

Protecting public interest reporting: what is the future of journalistic privilege in Irish law?

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Introduction

In its opening statement, the Disclosures Tribunal has drawn attention to several unanswered questions about the Irish law on journalistic privilege.

“Is there a privilege against giving evidence, including relevant records, where someone communicates in confidence, or off the record, as the phrase goes to a journalist? If that privilege exists, does it exist because of the public interest in protecting investigations by the media? Does journalistic privilege attach to communications to a journalist where that communication by the source may not be in the public interest but, instead, where the source is perhaps solely motivated by detraction or calumny? [i]s it possible that such a privilege does not apply to using the media as an instrument of naked deceit?”¹

It is beyond the scope of a short note such as this to propose answers to the issues identified by the Tribunal – not least because the facts pertaining to any assertion of privilege have not been established. The purpose of the note is rather to consider the conceptual framework in which these questions *might* be addressed. This is necessary given the relatively sparse authority on journalistic sources in Ireland. It is clear post-*Mahon v Keena*² that the privilege enjoys *some* degree of legal protection in Ireland. Yet, both the High and Supreme Courts there warned against any impression that journalists might enjoy an absolute entitlement to resist enquiries into the newsgathering process. The Divisional Court was firmly of the view that “[j]ournalists are not above the law nor are they entitled to create for themselves, where their own particular vocational interest is involved, a reserve into which the law may not go”.³ On appeal, Fennelly J. agreed that “[n]o citizen has

¹ Opening Statement of the Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters following, February 27th, 2017, available at <http://disclosuretribunal.ie/en/DIS/Pages/Opening_Statement> (last accessed March 23rd, 2017).

² [2010] 1 I.R. 336.

³ [2007] IEHC 348.

the right to claim immunity from the processes of the law”.⁴ An absolute immunity would also be out of keeping with the approach adopted by other common law⁵ and international courts⁶.

What this means, however, is that considerable uncertainty remains about the precise scope of the privilege under Irish law. This ambiguity is amplified by changes in media and publishing practices which themselves cast doubt on traditional notions of newsgathering and journalism. The problems of applying a ‘journalistic privilege’ when it is unclear what is news, who is a journalist, and what might constitute a source, are self-evident. As Binnie J. observed for the majority of the Canadian Supreme Court in *R. v National Post*⁷:

“To throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever ‘sources’ they deem worthy of a promise of confidentiality and on whatever terms they may choose to offer it ... would blow a giant hole in law enforcement and other constitutionally recognised values such as privacy.”

Uncertainty about the status and scope of legal protection may have a chilling effect on individuals, especially in a field with increasingly unstable boundaries. At the other extreme, perceptions of an absolute privilege may embolden the unscrupulous: the Plebgate and Valerie Plame affairs are reminders that some may see in the privilege an opportunity to make unaccountable mischief. For the *National Post* majority, “[t]he simplistic proposition that it is always in the public interest to maintain the confidentiality of secret sources is belied by such events in recent journalistic history”⁸. The Disclosures Tribunal is a reminder that the law in this area is more complicated – and uncertain – than the Press Council’s stark imprecation that “[j]ournalists shall protect confidential sources of information”⁹ might suggest.

⁴ [2010] 1 I.R. 336, at 363.

⁵ *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; *Fairfax (John) & Sons Ltd v Cojuangco* (1988) 165 C.L.R. 346; *Branzburg v Hayes* (1972) 408 US 665.

⁶ *Sanoma Uitgevers BV v Netherlands* [2009] ECHR 38224/03.

⁷ [2010] 5 LRC 510, at 528-529. See also *Globe & Mail v Canada* [2011] 2 LRC 260, at 275.

⁸ [2010] 5 LRC 510, at 537.

⁹ Press Council Code of Conduct, Principle 6.

What is journalistic privilege?

Of all the ambiguities associated with journalistic privilege, perhaps the most basic are those concerning the nature of the privilege itself. As Hogan J. pointed out in *Cornec v Morrice*, the familiar terminology of ‘journalistic privilege’ is a “convenient, if slightly inaccurate, shorthand”¹⁰ given that “there is, in fact, in strictness, no such thing”.¹¹ The legal value in question has variously been referred to in the Irish authorities as a right, a privilege, a freedom or, most generally, an interest. The language used by the courts has depended, in part, on the circumstances of the case. This re-makes Hohfeld’s point, however, that an inexactitude in terminology may bespeak a deeper ambiguity about the legal relationships at issue.¹² It is conceivable (and argued below to be conceptually plausible) that the legal interest may vary depending on the party in respect of whom it is invoked. In the most common scenario, however, the privilege is invoked for the purpose of relieving an individual of a legal obligation to provide information to which they would otherwise be liable. In this context, the ‘privilege’ operates, strictly speaking, as an immunity or exemption. For ease, this is referred to in the remainder of this note as an ‘exemption from the disclosure obligation’, or ‘disclosure exemption’ for short.

The legal foundations of a disclosure exemption

The European Convention on Human Rights has featured prominently in most recent discussions of the disclosure exemption in Ireland. This has followed partly from the positions adopted by the parties in arguing cases before the courts. In *Mahon v Keena*, for example, the Divisional Court noted that the case had been conducted before it largely by reference to decisions of the European Court of Human Rights. This was also the case on appeal. The Supreme Court was nonetheless careful to appropriately ground its’ discussion of the Convention caselaw in the relevant domestic legislation.¹³ This meant that the Court’s consideration of the Article 10 jurisprudence on “the confidentiality of journalistic

¹⁰[2012] 1 I.R. 804, at 821.

¹¹[2012] 1 I.R. 804, at 818.

¹² Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 *Yale Law Journal* 16.

¹³ [2010] 1 I.R. 336, at 362, 365.

sources”¹⁴ was undertaken on foot of its obligation under section 2 of the European Convention on Human Rights At 2003 to construe the Tribunals of Inquiry Acts “in a manner compatible with the State's obligations under the Convention provisions”. In other words, the question was not whether journalists had an independent Convention (or constitutional) right to protect their sources, but the narrower interpretative exercise of determining whether the order granted by the Tribunal fell within its statutory powers, properly construed.

Thus, while *Mahon v Keena* confirmed in general terms the existence of a disclosure exemption in Irish law, certain caveats follow from the Courts’ reliance, as invited, on Convention caselaw. As the Court correctly emphasised, the protection provided by the Article 10 jurisprudence is contingent on the application of section 2. It is not a free-standing entitlement under the Convention. This means, for example, that there must be some statutory provision or rule of law to which the section 2 obligation applies before the caselaw can be taken into account.¹⁵

More fundamentally, perhaps, it means that the disclosure exemption recognised in *Mahon v Keena* will not apply in the face of a sufficiently clear statutory obligation to disclose. *Mahon v Keena* does not prevent the Oireachtas from enacting provisions which expressly exclude the possibility of a disclosure exemption. This also leaves scope for some doubt about the extent to which any Article 10 principle of “confidentiality of journalistic sources” applies to material, the disclosure of which was expressly prohibited by, or otherwise contrary to, statute. While it would depend on the precise provisions of the relevant statutes, it could conceivably be argued that it goes beyond the “rules of law relating to [the] interpretation and application”¹⁶ of statutory provisions to interpretively infer an obligation to maintain the confidentiality of a discloser who has contravened a specific statutory prohibition on disclosure. In *News Group Newspapers Ltd v Metropolitan Police Commissioner*¹⁷, for example, the Investigatory Powers Tribunal rejected the argument that

¹⁴ *Goodwin v UK*, at para. 40.

¹⁵ *McD v L* [2010] 2 I.R. 199. See also Maria Cahill, “McD v L and the Incorporation of the European Convention on Human Rights” (2011) 45 *Irish Jurist* 221.

¹⁶ Section 2 (1), 2003 Act.

¹⁷ [2015] UKIPTrib 14_176-H.

it was disproportionate and inconsistent with Article 10 for the police to access journalists' phone data as part of an investigation into allegations of a conspiracy by police officers to make false claims about a Cabinet Minister to journalists. In the Tribunal's view, access was necessary and proportionate where "[t]he leaking of information to the journalist was an essential element of the criminal offence under investigation, rather than just corroborative evidence as to whether an offence had been committed".¹⁸ While he did not expressly address the 2003 Act in his reasoning, O'Neill J.'s ruling in *Walsh v Newsgroups Newspapers*¹⁹ that the privilege could not apply to material disclosed by a Garda in contravention of section 62 of the Garda Síochána Act 2005 seems in a similar vein.

Leaving aside the specific provisions of the 2003 Act, a reliance on the Convention also risks introducing some of its broader ambiguities into Irish law. The Strasbourg court's application of Article 10 is naturally shaped by the supranational and supervisory aspects of its jurisdiction. The Court is charged only with reviewing the effect of domestic measures. It is not concerned, for example, with the conceptual foundations of the legal interest invoked by a journalist, source or publisher. It does not need to address the optimal design or drafting of domestic efforts by legislatures or courts to weigh competing interests, save to the extent that they fall outside the margin of appreciation. In fact, Binnie J. expressed the suspicion in *R. v National Post* that the clearest aspect of the Court's conception of this issue – that the protection follows from the guarantee of freedom of expression – is a pragmatic product of its limited competence:

"It is true that the European Court locates journalist-source privilege in art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, but that is necessarily so because the Convention is the source of its jurisdiction."²⁰

On the whole, therefore, there are limitations to the use of Article 10 as the basis for a disclosure exemption in Irish law. The Strasbourg jurisprudence is pitched at a level of supervisory abstraction that clarifies little beyond the principle that a disclosure exemption

¹⁸ [2015] UKIPTrib 14_176-H, at para. 75.

¹⁹ [2012] IEHC 353.

²⁰ [2010] 5 LRC 510, at 536.

for *some* kinds of reporting in *some* situations is important. This is exacerbated by the fact that the necessary recourse to the 2003 Act renders the applicability of the exemption to particular individuals or cases contingent upon considerations of legislative clarity, statutory context, and judicial interpretation.

Despite these limitations, the Strasbourg jurisprudence has clear value as an established repository of principle for a party seeking to assert a disclosure exemption. It seems likely, however, that domestic law provides at least some form of similar protection, whether at common law²¹ or by reference to the Constitution. Unlike Article 10 of the Convention for example, the text of Article 40. 6. 1 (i) specifically acknowledges the press as a protected organ of public opinion. Furthermore, the decisions of the courts in recent years have consistently affirmed that this is a privileged constitutional position that reflects the vital role played by the press in a democratic society.²² This is broadly consistent with the position articulated by the ECHR in its own Article 10 caselaw. This raises the possibility that reliance on Article 10 as the source of a disclosure exemption – with all its associated issues – may be unnecessary.

Indeed, as the decision of the High Court in *Cornec v Morrice* indicates, the Constitution has the potential to provide a principled framework for the development of a disclosure exemption. Drawing attention to the deliberative aspects of the constitutional architecture, Hogan J. connected the protection of the press with the constitutional objective of ensuring “that the citizenry will ‘engage in robust political debate so that the forces of deliberation will prevail over the arbitrary and irrational so that, in this civic democracy, reasoned argument would prevail in this triumph of discourse’”.²³ Protection of the press and of ‘journalistic privilege’ were prerequisites to this kind of robust and informed debate.

²¹ This was the approach adopted by the Canadian Supreme Court in *R. v National Post*, and *Globe & Mail v Canada* [2011] 2 LRC 260.

²² *Irish Times v Ireland* [1998] 1 I.R. 359; *Mahon v Post Publications* [2007] 3 I.R. 338.

²³ [2012] 1 I.R. 804, at 820, citing *Doherty v Referendum Commission* [2012] IEHC 211, at 10.

“If journalism and the media did not enjoy at least a general protection in respect of their sources, that robust political debate - a sine qua non in any democratic society - would be still born. Only the naive would suggest otherwise.”²⁴

The advantage of this approach is that it provides a coherent conceptual basis for the exemption which conforms to both the text of the Constitution, and the public interest objectives that underpin ‘journalistic privilege’. As the outcome in *Cornec* itself shows, the purposive character of the constitutional analysis also preserves the degree of flexibility necessary to deal with matters arising on the margins of traditional journalism. However, as argued previously:

“The flexible character of this public interest-oriented approach suggests that the protection applies to the activity rather than to the particular individual. Thus, in the same way that non-journalists may be able to claim such protection on public interest grounds, so too journalists may not be entitled to claim this protection where their conduct lacks the necessary connection with the public interest.”²⁵

If this is correct, it has potential implications for several of the issues raised by the Disclosure Tribunal: most notably, the questions of who can assert a disclosure exemption; and when it might be disapplied?

Whose privilege?

There appears to be a general acceptance across most jurisdictions that the purpose of a disclosure exemption is to protect the interests of the public in receiving information rather than of either informants or the press in providing it. At the level of principle, therefore, the overriding question for a court faced with the assertion of a disclosure exemption is whether it is in the public interest to order disclosure, or, alternatively, to affirm the exemption claimed. Strictly speaking, an immunity from the obligation to disclose does not belong to a pre-defined class or category of persons. It is an exemption conferred for the

²⁴ [2012] 1 I.R. 804, at 820.

²⁵ Eoin Carolan, “The implications of media fragmentation and contemporary democratic discourse for ‘journalistic privilege’ and the protection of sources” (2013) 49 (1) *Irish Jurist* 182.

benefit of the public interest, to which all can in principle lay claim. “Its scope is shaped by the public interest that calls the privilege into existence in the first place.”²⁶

On one view, this supports the application by the courts of a balancing exercise between asserted public interests on a case-by-case basis. There are, however, both practical and conceptual concerns about an approach that regards it as, in essence, a matter of judicial discretion. Context-specific assessments may fail to provide the certainty and predictability that citizens are entitled to expect of the law. That is especially important in an area such as this where individuals may base their conduct on a conscious assessment of potential legal consequences. Non-recognition of a disclosure exemption – whether generally, or in specific individual cases – could foster a climate of uncertainty with adverse impacts on the newsgathering process. This is a point that has been repeatedly made by the European Court of Human Rights amongst others²⁷:

“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.”²⁸

Thus, while logic and individual justice might be satisfied by a case-by-case assessment of the public interest of each party’s actions, the risk is that this could create a climate of uncertainty that runs counter to the public interest in encouraging robust and informed debate that justifies the exemption in the first place. Confidence in the availability of the exemption is a critical aspect of its efficacy:

“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. It is for

²⁶ *R. v National Post* [2010] 5 LRC 510, at 532.

²⁷ See, for example, *R (Miranda) v Home Secretary* [2016] 1 W.L.R. 1505, at 1539 (‘If journalists and their sources can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. That is why the confidentiality of such information is so important’).

²⁸ *Goodwin v UK* (1996) 22 EHRR 123 at para. 39; *Sanoma Uitgevers BV v Netherlands* [2009] ECHR 38224/03 at para. 54.

this reason that it is well established now that the courts will normally protect journalists' sources from identification."²⁹

This confirms the importance of adhering to a system-oriented perspective on the public interests at stake in this area. In particular, it seems necessary to take due account of the societal implications of whatever course of action is proposed. This approach would be conscious, for example, of the role of legal certainty in creating a supportive environment for public interest expression. It would therefore favour a wider assessment by courts (or the Oireachtas) of the contribution made to democratic discourse by newsgathering practices generally.

This public interest in legal certainty logically supports an acknowledgement in law that certain groups (like journalists employed by traditional press) ought to be presumptively entitled to a disclosure exemption. This would facilitate freedom of expression by providing greater certainty and confidence to journalists in their dealings with sources, while doing so in a way that is – at a system-wide level – consistent with the constitutional understanding of the public interest in the traditional press.

That does not mean that the exemption is necessarily limited to journalists (or to persons analogous to journalists as in *Cornec*). The fact that the presumptive conferral of protection on particular persons may have benefits for freedom of expression does not mean that protection cannot be sought by persons outside that class on a case-by-case basis.

It also does not exclude the possibility that legal protection may be presumptively available on a wider basis. If the overriding concern is to protect practices that advance the public interest in democratic discourse, there may be an argument that those who disclose information should also be entitled to protection as a class. An analysis that takes account of the public interest in the actions of sources *as distinct from* journalists could, in fact, provide a more rigorous conceptual framework for dealing with instances outside the archetype of a carefully-cultivated source. *In re Kevin O'Kelly*³⁰ and *Mahon v Keena* both exemplify how

²⁹ *Ashworth Hospital Authority v MGN* [2002] 4 All ER 193 at 210.

³⁰ *In re Kevin O'Kelly* (1974) 108 I.L.T.R. 97.

‘journalistic privilege’ may in practice be asserted in the absence of a confidential journalist-source relationship at all. As Hogan J. pointed out in *Cornec*,³¹ there was no question of ‘confidentiality’ in *O’Kelly* where the individual in question had been interviewed and publicly identified as part of the broadcast. In *Mahon v Keena*, the information was received in anonymous correspondence so that there was, strictly speaking, no relationship – whether confidential or otherwise – between the journalists and discloser.

In common with more conventional examples of journalist-source relationships, the claim in each of these scenarios is that a journalist is entitled to an exemption from a legal obligation. In each instance, however, there are quite different individual, legal and public interests at play. There are, for example, differences in the nature and interplay of interests between a situation in which a person provides information to a journalist in return for an express assurance of confidentiality; and one in which a journalist receives unprompted and anonymous information from an unknown source. In legal terms, the interests of the discloser in the first situation can be relatively easily conceptualised as a question of confidentiality. The interest of the discloser in the second situation, however, is more a matter of anonymity than confidentiality. This shifts the nature of the discloser’s interest from one connected with the journalist’s position and the public interest in preserving confidence to one more closely aligned with personal rights to privacy and, arguably, freedom of expression³². This may also alter the nature and extent of the obligations owed by a journalist to a source, and, as *Mahon v Keena* demonstrates, the public interest in the putative obligation from which exemption is sought. As Fennelly J. concluded:

“If the apparent anonymity of the source weakens the defendants’ case for resisting the order, it must correspondingly weaken the tribunal’s case for obtaining it.”³³

The interests of the journalist also differ. In the first, he or she may have taken risk to locate and cultivate the source and has, at a minimum, invested his or her professional judgment,

³¹ [2012] 1 I.R. 804, at 817.

³² See the discussion of how privacy and confidentiality may facilitate individual expression in *Bartnicki v Vopper* 532 U.S. 514 (2001).

³³ [2010] 1 I.R. 336, at 365.

expertise and reputation in the relationship. In the second, these considerations do not arise – at least at the initial point of receiving the information.

Whether these interests are conceived as matters of personal right, contractual agreement, good faith obligations, or public interests to be balanced; and which interests relate to which party; ought to influence the course and outcome of a constitutional analysis. In terms of the specific question of whether a disclosure exemption arises, these differences may also be relevant to any public interest assessment of the practices employed. In the first situation, it might be expected that the journalists' knowledge of the identity of the source means that he or she is better placed to assess the credibility and reliability of the information provided. That is not so with the second. It is at least arguable that there is a greater public interest in the development by professional journalists of relationships with trusted and reliable sources, than in the receipt by those journalists of anonymous tip-offs. For the reasons explained below, that does not mean that a journalist should always be entitled to disclosure exemption for the first and never to the second.³⁴ It does, however, underline the point that a predominant concentration on the journalist may, in certain situations, obscure or distort the analysis. This is not aided by the common description of the interest as a 'journalistic' privilege. The public-interest underpinnings of the disclosure exemption require a careful consideration of the precise identity and nature of the interests asserted in each case. What this might mean for journalists and their newsgathering practices is considered in the concluding section below.

Towards a presumptive exemption for responsible newsgathering?

It has been argued thus far that there may be expressive and democratic advantages to a presumptive disclosure exemption for news journalists. Courts in Ireland and elsewhere have consistently held, however, that a 'journalistic privilege' is not a blanket exemption from legal scrutiny for all forms of journalistic practice. For the reasons already outlined, uncertainty over the scope of a presumed disclosure exemption may have an adverse effect on the public interest in expression and information generally. This militates against a purely

³⁴ It should be recalled that the overall legal approach proposed here allows for a residual discretion to grant a disclosure exemption on a case-specific balancing of the public interest involved. This is distinct from situations where a presumption of exemption can be established.

categorical approach to this issue. If the presumption means no more than that a journalist can assert an exemption, there is a risk of extending beyond its public interest foundations. In practice, this could set the threshold for rebuttal too low for the presumption to provide the certainty and confidence intended.

A more targeted presumption would also seem to better accord with the public interest character of the proposed exemption, especially in light of the educative dimensions to Article 40. 6. 1. (i)'s protection of media expression. This would be conceptually consistent with a Constitution that, in its text and theory, acknowledges the possibility that the democratic or public value of expression may vary. This could also have the effect of incentivising certain forms of practice which are more likely to advance the overriding legal and constitutional interest in promoting expression of value to the public.

Furthermore, it is possible that a less wide-ranging exemption could benefit traditional media organisations by privileging reporting based on the kind of professional – and often time-consuming and costly – practices in which they have historically engaged. At a time when investigative journalism competes for public attention with publishers of unverified claims, fake news, and partisan opinion masquerading as fact, there is a certain logic to limiting a public-interest exception to newsgathering practices that actually promote the public interest.

Taken together, this suggests that the presumption should be confined to situations where an exemption is sought in respect of material obtained by a journalist in good faith, the disclosure of which would undermine responsible newsgathering practices.

There are three key elements of this approach. The first is the fact that it applies to the disclosure of 'material'. This is a category which includes but is not limited to the identity of the source in question. It is also capable, in principle, of covering the content of a disclosure, or circumstances relating to the receipt of information from an anonymous source.

However, the extent to which the presumption can be said to apply to such material will be influenced by the second element of the approach: the requirement that disclosure be

capable of impacting on responsible newsgathering practices. Although there has been some discussion of the general concept of responsible journalism in the Irish law of defamation,³⁵ there has been relatively little consideration given to the practices used by journalists in their dealings with confidential sources. By contrast, it is notable that courts in other jurisdictions have engaged in a relatively detailed review of journalistic conduct. In *R. v National Post*, for example, both the majority and minority of the Court endorsed the proposition that an exemption could only apply where journalists had made reasonable efforts to confirm the reliability and veracity of the information provided. The majority was also of the view that confidentiality could only apply where journalists had, in the exercise of their professional judgment, made an express offer of confidentiality to the source in return for the provision of the information in question. Whether the material could have been obtained by other means or without an assurance of confidentiality has also been identified by the Canadian courts as a relevant factor.³⁶

That is not to say that an Irish disclosure exemption should be subject to precisely the same prerequisites. What it does suggest, however, is that there may be merit in more detailed guidance on the steps that should be taken by journalists in order to protect both themselves and their sources. It is arguable that a system that requires a journalist to take steps to ground a promise of confidentiality *before* it is offered gives greater clarity and protection to the journalist, the source, and the rights of any affected party than one based on over-broad assumptions of an immunity from legal scrutiny.

It is instructive that this also corresponds with at least some accounts of journalistic standards. The Society for Professional Journalists Code of Ethics, for example, includes the following requirements:

Verify information before releasing it. Use original sources whenever possible.

³⁵ *Hunter v Duckworth* [2003] IEHC 81; *Foley v Sunday Newspapers* [2005] 1 I.R. 88; *Leech v Independent Newspapers* [2014] IESC 79.

³⁶ *Globe & Mail v Canada* [2011] 2 LRC 260 at 283.

Identify sources clearly. The public is entitled to as much information as possible to judge the reliability and motivations of sources.

Consider sources' motives before promising anonymity. Reserve anonymity for sources who may face danger, retribution or other harm, and have information that cannot be obtained elsewhere. Explain why anonymity was granted.³⁷

The National Union of Journalists Code of Conduct states that a journalist should "[p]rotect the identity of sources who supply information in confidence and material gathered in the course of her/his work". The Press Council Code of Practice, as already noted, states simply that "[j]ournalists shall protect confidential sources of information". Neither Code provides further guidance as to when material or sources ought to be regarded as confidential. Both Codes also emphasise the responsibilities of journalists to ensure that material is accurate, factual, and not collected or published in breach of an individual's privacy. The Press Council's Handbook also makes the point that the obligation to maintain confidentiality (p.21):

"...does not preclude the publication of additional information about a source that does not compromise its confidentiality. Although attribution to a source - even a confidential one - does not require the precise identification of a specific source, any information a publication can give about the nature of its sources - including its confidential sources - will greatly enhance the credibility of its reports."

Each of these codes appears to recognise that an assurance or implication of confidentiality is a precursor to the journalist's obligation; and that the obligation to a source must be considered alongside and in light of the journalist's other ethical obligations. This indicates that there is no inherent inconsistency between journalistic ethics and a presumption of journalistic protection which is tied to responsible newsgathering techniques.

³⁷ <http://www.spj.org/ethicscode.asp> (last accessed March 23rd, 2017).

What might responsible newsgathering require in this area? Given the conceptual connection between the existence of the exemption and the constitutional value of the activities it protects, the most relevant considerations would seem to be those concerning the accuracy and reliability of the information. This would link the applicability of the presumption with steps taken by the journalist to confirm the reliability of the source of the information, and verify the information once received. The precise requirements would likely vary to some degree so that, for example, material provided by an anonymous person requires more corroboration than that provided by a source that had previously proved reliable. At a general level, however, a journalist should be entitled to presume that the he or she is covered by the disclosure exemption “where reasonable, good faith efforts have been made to confirm the reliability of the information from those sources”.³⁸

A reasonable argument can also be made that responsible newsgathering – and, by extension, the presumption – should also take account of the subject-matter of the material. This accords with the constitutional position of the media under Article 40. 6. 1 (i), while also providing a means to incorporate the interests of affected parties into the proposed presumption. This seems appropriate given the significant variations in the interests involved in disclosing or publishing information in different situations. On the one hand, disclosure of information about possible transgressions on the part of a public body or official falls squarely within the constitutional protection guaranteed for “rightful criticism of government policy”. In that context, there are limited countervailing factors to the clear public interest in facilitating the disclosure of information; in its verification by a journalist; and in the publication, if appropriate, of the results of the investigation. On the other hand, the public interest in confidential or anonymous disclosure about the private affairs of an individual may be limited in itself, or outweighed by the rights to privacy, confidentiality or to a good name that are engaged in that instance.

The third element of the suggested threshold for the presumption is a good faith requirement on the part of the journalist. The rationale for this is similar to that of the second element: namely, that the public interest that justifies the existence of the

³⁸ [2010] 5 LRC 510, at 547 per Abella J.

exemption only applies to responsible newsgathering practices. This would mean, for example, that the exemption might not apply where a journalist, while following the formal newsgathering processes relevant to the second limb, had reason to doubt the integrity or veracity of the information received. Asher J. observed in the context of New Zealand law, for example, that “[w]hile malice is irrelevant, if a source is known to be angry and biased, it may be less likely that the journalist had a genuine (that is honest) opinion about a vilifying statement”.

What would a responsible newsgathering standard mean for the Tribunal’s hypothesised instances of detraction, calumny or naked deceit? As a matter of principle, there is little public interest in encouraging or protecting knowing purveyors of false information. Binnie J.’s comment in *National Post* that “the ‘leak’ of a forged document undermines rather than advances achievement of the purpose of the privilege claimed by the media in the public interest” reflects a more general view that “the dissemination of falsehoods ... is said to exact a major social cost by deprecating truth in public discourse”³⁹.

However, it must also be borne in mind that the suggested objective of the court’s assessment should be whether a presumed exemption supports the general public interest in robust and informed debate. In this regard, the fact that a source may act for less than altruistic motives does not necessarily detract from the public interest in the information disclosed. Nor does it mean that confidentiality should be contingent on positive proof of the truth of the information disclosed. An exemption available only to the civic-minded or absolutely verified may add little to “the free flow of information which is essential in a free society”.⁴⁰ The fact that a source may have a political, personal or other form of partisan interest in the publication of the material means that additional steps to verify or authenticate the information may be required prior to publication. The same is true with an anonymous source. Furthermore, if the evidence suggests that a source sought to mislead the journalist, it is questionable whether either journalistic ethics or legal principle would support the maintenance of an obligation of confidentiality. The critical point, however, is that the fact that the disclosure exemption may, in principle, be excluded by the malice or

³⁹ *Hill v Church of Scientology* [1995] 2 SCR 1130, at para. 131 per Cory J.

⁴⁰ *Cornec v Morrice* [2012] 1 I.R. 804, at 819.

deceit of a source does not mean that the presumption may be lightly displaced in an individual case. Cynicism about the actions or objectives of the anonymous should be resisted. As the European Court of Human Rights pointed out in *Telegraaf*:

“While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose (for example, by intentionally fabricating false information), courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case.”⁴¹

That is particularly so where the journalist can show that they engaged in responsible newsgathering techniques. Abella J.’s view again seems apposite:

“Where ... the journalist has taken credible and reasonable steps to determine the authenticity and reliability of his source, one should respect his professional judgment and pause, it seems to me, before trespassing on the confidentiality which is the source of the relationship.”⁴²

Conclusion

This all points to the potential constitutional, expressive and democratic merits of a strong presumption that a disclosure exemption should arise once certain clearly articulated criteria are met. This follows, in particular, from the benefits of legal certainty in this area. If a disclosure exemption is, in fact, to increase the flow of information of value to the public, then it must actually give confidence to those contemplating the disclosure of information to journalists. Legislation would seem an obvious way to achieve this. In the absence of action by the Oireachtas, however, it will fall to the courts when faced with requests to compel disclosure to consider how a disclosure exemption should operate. Two propositions seem to enjoy broad acceptance: that there should be a disclosure exemption;

⁴¹ *Telegraaf Media Nederland Landelijke Media BV v The Netherlands* (App no. 39315/06) [2012] ECHR 1965, at para. 128.

⁴² [2010] 5 LRC 510, at 550.

but that this should not be understood to draw a veil over the conduct of any self-proclaimed reporter. An approach that presents the exemption as an almost inviolable 'privilege' or 'right' could, in the long-run, undermine the confidence of sources by over-promising in the abstract and then under-delivering in court. It is in striking a balance between the over-breadth of a categorical privilege and the uncertainty of an ad hoc approach that a presumption for responsible newsgathering practices may have merit. While it would be important that they not be treated as a compulsory checklist⁴³, associating the presumption with certain specific practices would allow journalists and sources to take positive steps to protect their legal position in advance. On a more system-wide basis, it would also incentivise the kind of practices that are more likely to elicit the public interest information that is, ultimately, the objective of the disclosure exemption.

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⁴³ For discussion of this risk with the concept of responsible journalism in the defamation context, see, for example, *Jameel v Wall Street Europe* [2006] UKHL 44.