[GB] Supreme Court requires broadcaster to be notified of evidence for police access to e-mails

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During a criminal investigation of two military officers under the Official Secrets Act 1989 for passing information on the Cabinet security committee to the broadcaster BSkyB, the police sought disclosure of evidence from the broadcaster. This included copies of all e-mails between the officers and the broadcaster. After hearing the police and the broadcaster, the court issued a production order. However, a further application, based on secret information, was made by the police for further evidence; the broadcaster was not present before the court and objected to the application. On 12 March 2014, the Supreme Court held that it was unlawful to make such an order without the broadcaster having full access to the evidence and an opportunity to comment on it.

Police investigations are covered by the Police and Criminal Evidence Act 1984. This provides the power for a court to issue a search warrant on an application made ex parte, which means without the other parties being aware or present. However, the Act also creates a special regime for material acquired or created for the purposes of journalism and in the possession of the person who created it for journalism. For such material, an application must be made to a more senior judge and it must be heard inter partes, that is, in the presence of any other affected parties. Nevertheless, the judge made the order in the absence of the broadcaster. The production order was then quashed by the High Court on the ground that it was procedurally unfair for the broadcaster to have had an order made against it without full access to the evidence on which the police's case was based and the opportunity to comment on or challenge that evidence.

The Supreme Court upheld the decision to quash the order. It held that normally applications for disclosure orders are held ex parte as they do not involve the determination of substantive legal rights. However, as an application for journalistic material would be likely to involve the journalist's legal rights in a highly sensitive and potentially difficult area; exclusion of one party is inconsistent with the nature of the inter partes hearing required in the case of such material, as was recognised in the Act. Equal treatment of the parties means that each should know what material the other is asking the court to take into account and should have a fair opportunity to respond to it.

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R. (on the application of British Sky Broadcasting Ltd) v. The Commissioner of Police of the Metropolis [2014] UKSC 17, 12 March 2014

http://supremecourt.uk/decided-cases/docs/UKSC_2012_0115_Judgment.pdf

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