

PCC REPORT ON SUBTERFUGE AND NEWSGATHERING

1.0 Introduction

1.1 The Press Complaints Commission has conducted an investigation into the use of subterfuge by the British newspaper and magazine industry, with particular reference to phone message tapping and compliance with the Editors' Code of Practice and the Data Protection Act.

1.2 The inquiry followed the convictions in January 2007 of News of the World journalist Clive Goodman and inquiry agent Glenn Mulcaire for offences under the Regulation of Investigatory Powers Act 2000 (RIPA) and Criminal Law Act (1977). They had speculatively tapped into private mobile phone messages and used the information they discovered for stories in the News of the World.

1.3 This type of snooping has no place in journalism, and the Chairman of the Commission has publicly deplored it on a number of occasions. The Commission as a whole condemns such behaviour.

1.4 Despite the police inquiry, court case and convictions, the Commission considered that there were a number of outstanding questions that arose under the Code of Practice, which sets out the required professional standards for UK journalists and, as such, supplements the law. Last November, before the verdict was reached, the Chairman of the PCC had already put the then editor of the News of the World, Mr Andy Coulson, on notice that, depending on the outcome of the trial, the PCC might wish to pursue matters with him.

1.5 On January 26 2007, Mulcaire and Goodman were sentenced to 6 and 4 months in prison. Mr Coulson resigned his post, saying that he had "decided that the time has come for me to take ultimate responsibility for the events around the Clive Goodman case". Mr Colin Myler was appointed editor in his place.

1.6 Despite Mr Myler's appointment, the question arose whether the PCC should ask Mr Coulson to give an account of what had gone wrong. The PCC decided not to do so. Given that the PCC does not - and should not - have statutory powers of investigation and prosecution, there could be no question of trying to duplicate the lengthy police investigation. Furthermore, Mr Coulson was, following his resignation, no longer answerable to the PCC, whose jurisdiction covers journalists working for publications that subscribe to the self-regulatory system through the Press Standards Board of Finance.

1.7 As a result, that part of the investigation involving the News of the World was conducted by the Director of the PCC with Mr Myler. The Chairman of the Commission also discussed the matter on a number of occasions with the Chief Executive of News International, Mr Les Hinton.

1.8 In a statement on 1st February 2007, the Commission said that “the public has a right to know that lessons have been learned from this episode, both at the newspaper and more generally”. It announced that it would be:

- Writing to the new editor of the newspaper for detailed information on what had gone wrong and to find out what steps would be taken to ensure that the situation did not recur;
- Conducting a broad inquiry across the whole of the press to find out the extent of internal controls aimed at preventing similar abuses;
- Publishing its findings.

1.9 There was a further point for consideration. The arrests and conviction of Mulcaire and Goodman coincided with a campaign by the Information Commissioner to raise awareness of the terms of the Data Protection Act, which applies to journalists but which also contains an exemption for some journalistic activity. The Information Commissioner was concerned that information provided to journalists by inquiry agents had been obtained by “blagging” or bribery in breach of the Act.

1.10 As part of its inquiry, the Commission therefore also asked the industry what was being done to raise awareness of the Data Protection Act, including its public interest defences.

1.11 In its approach to this matter, the Commission has also been concerned not to obscure or undermine the legitimate role of subterfuge in journalism that is in the public interest.

1.12 This report is therefore concerned with two main subjects: events at the News of the World in relation to Clive Goodman and Glenn Mulcaire, how the situation developed and how repetition will be avoided; and what the industry as a whole is doing to ensure that lessons have been learned from this incident so that British journalism is not brought into similar disrepute in the future.

2.0 The News of the World inquiry

2.1 Clive Goodman was a full time member of staff at the News of the World. The court heard that Glenn Mulcaire was an inquiry agent who was paid a retainer of £104,988 per annum by the newspaper. The court also heard that he had received £12,300 in cash from Clive Goodman.

2.2 The Director of the Commission wrote to the new editor of the News of the World, Colin Myler, on 7th February 2007. He said that the Commission had been especially concerned whether the employment of Mr Mulcaire represented an attempt to circumvent the provisions of the Code by sub-contracting investigative work to a third party. There are no loopholes in the Code in this regard, which says that “editors should take care to ensure it is observed rigorously by all editorial staff and external contributors, including non-journalists”.

2.3 The Commission asked a number of questions with regard to the Mulcaire and Goodman situation and also what the newspaper proposed to do to ensure that it would not happen again.

2.4 With regard to Goodman specifically, the PCC said that it seemed from the

evidence submitted to the court that he had repeatedly breached the Code as well as the law. The Commission therefore required the clearest reassurance that the paper made its staff journalists fully aware of the requirements of the Code and the law with regard to subterfuge, including when it would be justified.

2.5 The Commission informed the newspaper that it would be broadening its inquiry to involve the industry at large. It invited the News of the World to make any points, based on its experience and understanding of what went wrong, that might be helpful in this context.

3.0 The News of the World response

3.1 The editor, Mr Myler, replied to the Commission on the 22nd February. He described how the situation with Goodman and Mulcaire had developed and detailed what action was now being taken to minimise the chances of repetition. He urged the Commission to see the episode in perspective as it represented “an exceptional and unhappy event in the 163 year history of the News of the World, involving one journalist”. Moreover, two people had been sent to prison, Goodman had been dismissed from the paper and the previous editor had resigned.

3.2 He emphasised the newspaper’s commitment to the Code of Practice, drawing attention, by way of example, to an episode where a reporter had been dismissed for breaching its terms. He said that “every single News of the World journalist is conversant with the Code and appreciates fully the necessity of total compliance”.

4.0 Goodman and Mulcaire

4.1 The editor told the Commission that it was important to distinguish between the aberrational Goodman/Mulcaire episode which resulted in the prosecutions and the paper’s day to day contract with Mulcaire. It had emerged during the trial that Mulcaire had been paid a retainer by the newspaper. The editor confirmed to the Commission that this had been for £2,019 per week. Cash payments of £12,300 from Goodman to Mulcaire were in addition to this.

4.2 Because of the convictions, questions had been raised about the nature of the services provided by Mulcaire for which he was paid almost £105k per annum. The editor told the Commission that there had been a ‘great deal of inaccurate media speculation’ concerning this contract. In fact, the work was entirely ‘legal and legitimate’. The police had thoroughly investigated the retainer, and the prosecution had made clear to the judge that they were not suggesting that the retainer agreement involved anything illegal. This had been accepted by the judge.

4.3 The editor accepted that the retainer paid to Mulcaire may have seemed ‘substantial’, but argued that the cost to the paper would have been much greater had the work been contracted out on an ad hoc basis. He contended that Mulcaire’s hourly rate probably averaged less than £50. The editor added that there was nothing unusual about the employment of outside investigators; and that the practice was shared by solicitors, insurance companies, banks and many commercial organisations as well as newspapers.

4.4 The editor told the Commission what services Mulcaire provided. They were: gathering facts for stories and analysing the extent of the paper’s proof before publication; confirming facts and suggesting strategies; credit status checks; Land

Registry checks; directorship searches and analysis of businesses and individuals; tracing individuals from virtually no biographical details, including date of birth searches, electoral roll searches and checks through databases; County Court searches and analysis of court records; surveillance; specialist crime advice; professional football knowledge (Mulcaire was a former professional footballer); contacts in the sports and show business worlds; and analysis of documents and handwriting.

4.5 The editor hoped that it would be clear from this evidence that Mulcaire was not employed by the newspaper in order to circumvent the provisions of the Code, but to carry out legitimate investigative work.

4.6 But Mulcaire had a second, clandestine relationship with the paper through Clive Goodman. This was described to the Commission as a 'direct and personal' relationship, and involved cash payments amounting to £12,300 between November 2005 and August 2006, when the arrests took place.

4.7 Questions have been raised about how the newspaper could have allowed such payments to have been made, and whether anyone else at the newspaper was aware of Mulcaire and Goodman's illegal activities, which also breached the terms of the Code. The editor told the Commission that the paper has a standing policy on cash payments and transparency, something that was reiterated in a written memo to department heads and senior staff in 2005, and repeated at the start of 2006. Goodman was aware of this.

4.8 Despite this, the Commission was told that Goodman deceived his employers by disguising Mulcaire's identity and hiding the true origin of the information. Goodman claimed that the payments were for a confidential source on royal stories, identified only as 'Alexander'.

4.9 The Commission heard that "the identity of that source and the fact that the arrangement involved illegally accessing telephone voice mails was completely unknown and, indeed, deliberately concealed from all at the News of the World". The editor added in his submission that "it was made clear at the sentencing hearing that both the prosecution and the judge accepted that".

5.0 Action to prevent repetition

5.1 As to the Commission's questions about what would be done to avoid a repetition of the incident, the editor said that a number of steps were being taken.

5.2 With regard to external contributors, he had written to them to emphasise the absolute requirement that they abide by the Code and the law. The editor supplied the Commission with a sample copy of the letter that had been sent. In it, the editor set out to contributors that their contracts would now include 'a clause robustly reflecting [the paper's] fundamental commitment to the letter and spirit of the Code'.

5.3 The clause reads:

"The Contributor agrees that it is the Contributor's responsibility to review the Standards [the News Corporation Standards of Business], details of applicable rules, policies and procedures and the Code of Practice. The Contributor

acknowledges that the Standards, such rules, policies and procedures and the Code of Practice may change or be updated from time to time and that these changes or updates will be notified to him or her by the Company from time to time. The Contributor agrees that, having been so notified by the Company, it is the Contributor's absolute responsibility to ensure that he or she is conversant with any such changes and updates and to observe them fully.

"The Contributor understands and accepts that failure to comply with the requirements of this clause may lead to termination of the contract".

5.4 With regard to staff journalists, the editor told the Commission that it had long been the practice of the paper "to make clear to staff the importance of fundamental observance of the Code, with emphasis on the fact that the use of third parties to circumvent the Code is unacceptable and may be illegal". The editor told the Commission that, in light of this, the Goodman case appeared to have been a 'rogue exception'.

5.5 The editor said that, following Goodman's conviction, he had e-mailed every member of staff individually, and written to them at home, with the Code of Practice. Staff had been informed of a new clause in their contracts, replacing a long-standing one which had said that "the employer endorses the Press Complaints Commission Code of Practice and requires the employee to observe the terms of the Code as a condition of his employment".

5.6 The new clause states:

"The employee agrees to comply in full with the News Corporation Standards of Business Conduct (the "Standards") and all other applicable rules, policies and procedures of the Company and its Associated Companies including News Group Newspapers, and the Press Complaints Commission Code of Practice (the "Code of Practice") which are included herewith and are available on the News International intranet and on the PCC website.

"The employee agrees that it is the employee's responsibility to review the Standards, details of applicable rules, policies and procedures and the Code of Practice. The employee acknowledges that the Standards, such rules, policies and procedures and the Code of Practice may change or be updated from time to time and further agrees that it is the employee's absolute responsibility to ensure that he or she is aware of any such changes or updates. The employer is responsible for notifying the employee of any such changes and/or updates. The employee agrees that having been notified by the employer it is the employee's absolute responsibility to ensure that he or she is conversant with any such changes and updates and undertakes to observe them fully.

"The employee understands and accepts that failure to comply with the requirements of this clause will lead to Disciplinary Proceedings which may result in summary dismissal".

5.7 With regard to cash payments, the editor had written to all members of staff to reiterate the paper's clear policy on cash payments: "they are only permitted in exceptional circumstances. Every such payment requires a compelling justification and must be fully recorded".

5.8 In response to questions from the Commission about what further controls on cash payments were being developed, the editor said that the following protocol and policy was now in place:

- Cash payments are to be kept to a minimum and regarded as the exception;
- Requests for cash payments must be accompanied by a compelling and detailed justification signed off by the relevant department head;
- Information supplied on Cash Payment Request documents must be accurate and comprehensive;
- In the exceptional event of a requirement for a cash payment to a confidential source, the following would apply:

1. If the department head/staff member requesting the payment asserts that the identity of the source must be withheld, he/she is required to demonstrate clear and convincing justification for such confidentiality;
2. A memo detailing the reason for making the payment to a confidential source has to be provided to the Managing Editor's office.

- Every cash payment request must be signed off by the relevant Department Head;
- Details of the intended recipient's name and address are then verified via the electoral register/other checks to establish that they are genuine;
- Any journalist requesting a cash payment is required personally to endorse, with their signature, each page of the relevant documentation;
- Each request for a cash payment must be accompanied by the appropriate supporting documentation with a copy of the relevant story attached.

5.9 Turning then to the question of continuous professional training for his staff, the editor told the Commission that the paper had conducted a regular training programme in legal and PCC issues for some time. The latest series, starting on 20th February 2007, would focus on undercover journalism and its ethical and legal dimensions in light of the Goodman case; and highlight the requirements of the Regulation of Investigatory Powers Act, the Data Protection Act, the Computer Misuse Act and the PCC Code. For the first time, a representative of the PCC would attend and address each seminar. Attendance by staff would be mandatory.

6.0 The Commission's findings

6.1 The offences for which Goodman and Mulcaire were convicted were deplorable. Members of the Commission deprecated what had happened. The Commission has always made clear that subterfuge is justifiable only when there are grounds in the public interest for using it. Undercover investigative work has an honourable tradition and plays a vital role in exposing wrongdoing. It is part of an open society. But it risks being devalued if its use cannot be justified in the public interest.

6.2 In this case Mulcaire and Goodman paid a high price for their breach of the law (and in Goodman's case of the Code of Practice as well). They were sent to prison. Goodman, who had compliance with the Code written into his contract of

employment, was dismissed from the News of the World. The editor left his post. The case attracted a large amount of negative publicity.

6.3 No evidence has emerged either from the legal proceedings or the Commission's questions to Mr Myler and Mr Hinton of a conspiracy at the newspaper going beyond Messrs Goodman and Mulcaire to subvert the law and the PCC's Code of Practice. There is no evidence to challenge Mr Myler's assertion that: Goodman had deceived his employer in order to obtain cash to pay Mulcaire; that he had concealed the identity of the source of information on royal stories; and that no-one else at the News of the World knew that Messrs Goodman and Mulcaire were tapping phone messages for stories.

6.4 However, internal controls at the newspaper were clearly inadequate for the purpose of identifying the deception.

6.5 It was therefore right for the new editor to introduce a series of measures aimed at preventing repetition. These included: a revised contractual relationship with external contributors and staff members, with a new and robust reference to the Code, including a reminder that failure to comply with it could result in dismissal; a review of the policy on cash payments, and a reminder to staff about the current approach; and a renewed programme of mandatory training seminars aimed at raising awareness of the Code and the law. Commission officials have now completed seven 2 1/2 hour seminars on undercover investigations and the Code of Practice at the paper.

6.6 The Commission endorses this approach and welcomes the seriousness with which the editor and the company evidently take this matter. The review that the newspaper carried out has, in the Commission's view, thrown up examples of good practice – in particular in relation to the new reference in contracts to compliance with the Code of Practice, the new arrangements with external contributors, and the initiative of inviting Commission staff to help with the training seminars. The Commission also welcomed the tighter internal controls on cash payments.

6.7 The Commission's role here has been additional to the law, which has already investigated, prosecuted and punished the people responsible for the phone message tapping. The Commission has a duty to promote high professional standards and to hold editors responsible for the implementation of the Code on their publications by editorial staff and external contributors. It has ensured that the background to the episode, and the solutions that the newspaper proposed, would be ventilated publicly and be subject to scrutiny. Journalists and contributors to the newspaper can now be in no doubt of the serious consequences that will arise if there is any repeat of this highly regrettable incident.

7.0 Wider inquiry

7.1 The convictions of Mulcaire and Goodman raised questions about press practice in this area generally, and threatened to undermine confidence in journalism. The Commission believes that the public has a right to be reassured that this behaviour is not tolerated and that other publications have learned the lessons from what went on and have sufficient internal controls to prevent something similar happening elsewhere.

7.2 The Director of the Commission wrote to newspaper and magazine editors, with

copies to their managements, to inquire about the extent of internal controls and what they did with regard to educating journalists about the requirements both of the Code and the law. The Data Protection Act was highlighted. The Commission wrote directly to national newspapers and to magazine companies. It was grateful to the Newspaper Society for disseminating the questions through the regional press.

7.3 The Commission received a large number of responses, which contained a varying degree of detail. Some simply told the Commission that they did not and would not engage in telephone message tapping. Others went into some detail about the various measures that were in place at their publications to ensure compliance with the Code and the law. Perhaps understandably, the Commission received greater detail from the national press than the regional press.

8.0 Current practice

8.1 There were a number of instances of good practice. Contractual compliance with the Code of Practice is widespread, with further references to the necessity to abide by its requirements to be found in staff handbooks, and in regular internal reminders to journalists – both written and during meetings with heads of departments. Many newspapers told the Commission that the Code of Practice was available on the company’s intranet or that the editor wrote to journalists with copies when they joined the company or when the Code was updated.

8.2 Some publications also provided formal legal training for journalists or had updated their contracts with journalists to make explicit reference to the Data Protection Act.

8.3 There was a reference to the PCC’s own series of training seminars for journalists which have, among other things, raised awareness of when the Commission considers subterfuge to be appropriate. Some publications had had, or planned, internal ‘master classes’ on particular issues to achieve similar results and update journalists on the legal position.

8.4 One company had a ‘Review Group’ of editors which reported to the Chief Executive on matters of editorial policy and which was responsible for raising awareness of the Code and the law among journalists across the company.

8.5 There was less specific feedback about the circumstances when subterfuge might be acceptable or how journalists would know when the public interest exceptions to the Data Protection Act might apply. There was an assumption that such occasions would be rare, and when it was referred to in the responses the Commission was told that journalists would be expected to consult with the publication’s lawyers, editor or managing editor.

8.6 One newspaper told the Commission that, in addition to the internal controls that were in place, the threat of negative publicity along the lines of that experienced during the Goodman case would be a sufficient deterrent.

9.0 Data Protection Act

9.1 The Commission had specifically highlighted the DPA in its letter to the industry following the publication by the Information Commissioner of two reports titled *What price privacy?* and *What price privacy now?*

9.2 In those reports, the Information Commissioner published details of newspapers and magazines that had been paying inquiry agents for information. There was a suspicion that some of the information may have been obtained in breach of the Data Protection Act. The Information Commissioner called on the industry to bring forward proposals to clamp down on the illegal trade in information. He also called on the government to increase penalties for breaching the Act to two years' imprisonment. There would be no exemption from such a penalty for journalists.

9.3 The Commission condemns breaches of the DPA – or any law – when there are no grounds in the public interest for committing them. However, it has said before that it does not consider that the case for stronger penalties has been made out. Jailing – or threatening to jail – journalists for gathering information in the course of their professional duties is not a step to be taken lightly, and would send out a worrying message about the status of press freedom in the United Kingdom.

9.4 It seems to the Commission from the exercise it has just carried out that the DPA is taken seriously across the industry. As highlighted above, some companies have rewritten their journalists' contracts specifically to make reference to the DPA. Others had specific training on the Act. There were numerous references to the Information Commissioner's work.

9.5 The industry has also been working together to draw up a practical note for journalists on how the DPA works and applies to them.

10.0 Conclusions and recommendations

10.1 It is essential that the type of snooping revealed by the phone message tapping incidents at the News of the World is not repeated at any other newspaper or magazine. Such events threaten public confidence in the industry, despite the considerable change in culture and practice that has undoubtedly occurred over the last decade and a half, leading to greater accountability and respect by the press for the privacy of individuals.

10.2 But it is similarly important that the industry guards against overreaction. There is a legitimate place for the use of subterfuge when there are grounds in the public interest to use it and it is not possible to obtain information through other means. It would not be in the broader public interest for journalists to restrain themselves unnecessarily from using undercover means because of a false assumption that it is never acceptable.

10.3 This balance will be achieved when journalists are confident about where the line is drawn. The Commission welcomes the numerous initiatives that are underway to raise awareness of the Code's requirements on subterfuge and the law; and it endorses the decision by the industry to draw up guidelines on compliance with the Data Protection Act. These will complement those drawn up by the PCC itself in 2005.

10.4 The Commission believes very strongly that the impact of these initiatives should be assessed before the government proceeds with its proposals to increase the penalties for journalists who breach the DPA to two years in prison. Such a move would be difficult to reconcile with notions of press freedom. The mere threat of a custodial sentence could be enough to deter journalists from embarking on

legitimate investigations, despite reassurances about the public interest exemption from the Information Commissioner.

10.5 As a result of this inquiry, the Commission has a number of specific recommendations, drawn from the News of the World episode and best practice around the UK. In particular:

- Contracts with external contributors should contain an explicit requirement to abide by the Code of Practice;
- A similar reference to the Data Protection Act should be included in contracts of employment;
- Publications should review internal practice to ensure that they have an effective and fully understood “subterfuge protocol” for staff journalists, which includes who should be consulted for advice about whether the public interest is sufficient to justify subterfuge;
- Although contractual compliance with the Code for staff journalists is widespread, it should without delay become universal across the industry (the PCC will be pursuing this further);
- There should be regular internal training and briefing on developments on privacy cases and compliance with the law;
- There should be rigorous audit controls for cash payments, where these are unavoidable.

10.6 The PCC recognises that it has a key role to play in assuring the high journalistic standards that are the cornerstone of a free press and a credible system of self-regulation. To that end, the Commission will continue to offer free training seminars to UK publications. It will invite all national newspapers to attend a seminar in July 2007 specifically on subterfuge and the public interest. It will continue its training courses for budding journalists around the UK. It will, increasingly, take part in and promote seminars and debates on the great issues surrounding freedom of expression and journalists’ responsibilities in a digital age.

10.7 Finally, the industry, and the general public, should be in no doubt that the Commission will continue to take the severest view of any publication which uses inquiry agents to gather news in a manner that would otherwise breach the Code.