

Section Four: News Gathering

CLANDESTINE DEVICES AND SUBTERFUGE

Undercover, or underhand?

Consideration of the public interest, a core theme through much of the Code, is seldom more important than here. There is often a fine line to be drawn at the point where genuine investigative journalism ceases and intrusive reporting begins. The public interest is crucial in judging whether the ends justify the means and deciding whether undercover was merely underhand.

The speed of technological innovation puts this area constantly into the public spotlight, with concerns over the misuse of private data and the use of inquiry agents or others to circumvent the Code — and the law.

THE CODE SAYS...

Clause Ten — Clandestine devices and subterfuge*

- i) *The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs or by accessing digitally-held private information without consent.*
- ii) *Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.*

* A public interest exemption may be available: [See Section Six](#)

The Code Committee has been quick to react, with the introduction of new measures to prevent abuse. They include wide ranging curbs on intrusive activity *unless it can be demonstrated to be in the wider public interest*. They cover:

- *Hacking into digitally-held private information;*
- *The use of hidden cameras;*
- *Interception of mobile phones, text messages and emails;*
- *Bugging or electronic eavesdropping;*
- *The use of agents or intermediaries to obtain material intended for publication.*

Additionally, the PCC and the newspaper and magazine industry have launched their own initiatives to ensure that both the Code and the law — such as the Data Protection Act and the Regulation of Investigatory Powers Act — are properly observed ([See Briefing](#)).

Seeking or finding? The Code's rules apply to pre-publication news gathering as much as to publication itself. It would be a breach simply to seek material that was against the Code, or to *engage in misrepresentation or subterfuge* — even if nothing was published as a result — unless there was a reasonable expectation that some legitimate public interest would be served.

However, there is a distinction to be made between information which a newspaper or magazine has sought or obtained itself, or has commissioned, and that which comes unsolicited — via a leak or from a whistleblower, perhaps. The newspaper might not know

the provenance of documents obtained in this way but could still be justified in publishing.

Public interest or fishing expedition? The PCC has consistently ruled that journalistic fishing expeditions — where, for example, hidden cameras or clandestine listening devices are used simply on the off-chance of discovering some wrong-doing — are not sufficient justification. There should be reasonable grounds for the inquiry.

The PCC censured a newspaper which put a writer into a London primary school for a week, posing as a would-be teacher, and ran the story of his experiences, including the shortcomings of the educational system. The newspaper's claim of a public interest justification failed because the school had been chosen at random. The exercise was condemned as a fishing expedition. (*Munro v Evening Standard: Report 54, 2001*).

In the same way, a complaint that a Sunday newspaper's undercover reporters filmed guests at a private party for people working on the TV soap *Emmerdale* was upheld after the PCC roundly rejected the newspaper's explanation that the journalists *might* have discovered people behaving in a way which would have justified publication in the public interest. That would have given newspapers carte blanche to intrude on any private gathering of high profile figures, said the Commission. (*Ryle v News of the World: Report 53, 2001*).

But the same newspaper did not make the same mistake when it investigated controversial lifestyle advisor Carole Caplin. This time it was acting on information that she was using her relationship with Tony and Cherie Blair to promote her business. Its reporters, posing as clients, recorded Ms Caplin speaking about the Blairs' private life, thus justifying the subterfuge.

Both the story and a picture taken secretly to authenticate it focused on Ms Caplin's professional, rather than personal, life and opinions, which the PCC ruled was justified in the public interest. Had the picture involved some gratuitous humiliation or intruded into

her private life, it might have been very different. (*Caplin v News of the World: Report 72, 2005*).

So the existence of a public interest in a story does not automatically justify the indiscriminate use of clandestine methods. It has to be appropriate and proportionate to the public interest served.

There was obvious public interest in a story that a supermarket worker convicted of possessing pornographic images of children was making deliveries to a nursery school kitchen. But while a photograph of the man at the nursery was legitimate, secretly filmed footage of him at the supermarket shown on a tabloid newspaper's website was not.

The PCC upheld a complaint by the man's mother that the clandestine filming had breached the Code. The public interest element of the story related only to the nursery deliveries. There was no dispute that he worked at the supermarket, and the footage was not necessary to prove it. (*A woman v The Sun: Report 77, 2008*).

Identification: Even if subterfuge is not used, failure to identify oneself as a journalist could amount to misrepresentation. A woman reporter who visited Gill Faldo's home while she was out, did not reveal herself as a journalist and was let in by a housekeeper who spoke freely about Mrs Faldo.

The PCC ruled that the reporter had allowed a misleading impression to develop and obtained information from the housekeeper as a result. (*Faldo v The Sun: Report 53, 2001*).

The use of freelance journalists or agents does not minimise any breach. A freelance reporter, approaching a victim of a fraudster who duped women with offers of marriage, posed as a true life feature writer for women's magazines. In fact, he sold the story to a Sunday tabloid, which — while accepting it in good faith — became responsible for a series of breaches under the Code.

The Commission said there was no public interest defence for the

deception and reminded editors that they must take care to ensure that contributors' material has been obtained in compliance with the Code. (*Noble v News of the World: Report 65, 2004*).

Unauthorised removal: A weekly newspaper reporter used a false identity to join a community website and download a picture of a policeman charged with possessing indecent images of children. The policeman complained that this was unauthorised removal of a photograph, obtained by subterfuge. He also claimed the newspaper's reporting and publication of his address had distressed his mother — with whom he lived — thus intruding into shock, in breach of [Clause 5](#).

However, the PCC decided that downloading a picture that could be accessed simply by logging on to a public website did not amount to removal, and the relatively minor subterfuge used was justified in the public interest.

The Commission sympathised with the mother but said her vulnerability did not entitle her son to greater privacy than might be expected by others accused of a serious offence. (*Bretherick v County Times: Report 75, 2007*).

To joke or not to joke: The Code says misrepresentation and subterfuge can *generally* only be justified in the public interest, which leaves room for exceptions. This is designed to allow for harmless journalistic spoofs — such as April Fool stories — intended to amuse rather than mislead.

But when a tabloid ran a stunt 'signed confession' on Page One suggesting that Stan Collymore had admitted lying about being attacked by rugby players, the soccer star did not find it funny. While the inside page story made clear that he thought he was signing an autograph, rather than a confession invented by the paper, the front page was entirely misleading.

The PCC ruled that employing subterfuge to obtain a material that was used in a misleading way could not be in the public interest and

breached the Code. (*Collymore v The Sun: Report 68, 2004*).

Humour misfired again when a journalist rang companies asking if any of them would pay a retainer in return for favourable publicity, in order to run a light-hearted piece on their responses. The subsequent article said that a Railtrack spokeswoman had sounded shocked, but agreed to get back to the journalist.

The PCC upheld the complaint — ruling that, while humorous, the article might have left the impression that Railtrack had not entirely rejected the proposal. The press office had been misled and there was no public interest in doing so. (*Railtrack plc v The Independent: Report 57, 2002*).

Back door, or front: Another test is whether undercover methods are actually necessary, or whether the material could be obtained via the front door rather than the back. The Code is clear that generally subterfuge or misrepresentation should be used only when information in the public interest *cannot be obtained by other means*.

When a Sunday broadsheet ran a story that a Saudi-owned company printed the British National Party's publication *Voice of Freedom*, the firm complained that the newspaper's use of an undercover reporter posing as a potential client to confirm the information was unnecessary. The firm said that — when later approached formally — it had openly acknowledged the arrangement.

The PCC rejected the complaint. It said the degree of subterfuge was minor; the information was commercial and not private, and this was not a fishing expedition, but following up specific information about the company. The potential commercial embarrassment involved supported the newspaper's view that the firm would not have volunteered the information. (*HH Saudi Research v The Sunday Telegraph: Report 74, 2005*).

However, another Sunday newspaper's use of subterfuge to get a story about a gun expert was rejected because the PCC decided that the information could have been obtained by direct means: the

complainant had already been interviewed by a journalist on a related subject. (*A man v The Observer: Report 44, 1998*).

KEY RULINGS

- *Munro v Evening Standard* (Report 54, 2001).
- *Ryle v News of the World* (Report 53, 2001).
- *Caplin v News of the World* (Report 72, 2005).
- *A woman v The Sun* (Report 77, 2008).
- *Faldo v The Sun* (Report 53, 2001).
- *Noble v News of the World* (Report 65, 2004).
- *Bretherick v County Times* (Report 75, 2007).
- *Collymore v The Sun* (Report 68, 2004).
- *Railtrack plc v The Independent* (Report 57, 2002).
- *HH Saudi Research v The Sunday Telegraph* (Report 74, 2005).
- *A man v The Observer* (Report 44 1998).

KEY QUESTIONS

- **Did the publication seek to obtain or publish the material?** Genuinely unsolicited material may not be affected.
- **If the publication used undercover methods was there reason to believe it was in the public interest?** Fishing expeditions don't count.
- **Was the clandestine activity related directly to the public interest?**
- **Could the material have been obtained by other means?**
- **Were agents or intermediaries used to acquire confidential information not in the public interest, without consent?** If so it would breach both the Code and the law.

Dangerously exposed

Investigative reporting in the public interest is in the very best tradition of British journalism. However, uncovering information that the public ought to know but others wish to remain secret is not easy. It sometimes requires the use of techniques that might otherwise be intrusive, or even illegal.

For that reason, the proper use of subterfuge and clandestine devices has always been tightly defined by the Code of Practice, which stresses the need for an appropriate public interest exemption for such activities.

Increasingly, the law covers these areas too, but it does not always offer the same public interest defences for journalists. And, while the Code assumes that compliance with the law would normally be required to uphold the highest standards of journalism, it is essential that journalists working in these areas are fully aware of both their legal and ethical obligations.

Two entirely separate developments underlined the dangers. First, the Information Commissioner suggested that journalists, or their agents, were routinely ‘blagging’ private information in breach of section 55 of the Data Protection Act. Then a reporter and an inquiry agent were convicted — under the Regulation of Investigatory Powers Act 2000 — of hacking into royal telephones.

As a result, the Code Committee, the PCC and the press industry collectively acted to improve training and tighten procedures in these areas.

The Code was amended to cover, specifically, hacking into digitally-held private information, and the use of agents to obtain private material by subterfuge. It means that without a public interest justification, the use by journalists — or their agents or intermediaries — of hidden cameras or bugging devices; computer hacking or of interception of mobile phones,

text messages or emails would all risk causing a breach of the Code. (*See Page 53*).

The PCC introduced comprehensive [guidelines](#) on the use of subterfuge and newsgathering. The Commission, in a survey following the royal phone bugging case, found no inadequacy in the Code of Practice, but made a series of recommendations of good practice. They included:

- Strengthening contractual obligations to follow both the Code and Data Protection Act;
- Improving internal training; and
- Introducing rigorous audit controls for cash payments, where these were unavoidable.

Industry bodies produced a Guidance Note specifically aimed at raising awareness among Britain’s journalists of the importance of operating in compliance with section 55 of the Data Protection Act. (*See Briefing*).

This answers the key questions facing members of the press:

- What does the Act do?
- What happens if I breach the Act?
- Are there any journalistic exemptions or defences?
- What should I do if I am unsure about my actions?

At the same time, the PCC — which in 2005 produced [guidelines](#) for journalists on the Data Protection Act — stepped up its work on training journalists in the use of undercover newsgathering methods.

The panel
colour code

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