



Our Ref: PJ/SB/K0006

Tim Toulmin
Director
Press Complaints Commission
1 Salisbury Square
London
EC4Y 8JB

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Information Commissioner

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Tel: 01625 545700
Fax: 01625 524510

e-mail: mail@ico.gsi.gov.uk

Website: www.informationcommissioner.gov.uk

Dear Tim

Apologies for the delay in getting back to you with comments on your note headed "Data Protection Act, Journalism and the PCC Code".

Before commenting, however, I ought to congratulate you on your appointment as Director. I saw the piece in 'The Independent'.

I think the Q and A approach makes sense.

"What is the DPA designed to do?"

At the risk of making this answer unduly long I think it might be worth considering replacing the existing opening sentence in order to ensure the 'data quality' requirements are touched upon. Perhaps something along the lines of "The DPA requires those who use information about individuals for a business purpose to observe rules of good information handling practice to ensure such information is obtained and used appropriately and is accurate, relevant and up-to-date".

"What counts as the public interest?"

"The PCC Code does not require demonstration of the public interest for compliance with every clause or to justify publication." I wonder if this sentence (and the paragraph as a whole) are as clear as they could be? If the point is that though the Code does not require that public interest be demonstrated to justify publication it does give guidance on what may be covered by the public interest, this point could be made more clearly.

"Are there any rules on obtaining personal information?"

My major concern is the way the unlawful obtaining offence (s55) is covered. The reality is that if you are paying a private investigator several hundred pounds to obtain itemised phone records or details of a private bank account, you will almost certainly commit an offence. It seems to me unlikely that the "required by law", "right in law", and "reasonably believed would have had data controllers consent" (question, why not ask for it directly then?) defences will be likely to apply to journalists. Therefore, in a note not claiming to provide exhaustive definitive legal guidance is it really worth having them in? On the contrary, I think the reference to the "public interest" defence probably needs amplification.

I recognise that giving authoritative advice on when the public interest will apply is difficult. The point is that you are usually (perhaps always) weighing two competing public interests. When considering whether the public interest defence applies you are weighing on the one



-2-

hand the public interest in journalists obeying a law designed to ensure personal information is not obtained without the authority of the organisation holding the information against the public interest in exposing something of obvious public importance such as venality by a politician etc.

Given the importance of freedom of expression it is fair enough that when deciding whether publication is in the public interest for the purposes of s32 (1) (c), the assumption is that the publication of much that is not of great importance will nevertheless be in the public interest. However, it is our view that in order to demonstrate that procuring private information by paying a private investigator, or by bribing an employee, that is actions which would normally be criminal offences, are justified in the public interest, the publisher would have to convince a court that the information concerned was of such vital importance that using underhand methods was, exceptionally, justified. This defence has not yet been tested in the courts. I hope it will be shortly. However, we are confident that the courts will be reluctant to accept it as a defence, for example, for paying for a celebrity's phone records where there is no question this will reveal significant wrong doing. In summary, my concern is lest your note gives the impression that as long as a journalist considers there is a public interest in the story he/she is researching, there is little risk of committing an offence even if information is obtained by bribery.

I have similar reservations about the reference to National Security. The exemption (s28) does expressly refer to s55. You are right that the exemption is generally applicable in that it is not available only to state officials. However, I am confident that Parliament had in mind security officials obtaining information by deception. I am sceptical whether a court would lightly accept the argument that a journalist obtaining information by deception in order to expose serious security weakness could claim that his actions were justified on the grounds of safe guarding National Security. I concede that, in exceptional circumstance, it is conceivable such an argument would succeed. However, again, I have doubts about including a defence which I think it likely will only rarely apply in a note of this character. I appreciate the note is aimed at editors as well as journalists and that an editor considering whether to seek to obtain information by payment in a matter of great importance might reasonably want to get his lawyers to consider the possible application of the National Security exemption. My concern is that a junior journalist might take unwarranted comfort from the fact that a piece he/she was working on arguably had a tenuous national security element.

In summary I wonder if there is an argument for more unequivocally urging caution before obtaining information by deception or by paying for it whilst flagging that in exceptional circumstances a defence might apply. You could advise that journalists should not lightly assume such defences are likely to apply and may be well advised to seek legal advice.

Best Wishes,

A handwritten signature in dark ink, appearing to read 'Phil'.

PHILIP JONES
Assistant Commissioner