so that a user in the UK on the</p> <p style="text-align: center;">Page 85</p>	<p>1 individual sites and trying to get them down, and I have 2 to say that because Google isn't the Internet, taking it 3 down out of our search results doesn't make it 4 disappear, that is the right way to get at it and get 5 the content to actually come down from the sites that 6 did put it up. 7 Q. Would it be right that if the video was considered legal 8 in any of the countries in which you operate, it would 9 remain accessible using the Google site for that 10 country? 11 MS KELLER: Yes. If there's a country whose law says that 12 that should stay up, then in that country we would 13 comply with that law. 14 Q. So effectively the opposite effect of what you described 15 as the lowest common denominator, if someone is prepared 16 to look in the right country? 17 MS KELLER: I suppose you could put it that way. 18 Q. Can you help us with some indication of how quickly you 19 are able to deal with notices asking for material to be 20 removed? No doubt there is a variation according to 21 whether or not it's obvious whether thought needs to be 22 given and so on and so forth, but can you give me 23 a range from best to worst of how long the process 24 takes, please? 25 MS KELLER: I don't have specific numbers. I can tell you</p> <p style="text-align: center;">Page 87</p>
<p>1 google.co.uk domain would see search results that had 2 been filtered effectively for the laws of Japan and the 3 laws of Chile and the laws of France and so forth. So 4 the third-party websites that show up in our search 5 index that are perfectly lawful for a UK citizen to see 6 would all be missing. It would be a lowest common 7 denominator of lawful speech. 8 This isn't an outcome that I think most people want 9 to see, and this is the basis for our dividing our 10 services in the way that we've described. 11 Q. Understanding the rationale for the system, if we take 12 the example of someone who is famous internationally -- 13 we've heard evidence from a man, Mr Mosley, about whom 14 a video which invaded his privacy went viral and spread 15 globally -- would it mean that somebody in his position, 16 as well as having to try and deal with the individual 17 websites that were posting the material that was 18 offending, so far as Google was concerned, to have it 19 removed from your search results, would have to make an 20 application in respect of each jurisdiction in which 21 that content was illegal? 22 MS KELLER: It does. I would hope that wouldn't be 23 a terribly difficult thing to do, and I can tell you 24 that in his case we have removed hundreds of urls, 25 although I agree -- you referenced him going to the</p> <p style="text-align: center;">Page 86</p>	<p>1 that we've been getting steadily faster. We've made 2 a lot of improvements both to the tools -- the public 3 tools and to our internal processes. Actually, often 4 a lot of the volume that can keep us busy comes from 5 copyright complaints, and over the past year we launched 6 what we call our fast-track process for copyright that 7 has greatly accelerated sort of new technologies to 8 greatly accelerate the intake and processing of those 9 complaints, and that speeds everything up greatly. 10 Q. I think I probably should have refined my question. 11 We're primarily interested in privacy and defamation 12 complaints. What sort of turnaround would you expect 13 for those? 14 MS KELLER: Sorry, I bring in the copyright thing only 15 because it adds to the queue. We process all of the 16 complaints as they come in, and if there's sort of 17 a glut from one source, that would cause it to slow 18 down. 19 But because of that tool, we've gotten considerably 20 faster. Of course we're constantly expanding the team 21 that does this within the legal department, and we 22 have -- we improve tools like the user form that 23 I submitted with the testimony. So it's getting 24 steadily faster, but I don't have the exact figure. 25 Q. For a case which involved a submission with a judgment,</p> <p style="text-align: center;">Page 88</p>

1 are we talking hours, days, weeks or months?
 2 MS KELLER: I think we're talking days.
 3 Q. And for a submission which wasn't backed by a legal
 4 judgment, it was just a submission to you that something
 5 was defamatory?
 6 MS KELLER: I think in those cases we're also talking days.
 7 Q. It's right, isn't it, that whenever you receive a notice
 8 asking you to remove content from your search results,
 9 you send a copy of the application to
 10 chillingeffects.com?
 11 MS KELLER: That's correct, with the personal information of
 12 the sender redacted.
 13 Q. Of course. And the purpose of that is?
 14 MS KELLER: So that -- Chilling Effects is a third-party
 15 public interest organisation, and as their somewhat
 16 loaded name suggests, they have a mission to document
 17 the ways in which content disappears from the Internet,
 18 or at least -- I think they apply it more broadly to the
 19 Internet. I know that they are trying to document the
 20 ways in which results disappear from our corner of the
 21 Internet, namely the search results. And so they
 22 maintain a database of the removal requests that we've
 23 received.
 24 Q. In short, these are people who are monitoring censorship
 25 of the Internet?

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1 MS KELLER: I don't know if I would put it that way, because
 2 they're monitoring removals, whether legitimate or
 3 illegitimate. I don't want to sort of put a cast on
 4 whether it counts as censorship or not.
 5 Q. I see.
 6 MS KELLER: I would note there's been a tremendous amount of
 7 scholarship that's come out of their database. They
 8 recently submitted an Amicus brief in a case and the
 9 brief was basically a three-page string citation to
 10 different academic articles written using their
 11 information.
 12 One that may be relevant here, this was years ago,
 13 a couple of outside scholars looked at -- it was
 14 actually Google's copyright removals, but this
 15 observation would apply to other kinds as well, you
 16 know, looking at the copies of letters that were on
 17 Chilling Effect, and they concluded that over
 18 30 per cent of the letters received and processed were
 19 from competitors trying to use the law as an excuse to
 20 take down each other's websites.
 21 So they're documenting both totally legitimate uses
 22 of the law to remove things from search and also ways in
 23 which the law can be abused as an excuse to try to take
 24 down lawful speech.
 25 Q. So, as the name suggests, looking at chilling effects.

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1 What I want to know is if Google is working in close
 2 partnership with an organisation which is considering
 3 chilling effects on the Internet, what does it do to
 4 help look into the destructive effects of abuses of the
 5 Internet on individuals? Is there any equivalent
 6 activity that Google is involved in?
 7 MS KELLER: We've had a number of efforts recently to help
 8 users protect their privacy online. I think DJ can
 9 probably speak to these more --
 10 MR COLLINS: I can speak to a couple of examples. In the UK
 11 recently, we ran a very expensive, widely publicised
 12 campaign called "Good to know", and this was a very
 13 simple set of tools for people to remain safe online,
 14 through whether it's privacy protection or securing
 15 their email accounts -- not specific, by the way, to
 16 Google, but generally how to maintain their identity on
 17 the Internet.
 18 So in terms of the investments that we're making, we
 19 ran the same campaign in Germany, where I think if you
 20 enter Germany, discussions around privacy generally in
 21 society are very intense. We've just launched the same
 22 campaign in the US. We'll be doing the same in Italy by
 23 the end of next month.
 24 So in terms of the tools and the investment and the
 25 advice and the education that we make for users to

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1 maintain their identity online I think in many ways
 2 outweighs the relationship we have with the website that
 3 you mentioned.
 4 Q. That's privacy that you're talking about. I'm really
 5 interested in the prevention of illegal destructive
 6 content. Is there any research on monitoring work
 7 there?
 8 MR COLLINS: I would have to -- I mean, I actually work with
 9 a team that commits significant investment to a large
 10 amount of very long-term academic debate in all areas of
 11 Internet regulation, internal policy. I would -- rather
 12 than give you an answer that is incorrect now, I would
 13 want to go back and look at the investment that we're
 14 making in academic research, which, as Daphne has said,
 15 is relevant to the website that you mentioned, and then
 16 supply after, if it's okay.
 17 Q. If there is any relevant research we would be very
 18 grateful to receive it. Thank you.
 19 MR COLLINS: Thank you.
 20 Q. You provide in your exhibit, Ms Keller, at tab 3, some
 21 statistics -- I'm afraid certainly in my bundle they're
 22 very difficult to read. A shot from a screen -- about
 23 requests from the United Kingdom for content to be
 24 removed. And these are, as I understand it, requests
 25 from all sides of the UK state, including courts; is

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<p>1 that right?</p> <p>2 MS KELLER: That's right.</p> <p>3 Q. I'm not going to go into great detail --</p> <p>4 MS KELLER: That's good. I can't read it either.</p> <p>5 Q. Certainly a very high percentage of requests appear to</p> <p>6 be complied with. 65 content removal requests with an</p> <p>7 82 per cent compliance rate. It would seem, certainly</p> <p>8 in the period that this was referring to, January to</p> <p>9 June of last year, that the single biggest category</p> <p>10 appears to have been national security matters. Matters</p> <p>11 of privacy also feature reasonably strongly, is that</p> <p>12 fair?</p> <p>13 MS KELLER: I think that is fair. I'm sure if you can read</p> <p>14 it that it's correct.</p> <p>15 Q. Can I now pick up a little bit on the question the</p> <p>16 Chairman asked you a moment ago, about Google's attitude</p> <p>17 towards domestic regulators, media regulators? You've</p> <p>18 explained that you haven't come across the PCC in</p> <p>19 practice, but can I ask you about the future?</p> <p>20 First of all, and this is in relation to your search</p> <p>21 engine, if there was to be a future regulator of the</p> <p>22 British media, which was to consider a complaint by an</p> <p>23 individual about, say, a newspaper and its online</p> <p>24 content, and to rule against the newspaper, what is</p> <p>25 Google's attitude likely to be to the weight that it</p> <p style="text-align: center;">Page 93</p>	<p>1 Q. I can certainly accept that it's unfair to ask you to go</p> <p>2 into any detail, but would it be fair that from the</p> <p>3 principles you've enunciated, that if it was something</p> <p>4 that was working to UK law, you would in principle be</p> <p>5 content?</p> <p>6 MR COLLINS: As we said in our submission, we comply with UK</p> <p>7 law in this country. As I said, I would want to look at</p> <p>8 the process in some detail and give you a really full</p> <p>9 answer.</p> <p>10 LORD JUSTICE LEVESON: It follows, therefore, doesn't it,</p> <p>11 that what was backed by law would be more effective in</p> <p>12 that regard than something that wasn't backed by law?</p> <p>13 MR COLLINS: I think as --</p> <p>14 MS KELLER: Yes.</p> <p>15 MR COLLINS: -- in summary, as Daphne said, again I don't</p> <p>16 want to speculate on something that hasn't been fully</p> <p>17 developed, but as Daphne said at the start, we prefer</p> <p>18 for removing results from our search index, it's much</p> <p>19 better for users if those judgments have been made by</p> <p>20 essentially a court or a legal process that has weighed</p> <p>21 all of the evidence, that has been robust, that has been</p> <p>22 fair and that justice is done, and then the result is</p> <p>23 not just, by the way, handed to a search engine, but</p> <p>24 handed to the webmaster and the other entry points to</p> <p>25 the web.</p> <p style="text-align: center;">Page 95</p>
<p>1 would attach to the ruling of such a body, if it was</p> <p>2 applying an agreed press code, if such a ruling was</p> <p>3 deployed to support a request to remove a site or an</p> <p>4 article from your results?</p> <p>5 MR COLLINS: It is an incredibly interesting question.</p> <p>6 I think it gets to the nub of what the Inquiry is</p> <p>7 looking at. I don't want to get into the sort of</p> <p>8 position of speculating about what the regulation might</p> <p>9 look like, or whether it's backed by law or not.</p> <p>10 I think, with a process like that, we would look for</p> <p>11 exactly the same things that you would look for, which</p> <p>12 were robustness, that justice is being done, that</p> <p>13 there's fairness, that there's -- that people get to the</p> <p>14 truth of the issue.</p> <p>15 I don't want to speculate what our submission to</p> <p>16 that idea might be, or our reaction to it might be,</p> <p>17 because I'd want to look at it in a great deal of</p> <p>18 detail.</p> <p>19 The one point I would make is that we obviously,</p> <p>20 with our UK services, comply with UK law, but I would</p> <p>21 want to have a very serious think about a process like</p> <p>22 that before giving you a full answer. So maybe as you</p> <p>23 develop the ideas for a process like that during the</p> <p>24 Inquiry, then we could give you some evidence written</p> <p>25 into the Inquiry --</p> <p style="text-align: center;">Page 94</p>	<p>1 I think there is just one point I would like to</p> <p>2 make, Mr Barr. Google is, as Daphne said, Google is not</p> <p>3 the Internet. We're also not the only entry point to</p> <p>4 the Internet. There are now multiple entry points to</p> <p>5 the Internet. I think it's fair to say there are more</p> <p>6 entry points to the Internet now than there were when</p> <p>7 Google was started 12 years ago. So whatever robust</p> <p>8 system that you recommend will have to cover all those</p> <p>9 multiple entry points, not just a search engine.</p> <p>10 LORD JUSTICE LEVESON: Yes, I quite understand that, and</p> <p>11 I appreciate that you are rightly careful. That's</p> <p>12 entirely appropriate. Of course, to some extent I have</p> <p>13 a chicken and egg here, don't I, because if something is</p> <p>14 going to be more effective one way, then that might</p> <p>15 drive me more in that direction. If it's going to be</p> <p>16 less effective, then I'm going to be moving away from</p> <p>17 that all other things being equal, which of course</p> <p>18 they're not.</p> <p>19 But it may be that in your answer, you've identified</p> <p>20 something of significance, because you're right, there</p> <p>21 are many, many different search engines, and many</p> <p>22 different entry points to the Internet. Of course</p> <p>23 whatever order was made would bite the webmaster,</p> <p>24 because if it was a newspaper or whether published in</p> <p>25 print or not in print, or just online, you'd have wanted</p> <p style="text-align: center;">Page 96</p>

<p>1 them to be part of the debate. But how one transmits 2 that to everybody is a slightly different problem. 3 MR COLLINS: Yes. 4 LORD JUSTICE LEVESON: And therefore may require, for that 5 reason, somewhat more authoritative backing, if I put it 6 like that. 7 MR COLLINS: It's a very interesting question, sir. The 8 first principle, as Daphne has rightly set out, is that 9 ultimately the person that publishes that content to the 10 Internet is ultimately responsible for the content that 11 they've published. I think that's the first principle. 12 But it's a very interesting question, and as I said, 13 sir, as you develop your proposals around the system 14 that you just outlined, we'd be very happy to submit 15 some written evidence in time, if you asked us to. 16 LORD JUSTICE LEVESON: Hang on, let me just work that out. 17 So if I have some provisional view, then I could ask you 18 to provide some provisional response to my provisional 19 view? 20 MR COLLINS: It sounds very provisional, but -- 21 LORD JUSTICE LEVESON: Well, it is because this is back to 22 my chicken and egg. I will need to know that whatever 23 I suggest is going to work, and it won't help me if six 24 months after I've published a view, you come along and 25 say, "Well, actually, this doesn't work, but if you'd Page 97</p>	<p>1 freedom of expression, everything. I don't believe that 2 there would be anything that we would suggest that you 3 would not find entirely compatible with your concerns of 4 fairness, although whether it goes quite as far as your 5 First Amendment is different, but that's a UK position 6 rather than -- 7 MS KELLER: Of course, a different country, different laws. 8 LORD JUSTICE LEVESON: That's the point. 9 MR COLLINS: If I can, I think in summary, as your 10 recommendations apply to services like our own, of 11 course we'll take a very close interest and I'm sure 12 we'll -- if you ask us for our advice, then we would 13 very happily provide it, sir. 14 MR BARR: Can I ask you, given that you have a multinational 15 portfolio, either of you if you can answer, does Google 16 take into account the decision of any foreign media 17 regulators when considering removal notices? 18 MS KELLER: I cannot recall ever seeing an example of 19 a media regulator being a basis for a removal, so 20 I think it just hasn't come up. 21 Q. So either way? 22 MS KELLER: Yeah. 23 Q. Okay. Can I now move on from the questions I've been 24 asking about your search engine to look at some, but not 25 all, of your other products? I'm going to start with Page 99</p>
<p>1 done it this way, it might have worked". 2 MS KELLER: Just to reiterate a point that DJ made, first, 3 ultimately, we will comply with what UK law requires. 4 But what we would hope to see in such a process are the 5 same things that I'm sure you're thinking about already, 6 you know, an opportunity for the publisher to defend 7 himself, an adversarial process, a collection of facts, 8 application of public interest defence. This is not 9 news to you. 10 LORD JUSTICE LEVESON: It may not necessarily be 11 adversarial, it may be inquisitorial. I'm sure you 12 understand the difference. This Inquiry is 13 inquisitorial. Of course, there are serried ranks of 14 the press here to make sure their interests are 15 protected, but it's a question of how best to achieve 16 the result when a complainant might not have the benefit 17 of legal representation, and therefore there's 18 a mismatch of power. 19 MS KELLER: Right. 20 LORD JUSTICE LEVESON: But there would have to be a process 21 that was fair, that was fully compliant with the right 22 to be heard, and that comported to a set of 23 principled -- I won't say laws, but rules, which 24 themselves were bounded in respect for all the elements 25 that you would want to see, privacy, freedom of speech, Page 98</p>	<p>1 those which are closely related to your search engine 2 because they also work on search principles. 3 First of all, Google Images, which is a product for 4 searching for images. What I'd like to ask, first of 5 all, is if someone wants to ask for an image to be 6 removed from your search engine, from Google Images, is 7 the process the same as the one that you've outlined for 8 Google Search? 9 MS KELLER: Yes, it's exactly the same, the same web form, 10 the same team at the back end assessing the request. 11 Q. If the request relates to a url, as I think I've 12 understood correctly it must, what happens if the image 13 is being hosted by multiple websites or if there is 14 someone who is prepared to repost the same image on 15 another url as soon as it's removed from the search 16 results of the original -- the original url is removed 17 from the search results? Is there anything that you can 18 do about that? 19 MS KELLER: Much as I described for Web Search, because 20 we're not the Internet, we're just reflecting what's out 21 there on these third-party sites, and we are not in 22 a position to assess whether each of -- what the legal 23 defence is for each of them. We undertake to remove 24 based on the complainant, or a court order, identifying 25 the urls. Page 100</p>

25 (Pages 97 to 100)

<p>1 I think what you're getting at is maybe the idea 2 that there could be a way to identify if the same image 3 exists on multiple urls and sort of automatically make 4 them all disappear from our search results at the same 5 time. 6 Q. Mm. 7 MS KELLER: The first part of the answer is we don't have 8 a switch that we can flip, or a button we can push to 9 make that happen. But I think a second and important 10 part of the answer is I'm not sure on policy grounds 11 that you would want such a thing to exist, because while 12 our algorithms, our computer programs are quite good at 13 identifying when a page is relevant to a query, the 14 kinds of things we work on, they're not good at making 15 the kind of judgments that the judge or a court or 16 a human would make about the context in which something 17 appears. 18 So they won't necessarily distinguish between 19 a particular image or a particular text phrase used in 20 news reporting or scholarship or art criticism compared 21 to when used in some other context. So if there were to 22 be this sort of -- the switch that you flipped to make 23 all duplicates disappear, I think that an inevitable 24 result would be overfiltering and would be the 25 suppression of perfectly lawful content to the detriment</p> <p style="text-align: center;">Page 101</p>	<p>1 words, so that it would be quite acceptable to allow 2 through Max Mosley Formula 1, but you wouldn't get 3 a result if you put in Max Mosley and then words to try 4 and single out the offending video? 5 MS KELLER: That also is something that we don't have. We 6 couldn't throw a switch and do that, although I assume 7 that an engineer could build it in theory, but I think 8 that that has perhaps even greater potential for 9 overbreadth -- we submitted in our evidence the 10 Metropolitan Schools case which talks about a very 11 similar case to filter all results for a particular 12 pairing of words, and the court noted that there were 13 a number of totally unrelated and totally innocent sites 14 that would have disappeared had it been possible to 15 implement that request. 16 I think in the Max Mosley case, obviously there's 17 been all kinds of news coverage about this very Inquiry, 18 and other coverage that is legitimate and that you 19 wouldn't want to disappear from search results. 20 Q. Can I move now to Google News, please. First of all, 21 I'd like to get a summary as to just what the process 22 is. If one if goes to Google News, what's happening 23 behind the scenes in a nutshell? 24 MR COLLINS: Okay, I'll attempt not to be overtechnical. 25 For instance, if I wanted to find out news about</p> <p style="text-align: center;">Page 103</p>
<p>1 of the webmasters who put up that content. A small 2 business, a small newspaper, losing its traffic from one 3 of the major search engines and losing a lot of readers 4 because of sort of overbreadth of technical filtering. 5 If I could offer a personal anecdote on this, I am 6 a mother of two young children, and I miss them when 7 I travel like this, so last night I used my mobile phone 8 to try to look at some pictures of them, which my 9 husband uploaded -- you know, they're our pictures, we 10 took them, and my husband uploaded them to Flickr, which 11 is a photo hosting site owned by Yahoo, and the mobile 12 carrier gave me a message saying that I couldn't see 13 them unless I attested that I was over 18 and then 14 another message saying I was not allowed to attest that 15 I was over 18. So I was technologically blocked from 16 seeing pictures of my own children that I took and that 17 my husband uploaded. This is, I think, an example of 18 the kind of technical error and overbreadth of filtering 19 that can arise through perfectly good intentions. 20 Q. Accepting the technical difficulties and the potentially 21 unwanted results which you've just explained, does 22 Google have, if we take perhaps Google Videos as an 23 example, in the Max Mosley case, if one was trying to 24 search for the Max Mosley video on Google Videos, is 25 there a way of blocking certain combinations of search</p> <p style="text-align: center;">Page 102</p>	<p>1 this Inquiry, I would -- I could either go to the Google 2 Search home page, put in "Leveson Inquiry". Within 3 those page of search results, some of them would be news 4 search results. Or I could go to Google News, which is 5 dedicated to making queries amongst news content. 6 So I put in that query. We then serve back to you 7 what we think is the most relevant information linked to 8 the query that you've made. 9 To be more specific, if I put in, say, maybe I'm 10 interested in a particular football team and I follow 11 a particular player and I want to track whether that 12 person is injured for Saturday's game or not amongst the 13 news, I put in the name of that person into Google News, 14 and then at the back end our algorithm works very hard 15 to serve back to you links to newspaper or other news 16 content websites that is most relevant to that query. 17 It's also important to explain what we're not doing. 18 We're not producing that news ourselves. We're merely 19 producing the relevant links to the most relevant 20 information that we think you're looking for. 21 LORD JUSTICE LEVESON: I was about to say "merely", but 22 I don't say "merely". It is a subset of the general 23 search of Google? 24 MR COLLINS: It's part of Search. 25 LORD JUSTICE LEVESON: It's a restricted search on news --</p> <p style="text-align: center;">Page 104</p>

<p>1 MR COLLINS: It's a more refined search, but it's 2 essentially part of Google Search, absolutely. 3 MR BARR: If you're not creating the news, writing it 4 yourselves, as has been pointed out part of the search 5 technology, the algorithm is very important, isn't it? 6 It operates something as a remote automated editor, 7 doesn't it, in what is served up to the user? 8 MR COLLINS: Not -- 9 Q. Can I ask you, does Google accept payment to promote 10 particular news results in response to searches from 11 news organisations? 12 MR COLLINS: Absolutely not. That's absolutely not what we 13 do. Also, if I may just pick up on what word you 14 used -- sorry, two words, "remote editor", it's really 15 important to emphasise this isn't editor in the sense of 16 many of the people who have given evidence in the 17 Inquiry. We don't have an editorial board for Google 18 News, we don't have an editor saying, "I'd really like 19 to promote that particular link" or "Let's push that 20 particular piece of content up the rankings because my 21 sense is that's what people are looking for". 22 Q. It's a computer programme? 23 MR COLLINS: Absolutely right. But just to re-emphasise, we 24 absolutely do not take payment for rankings in Google 25 News, just as we don't take payment for rankings in Page 105</p>	<p>1 come into it. 2 MS KELLER: Just to fill that out, we do legally based 3 removals from Google News if that comes up as well on 4 exactly the same model I've described before. I can't 5 tell you the number of times I've looked at the results 6 for the word "Google" on Google News and there have been 7 a number of things that I disagree with. But we don't 8 have people making choices about that. 9 MR COLLINS: It still appears. 10 LORD JUSTICE LEVESON: You don't censor your own content? 11 MR COLLINS: No, we don't. 12 MR BARR: That's reassuring. 13 Can I move now to blogging.com, which is owned by 14 Google, isn't it? 15 MR COLLINS: Yes. 16 MS KELLER: Yes, it's blogger.com, but yes. 17 Q. It's a service which allows a user to set up and run 18 a blog? 19 MR COLLINS: Yes. 20 Q. Who do you regard as publishing the content on the 21 blogs? Is it the user or is it Google or is it both? 22 MS KELLER: It's the user, and sort of to make the 23 comparison to Web Search, as I described before, Web 24 Search is us being an intermediary, a technical indexer 25 of third-party content that's hosted on third-party Page 107</p>
<p>1 other parts of that natural Web Search result. 2 Q. And so is there any other way by which Google will 3 filter out particular news content or otherwise promote 4 one sort of news over another except for simply trying 5 to match the search terms? 6 MR COLLINS: I will come to Daphne's world in a second, but 7 as you said at the end, what we're trying to do is to 8 provide information that is the most relevant to the 9 query that you've made, and again I want to emphasise, 10 not to you, but to the query that you've made. That's 11 the criteria. We don't say, "We don't like this 12 particular newspaper this week", someone sits in an 13 office and says, "Let's just take those people out"; 14 that's not how it works. 15 In terms of content, which is the subject of the 16 discussion Daphne's been having with you around 17 removals, obviously there's a process for that form of 18 content, and if you're the webmaster of an online 19 newspaper or a newspaper's online site, then you use the 20 tools that Daphne has outlined to refresh content, for 21 instance if you've taken something down because it's 22 been found to be defamatory, but I want to underline the 23 central premise of Google News just as the central 24 premise of our overall search service is relevance, not 25 whether we like a particular newspaper or not. Doesn't Page 106</p>	<p>1 machines. Blogger is us providing a hosting platform 2 for third-party content that's hosted on our machines. 3 So it is different. It's on our machines. We didn't 4 create it, we didn't write any of it, we certainly don't 5 have time to read it, given the scale at which it's 6 uploaded, but we do host it and have the power to take 7 it down, and do when appropriate. 8 What's the same about Web Search and Blogger is the 9 notice and takedown framework that I described. In both 10 cases, the same web form that I've shown you, where you 11 can check the box to say, "My complaint is about 12 Search", you can also check the box to say, "My 13 complaint is about Blogger", and consistent with the 14 E-Commerce Directive notice and takedown framework and 15 the implementing legislation in the UK, we operate the 16 same kind of notice and takedown process. 17 LORD JUSTICE LEVESON: The process is the same but the 18 result is different because this time you actually kill 19 it, you take it down. 20 MS KELLER: Right. So, I mean, unless there happens to be a 21 different copy that someone has hosted somewhere else, 22 it actually is solved at the root. 23 MR BARR: Do you permit on blogger.com anonymous blogs, or 24 do they have to be blogged in the real name of the 25 person posting the content? Page 108</p>

<p>1 MS KELLER: They are pseudonymous?</p> <p>2 MR COLLINS: I don't want to give you the wrong answer.</p> <p>3 I will check and then come back to the Inquiry</p> <p>4 afterwards.</p> <p>5 MS KELLER: But I'm sure we have bloggers blogging under</p> <p>6 names that are not --</p> <p>7 MR COLLINS: Yes, I think --</p> <p>8 MS KELLER: -- their real names.</p> <p>9 MR COLLINS: -- I want to give you the right answer.</p> <p>10 MR BARR: It's certainly a very popular service. From</p> <p>11 a recent judgment I've taken the fact that it has half</p> <p>12 a trillion words on it and 250,000 words are added every</p> <p>13 minute. Do they sound like familiar statistics?</p> <p>14 MS KELLER: That sounds plausible.</p> <p>15 LORD JUSTICE LEVESON: So one would understand why you can't</p> <p>16 read it all.</p> <p>17 MS KELLER: Right.</p> <p>18 MR BARR: All of that is accessible to UK users, is it,</p> <p>19 wherever in the world the blog is posted?</p> <p>20 MS KELLER: Mm-hm.</p> <p>21 Q. Does that mean, again we have the same trans-national</p> <p>22 issues, where if a blog is contrary to the law of one</p> <p>23 country, you would take it down on, for example, the UK</p> <p>24 side, or does it work differently, is it just</p> <p>25 blogger.com, or do you have blogger.co.uk?</p> <p style="text-align: center;">Page 109</p>	<p>1 I'm not going to hold you to a firm answer -- consider</p> <p>2 and what sort of considerations would you apply to the</p> <p>3 question of whether Google would be prepared to be</p> <p>4 a part of that system, to be prepared to respond within</p> <p>5 the regulatory system to complaints about blogging posts</p> <p>6 on blogger.com?</p> <p>7 MR COLLINS: Again it's a very interesting question.</p> <p>8 I think there are two essential parts to this. Firstly,</p> <p>9 there is a very clear set of regulations which apply to</p> <p>10 technical intermediaries hosting platforms. It's called</p> <p>11 the E-commerce Directive and it does place a number of</p> <p>12 responsibilities on us around removal of content.</p> <p>13 I know that you're very aware of it.</p> <p>14 It's important to make the distinction between -- in</p> <p>15 the system that you've outlined, it's important to make</p> <p>16 the decision between someone who provides a hosting</p> <p>17 platform for other people to create and post content,</p> <p>18 and a publisher. Blogger.com or other products that</p> <p>19 are -- attempt to form a community around the product,</p> <p>20 YouTube, et cetera, they don't make us a publisher; we</p> <p>21 remain a hosting platform. So I think whatever system</p> <p>22 that you devise, it's important to retain that</p> <p>23 distinction, because not only is there already a very</p> <p>24 clear set of regulations around those principles placing</p> <p>25 responsibilities on us, but it retains a very essential</p> <p style="text-align: center;">Page 111</p>
<p>1 MS KELLER: At present, just because of the way that product</p> <p>2 was technologically designed, it only has the.com</p> <p>3 domain.</p> <p>4 Q. So which law do you apply when deciding whether to take</p> <p>5 down a post?</p> <p>6 MS KELLER: If we determine that something is in violation</p> <p>7 of UK law, we do take it down.</p> <p>8 Q. If it's a UK post. What would you do if it was a French</p> <p>9 post saying something defamatory about an English</p> <p>10 person?</p> <p>11 MS KELLER: I don't think we would draw a distinction based</p> <p>12 on the origin of the post. I should double-check that</p> <p>13 and get back to you, but I'm fairly confident -- sorry,</p> <p>14 I represent the web search product, so I'm reaching</p> <p>15 a little here.</p> <p>16 Q. Fine. I'm asking searching question, if you'll forgive</p> <p>17 the pun, and if you wish to put the answer in writing,</p> <p>18 that would be helpful, but I'm interested in what the</p> <p>19 test for jurisdiction is, as to which law you apply.</p> <p>20 If, in relation to Blogger, you are also an Internet</p> <p>21 host, could I now pose another hypothetical future</p> <p>22 regulatory question to you based on your Blogger</p> <p>23 service? If there was to be a future regulatory body in</p> <p>24 this country, which was going to adjudicate on</p> <p>25 defamation and privacy complaints, would Google -- and</p> <p style="text-align: center;">Page 110</p>	<p>1 balance online, which is: where does that responsibility</p> <p>2 lie? We have our responsibilities, which we fulfil; the</p> <p>3 person that produces and uploads that content has his or</p> <p>4 her responsibilities as well.</p> <p>5 So again, it's -- this is obviously a hypothetical</p> <p>6 scenario, and something I know that you're working</p> <p>7 through as you work through your evidence. Again,</p> <p>8 I would give the same answer that I gave to the</p> <p>9 Lord Justice, that, as you develop your system and as</p> <p>10 that regulatory proposal affects our services, we would</p> <p>11 be happy to supply written evidence if you asked for it.</p> <p>12 Q. A short question about YouTube. It's owned by Google,</p> <p>13 isn't it?</p> <p>14 MR COLLINS: Correct.</p> <p>15 Q. That service -- would your answer be the same? -- do you</p> <p>16 regard yourself as hosting the content rather than</p> <p>17 publishing it?</p> <p>18 MR COLLINS: Correct.</p> <p>19 Q. When you go on to YouTube, you do get an image on the</p> <p>20 screen, which you then click on to watch the video. Do</p> <p>21 you regard yourself in any way as publishing at least</p> <p>22 the thumbnail image or do you regard yourself purely as</p> <p>23 the vehicle for somebody else's publication?</p> <p>24 MR COLLINS: I think I would give the same answer that</p> <p>25 I gave before, that -- and as Daphne gave around Google</p> <p style="text-align: center;">Page 112</p>

<p>1 Images, which is again we're the technical intermediary, 2 we're the hosting provider. We're not ourselves 3 publishing that content, and I think under the 4 E-commerce Directive and the judgment you referred to 5 earlier sort of underpins that. 6 MS KELLER: The thumbnail is part of the processing that we 7 provides a the host. I don't know if this has come up 8 under UK law, but it has under the sort of analogous 9 provisions for copyright of US law and I think there's 10 a general understanding that hosting includes showing 11 a thumbnail or video -- 12 MR COLLINS: Presentation -- 13 MS KELLER: -- or whatever the sort of normal processing 14 would be. 15 MR BARR: Sir, I've very nearly finished; will you indulge 16 me for a few minutes, please? 17 LORD JUSTICE LEVESON: Certainly. 18 MR BARR: Can I come on now to a separate topic. It's dealt 19 with at the end of your witness statement, Ms Keller. 20 It's about the concept of self-regulatory traditions, 21 which are developing on the Internet. I've been posing 22 questions about more formal regulation, but perhaps you 23 could tell us a little bit about what you mean when you 24 say that the Internet has also developed global 25 self-regulatory traditions? Page 113</p>	<p>1 disseminated quickly to every who might need to act to 2 them. It's a pretty effective example of 3 a self-regulatory body that came together through 4 industry agreement. 5 DJ, I think you -- 6 MR COLLINS: Yes, I think it -- I would say a couple of 7 things. Firstly, the Internet is very well regulated in 8 two ways. There is regulation, and we've been 9 discussing what future regulation might look like, and 10 that is really embodied by principles around the 11 E-commerce Directive. The European Commission's 12 published its proposals for online privacy regulation, 13 but -- so it's important to emphasise we don't think the 14 Internet should just be self-regulated. There is 15 already a body of very tight regulation, particularly in 16 areas around data. 17 But self-regulation is also important, because 18 regulation doesn't cover everything, and we see 19 ourselves as a responsible company. We work very 20 closely with the IWF, but also other bodies. I can 21 think of some -- an example in the UK that we've been 22 involved in with the Advertising Standards Authority, so 23 to making sure that online advertising is being checked 24 in the right sort of way, and we play an active part in 25 that, but also in terms of global governance of the Page 115</p>
<p>1 MS KELLER: I will give you a couple of examples, I think DJ 2 may be able to provide some others. I'll start from the 3 bottom up with self-regulatory traditions that came from 4 the engineers who built the Internet and the primary one 5 that really affects us is the robots.txt protocol, which 6 I mentioned earlier, which is the way -- there's 7 actually technically two varieties. You can use 8 robots.txt or something called metatags, which is text 9 in the source code of a page that's not visible to the 10 user. Used following a standardised protocol that every 11 webmaster can follow the same way, that every search 12 engine can understand, for webmasters to give 13 instructions saying, "Don't index me", or they can vary 14 a little, they can say, "Index me but don't show 15 a snippet", or things like that, so that's a sort of 16 a foundational example in the world we operate. 17 An example that comes closer to the kinds of things 18 we think of as regulation is the work done by groups 19 like the IWF, the Internet Watch Foundation in the UK, 20 and some comparable groups like the BPJM in Germany and 21 Nikmeg(?) in the US. The IWF is primarily private, 22 I think almost all of its funding comes from corporate 23 members, and it creates standards for creating and 24 disseminating lists of urls with child abuse content, 25 very abhorrent content, so that we can get those lists Page 114</p>	<p>1 Internet, there are very well established forums such as 2 the Internet Governance Forum, the IGF, where every year 3 a collection of government and NGOs and Internet 4 companies come together and work out where the new 5 responsibilities should be lying. So both traditions 6 are important, but I don't want to imply and neither of 7 us want to imply that in some way we think it should 8 just be self- regulated, because -- 9 LORD JUSTICE LEVESON: The regulation you're talking about 10 is slightly different. You're using the word in 11 a slightly different sense. What you're saying is that 12 there need to be common standards, common agreements, 13 common mechanisms that work for everybody, because if 14 they work for everybody, then they will work for 15 everybody. If everybody goes in their own direction, 16 there is a risk for chaos. 17 MR COLLINS: That's right. 18 LORD JUSTICE LEVESON: But there isn't anybody to police it 19 it's what you all do in order to achieve the common good 20 for all. Would that be fair? 21 MR COLLINS: Correct. I think it's robust in some areas and 22 I think, if I may, if you look back at the technology 23 developments for the last hundred years, this has been 24 a very common theme; it's not just relevant to the 25 Internet. But a lot of my work and a lot of my team's Page 116</p>

1 work, and I work very closely with some of the people
2 that you're going to be hearing from this afternoon, and
3 we take these issues very seriously, because I come back
4 to something I said right at the start, that the trust
5 that we have with our users is very, very important, and
6 in some cases the regulation goes obviously so far,
7 and -- but we don't always just rest with where that
8 regulation lies. Sometimes we think we can tighten up
9 even further, or because our technology understanding
10 sometimes runs a little ahead of some regulatory bodies,
11 we want to do it before there is a need for statutory
12 regulation.
13 MR BARR: Thank you very much, both of you. Those are all
14 the questions that I have.
15 MR COLLINS: Thank you.
16 MS KELLER: Thank you.
17 LORD JUSTICE LEVESON: Thank you very much indeed, and thank
18 you again for coming. I'm sorry to deprive you of the
19 sight of the pictures of your children.
20 MS KELLER: I'll see them soon. Thank you.
21 (1.07 pm)
22 (The luncheon adjournment)
23
24
25

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