

CLAUSE 10

Clandestine devices and subterfuge

IT IS a basic principle of journalism that reporters are open and transparent when they make inquiries about a story. This means they must tell people they interview who they are, who they are working for, and the nature of the story they are investigating.

They must not, as detailed in Clause 10, use hidden cameras or listening devices, intercept private messages or phone calls, or misrepresent who they are.

This was brought into dramatic focus when the phone-hacking scandal engulfed the newspaper industry. The victims of phone-hacking sought legal recompense, but accessing an individual's private voicemails is a serious breach of the Code as well.

Yet some of the most important stories revealed by the press involve the use of clandestine devices and subterfuge. Newspapers acting in the public interest have exposed scandals, unmasked hypocrisy and prevented crimes – and society has benefited as a result.

How is this circle squared? The key factor is that the

WHAT THE CODE SAYS

- 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 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 Page 120.](#)

newspaper or magazine engaging in subterfuge must clearly demonstrate that the investigation is in the public interest. A failure to do so means a breach of the Code. So an editor will need to think hard before deciding to engage in any of the activities prohibited by Clause 10.

As soon as a publication has embarked on an investigation using clandestine devices or subterfuge, the Code comes

into effect because it covers newsgathering – a breach could occur even if nothing is published.

It is no defence to say the investigation was brought to you, or carried out, by an agent or intermediary. Once you take ownership of the story you are responsible for ensuring that every aspect of it complies with the Code, even if initial inquiries were carried out by a third party.

Key questions to be asked include:

- Do you have a reasonable belief, based on credible evidence, that your investigation will uncover material that is in the public interest? How will you demonstrate to IPSO the basis of that belief? Fishing expeditions are not allowed.
- Do you have a reasonable belief, based on evidence, that all institutions or individuals subject to your investigation are engaged in the activity you are investigating?
- Can the information be obtained by any other means?
- Is the subterfuge involved proportionate to the public interest in the story you are investigating?
- Is there a public interest in publishing the material you have obtained?
- Have you kept a record of how you reached your decision on each of these questions?

It is no defence under Clause 10 to claim your investigation was justified by what it uncovered, or what happened after it was published. You must be able to show you had reasonable grounds to believe your investigation was in the

public interest before you launched it – which is why it is important to keep records. If the investigation was carried out by someone else, they must be able to demonstrate the consideration they gave to the public interest before embarking on it.

Within its first days of operation, IPSO chose to launch an investigation into a Sunday Mirror story about an MP that had involved subterfuge. The MP, Brooks Newmark, sent an explicit image to a reporter posing as a female Conservative Party activist and resigned as a minister after the newspaper published the story, which had been supplied by a freelance.

IPSO had not received a complaint but decided that the article and the newsgathering techniques used to obtain it raised issues under the Editors' Code of Practice and were a matter of public concern. It decided to make inquiries of the Sunday Mirror to ensure it had complied with its obligations under the Editors' Code. At the time it was not clear whether IPSO could conduct such an investigation of its own volition but following changes to IPSO's rules in 2016 it can now do so.

IPSO concluded that the use of subterfuge in the investigation was justified at each stage, and the investigation and article were in the public interest.

Subterfuge was justified because:

- There was sufficiently credible evidence of a story in the public interest.
- There were no alternative means of pursuing the story.

- It was proportionate to the initial evidence and then to the escalating behaviour of Mr Newmark.
- It was compliant with the obligations placed on editors.

Publication was found to be justified by the public interest in the material obtained. IPSO also made clear that even though the investigation was conducted by a freelance, the newspaper's editor remained responsible for ensuring that it complied with Clause 10.

Issues arising from an article in the Sunday Mirror on September 28 2014:
www.ipso.co.uk/news-press-releases/news/brooks-newmark-sunday-mirror-case-ipso-decision/

IPSO rejected a complaint against The Sun when it went undercover to investigate charity call centres following the suicide of charity campaigner Olive Cooke. Reports of her death highlighted the volume of charity fundraising requests she had received.

The complainant said the newspaper could not justify its decision to engage in subterfuge as it had no grounds to believe that this would expose unlawful conduct, crime or serious impropriety.

Furthermore, the newspaper's investigation had not uncovered information that could justify it in the public interest: the article stated that there was "no suggestion" the company did anything illegal, and the company was "scrupulous in instructing its employees to stick to acceptable practices".

The newspaper said the article was commissioned by its head of features as a direct result of Mrs Cooke's death,

which it believed demonstrated that cold calling vulnerable people, such as the elderly, was becoming "dangerous". This was a matter of considerable public interest.

The company where the reporter went undercover had worked for three of the charities that contacted Mrs Cooke before her death.

The newspaper outlined the process it had undertaken in considering the story. The head of features discussed the idea with the head of content, the managing editor, the head of the legal department and the editor. They considered whether the required information could be obtained by means other than subterfuge. It was decided that the only way to establish how the agency operated in its normal environment was to send a reporter to work undercover in its call centre.

The day before the article was published, there was a further meeting of senior editorial staff to consider whether the level of subterfuge employed was proportionate to the public interest in the material obtained. The team considered that the level of subterfuge was relatively limited, in that the reporter attended a training day at a business.

The findings of the investigation were also considered and the newspaper concluded that a minimal level of subterfuge was balanced against a considerable public interest, and the editor decided to publish the article.

IPSO did not uphold the complaint. It said the newspaper's investigation took place in the context of a widespread public debate about the fundraising techniques employed

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by charities and their possible effects on vulnerable people, and it focused on a call centre that had a specific and publicly-identified link to the charities that had reportedly been involved in Mrs Cooke's case.

The level of subterfuge employed was minimal, given the relative ease with which the reporter had been able to obtain a place on the training day, and the fact that the investigation had focused on sales techniques rather than confidential or personal information relating to identifiable individuals.

IPSO said that while alternative means for investigating practices in the sector generally were available to the newspaper, it was satisfied that it could not have obtained, and verified, the information it sought by open means.

The reporter uncovered no evidence that the company was acting contrary to any relevant law or regulation, but this did not eliminate the public interest in the story: it was relevant to the issue of whether the current laws and regulations were adequate.

IPSO concluded that, in the context of such significant public concern regarding charity fundraising practices, the low-level subterfuge employed was proportionate to the public interest identified.

Pell & Bales v The Sun:

www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=04088-15

If a freelance journalist employs subterfuge in pursuit of a story and subsequently sells the result to a newspaper, the editor is still required to ask the key questions regarding Clause 10.

IPSO rejected a complaint when a freelance reporter used subterfuge at a meeting addressed by a UKIP candidate. The story was published by the Daily Mirror. IPSO said the use of a hidden camera, and the journalist's failure to disclose his identity, was justified in the public interest to prevent the public potentially being misled by the actions of the complainant.

When the newspaper was presented with the story by the freelance journalist, it appropriately and satisfactorily considered the issues raised under the Code.

Nielsen v Daily Mirror:

www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=00776-15

When IPSO considered a complaint involving a reporter who had posed as a member of the public in a shop selling

cannabis flowers, it said the level of subterfuge or misrepresentation a reporter may engage in falls on a sliding scale.

The reporter had engaged in a very low level of subterfuge. She had simply acted as a customer, and had not used hidden cameras or clandestine listening devices or accessed information not accessible to the general public.

She had not actively concealed her identity as a journalist by constructing a false identity or denying she was a journalist.

IPSO said the Code was engaged to a limited degree and Clause 10 required a proportionate public interest defence.

It concluded that there was a public interest in publishing the information that had been acquired by the approach - that cannabis flowers were being sold openly in the complainant's shop.

Conway v dailyrecord.co.uk:

www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=04631-19