

Talk to photographers' branch of the NUJ

Tuesday 30th April 6pm

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How does The Police and Criminal Evidence Act 1984 (PACE) apply to journalists?

Broadly, if not a suspect, police can not access journalists' materials without a court order unless the journalist agrees.

If a journalist is a suspect there are wider powers to stop and search and search on arrest - There is not always mention of special protection for journalistic material in the various sections that cover these powers but anyone under arrest wishing to protect journalistic material should always argue that material should be protected, relying on principle of freedom of expression under A10 ECHR.

The procedure for seeking access in cases where pre and post arrest powers do not apply is governed by S9 and Schedule 1 Police and Criminal Evidence Act 1984

Broadly PACE defines journalistic material as "*material acquired or created for the purposes of journalism*". It must be in the possession of a person who acquired or created it for the purposes of journalism.

Journalistic material can be either excluded material (broadly confidential source material) or special procedure material (all other journalistic material) - so footage will usually be special procedure material.

It is very difficult for the police to get a production order for confidential source material.

So far as non confidential source material is concerned there are some high hurdles the court must be satisfied are overcome before an order can be made. And the court must carry out a balancing exercise between the needs to bring an offender to justice and the need to protect press freedom of expression which can be seriously undermined if journalists are required to hand over materials to the police.

The application is to a Crown Court judge on notice to the person holding the material.

The judge must be satisfied that there are reasonable grounds to believe

- An indictable offence has been committed
 - There is special procedure material on the premises specified in the application
 - That the material is likely to be of substantial value to the investigation
 - That it is likely to be relevant evidence
 - That other methods have been tried to get the material without success or efforts are bound to fail
 - it is in the public interest, having regard—
 - (i) to the benefit likely to accrue to the investigation if the material is obtained;
- and

(ii) to the circumstances under which the person in possession of the material holds it,
that the material should be produced or that access to it should be given.

Dale Farm was an appeal against an order made in the Crown Court by way of judicial review to the High Court. It was held that the court could not be satisfied on the information provided by the police that the footage sought would be of substantial value to the investigation, or that interference with A10 rights was justified - the application was very wide ranging in time and place. Also the journalists and media organisations involved were not given an adequate opportunity to argue against the making of the order as the police did not supply clear information about what was needed and why.

The court acknowledged that overuse of production orders can readily have a chilling effect on press freedoms- for example press photographers they may not be permitted ready access to film if it is thought that their material may be seized routinely, and there may be increased risks to safety of cameramen.

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Practical steps if the police are seeking material

These are some ideas- I realise not always practical

Carry valid press card

Try to keep work and footage securely in specially labelled files or folders to make it clear it is journalistic material.

Where possible keep materials in your place of work and if possible differentiate between work and personal computers and smart phones and cameras.

If search on arrest etc then assert that material is journalistic and should be separated pending resolution. If necessary ask if it can be looked at by an independent lawyer.

If asked to produce without an order say you are not in a position to do so without a court order - refer to S 9 and schedule 1 of PACE

If you get a production order and wish to oppose- consult a lawyer- you can ask for your costs if you are successful

In court ask for details of why the police think what you have will add significantly to the evidence they already have. For example did they have their own surveillance camera men or material produced by others such as CCTV or private security firms?

Provide evidence of the risk to freedom of expression more broadly if the order is to be made-

Possible implications of changes proposed by Lord Justice Leveson

These were proposed for consultation as they had been raised on behalf of the police. Not all of them were endorsed by Leveson LJ though he expressed some support for amendment of S11 PACE with the aim of excluding the protection given

to confidential source material in circumstances where there had been a crime or fraud.

Amend para 2(b) Schedule 1 PACE

Should paragraph 2(b) Schedule 1 PACE be watered down so that the police would not longer have to demonstrate they had tried other ways of obtaining the material or it was bound to fail?

This was proposed on behalf of the police on the grounds that if it is asserted that the holder of the material is willing to assist, but is not in fact assisting, access to relevant material can never be gained. Apparently evidence was not produced to show this had ever happened. In any event if it is clear that there is no cooperation following a request police can assert other ways have been tried and have failed. Any watering down of the protections in Schedule 1 should be opposed and this suggestion has the hallmarks of using a sledge hammer to crack a nut.

Definition of journalistic material

Should S13 PACE be amended to provide a definition of the phrase “for the purposes of journalism?” The aim would be to emphasise that the phrase should be given a narrow meaning.

It is unnecessary and such an amendment is unlikely to materially alter the position as the phrase has already been given a narrow meaning in other contexts.

Amend S 11(3) PACE

Should the Government amend S 11(3) PACE to provide that material is only held in confidence for the purposes of PACE if it is held or has continuously been held since it was first acquired or created subject to an enforceable or lawful undertaking restriction or obligation?

This is a very dangerous inroad. Any watering down of the protection for confidential sources will have very chilling effect on Freedom of Expression. If a whistleblower provides a journalist with a CD or papers or information relating to their employment will they be regarded as having committed a theft, misfeasance in public office, breach of Official Secrets Act? Will the journalist be regarded as complicit? Will the protections not apply? Fewer safeguards for sources mean fewer people to come forward and speak the truth in the public interest.

This proposal seem a contradiction to other comments made by Leveson LJ, for example:

6. The protection of sources and other legal privileges of the press (pg 68)

6.1 A free press is able to perform valuable functions which individual free speech cannot. It is because of the position of the press as an institution of power that it is able to stand up to and speak truth to power. The professional skills and resources at its disposal enable the press as an institution to carry out ground-breaking investigations in the public interest. It is these considerations and functions which have resulted in the press as an institution being afforded certain privileges going beyond those protected by freedom of speech.

6.2 Principal amongst these is the press privilege not to disclose sources of information. Now enshrined in section 10 of the Contempt of Court Act 1981, the privilege means that a publisher cannot be compelled to reveal the source of published information unless a court considers such disclosure to be in the interests of justice or national security or for the prevention of crime. The Police and Criminal Evidence Act (PACE) 1984 confers a similar procedural privilege, preventing the police from access to journalistic material without authorisation obtained by application to the court. Furthermore, the courts have also recognised the right not to disclose sources as an important facet of the free press, as is reflected in the following words of Lord Woolf CJ:33 “The fact that journalists’ sources can be reasonably confident that their identity will not be disclosed makes a significant contribution to the ability of the press to perform their role in society of making information available to the public”.

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