Submission to the Joint Committee on Justice and Equality

General Scheme of the Communications (Data Retention) Bill 2017

November 2017

Opening statement by Séamus Dooley, Irish Secretary, National Union of Journalists, (UK & Ireland) to the Joint Committee on Justice and Equality, Wednesday 15th November 2017

Chairman, Members of the Committee,
On behalf of the National Union of Journalists (NUJ) I am grateful for the opportunity to address the committee as part of the pre-legislative scrutiny of the General Scheme of the Communications (Data Retention) Bill 2017.

This Bill has profound implications for journalists and for media organisations.

The NUJ believes that the highest level of protection, under both Irish Constitutional and international law, must be afforded to journalists in respect of privacy in their communications. The media plays a crucial role in maintaining accountability and transparency in the workings of civic society in a democratic state.

Where the rights of the media are undermined the ability of journalists to shine a light into the darkest corners are severely curtailed.

While there is an individual right of privacy afforded to citizens, the right of privacy afforded to journalists in the exercise of their professional function is rooted in a public good that extends beyond the individual rights of citizens.

The General Scheme of the Communications (Data Retention) Bill 2017 does not make adequate provision for the protection of sources or afford the level of judicial oversight recommended by Mr Justice John Murray in his review of the legislative framework in respect to access by statutory bodies to communications data of journalists held by communications service providers.

Mr Justice Murray was asked to take into account "the principle of protection of journalistic sources; the need for statutory bodies with investigative/and or prosecution powers to have access to data in order to prevent and detect serious crime; and current best international practice in this area".

The Committee will be aware that Mr Justice Murray found that current data-retention legislation amounts to mass surveillance of the entire population of the State and recommended a series of changes to the current statutory framework, which he found was in breach of European law.

The General Scheme before the committee this morning sets aside the key recommendations of Mr Justice Murray and this is as concerning as it is curious.

In scrutinising the proposed legislative I respectfully suggest that the committee have due regard to the recommendations of Mr Justice Murray.

Mr Chairman, the NUJ welcomed the establishment of the Murray Review by the Tánaiste and Minister for Justice and Equality announced on 19th January 2016.

In establishing the review the Minister announced that it was anticipated that the review would be completed in three months. On October 19th 2016 Minister Fitzgerald advised the NUJ that the report was at "an advanced stage".

The report was presented by Mr Justice Murray in April 2017 but only published on October 3rd 2017.

The fact that the Minister for Justice and Equality published the Murray Review and the General Scheme of the Communications (Data Retention) Bill 2017 simultaneously is an acknowledgement that the two are interlinked and my comments today are predicated on our submission to Mr Justice Murray.

The events leading to the establishment of the review provided a context to our submission.
The NUJ was gravely concerned at revelations in January, 2016 that the Garda Services Ombudsman Commission had authorised its investigators to demand access to the mobile 'phone records of two journalists, on foot of its powers under section 98 of the Garda Síochána Act, exercised in the context of a disclosure request for telephone records made under section 6 of the Communications (Retention of Data) Act, 2011.

We met the Minister for Justice and Equality and with GSOC and raised our concerns with both.
In the case of GSOC we have a robust but respectful exchange of views on general principles.

The Communications (Retention of Data) Act 2011 covers the retention and storage of historic data pertaining to all electronic communication, including fixed line and mobile telephone, internet communication and text messages and is being done without the consent of those affected.

As Mr Justice Murray has pointed out, the arrangement is indiscriminate in application and scope, affecting the retention and storage of journalists' communications data pertaining to the time, date, location, destination and frequency of a journalist's telephone calls and can thus identify sources.

Location data linking a journalist's telephone calls with those of another caller before or after a sensitive meeting in which that person was known to have been involved can fatally compromise confidential sources of information, including from whistleblowers and it was in this context that the NUJ expressed particular concern at the actions of GSOC.

The Minister subsequently announced the Ministerial Review and at this stage we would like to acknowledge the forensic work undertaken by Mr Justice Murray.

The NUJ's approach to the protection of sources is firmly rooted not just in journalistic ethics but in international conventions.

Our submission to the Murray Review is attached as Appendix A, since it sets out the context for our approach to the General Scheme of the Communications (Data Retention) Bill 2017.

It is worth noting that Head 18 makes provision for a High Court judge to keep the operations of the provisions of the Bill under review.

Committee members will perhaps understand a degree of scepticism on our part against the backdrop of the decision not to incorporate key recommendations of the former Chief Justice into the new legislation.

The NUJ suggests that the Communications (Retention of Data) Bill 2017 should incorporate the recommendations on journalistic sources made by Mr Justice Murray.

For ease of references these are:
231. Applications by a statutory body for authorization to access a journalist's retained communications data for the specific purpose of determining his journalistic sources should be made only to a judge of the High Court. (R)
232. Access to a journalist's retained communications data for any purpose, including for the purpose of identifying his or her sources, should in principle be permitted only when the journalist is the object of investigation for suspected commission of a serious criminal offence or for unlawful activity which poses a serious threat to the security of the State. (R)
233. Accordingly, contrary to what is permitted under the 2011 Act it should not be permissible to access a journalist's retained data for the purpose of investigating an offence committed by someone else. This limitation should be subject only to 'particular situations' (referred to at paragraph 119 of the Tele2 Judgment) where vital national interests such as public security are at stake and there is objective evidence justifying access. (R)
234. In addition, as regards any statutory regime for the retention of communications data, express provision should be made by law prohibiting access by State authorities to retained data for the purpose of discovering a journalist's sources unless such access is fully justified by an overriding requirement in the public interest. (R)
235. A journalist whose retained communications data has been accessed should, as in the case of any other person similarly affected, be notified of that fact as soon as such 106 notification would no longer be likely to prejudice any investigation or prosecution of a serious criminal offence. (R)
236. The general recommendation that express provision be made for judicial remedies in the case of unlawful access of a person's retained communications data should, ipso facto, be available to journalists who considers their rights have been infringed by any such access. (R)
237. As already pointed out, in addition to these particular safeguards, access to a journalist's retained communications data for any purpose will also benefit from the full range of safeguards recommended in respect of such access generally by State authorities.

It is welcome that Mr Justice Murray recognises that the protection of journalistic sources is of vital importance to journalists in the exercise of their professional activities and the attention of the committee is drawn, in particular, to his recommendation:
223: Any exception which permits the identification of journalistic sources or which might oblige a journalist to disclose them should be subject to prior control by a judicial or independent administrative authority.

Mr Justice Murray recommends (231) that applications must be made to a High Court Judge.

It is of particular concern that Head 9 of the General Scheme makes provision for the designation of judges of the District Court for a panel to act as authorising judges.

In a sense that decision is reflective of the low priority given under the General Scheme to the recommendation of Mr Justice Murray.

I note that in publishing the General Scheme the current Minister for Justice and Equality acknowledged that while there are problems with the current legislation he emphasised that it was not unconstitutional.

The current legislation in relation to the protection of sources is in conflict with the ECHR and demonstrably undermines the fundamental rights of journalists.

I note that the Minister has ignored the recommendation of the designation of a supervisory authority to ensure the legislation is not abused. This is also regrettable.

Chairman, Members of the Committee, we share many of the concerns expressed by Digital Rights Ireland and the ICCL.

In particular, we share the concern that the General Scheme does not reform the structure for oversight of Data Retention and does not comply with EU law.

Head 22 seeks to abolish the current power of the Complaints Referee to award compensation to individuals whose data has been accessed in contravention of the legislation.

There is urgent need for legislative reform in this area. In relation to the issues of specific concern to the National Union of Journalists we believe the report of Mr Justice Murray provides a framework for meaningful reform.

Séamus Dooley
Irish Secretary
National Union of Journalists
November 2017

APPENDIX A

Independent Review of the Law in Respect of Access to the Communications Data of Journalists

"We need to constantly remind ourselves of the commitments we have all made to press freedom and the challenges posed by new contingencies and new technology, but these cannot be left at the level of rhetorical gestures"
(President Michael D Higgins]

Revelations in January, 2016 that the Garda Services Ombudsman Commission had authorised its investigators to demand access to the mobile 'phone records of two journalists on foot of its powers under section 98 of the Garda Síochána Act, exercised in the context of a disclosure request for telephone records made under section 6 of the Communications (Retention of Data) Act, 2011, have given rise to this Ministerial Review.

In response to those revelations, National Union of Journalists (NUJ) representatives met the Minister for Justice, Equality and Law Reform. NUJ representatives also met the Garda Síochána Ombudsman Commission (GSOC).

Mr Justice John Murray has now been requested by the Minister for Justice; "*to examine the legislative framework in respect to access by statutory bodies to communications data of journalists held by communications service providers, taking into account the principle of protection of journalistic sources; the need for statutory bodies with investigative/and or prosecution powers to have access to data in order to prevent and detect serious crime; and current best international practice in this area*".

This submission articulates and expands upon the firmly held view of the NUJ that the highest level of protection, under both Irish Constitutional and international law, must be afforded to journalists in respect of privacy in their communications in light of the crucial role of the media in maintaining accountability and transparency in the workings of civic society in a democratic state.

While there is an individual right of privacy afforded to citizens the right of privacy afforded to journalists in the exercise of their professional function is rooted in a public good that extends beyond the individual rights of citizens.

1. The right to privacy in communications.

GLOBAL

Universal Declaration of Human Rights
Article 12

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

The dangers to society and individual rights posed by the potential for State interception of digital communications generally were explicitly addressed by United Nations Resolution no. 68/167, on *The Right to Privacy in the Digital Age*, adopted by the General Assembly on 18 December 2013 as demonstrated by the following extract from the Resolution:

"The General Assembly,
...
4. *Calls upon* all States:
...
(*c*) To review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law;

(*d*) To establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data ..."

In October 2000, the Organization of American States (OAS) adopted the Declaration of Principles on Freedom of Expression. Principle 8 states:

"Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential."

NATIONAL / DOMESTIC

The un-enumerated implicit constitutional right to privacy afforded citizens by Bunreacht na hÉireann has been unequivocally held by the courts to extend to privacy in communications. (*Kennedy and Ors v Ireland [1987] IR 587).*

Geraldine Kennedy and Bruce Arnold, both then NUJ members and political journalists, successfully established in the High Court the Constitutional right to privacy in communications of all citizens subject always to lawful exceptions which were found not to have applied in respect of the tapping of their private telephones by the State.

E Privacy Regulations, 2011

European Communities (Electronic Communications Networks and Services) Privacy and Electronic Communications) Regulations, 2011 (SI336/2011) implementing the EU E Privacy Directive (Directive 2009/136/EC). This purpose of these Regulations is to impose security and data protection obligations on electronic communications networks and services

providers in order to safeguard the privacy of communications of users of those networks and services.

EUROPEAN

The right of privacy in communication is recognised explicitly by Article 8 of the European Convention on Human Rights:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

This right was most recently upheld in favour of a journalist in the European Court of Human Rights (ECtHR) Grand Chamber decision in *Roman Zakharov v Russia (Application 47143/06) of* 04 December, 2014. The judgment emphasizes the proportionality principle in any interference with an individual's right of privacy in their communications. It also addresses the desirability of informed judicial oversight of any system of interception by State authorities of an individual's telecommunications.

While that case turns on its own facts, it is submitted that the judgment of the Court merits consideration in the context of this Review. Extracts deemed particularly relevant to the deliberations of this Review are set out in Appendix 1. One sentence stands out: "*In view of the risk that a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it, the Court [ECtHR] must be satisfied that there are adequate and effective guarantees against abuse." (para. 232).*

It is this consideration of the effects of secretly accessing data concerning journalists' telephone communications on the effective functioning of the media and on the effective functioning of democracy itself, that calls for exceptional levels of protection to be extended to the private communications of journalists.

E Privacy Directive of 2009

The EU E Privacy Directive (Directive 2009/136/EC) was incorporated into Irish domestic law by the European Communities (Electronic Communications Networks and Services) Privacy and Electronic Communications) Regulations, 2011 (SI336/2011) This purpose of this Directive is to impose security and data protection obligations on electronic communications networks and services providers in order to safeguard the privacy of communications of users of those networks and services.

2. The right to freedom of expression

GLOBAL

Universal Declaration of Human Rights
Article 19

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The International Covenant on Civil and Political Rights (ICCPR) committing signatory states to upholding the rights set out in the Universal Declaration of Human Rights was signed by Ireland in 1989.

NATIONAL / DOMESTIC

The explicit constitutional right to freely express convictions and opinions provided for citizens by Article 40.6.1° of Bunreacht na hÉireann has been upheld by the Irish Courts consistently in the context of appeals brought by media outlets and journalists.

The right to freedom of expression was expressed by Barrington J in the Supreme Court in *Irish Times v Ireland [1998] 1 IR 359 (at p.405)* to be *"a right to communicate facts as well as a right to comment on them".*

Fennelly J in the Supreme Court in *Mahon v Post Publications [2007] IESC 15* held that restrictions imposed by the Mahon Tribunal on the publication of certain information that had been submitted to the Tribunal were disproportionate, to the extent that they interfered both with the Constitutional right to freedom of expression enjoyed by the media and the similar right afforded by Article 10 of the European Convention on Human Rights At para. 51 of his judgment, he stated, "*The right of a free press to communicate information without let or restraint is intrinsic to a free and democratic society*". Significantly, he states at para. 43 of his judgment that the *"right of freedom of expression extends the same protection to worthless, prurient and meretricious publication as it does to worthy, serious and socially valuable works".*

EUROPEAN

European Convention on Human Rights
Article 10 – Freedom of Expression

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

There is extensive case law from the European Court of Human Rights (ECtHR) exploring the parameters of what constitutes restrictions that are '*necessary in a democratic society'* in the interests listed in Article 10.2. Provided here is a hyperlink to a useful and concise summary of recent ECtHR case law on Article 10 prepared by the ECtHR: http://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf

The provisions of the Convention were effectively incorporated into domestic law by virtue of the European Convention on Human Rights Act, 2003. The 2003 Acts requires that every organ of the State carry out its functions in a manner compatible with the State's obligations under the Convention (section 3). Further, a court, when interpreting and applying Convention provisions, is required to take 'due account' of principles laid down *inter alia* in decisions of the ECtHR (section 4).

The Council of Europe has consistently recognised the right to freedom of expression and has sought to balance rights.

At the 4th European Ministerial Conference on Mass Media Policy - Prague, 7-8 December 1994, Resolution No 2 noted:

"Principle 2
The practice of journalism in the different electronic and print media is rooted in particular in the fundamental right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights, as interpreted through the case law of the Convention's organs.

Principle 3
The following enables journalism to contribute to the maintenance and development of genuine democracy:

a) unrestricted access to the journalistic profession;

b) genuine editorial independence vis-à-vis political power and pressures exerted by private interest groups or by public authorities;

c) access to information held by public authorities, granted on an equitable and impartial basis, in the pursuit of an open information policy;

d) the protection of the confidentiality of the sources used by journalists.

The concluding documents of the 1986 Vienna meeting of the OSCE committed member states to… ensure that, in pursuing this activity, journalists, including those representing media from other participating States, are free to seek access to and maintain contacts with public and private sources of information and that their need for professional confidentiality is respected."

Setting the bar for any interference with the exercise of the right of freedom of expression by journalists

The bar on any measure that could undermine the communication of facts and opinions of social and political importance to the public, or indeed that could undermine the right of freedom of expression in material that does not carry any significant degree of social and political importance at all, must of necessity be set particularly high to ensure that the Constitutional and internationally-recognised right of freedom of expression of the media is fully protected. This imperative is emphasised in the interests of our society as a functioning democracy and not solely in the interests of journalists as individual members of that society.

3. Protection of confidentiality of journalists' sources

Protection of the confidentiality of their sources is a core principle for all journalists. This principle is enshrined in the NUJ Code of Conduct (see Appendix 2) the relevant provisions of which state:

A Journalist…..

(1*) At all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed.*

(7) Protects the identity of sources who supply information in confidence and material gathered in the course of her/his work.

In the print industry the majority of journalists in the Republic of Ireland work for media organisations affiliated to the Press Council of Ireland (PCI) and consequently are also required to adhere to the Code of Practice of the PCI (see Appendix 3).

In the context of the terms of reference of this Review attention is drawn to Principle 6 of the Code of Practice of the PCI:

Principle 6 − Protection of Sources: Journalists shall protect confidential sources of information.

The necessity to protect the anonymity of journalists' sources is critical to the disclosure, through a journalist, of information that requires to be released into the public domain where the peril of the disclosure to the informant is such that the information can only be disclosed on the assurance of anonymity.

The commitment of journalists to maintaining the anonymity of their sources has been demonstrated time and again in the actions of journalists across the world willing to endure the risk and on occasion the actuality of imprisonment, rather than disclose the identity of their anonymous sources.

See for example the case of Judith Miller of the New York Times in 2005 (http://www.nytimes.com/2005/07/07/opinion/judith-miller-goes-to-jail.html?_r=0) ; in this jurisdiction Kevin O'Kelly of RTÉ in 1972 (http://www.rte.ie/archives/profiles/okelly-kevin/) and Barry O'Kelly in 1997(http://www.irishtimes.com/news/judge-declines-to-jail-journalist-who-refused-to-name-informant-1.21591) ; in Northern Ireland Ed Moloney in Belfast Appeal Court in 1999 (reversing on appeal an order that Moloney hand over to the RUC interview notes of an interview with UDA paramilitary William Stobie).

The principle of the protection of journalists' sources was most recently considered in the Irish courts in *Mahon v Keena and Kennedy [2009] IESC 64.*

In the Supreme Court judgment on the appeal against a High Court ruling requiring Irish Times editor, Geraldine Kennedy and journalist Colm Keena to answer questions of the Mahon Tribunal on the source of certain information published in the Irish Times, Fennelly J, having observed that the right to freedom of expression may be subject to legitimate restrictions, stated at para. 49;

"Nonetheless, the [ECtHR] constantly emphasises the value of a free press as one of the essential foundations of a democratic society, that the press generates and promotes political debate, informs the public in time of elections, scrutinises the behaviour of governments and public officials and, for these reasons, that persons in public life must expect to be subjected to disclosure about their financial and other affairs, to criticism and to less favourable treatment than those in private life. Generally, therefore, restrictions on freedom of expression must be justified by an "overriding requirement in the public interest.""

Discussing the ECtHR judgment in the *Goodwin* case (see below) and quoting from that judgment, Fennelly J observed towards the end of para. 52;

"Ultimately, the court considered that the interests protected by that Article 10 "tip the balance of competing interests in favour of the interest of Democratic society in securing a free press" and that "the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, not sufficient to outweigh the vital public interest in the protection of the applicant journalist's source.""

The touchstone case informing the jurisprudence of the ECtHR on the protection of journalists' sources, and referenced in the *Mahon v Keena* judgment, was and remains *Goodwin v United Kingdom ECtHR (Application 17488/90)* of 27 March, 1996. The NUJ

supported our member, William Goodwin, in his successful claim to vindicate of his journalistic right to maintain the confidentiality of his sources.

Goodwin recognises the core importance of balancing the public interest served by encouraging the flow of information to journalists by sources who may wish to remain anonymous against the confidentiality of the information disclosed. While the entirety of the judgment has direct and fundamental relevance to the deliberations of this Review, the view of the ECtHR as expressed at para. 39 is set out below:

"The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (see, as a recent authority, the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 23, para. 31).
Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (see, amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists' Sources by the European Parliament, 18 January 1994, Official Journal of the European Communities No. C 44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest."

A hyperlink to a concise and comprehensive article appearing on the website of Article 19, a respected international organisation working to protect and vindicate the right to freedom of expression recognised by Article 19 of the Universal Declaration of Human Rights, which addresses the issue of protection of journalists' sources internationally, is provided here https://www.article19.org/pages/en/protection-of-sources-more.html

4. Data Protection Legislation

Section 22A of the Data Protection Act, 1988 (as amended) recognises the need in the public interest to exempt what would otherwise be 'personal data' subject to the rules of data protection from those rules, where that information is held for the purposes of journalistic publication in the public interest:

22A. (1) Personal data that are processed only for journalistic, artistic or literary purposes shall be exempt from compliance with any provision of this Act specified in subsection (2) of the section if -

(a) the processing is undertaken solely with a view to the publication of any journalistic, literary or artistic material,

(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, such publication would be in the public interest, and

(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision would be incompatible with journalistic, artistic or literary purposes.

This principle, which applies across the EU, recognises that there is a need to treat confidential information held for journalistic purposes as a special category of information attracting special protections under the law.

5. The balancing of rights

The decision as to whether or not to permit State investigation authorities access to information concerning the private communications of journalists is, as is clear from the over-view of the relevant domestic and international law set out in this submission, one that requires a careful, considered and informed balancing of fundamental constitutional and civil rights.

The NUJ notes with deep concern, that the recent exercise by GSOC of its section 98 power to demand disclosure of telecommunications data concerning our members' private telephone communications, was exercised in the context of an investigation into a suspected criminal offence that is arguably on the borderline of the level of 'seriousness' required to merit the exercise of the power to seek disclosure under section 6 of the Communications (Retention of Data) Act, 2011.

The 2011 Act grants the power to a member of An Garda Síochána, not below the rank of Chief Superintendent, to make a disclosure request where she / he is satisfied that the disclosure is required for:

(a) the prevention, detection, investigation or prosecution of a serious offence,
(b) the safeguarding of the security of the State,
(c) the saving of human life.

The 2011 Act defines a 'serious offence' as one that is punishable by imprisonment of 5 years or more (together with a handful of offences set out in Schedule 1 to the Act that are not relevant to this discussion).

The suspected criminal offence in respect of which disclosure requests were made on the authority of GSOC was not one that was committed (if committed at all) by the journalists whose 'phone data was accessed. It was a suspected offence that, if committed at all, was committed 8 years ago and which, if a conviction ensued, would attract penalties:

- on summary conviction – fine up to €3,000 and maximum 12 months' imprisonment (or both)
- on conviction on indictment – fine up to €50,000 and maximum 5 years' imprisonment (or both)

In the event that a gift or consideration was accepted by the offending Garda for disclosing information to the media, the penalties on indictment rises to maximum fine of €75,000 and maximum 7 years' imprisonment (or both).

It is submitted that the suspected offence being investigated was, while a criminal offence, towards the lower end of the scale of serious offences as defined by the 2011 Act. Further, it must be queried how the process of carrying out the necessary balancing of potentially competing Constitutional and civil rights was addressed by GSOC prior to its authorisation of the disclosure request that led to such a profoundly serious and worrying encroachment on the rights of the journalists in question.

While the National Union of Journalists held a meeting with GSOC the Commissioners said they were unable to discuss specific incidents.

6. Practical implications for journalists

The NUJ represents full-time journalists employed in the print, electronic and on-line media, working in diverse range of media organisations and platforms either as employees or freelance workers and contributors.

1. The NUJ has long asserted the right of journalists to refuse to divulge both the names of their sources and the nature of the information conveyed to them in confidence. As stated earlier in this submission, the NUJ actively supported William Goodwin in his successful application to the ECtHR in 1996 to vindicate his right to freedom of expression in the face of an Order from the UK courts that he disclose confidential sources of a business article he had written.

2. A free and effective media depends on the free flow of information to journalists, often from sources that may wish for various reasons to remain anonymous. Respect for that anonymity can often be a precondition for the supply of information provided by sources in the public interest. Journalists are trained and experienced in evaluating information received from such sources.

3. The protection of confidential information about sources from public disclosure is the cornerstone of investigative journalism. Any statutory provision that potentially undermines such protection inevitably inhibits the ability of journalists and media organisations to carry out their work in the public interest.

4. The ability of journalists to expose corruption or wrongdoing is compromised when the protection of the confidentiality sources is put at risk. To have in place laws that enable a State official to authorise actions that clearly put the confidentiality of sources at risk, despite journalistic commitments to honour that confidentiality, cannot but undermine public confidence in the capacity of journalists to deliver on such commitments.

5. The chilling effect of routine, non-judicially authorised accessing of data held by journalists can only deter whistle-blowers from contacting journalists. It further has the ominous potential to promote a culture of secrecy within our system of politics and public administration.

6. The accessing of communications data held by journalists has profound implications for the profession of journalism. A journalist whose confidential sources have been compromised, for example on foot of their private communications data being accessed by a state authority, is at serious risk of suffering 'career blight'. The trust carefully developed over years with a wide range of contacts can be obliterated at a stroke by such actions by a state authority.

7. Summary of NUJ submissions to Review

Based on the law, the principles discussed in this submission and the practical implications for a free media and the practice of journalism of involuntary / forced disclosure of information about journalists' confidential sources, the NUJ submits to this Review as follows:

1. Secret access to a journalist's private communications data on the authority of a State official, not exercising judicial authority and with no opportunity for the journalist to challenge the proposed disclosure, is disproportionate, oppressive, contrary to the public interest and contrary to democratic principles enshrined in the Constitution and protected by international treaties of which Ireland is a signatory.

2. The profound implications for society generally as well as the individual journalists concerned, requires that any authorisation by a member of An Garda Síochána or other State official to seek disclosure of journalists' confidential communications or other private data should be carried out only by a person exercising judicial authority.

3. Wherever feasible, the journalist in question should have prior notice of the proposed request for disclosure and be afforded the right to make representations to the court on the application being made by a State authority / official.

4. By reference to established European law and also Irish law, any order issued with legal authority, which compels journalists to answer questions for the purpose of identifying their source or accesses that information without their knowledge, can only be justified by an overriding requirement in the public interest. Such overriding requirement, it is submitted, must be more than a mere convenience for criminal investigation authorities. Of necessity, the deleterious consequences for journalism

and freedom of expression must be weighed against the advantages to criminal investigation authorities of such orders or disclosures.

5. The current tendency by An Garda Siochána to routinely seek access to notes and images held by journalists can fly in the face of the principle of 'overriding requirement in the public interest' as justification for such disclosures. News organisations report frequent visits to their offices and requests for interviews with reporters and journalists, even where material requested is already in the public domain. Photographers frequently receive demands to hand over data such as images readily available from CCTV cameras at public events., including public protests and demonstrations.

6. The NUJ is aware that some news organisations have handed over information, in order to avoid a costly court challenge and to avoid drawing public attention to the inherent threat to maintaining the confidentiality of sources. The NUJ views this tendency with alarm, due to the potential 'chilling effect' of such actions and the consequences of such effect for the environment in which journalists in this jurisdiction operate.

7. In *Mahon v Kennedy and Keena* the Supreme Court held that the exercise of balancing competing constitutional rights is entirely a matter for the courts, not journalists; a view endorsed emphatically by the EctHR in a subsequent application by those journalists to that court in respect of the costs award made against them in the case. The NUJ contends that the converse is true in that it is not a matter for a senior ranking Garda or a member of GSOC to decide whether or not there the required level of overriding public interest is present to merit access to journalists' private data. There should properly be recourse to a judicial authority to do so.

The NUJ thanks Mr Justice Murray for his kind attention and consideration of this submission. The NUJ would be pleased to provide any further explanation or expansion on its position as set out in this submission.

Seamus Dooley,
Irish Secretary, NUJ
11 March, 2016

APPENDIX 1

EXTRACT FROM GRAND CHAMBER JUDGMENT OF EUROPEAN COURT OF HUMAN RIGHTS IN ROMAN ZAKHAROV V RUSSIA (APPLICATION 47143/06); 04.12.15

"230. Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see, among other authorities, *Malone*, cited above, § 68; *Leander*, cited above, § 51; *Huvig*, cited above, § 29; and *Weber and Saravia*, cited above, § 94).

231. In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in law in order to avoid abuses of power: the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed (see *Huvig*, cited above, § 34; *Amann v. Switzerland* [GC], no. 27798/95, §§ 56-58, ECHR 2000- II; *Valenzuela Contreras*, cited above, § 46; *Prado Bugallo v. Spain*, no. 58496/00, § 30, 18 February 2003; *Weber and Saravia*, cited above, § 95; and *Association for European Integration and Human Rights and Ekimdzhiev,* cited above, § 76).

232. As to the question whether an interference was "necessary in a democratic society" in pursuit of a legitimate aim, the Court has acknowledged that, when balancing the interest of the respondent State in protecting its national security through secret surveillance measures against the seriousness of the interference with an applicant's right to respect for his or her private life, the national authorities enjoy a certain margin of appreciation in choosing the means for achieving the legitimate aim of protecting national security. However, this margin is subject to European supervision embracing both legislation and decisions applying it. In view of the risk that a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there are adequate and effective guarantees against abuse. The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law. The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" to what is "necessary in a democratic society" (see *Klass and Others*, cited above, §§ 49, 50 and 59; *Weber and Saravia*, cited above, § 106; *Kvasnica v. Slovakia*, no. 72094/01, § 80, 9 June 2009; and *Kennedy*, cited above, §§ 153 and 154).

APPENDIX 2

NUJ Code of Conduct

A journalist:

1 At all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed.

2 Strives to ensure that information disseminated is honestly conveyed, accurate and fair.

3 Does her/his utmost to correct harmful inaccuracies.

4 Differentiates between fact and opinion.

5 Obtains material by honest, straightforward and open means, with the exception of investigations that are both overwhelmingly in the public interest and which involve evidence that cannot be obtained by straightforward means.

6 Does nothing to intrude into anybody's private life, grief or distress unless justified by overriding consideration of the public interest.

7 Protects the identity of sources who supply information in confidence and material gathered in the course of her/his work.

8 Resists threats or any other inducements to influence, distort or suppress information and takes no unfair personal advantage of information gained in the course of her/his duties before the information is public knowledge.

9 Produces no material likely to lead to hatred or discrimination on the grounds of a person's age, gender, race, colour, creed, legal status, disability, marital status, or sexual orientation.

10 Does not by way of statement, voice or appearance endorse by advertisement any commercial product or service save for the promotion of her/his own work or of the medium by which she/he is employed.

11 A journalist shall normally seek the consent of an appropriate adult when interviewing or photographing a child for a story about her/his welfare.

12 Avoids plagiarism.

The NUJ believes a journalist has the right to refuse an assignment or be identified as the author of editorial that would break the letter or spirit of the NUJ code of conduct.

The NUJ will support journalists who act according to the code.

NUJ code of conduct was updated in 2011.

APPENDIX 3
Press Council of Ireland Code of Practice

Preamble
The freedom to publish is vital to the right of the people to be informed. This freedom includes the right of a print and online news media to publish what it considers to be news, without fear or favour, and the right to comment upon it.

Freedom of the press carries responsibilities. Members of the press have a duty to maintain the highest professional and ethical standards.

This Code sets the benchmark for those standards. It is the duty of the Press Ombudsman and Press Council of Ireland to ensure that it is honoured in the spirit as well as in the letter, and it is the duty of publications to assist them in that task.

In dealing with complaints, the Ombudsman and Press Council will give consideration to what they perceive to be the public interest. It is for them to define the public interest in each case, but the general principle is that the public interest is invoked in relation to a matter capable of affecting the people at large so that they may legitimately be interested in receiving and the print and online news media legitimately interested in providing information about it.

Principle 1 − Truth and Accuracy

1.1 In reporting news and information, print and online news media shall strive at all times for truth and accuracy.

1.2 When a significant inaccuracy, misleading statement or distorted report or picture has been published, it shall be corrected promptly and with due prominence.

1.3 When appropriate, a retraction, apology, clarification, explanation or response shall be published promptly and with due prominence.

Principle 2 − Distinguishing Fact and Comment

2.1 Print and online news media are entitled to advocate strongly their own views on topics.

2.2 Comment, conjecture, rumour and unconfirmed reports shall not be reported as if they were fact.

2.3 Readers are entitled to expect that the content of a publication reflects the best judgment of editors and writers and has not been inappropriately influenced by undisclosed interests. Wherever relevant, any significant financial interest of an organization should be disclosed. Writers should disclose significant potential conflicts of interest to their editors.

Principle 3 − Fair Procedures and Honesty

3.1 Print and online news media shall strive at all times for fair procedures and honesty in the procuring and publishing of news and information.

3.2 Publications shall not obtain information, photographs or other material through misrepresentation or subterfuge, unless justified by the public interest.

3.3 Journalists and photographers must not obtain, or seek to obtain, information and

photographs through harassment, unless their actions are justified in the public interest.

Principle 4 − Respect for Rights

4.1 Everyone has constitutional protection for his or her good name. Print and online news media shall not knowingly publish matter based on malicious misrepresentation or unfounded accusations, and must take reasonable care in checking facts before publication.

Principle 5 − Privacy

5.1 Privacy is a human right, protected as a personal right in the Irish Constitution and the European Convention on Human Rights, which is incorporated into Irish law. The private and family life, home and correspondence of everyone must be respected.

5.2 Readers are entitled to have news and comment presented with respect for the privacy and sensibilities of individuals. However, the right to privacy should not prevent publication of matters of public record or in the public interest.

5.3 Sympathy and discretion must be shown at all times in seeking information in situations of personal grief or shock. In publishing such information, the feelings of grieving families should be taken into account. This should not be interpreted as restricting the right to report judicial proceedings.

5.4 In the reporting of suicide excessive detail of the means of suicide should be avoided.

5.5 Public persons are entitled to privacy. However, where a person holds public office, deals with public affairs, follows a public career, or has sought or obtained publicity for his activities, publication of relevant details of his private life and circumstances may be justifiable where the information revealed relates to the validity of the persons conduct, the credibility of his public statements, the value of his publicly expressed views or is otherwise in the public interest.

5.6 Taking photographs of individuals in private places without their consent is not acceptable, unless justified by the public interest.

Principle 6 − Protection of Sources

Journalists shall protect confidential sources of information.

Principle 7 − Court Reporting

Print and Online news media shall strive to ensure that court reports (including the use of images) are fair and accurate, are not prejudicial to the right to a fair trial and that the presumption of innocence is respected.

Principle 8 − Prejudice

Print and online news media shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of their race, religion, nationality, colour, ethnic origin, membership of the travelling community, gender, sexual orientation, marital status, disability, illness or age.

Principle 9 − Children

9.1 Print and online news media shall take particular care in seeking and presenting information or comment about a child under the age of 16.

9.2 Journalists and editors should have regard for the vulnerability of children, and in all dealings with children should bear in mind the age of the child, whether parental or other adult consent has been obtained for such dealings, the sensitivity of the subject-matter, and what circumstances if any make the story one of public interest. Young people should be free to complete their time at school without unnecessary intrusion. The fame, notoriety or position of a parent or guardian must not be used as sole justification for publishing details of a child's private life.

Principle 10 − Publication of the Decision of the Press Ombudsman / Press Council

10.1 When requested or required by the Press Ombudsman and/or the Press Council to do so, print and online media shall publish the decision in relation to a complaint with due prominence.

10.2 The content of this Code will be reviewed at regular intervals.