

A man v British Medical Journal

Clauses noted: 14

A man complained to the Press Complaints Commission through his son that an article published in the British Medical Journal in 2009 had failed to protect him as a confidential source of information in breach of Clause 14 (Confidential Sources) of the Editors' Code of Practice. The complainant's son was engaged in direct correspondence on various issues with the journal from November 2009 until the complaint to the PCC was formalised in late December 2010.

The complaint was not upheld.

The article examined the issue of gagging clauses in NHS contracts, using the complainant's case as its primary focus. The complainant had left his employment with an NHS Trust after raising a number of concerns about its working practices. He had signed a compromise agreement with the Trust, which included a confidentiality clause that prohibited all communication with the media. The Trust had made a severance payment but reserved the right to sue for its return if the complainant breached the terms of the agreement.

Following related legal proceedings, the compromise agreement and other documentation had been made public. Concerns had been raised at an early stage, on numerous occasions, through the complainant's son, that publication of direct quotes from the complainant - rather than, for example, extracts from the documents which appeared to have entered the public domain - would risk a breach of the confidentiality clause. The complainant had entered into dialogue against this background.

The article, when it appeared, included direct quotes attributed to the complainant. The complainant said that the "rules of engagement" had been established at an early stage of the conversation with the reporter: "These were that I was happy to speak openly, honestly and fully... The reciprocation of this 'goodwill' was that my interests would be protected", with particular reference to the severance payment. The complainant considered that the inclusion of direct quotes "could have been" very damaging to his interests: "Had this happened, I would very definitely have considered this to have been a breach of the faith I had shown". He asked for the article to be removed from the journal's website and to receive a private letter of apology.

The journal did not agree that it had failed in its obligations under Clause 14: the complainant's identity as a "whistle-blower" had previously been established publicly as a consequence of the related legal proceedings, and the quotes did not identify him as the source of the information in the article. Moreover, it denied that any agreement had been in place not to quote the complainant, although it was aware of his concerns in this regard. The journal had initially attempted to write the article without direct quotations from the complainant, but had been advised that the article was potentially defamatory of him. It had, therefore, invited the complainant to provide comments.

In the conversation with the reporter (a recording of which was provided to the Commission) the complainant, who did not specify that his comments were provided off the record, had asked how the information he was providing was to be used. The reporter had said that he needed to speak to the complainant to "put the icing, as it were, on the cake".

The journal also argued that the complainant had appeared to welcome the article judging by his "rapid response" to it, which had been posted following publication; the complainant's son had also commented positively on the article. It was willing to write to the complainant personally to apologise for any misunderstanding and any distress that may have been unintentionally caused. It saw no reason why the article should be removed from public view.

The complainant's son made clear that their initial responses were influenced by the fact that they would have had to rely upon assistance from the journal, had any legal action resulted from the publication of the article.

Adjudication

Under the terms of Clause 14, journalists have a moral obligation to protect confidential sources of information. The purpose of this clause is to enable sensitive, often significant, information to be provided to publications by individuals without fear that their identities will be revealed against their wishes. The Commission has previously made clear that when considering complaints made under Clause 14, it will take account of whether a publication has agreed to treat the individual as a confidential source.

The question in this instance was whether such an agreement had been reached in relation to the nature of the complainant's involvement in the story. It was clear that, from the outset, the journal had accepted the need for sensitivity and care in its approach, and that the issue of potential risk to the complainant of having been seen to have cooperated with the journal had been discussed. However, in all the circumstances, the Commission did not consider that a breach of Clause 14 could be established by the complaint, for the following reasons.

The journal had been reporting on a case involving a whistle-blower who was party to a confidentiality clause which precluded him from speaking to the media. The complainant had not been identified as being at the heart of the story against his wishes; on the contrary, he had explicitly consented to being named in the article. His name, and details of the case, had, in any event, appeared in documents which had become publicly available.

The complaint rested on whether the complainant should have been regarded as a confidential source in the specific context of a conversation he had had with the journalist. The complainant argued that concerns had been raised, in advance of this conversation, over the potential legal difficulties that could occur if he had been known to have spoken directly to the journal. The journal acknowledged this, but said that no agreement had been reached about the way in which the direct quotations were to be used.

The Commission found that this question was the subject of some considerable dispute, not least in regard to the basis upon which the interview - undertaken in order to offer the complainant an opportunity to respond to claims concerning him - had taken place. The Commission was not in a position entirely to reconcile the opposing positions of the parties.

The Commission made clear that it would have been preferable for the parties to have reached a clear agreement before publication. In particular, the journalist concerned should have expressly addressed the issue about quotation during his conversation with the complainant. It was regrettable that this had not occurred.

However, the Commission was not persuaded that there was a "moral obligation" for the journal to have protected the complainant as a confidential source for the quotes. It did not consider, having read the transcript, that there was any implied agreement between the complainant and the journalist about the use to which the quotes would be put. Indeed, the tone of the exchange, in the Commission's opinion, suggested that the quotes were being obtained for publication. There was also no unequivocal express agreement reached about confidentiality in the exchanges prior to publication between the complainant's son and the journal. The discussions about the complainant's interests fell short of being an agreement between the parties that no direct quotes would appear.

The Commission also noted that, immediately following publication, the complainant had not directly complained about the use of the quotes, or suggested that any agreement about his status as a confidential source had been breached. The complainant had in fact posted an on-the-record

response to the published article under his own name, describing it as "sensitive and accurate". He had also responded directly to the journal in a positive fashion about the content of the article.

In all the circumstances, the Commission did not conclude that there was a breach of the Code. It did wish to highlight that journalists should strive to be absolutely clear when dealing with members of the public about the purpose - and status - of their conversations.

The complaint was not upheld.

Relevant rulings

A man v Oxford Mail, 2010

Foster v Cambridge Evening News, 2006

Adjudication issued 01/08/2011