

WELLINGTON REGISTRY

Under The Judicature Amendment Act 1972, Part 30 of the High Court Rules, the Bill of Rights Act 1990, and the Search and Surveillance Act 2012

In the matter of An application for judicial review

And in the matter of A search warrant issued by Judge IM Malosi of the Manukau District Court on 30 September 2014

Between **N A HAGER**
Applicant

And **HER MAJESTY'S ATTORNEY-GENERAL**
First Respondent

And **THE NEW ZEALAND POLICE**
Second Respondent

And **THE MANUKAU DISTRICT COURT**
Third Respondent

Affidavit of Gavin Peter Ellis

Dated: 31st March 2015

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I, Gavin Peter Ellis, media researcher of Auckland, solemnly and sincerely affirm:

Introduction

1. I have been asked to provide this affidavit to assist the Court on matters relevant to the judicial review brought by Nicholas Alfred Hager in relation to a warrant issued to the New Zealand Police to search Mr Hager's residence and examine his documents and computer systems.

Code of Conduct

2. I have read, and agree to comply with, the Code of Conduct for expert witnesses set out in Schedule 4 of the New Zealand High Court Rules.

Experience

3. I hold the degrees of Master of Arts (First Class Honours) and Doctor of Philosophy in Political Studies from the University of Auckland. My specialisations are in journalism and the political economy of communication. I am a part-time senior lecturer in Media, Film, and Television at the University of Auckland, where I teach the structures, theory and practice of journalism. I am the author of peer-reviewed works on media institutions, ethics, and regulation. My 2014 book, *Trust Ownership and the Future of News: Media Moguls and White Knights* (London, Palgrave), addressed the need for institutional models that protect and foster journalism that contributes to civic life and democracy.
4. I have also practiced journalism for 50 years. In 2005, I retired as editor-in-chief of the *New Zealand Herald* after a 40-year career in daily journalism, during which I had practical experience with confidential sources and attempts by police to gather evidence from newsrooms. I now broadcast a weekly commentary on the media on Radio New Zealand National. I also write a bi-monthly column that addresses issues facing the news media and journalism for the *PANPA Bulletin* (an industry publication that circulates in Australia and New Zealand).

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5. I was a founder member and former chairman of the Media Freedom Committee, which represents all mainstream media (newspapers, television, radio, and magazines) on matters relating to freedom of expression. In 2005 I was the recipient of the Commonwealth Astor Award for contributions to press freedom. In 2014, I acted as one of two independent advisors to the judicial panel reviewing in-court media coverage.
6. I act as a consultant on media matters and, as part of that consultancy, have peer-reviewed media codes of conduct and have been commissioned by a media company to investigate journalists' activities to determine whether ethical guidelines have been breached.
7. In 2009, I provided evidence as an expert witness in an application by the New Zealand Police seeking to compel TV3 journalist John Campbell and four other defendants from the television network to disclose the identity of an informant in a case that led to the prosecution of James Joseph Kapa and Robert Van Wakeren. My evidence supported the position that, with a very small number of exceptions, a journalist was bound to maintain confidentiality.

Background

8. I have met Mr Hager in the course of my activities at the University of Auckland and have utilised aspects of his work in lectures.
9. I am familiar with his book *Dirty Politics* published in 2014 and with the events that followed its publication, including subsequent disclosures to news media made by the person who identified himself as Rawshark and media reports of the execution of a search warrant on Mr Hager's home.

Instructions

10. I have been asked to assess the potential effects on journalists and their confidential sources of the raid on Mr Hager's house and of the possible access of police to his seized documents and electronic devices. The potential consequence of such acts is often called the "chilling effect". I have been



asked to examine the academic literature on the subject to determine whether, in conjunction with my own professional experience, it supports the view that denial of Mr Hager's application will have adverse consequences for him, the wider journalist community, and the public's interest in the news media's disclosure of important information possessed by potential confidential sources.

Overall opinion

11. In my view, the actions of the New Zealand Police in executing a search warrant on the home of Mr Hager – and the expectation that police officers will have access to the contents of his computer systems, documents, notebooks and other material relevant to his role as an investigative journalist – will have the following chilling effects. It will:
 - 11.1. act as a disincentive to potential sources because the journalist's solemn undertaking to maintain confidentiality is nullified by actions beyond the journalist's control;
 - 11.2. force journalists to adopt extraordinary time-consuming clandestine methods to protect sources' identities, or limit their dealings with 'whistle-blowers'; and
 - 11.3. compromise Mr Hager's ability to practice as an investigative journalist and his capacity to build vital trust with his informants by sending a signal that he is unable to protect the identity of confidential sources.

Principles

12. Before providing the reasons for this overall opinion, it may be helpful to set out what I believe are the underlying principles that are at stake in this matter. In so doing I will address not only the 'Reporter's Privilege' but the 'Reporter's Dilemma'.
13. The so-called 'Reporter's Privilege', often claimed and less often conferred, recognises a need for journalists to avoid identifying individuals who are

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unable or unwilling to divulge matters of great public interest without a cloak of anonymity. It further recognises that journalists have a moral obligation to such informants to protect their identities (and, perhaps, employment and even freedom from harassment, vilification, retaliation or punishment) once an undertaking of confidentiality and been given.

14. It is a solemn undertaking that should not be made without considerable thought being given to whether or not it is justified. During my editorship at *The New Zealand Herald* I required reporters to seek the permission of a senior editorial executive (usually the editor) before giving such an undertaking. I required that the name of the source be made known to me
15. There are a number of 'tests' that can be used to determine whether a guarantee of anonymity – which precedes, and is not a guarantee of, publication – is warranted. I understand that Mr Hager has satisfied himself that his sources meet these criteria. The four questions that need to be asked are:
 - 15.1. Is this a matter of significant public interest sufficient to warrant a guarantee of confidentiality?
 - 15.2. Is confidentiality essential for the relationship between source and reporter to continue?
 - 15.3. Would the disclosure of the source's identity cause that person significant harm?
 - 15.4. Is the source acting in good faith?
16. If these tests are satisfied there must be a clear and unambiguous understanding of the agreement and a determination by all involved – the reporter and all others privy to the source's identity – to maintain confidentiality.
17. There are divergent attitudes on the validity and extent of legal protections for the 'Reporter's Privilege' but a general recognition that there is, at least,



some legitimacy to confidential sources where official wrongdoing or abuses of power cannot be revealed except by their use.

18. Within the English-speaking world there is a universal belief by journalists that confidential sources should not be revealed.¹ The inclusion of such a provision in codes of ethics is almost as widespread, as demonstrated by the attached matrix (Appendix A) that I developed during research on the commonality of journalistic ethics.² The entries relating to “Confidentiality” demonstrate that almost all significant journalistic codes of ethics contain a requirement to respect promises of confidentiality.
19. The burden on journalists is often stated unequivocally: The Editors’ Code of Practice adopted by the Independent Press Standards Organisation in the United Kingdom (successor to the Press Complaints Commission) states simply that “Journalists have a moral obligation to protect confidential sources of information”. Coulter’s interpretation is that the journalist, once a solemn undertaking has been given, has no option but to maintain that secrecy come what may.³
20. Stone believes no offer of anonymity can legally extend beyond what is recognised by law⁴ while others believe the agreement may be nullified by certain circumstances and that a balance must be struck. Martin-Clark, a journalist who broke such a confidence, justified his action by saying his disclosure of a confession of murder during The Troubles in Northern Ireland could have prevented further killings.⁵ My own view, set out in my evidence in *Police v Campbell*,⁶ is that there are only two circumstances in which the undertaking may be breached: (i) where a person or persons subsequently may suffer actual harm or a serious crime may be committed

¹ Weaver, D.H., “Who Are Journalists” in *Making Journalists*, H. de Burgh (ed). London, Routledge 2005. P. 83.

² Ellis, G.P., *Journalism’s road codes: The enduring nature of common ethical standards*, Pacific Journalism Review, Vol 18 Issue 2 October 2012.

³ Coulter, J., “The Moral Reason Never To Tell”, *British Journalism Review* Vol 16 No 1 pp. 65-69.

⁴ Stone, G.R., “Why We Need a Federal Reporter’s Privilege” *HOFSTRA Law Review* Vol 30:39, pp. 39-58.

⁵ Martin-Clark, N., “When a Journalist Must Tell”, *British Journalism Review* Vol 14 No 2 pp. 35-39.

⁶ *Police v Campbell* - [2010] 1 NZLR 483



unless the journalist discloses the source to appropriate authorities, and (ii) where there was an ulterior motive on the part of the informant in seeking confidentiality such as the publication of intentionally wrong information or the prevention of disclosure of self-incriminating material. At the other end of the scale, Wasserman regards the convention as “nothing more than a valuable information-gathering technique”.⁷ This is a view with which I strongly disagree, preferring the more widely-held opinion that it represents a valuable means by which wrong-doing and misuse of power, particularly by the state, may legitimately be brought to public attention.

21. But herein lies the Reporter’s Dilemma: Journalists must of course act within the law but in order to satisfy their moral obligation to confidential informants set out in their codes of ethics – beyond the narrow band of exceptions outlined above – they may feel compelled to defy the law and risk the consequences.
22. There are numerous examples of journalists being prepared to go to prison rather than reveal a source. In the much-cited *Branzburg v Hayes* case (I have found Justice Potter Stewart’s dissenting view useful in forming my views on confidential sources), the U.S. Supreme Court required journalist Paul Branzburg to reveal names to a Grand Jury. His continued refusal led to a six- month prison sentence.⁸
23. I was prepared for such an eventuality when, as editor-in-chief of *The New Zealand Herald* and before the addition of s 68 to the Evidence Act, I refused under lengthy examination to reveal the names of sources during an interlocutory hearing in the *Queen v Cara and Kelman*. In the event, I was relieved of the obligation to answer because the court found that the potential ‘chilling effect’ of my being forced to reveal the sources outweighed any benefit that might accrue to the defendants in that case.

⁷ Wasserman, E.J. “A Critique of Source Confidentiality” *Notre Dame Law Journal*, Ethics and Public policy 553 (2005).

⁸ Branzburg did not serve the sentence because the state to which he had moved refused to extradite him to Michigan.



24. A further principle in play here is the general duty on the part of a journalist to keep safe material utilised in published work or which may have informed those published efforts but which did not appear in print or go to air. This latter category might include background information that could lead to the identity of a source, the journalist's notes and observations (that could include potentially embarrassing musings about the character or activities of various related parties), recordings of interviews (far more fragmented and idiosyncratic than the polished and edited broadcast product and often with unguarded 'off the record' asides) and, importantly, material from other unnamed sources used to verify the informant's claims.

Reasoning

25. I would like now to return to my opinion of the effects that the execution of a search warrant on Mr Hager's home and the seizure of his computer equipment would have on him, journalists, and potential confidential sources. To reiterate, I believe there will be significant 'chilling effects' should the court unseal the considerable amount of material seized during a prolonged search of Mr Hager's home. I have formed my opinion on these matters for the following reasons.
26. I will assume (though I have no knowledge of this) that there is a possibility that forensic examination of the material could reveal the name of Mr Hager's confidential source or sources and thereby nullify the solemn undertakings he gave to maintain secrecy. I note that any police search would run the danger of unmasking confidential sources other than the one they are looking for. There is widespread belief among journalists that the revealing of a confidential source is a cardinal sin. An influential empirical study by Blasi in 1971 found that while many reporters felt testifying on sources to be a matter for personal conscience, there was "a very high level of asserted willingness to go to jail if necessary to honor what they perceive to be their obligation of confidentiality".⁹ Coulter,³ a political journalist as well as being a senior lecturer in journalism, asserts that journalists "...have

⁹ Blasi, V., "The Newsman's Privilege: An empirical study", *Michigan Law Review* Vol 70:229.



a moral imperative to give a guarantee of anonymity to genuine confidential sources providing bona fide information” and further asserts that if journalists sacrifice the trust implicit in that relationship, “we betray our credibility as reporters of the truth”.

27. I believe Police access to material in an attempt to identify his informants will lead to Mr Hager being seen as unable to protect his sources and other journalists taking the view that they are similarly vulnerable to search and seizure that could expose their own confidential sources.
28. The ability to protect sources who take risks to provide information, the disclosure of which is demonstrably in the public interest, is a cornerstone of investigative journalism. If potential sources feel journalists are no longer in a position to honour guarantees of confidentiality they are left with two options: to make the information public and bear the consequences of exposure as the source, or to stay silent. There are compelling incentives to stay silent, given that an informer may lose his or her livelihood and be charged with theft for handing over even material revealing the most egregious wrong-doing by the state or a corporation. Whistle-blower protection in the Protected Disclosures Act is, at best, a limited shield as it maintains a closed circuit within the organisation and referral upward and leaves the whistle-blower within a power structure that may be perceived as intimidating or hostile. Nor does it even guarantee anonymity to the whistleblower. The ability to ‘go public’ remains an important safeguard in a democracy.
29. Equally important is the ability of journalists to access multiple sources to verify stories. Kovach and Rosenstiel say the essence of journalism is a discipline of verification – checking and cross-checking in order to get it right.¹⁰ Any reduction in the level of confidential sources’ trust in journalists reduces the ability to find sources who will confirm facts on an anonymous basis. Information from confidential sources may well be of such a nature

¹⁰ Kovach, B., and T. Rosenstiel, *The Elements of Journalism* 2001, New York, Three Rivers Press.

that other knowledgeable people will only confirm matters under a similar guarantee of anonymity offered to them.

30. In *Police v Campbell* the judge was asked to exercise his discretion under s 68 of the Evidence Act 2006. The judge held that, in the circumstances of that case, the public interest in the disclosure of the identity of the sources outweighed the public interest in the communication of facts and opinion to the public. He referred to evidence that the chilling effect may be less when the case is not high-profile, the courts do not force disclosure frequently, and other sources do not see themselves as being in a comparable position. He concluded that the public interest in the disclosure of identity was high, and the likelihood of harm to the public interest in ordering disclosure was low, because of the very unusual circumstances of the case (which involved a self-confessed thief of valuable medals) and the low incidence of similar court orders. I believe the current case is significantly different (and much more in line with the disclosure cases encompassed by the literature) because *Police v Campbell* involved a self-incriminating common thief and not a 'whistle-blower' (as I consider Rawshark to have been), it was not a matter that impacted on the public beyond a sentimental attachment to war medals, and the circumstances may have been unique. Nevertheless – and in spite of the judge's assurance that compulsion under s 68 would be infrequent – I believe that, should the court unseal Mr Hager's material, the cumulative effect will be to persuade journalists that they should not rely on the section to protect their sources. It will add to a growing list of assaults that journalists see being made on media freedom such as 'witch-hunts' over leaks, search warrants, and the collection of electronic metadata.
31. The majority decision in *Branzburg v Hayes* rested, in part, on the view that there was no empirical evidence to support the claim that enforced disclosure would have a chilling effect on sources. Justice Stewart's view, however, was that the court had never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist. I believe that to



require such proof before acknowledging a 'chilling effect' is counter-intuitive: how can one build a body of evidence that undisclosed sources decided to stay silent? In any event, there *is* evidence that invasion of the reporter's ability to protect sources has led to sources 'drying up' and important information in the public interest suppressed. In 2005, as reporters from the *New York Times* and *Time* magazine faced imprisonment for refusing to reveal sources of stories in the build-up to the invasion of Iraq, the *Cleveland Plain Dealer* withheld two investigative articles that the editor Douglas Clinton described as "profoundly important" for fear that the sources would be identified and imprisoned.¹¹

32. Following the seizure of telephone records of The Associated Press by the US Department of Justice in 2013, the wire service's chief executive, Gary Pruitt, stated that "some long-term trusted sources have become nervous and anxious about talking to us – even on stories unrelated to national security... this chilling effect on newsgathering is not just limited to AP. Journalists from other news organizations have personally told me that it has intimidated both official and nonofficial sources from speaking to them as well."¹²
33. It is reasonable to believe that journalists have already been unsettled by the events surrounding the seizure of Mr Hager's material and computer systems. It has been widely reported¹³ that Police spent 10 hours at Mr Hager's home in his absence. Journalists in New Zealand find the execution of search warrants on newsrooms unsettling because it is seen intuitively as a violation of press freedom.¹⁴ To now feel that their homes may also be

¹¹ McFadden, R., "Newspaper Withholding Two Articles After Jailing", *The New York Times*, 9 July 2005.

¹² Pruitt, G., Address to the National Press Club 19 June 2013. Retrieved from <http://www.ap.org/Content/Press-Release/2013/Gary-Pruitt-address-to-National-Press-Club>

¹³ <http://www.stuff.co.nz/national/10585208/Nicky-Hagers-house-raided-by-police>
http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11337913 <http://tvnz.co.nz/national-news/nicky-hager-i-d-go-jail-before-revealing-dirty-politics-source-6099688>

¹⁴ During the Teapot Tape investigation in 2011 – which followed the recording of a conversation between Act leader John Banks and National Party leader John Key in an Epsom café – search warrants were executed on the premises of the *Herald on Sunday*, TVNZ, TV3 and Radio New Zealand, leading to much public debate and concern about press freedoms



subjected to such intrusion adds an altogether more personal dimension. An increasing number of journalists work from home and those writing on sensitive subjects may now feel they are putting the well-being of their families at risk.

34. Journalists must protect confidential sources and material and there is already some evidence that journalists are going to extraordinary lengths to protect sources in the wake of (i) revelations that the telephone records and parliamentary movements of Dominion-Post reporter Andrea Vance had been accessed during the investigation into the source of the leaking of the Kitteridge report into the activities of the GCSB in 2013 and (ii) disclosures by former U.S. security contractor Edward Snowden of GCSB surveillance operations. The measures being taken by journalists include:
- 34.1. non-use of the parliamentary telephone system for sensitive calls,
 - 34.2. the use of so-called 'burners' – cheap, pre-paid cell phones with no ownership record that are used briefly then discarded; and
 - 34.3. the use of encrypted email.
35. I regard these measures as a form of 'chilling'. They are symptomatic of the need for journalists, already under substantial pressure as a result of reduced numbers in newsrooms and increased workload in a multimedia digital environment, to add significantly to the processes involved in their occupation in order to honour their undertakings. I am aware of journalists in New Zealand who, in addition to the measures outlined above, employ elaborate means to protect their sources and to keep their on-going investigations secret. These measures include removing themselves from conventional Internet and email communication, which in surveillance circles is known as 'going dark'. It involves placing all online communication on what is known as the "Deep Web", a series of hidden networks predicated on anti-surveillance protocols. It is telling that, in order to prevent surveillance and disclosure, journalists are prepared to use networks that are also utilised by criminals, terrorists, and paedophiles.

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Publications such as *Deep Web for Journalists: Comms, Counter-surveillance, Search* by Alan Pearce instruct journalists on how to take themselves into this clandestine environment. These networks were used by Edward Snowden in his communications with the editorial team led by Glenn Greenwald. It is noteworthy that the initial contact broke down because Greenwald was unable to set up the counter-surveillance software that Snowden demanded. Entering this Deep Web is time-consuming and complex.

36. At the other end of the scale is a return to reporting methods that pre-date the introduction of the telephone. The Australian chief executive of Rupert Murdoch's News Corporation, Julian Clarke, has warned journalists in his organisation to stop using text and email messages and meet sources face-to-face in light of new laws on the gathering and retention of electronic metadata.¹⁵ Of course, this makes it much more difficult to meet with sources from out-of-town, particularly if the journalist is determined not to create any trail of the contact.
37. The use of such strategies is confirmed in a 2014 report by the American Civil Liberties Union and Human Rights Watch,¹⁶ which found that fear of surveillance and the compromising of sources had led journalists to adopt three defensive strategies:
 - 37.1 use of advanced privacy and security technology;
 - 37.2 decreased reliance on digital technology; and
 - 37.3 use of other strategies such as diversionary tactics including the laying of false digital trails.
38. Investigative journalism is an expensive undertaking that requires journalists spending weeks and sometimes months on a story. Anything that adds to the burden of the investigative journalist ultimately translates into a reduced output. This, coupled with minimal editorial budgets, leads to hard

¹⁵ Markson, S., "Julian Clarke: texts, emails out for journalists' sources", *The Australian* 23 March 2015.

¹⁶ ACLU/Human Rights Watch, "With Liberty to Monitor All: How large-scale surveillance is harming journalism, law, and American democracy". Downloaded from http://www.hrw.org/sites/default/files/reports/usnsa0714_ForUpload_0.pdf



decisions on how many investigative projects will be undertaken. In *Trust Ownership and the Future of News* I lamented the reduction in what I described as democratically significant journalism. This can only be exacerbated by further impediments to the ability of investigative journalists to do their jobs.

39. A further 'chilling effect' lies in the subject of Mr Hager's investigation, which was firmly rooted in domestic politics. Journalists acknowledge that government has a responsibility to maintain national security – although they may be highly critical of inappropriate actions taken in the name of national security. Journalists are certainly mindful of the responsibility of government, and their own obligations, in the face of threats to national security. However, when the security of the state is not at risk and there is clear public interest in the disclosures being made, journalists begin to worry when their ability to do their job is impeded by the power of the state. I believe journalists will regard this case as a sea-change, a perilous shift that places coverage of politically sensitive domestic issues in the same area of "risky" coverage as national security. Journalists may well ask themselves whether they should be more cautious in writing on politically embarrassing subjects that almost invariably will involve unauthorised access to material. That is not a question that should need to be posed in a free and democratic society.
40. Finally, I turn to the effect on Mr Hager should Police gain access to his material – even if it does not, in fact, reveal the identity of his sources.
41. I have no doubt that Mr Hager will continue in the role of investigative journalist and will seek to cultivate existing and new confidential sources. However, there will be inevitable consequences for him, as follows:
 - 41.1. He will feel compelled to go to even more extraordinary lengths to protect his sources and the integrity of the material he holds.
 - 41.2. The time-consuming nature of the security measures he will feel compelled to implement will affect his productivity and, hence, his income.

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- 41.3. While his confidential sources may not blame him directly for any breach of confidence he will be forced to rebuild the level of trust they have resided in him.
- 41.4. Potential sources that may have approached him could now be reluctant or unwilling to do so.
- 41.5. He may be faced with the prospect of sources refusing to identify themselves to him (a dangerous situation open to malicious manipulation and one that I would not countenance when I was a editor).
- 41.6. He may be forced to shoulder the added expense of office accommodation to avoid exposing his family to the anxiety of potential future searches of his home.

Summary

42. I am firmly of the view that to condone the Police search of Mr Hager's home by unsealing the computer systems and materials seized in that search will have detrimental consequences for him and for society at large that outweigh whatever benefits that may arise from police examination of the material.

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Appendix A

	U.K. Press Complaints Com.	National Union Journalists U.K.	New York Times	Los Angeles Times	Associated Press (U.S.)	Brit. Columbia Press Council	#Canadian Newspaper Ass.	Australian Press Council	New Zealand Press Council
Accuracy	•	•	•	•	•	•	•	•	•
Attribution			•	•	•				
Balance			•	•	•		•	•	•
Children	•			•	•	•			•
Confidentiality	•	•	•	•	•	•		•	•
Interest conflict	•	•	•	•	•	•	•		
Correction	•	•	•	•	•	•	•	•	•
Discrimination*	•	•				•		•	•
Fabrication**		•	•	•	•				
Fairness		•	•	•	•		•	•	•
Grief/shock	•	•						•	•
Harassment	•		•						
Identification	•		•	•	•	•			
Privacy	•	•	•		•	•	•	•	•
Right of reply	•		•	•	•	•	•	•	•
Sex victims	•			•	•	•			
Subterfuge	•	•	•	•		•		•	•
Treating			•	•	•				

• Includes communal tension ** Includes plagiarism
 # Individual Canadian newspaper codes include confidentiality provisions.

Affirmed at *Auckland*)
 on the *31st* day of March 2015)
 before me)



Garry Claude Williams
 GARRY CLAUDE WILLIAMS

A solicitor of the High Court of New Zealand
 Barrister
GCD

