

The Press Complaints Commission and Privacy

This short paper has been drawn together to set out the manner in which the Press Complaints Commission deals with complaints of intrusion into privacy - and the factors it takes into account in interpreting the editors' Code of Practice. The paper deals with all the sections of the Code - a copy of which is attached - that touch on matters of personal privacy. This is, principally, Clause 3 - but also Clauses 4 (Harassment), 6 (Children) and 9 (Hospitals).

Before looking at a number of cases in detail, it is important to underline two key points about the interpretation of the Code.

The first is that it was never the intention of those that originally established the Code of Practice - nor indeed those who have amended it and kept it up to date since then - that it should be read narrowly and interpreted in a legalistic manner. It has always been intended that it must also be interpreted in spirit as well as letter - and that its interpretation be based on case law and precedents established by the PCC. That is why the PCC always undertakes a full investigation - hearing from both parties - before it can, according to principles of natural justice, reach a conclusion about whether or not the Code has been breached.

The second is that the newspaper industry itself decided that the investigation of complaints and the subsequent interpretation of the Code be carried out by an independent, yet expert, body. The PCC performs that function - having a combination of lay members (in the majority) and experienced editors. This philosophy was endorsed by Mr Justice Silber in ruling on the case for judicial review brought by the television news reader [redacted] 31st July 2001).

It is the role of the PCC to interpret the Code in letter and in spirit. That means it must take a number of factors into account in doing so - particularly on privacy matters where it has, over the years, built up a substantial body of case law. (It must be remembered that when editors are making judgements about the Code prior to publication, they are expected to - and do - take into account not just the letter of the Code but such precedents, which are available all the time on the Commission's web site, as well.)

In doing so, both editors and the Commission will always take into account a number of factors including:

- * the extent to which the material has, or is about to, become available to the public;
- * an assessment of whether a complainant has openly discussed similar matters in the past;
- * an investigation of whether a complainant has sold private material about themselves
- * whether the public interest is served by publishing private details or pictures.

In cases involving photographs that are alleged to have been taken and published in breach of the Code the Commission will consider whether complainants were in a place where they had a reasonable expectation of privacy.

A final - crucial - point needs to be underlined, arising from this introduction. That is that privacy - in the Commission's view - is not and cannot be an absolute right.

First of all, it needs to be balanced - as, indeed, the jurisprudence of the European Court in Strasbourg itself makes clear - with the rights of others to freedom of expression.

Second - and as importantly - privacy is a right which, if sold in some way, can be compromised. As Lord Wakeham, former Chairman of the PCC, frequently made clear, privacy is not a tap that can be turned on and off: those who talk about their private lives on their own terms must expect that there may be others who will do so, without their consent, in a less than agreeable way.

Lord Wakeham addressed this issue - in the context of the interview with Diana, Princess of Wales about to be broadcast by BBC's Panorama - in an article in *The Mail on Sunday* in the autumn of 1995. Its central premises remain true.

"Privacy is an inalienable right for us all..... But that privacy can be compromised if we voluntarily bring our private life into the public domain. Those who do may place themselves beyond the PCC's protection. And must bear the consequences of their actions." (19th November 1995)

Against that background, the following cases establish the Commission's jurisprudence in this area.

1. SELLING AND COMPROMISING PRIVACY

The PCC has always taken the common-sense view that privacy is not a commodity that can be sold on one person's terms. If an individual sells a story about his or her private life, then they limit their ability to complain and to protect themselves in future. Similarly, people who talk about private matters in public cannot be surprised if other newspapers write about similar matters - provided they do so in a manner which is proportionate. In short, individuals can intrude into their own privacy. These cases provide some useful examples which all editors bear in mind in deciding whether publication of a particular story is likely to raise a breach of the Code.

[redacted] v **The Sun** (*Report 32, 1995*)

In 1995 the Commission rejected a complaint from [redacted] against an article in *The Sun* which had reported on her own relationships and that of her husband and the [redacted]. The Commission took into account that [redacted] had clearly placed details of past and current relationships into the public domain by virtue of articles and interviews aimed at self-promotion. She therefore could not claim protection under the terms of the Code about an article that sought to contrast or clarify the impression that she herself had publicly given. This decision did not mean

that previous publicity *automatically* disentitles a complainant to privacy (see Scott and Pirie, below, for example); but in this particular case the Commission felt that the details of the complaint were not significantly removed from details that had been already placed in the public domain by the complainant herself.

[redacted] v Daily Mail (*Report 50, 2000*)

In 2000 the Commission rejected a complaint from [redacted] about a piece in The Daily Mail. It reported the comments of the complainant's ex-husband, detailing his attempt to gain greater access to his children who now lived with the complainant and her new husband [redacted]. The Commission had to consider whether the details in the article were proportionate to those already in the public domain as a result of the complainant. It felt that [redacted] had brought details of her children and family life into the public view, and considered that her ex-husband had a right to express his own opinions on the subject. In this case, [redacted] had not herself kept similar matters private and therefore could not expect the Commission to prevent the right of the newspapers to follow suit.

[redacted] News of the World (*Report 33, 1995*)

The report concerned the allegations of a man about an alleged affair with the complainant conducted fifteen years before. The Commission noted that the matter was not current or currently in the public eye. Indeed, the allegations focused on events that pre-dated [redacted] celebrity. Therefore, it considered that her subsequent exposure to publicity did not disentitle her to the right of privacy in a matter that she had never placed, nor had ever shown signs of placing, in the public domain. [redacted] had not revealed information of a similar or a proportionate nature to those exposed by the newspaper and therefore was protected by the Code of Practice. Furthermore, the Commission considered that complaint over privacy was in conjunction with a complaint over accuracy. It felt that, as the newspaper had not sufficiently substantiated its claims, the article was in itself misleading in breach of Clause 1. It therefore followed that, as [redacted] was entitled in any event to be protected from unsubstantiated allegations, her privacy had been unjustifiably intruded upon.

This adjudication underlined that the Code is most powerful in protecting the privacy of individuals where they have never sold or compromised their privacy in any way.

[redacted] News of the World (*Report 49, 2000*)

This adjudication concerned an article based on the story of the ex-fiancé of a well known TV celebrity. The Commission again had to consider whether the complainant had put sufficient material about her private life into the public domain to disentitle her to the protection of the Code. In this case, the Commission found that, although she had given a number of press interviews, she had not spoken about such highly intimate matters and had not therefore lost the protection of the Code. The Commission also made clear in this adjudication that it would balance a newspaper's right to freedom of expression against an individual's right to privacy, but concluded

that on this occasion the newspaper had made the wrong decision and the complaint was upheld.

v **The People** (*Report 60/61, 2003*)

A similar principle in relation to pictures was involved when the People published long lens photographs of the television actress J [REDACTED] sitting in her back garden. The Commission upheld her complaint. The editor had attempted to argue that publication was justified because his newspaper had previously paid the complainant a significant sum of money for features about her home and garden, including pictures of her in the same garden. The Commission rejected that argument because the Code is extremely strict about the use of long lens photography – calling it ‘unacceptable’ unless it is in the public interest – and it “did not consider that the previous publication of mutually agreed feature stories was a sufficient reason in these particular circumstances” to breach the Code. It reiterated in this ruling that people do not lose all their rights to privacy by selling pictures or information.

v **Mail on Sunday** (*Report 59/60, 2002*)

The principles regarding information in the public domain set out in the *Pirie* case were reinforced when the Commission adjudicated on a complaint from the family of the [REDACTED]. The [REDACTED] 17-year old daughter – [REDACTED] had recently split up with her boyfriend, who gave the paper an interview about his experiences with the family. The family said that the article was intrusive. However, the Commission found that [REDACTED] had previously spoken about very similar matters to those contained in the article and that there was no evidence of a particular desire on their part to protect their privacy. On the other hand, there was no material in the public domain similar to some of the information – including [REDACTED] about [REDACTED] and the Commission therefore upheld the complaint as it related to her.

v **Manchester Evening News** (*Report 55, 2001*)

The complaint was brought by the parents of a baby who was the sole survivor of a pair of conjoined twins. An injunction prevented the media from identifying the girl, [REDACTED] but the family went to court to overturn this injunction so that they could sell information and pictures about [REDACTED] to the media. The Manchester Evening News obtained photographs of [REDACTED] taken outside the hospital, but - after the newspaper published one - lawyers for the family successfully applied for another injunction, which stated that photographs could only be used with the permission of the parents. The parents then complained to the PCC that the pictures were intrusive and damaged the welfare of the child. The Commission declined to adjudicate under Clause 3 because of the Court’s decision but rejected all of the other complaints. First, it did not consider that a photograph of the infant’s face was a matter that concerned her welfare. Second, it drew attention to the fact that the Code - mirroring exactly the terms of Human Rights Act - specifically charges the Commission with having regard to the extent to which material has, or is about to, become available to

the public with the consent of the complainants. That was clearly the case in this instance. In its adjudication, the Commission said that it has “always taken the common sense view that where a complainant releases or sells information or photographs then they may become disentitled to the protection of the Code in certain circumstances. Privacy is - in the Commission’s opinion - not a commodity which can be sold on one person’s terms”.

v OK! Magazine (Report 55, 2001)

The Commission underlined the point in defending the rights of people who go to some lengths to protect their privacy or that of their families. In upholding the complaint about publication of photographs of the well-known writer [redacted] daughter on a beach in her swimwear, the Commission effectively held that it was precisely because the complainant had gone to such lengths to protect her daughter’s privacy that photographs of her would affect her welfare. Her image was not known because her mother had not put her into the public domain in any way, and the photographs were only taken and published because of the fame of her mother.

The Mirror/Sunday Mirror (Report 56, 2002)

The television personality [redacted] complained that pieces concerning an alleged sexual relationship that she had had with a man were inaccurate and intrusive. In dismissing the complaint about privacy, the Commission took account of the large amount of material in the public domain concerning her relationships, in particular the breakdown of her marriage. The Commission noted that as ‘the public had been kept closely informed about the state of the complainant’s previous relationships’ it was not unreasonable for people who had been in relationships with her to talk about them in public, providing it was in a manner proportionate to the material that was already in the public domain. It concluded that to deny them this opportunity would arguably infringe on their rights to freedom of expression.

v Islington Gazette (Report 62/63, 2003)

However, it is not the case that being famous *per se* deprives individuals of strong protection under the Code. The Commission is aware that some high profile people have had particular security problems as a result of obsessive fans, and concluded in a ruling on a complaint from the singer N [redacted] hat newspapers and magazines should not publish material likely to put into the public domain the whereabouts of a celebrity’s home (without consent).

2. PICTURES - PRIVATE OR NOT?

A number of complaints involve photographs of individuals taken without their consent or knowledge. It is a common misunderstanding that the Code outlaws the use of long lens photography without consent: it actually says that use of long lenses

is unacceptable only where pictures of people in '*public or private places where they have a reasonable expectation of privacy*' are published.

Again, the following key decisions underline these points.

[REDACTED] v Daily Mail/OK! Magazine (Report 52, 2000)

The Commission rejected complaints that photographs of the BBC newsreader [REDACTED] and her partner in their swimwear were taken with a long lens when they were in a place where they had a reasonable expectation of privacy. It found that a publicly-accessible Majorcan beach which was overlooked by other holiday apartments, at the height of the summer, was not somewhere where someone could reasonably expect privacy. It also found that publication of the photographs did not show her disrespect for her private life. This adjudication was subsequently challenged on judicial review - and the Commission's ruling clearly upheld by the Divisional Court.

[REDACTED] v Sunday Mirror (Report 53, 2001)

[REDACTED] former wife complained, *inter alia*, that photographs of her in a car park and on a petrol station forecourt were taken in a place where she had a reasonable expectation of privacy. The Commission did not agree and noted that she was outdoors and somewhere where any number of people were entitled to be without restriction. It also found that publication of the photographs did not show her disrespect for her private life.

[REDACTED] v Sunday Mail (Report 48, 1999)

The Commission rejected a complaint from [REDACTED] that a photograph of him taken while he was strolling in a hotel's grounds breached the Code. The Commission noted that the complainant was visiting the hotel as part of a high-profile trip to publicise a film and that as the land was owned by a hotel there would, by definition, be members of the public unknown to the complainant congregating there. He was also outside and heading for a public street, from where the photograph was taken. The Commission added that "there are areas open to the public where people may be considered to have a reasonable expectation of privacy just as there are places which are privately owned where an individual would not have such an expectation".

[REDACTED] v Daily Mail (Report 46, 1998)

The Commission agreed with the [REDACTED] that photographs taken with a long lens of him and his family while they were on the deck of their yacht were in breach of the Code. The yacht had been moored close to a private island on which the general public was not allowed in order to protect their privacy.

[REDACTED] v Hello (Report 43, 1998)

The Commission deprecated photographs of [REDACTED] taken while he was in Notre Dame cathedral shortly after the death of his wife. It thought that the inside of a Cathedral was clearly a place where, although clearly not somewhere in private owned, a person would have a reasonable expectation of privacy.

[REDACTED] v Sunday Sport (*Report 55, 2001*)

Photographs were taken with a long lens of the TV presenter [REDACTED] as she sunbathed topless at her Spanish home. The Commission found a blatant breach of the Code - she was not only in a private place but somewhere where she clearly had a reasonable expectation of privacy as she could not be observed by any passing member of the public.

[REDACTED] v Dorking Advertiser (*Report 58, 2002*)

The Commission upheld a complaint from a member of the public who had been photographed without his consent as he was eating afternoon tea in a quiet tearoom in Dorking. It said that the complainant had a reasonable expectation of privacy, and added that the Code makes clear that such places included both public and private property. The Commission concluded that 'customers of a quiet café could expect to sit inside such an establishment without having to worry that surreptitious photographs would be taken of them and published in newspapers'.

[REDACTED] v Brighouse Echo (*Report 64/65, 2004*)

A man complained that a newspaper had published a photograph of him that had been taken at the 10th Anniversary celebration of the opening of a local school. He considered that, as he was on private property at the time and had been privately invited to the event, the subsequent publication of his photograph represented an intrusion into his privacy. The Commission ruled that, while the event took place on private property, it was clear that 'the nature of the occasion was not private'. A senior member of the [REDACTED] had been in attendance in an official capacity and photographers had been invited to the school to record the event. The complainant did not have a 'reasonable expectation of privacy' and the newspaper was entitled to publish a photograph taken at that time.

3. INTRUDING INTO PRIVACY IN THE PUBLIC INTEREST

[REDACTED] v Daily Mirror (*Report 37, 1996*)

The Commission found a sufficient public interest in a story about an MP's affair with a married woman. While asserting that the status of a public figure did not necessarily justify the publication of their intimate details, it noted that [REDACTED] had led his constituents to believe - in his 1992 election literature - that he was a

family man, an impression that had not since been corrected. There was therefore a public interest in revealing details of his private affair.

Daily Mail (Report 37, 1996)

An article which reported the suicide of [REDACTED] during his trial for rape included family photographs and a reference to his first wife, who complained that the details were intrusive. The Commission sympathised but considered that the public interest in the case was great and that it had become of sufficient magnitude to warrant the publication of personal family details.

Daily Mirror (Report 29, 1995)

There was no public interest in reporting that the nephew of a cabinet minister was dying of AIDS.

v Daily Mail *inter alia* (Report 37, 1996)

The complainant's 15 year old daughter was diagnosed as having vCJD and newspapers identified her and reported this fact. However, the Commission considered that while the subject matter was firmly in the public interest, the right to privacy of the patient was paramount, and her identification was in breach of the Code.

v Eastbourne Gazette (Report 59/60, 2002)

While Clause 9 (Hospitals) allows for a public interest defence, it must be particularly impressive to over-ride the very strong protection that the Code affords to patients. In this case, there was no public interest in a reporter speaking to an accident victim in his bed without having identified himself to the hospital authorities first. This was a serious breach of the Code to which there could be no reasonable remedy – even though the newspaper had apologised to the complainant and sacked the journalist concerned.

v Peterborough Evening Telegraph (Report 59/60, 2002)

The complainant – a woman convicted of drug smuggling who was said to have amassed a considerable fortune from her illegal behaviour – complained that her local newspaper published photographs of the inside of her house. Normally such photographs would of course be a breach of the Code, but in these circumstances the Commission found a number of reasons why this was not the case. Not only had the photographs been taken by and provided by the police, but the Commission also agreed with the newspaper that there was a public interest in illustrating how the proceeds of her crimes had been spent.

v News of the World (Scotland), (Report 59/60, 2002)

The complainant was a lesbian [REDACTED] employee who became pregnant following artificial insemination. She planned to bring up the child with her partner but

complained that an article about the pregnancy breached Clause 3 (Privacy). The Commission found that while there was certainly a public interest in stories about same-sex parenting, the level of detail in the piece – particularly concerning how the baby was conceived and other health matters – was not justified and the Commission upheld the complaint. This adjudication re-inforced that newspapers must, when publishing intrusive detail, either demonstrate that it has been consented to, is in the public domain, or is in the public interest. It also underlined that while the subject matter of some stories might be in the public interest, there might be elements to them – concerning someone's health, for example – which are not.

[redacted] v **The Sun** (*Report 61/62, 2003*)

The Commission dealt with the issue of eavesdropping on private telephone conversations in this adjudication from [redacted] the man who controversially bought two flats on behalf of [redacted]. The newspaper had taped and published details of conversations between [redacted] and his mother. Despite the considerable interest in the story itself, the Commission concluded that such behaviour “is one of the most serious forms of physical intrusion into privacy” and that the public interest hurdle must therefore be set at a “demonstrably high level”. In this case, the Commission concluded that the telephone conversations merely illustrated the story in a manner that was already well known. There was no strong public interest to justify the breach of the Code.

[redacted] v **Sunday Telegraph** (*Report 64/65, 2004*)

The Commission found sufficient public interest grounds to justify an article that revealed how a policewoman, who had special responsibility for investigating racially motivated crimes, lived in a house containing Nazi memorabilia. The article included pictures taken inside the complainant's home.

4. PROTECTING THE PRIVACY OF CHILDREN

While the Code gives greater protection to children under Clause 6 of the Code, it is another common misconception that it outlaws all pictures of children taken without consent. The Commission will bear in mind whether the photographs concern a child's welfare, where they were taken and whether they might embarrass or inconvenience a child. As noted in Section 1 above, the Commission will also take into account the extent to which a parent has compromised the privacy of a child.

[redacted] v **Hello! Magazine** (*Report 52, 2000*)

The complainants said that a photograph of their child, taken while he sat in a push-chair in a public street, breached the Code. The Commission noted that the Code does not require editors to seek consent before publishing *any* pictures of a child under the age of 16, as this would mean no pictures at all could be published without consent. It was only those that could have ‘involved the welfare of the child’ that required

consent. In the case of Donald, the photograph was an innocuous image, unaccompanied by personal details and taken in a public place, and was therefore not in breach of the Code. The Commission reaffirmed this principle in *Kingston v Hello! Magazine* (Report 55, 2001) and *Beckinsale v Daily Mail* (Report 62/63, 2003).

[redacted] v Daily Sport (Report 49, 2000)

Photographs of the [redacted] son kissing a girl at a party were held to be in breach of the Code. The Commission pointed out that newspapers should take particular care to seek full and proper consent when publishing pictures of children which might embarrass them, interrupt their schooling or damage their welfare in some other way. It also noted that the photographs had only been published because of the identity of the boy's parents, in breach of Clause 6 (v) of the Code.

[redacted] v OK! Magazine (Report 55, 2001)

As outlined in Section 1, the photographs of the eight year old daughter of [redacted] were only taken and published because of the identity of her mother, and were taken with a long lens in a place where the girl had a reasonable expectation of privacy.

[redacted] v Mail on Sunday (Report 47, 1999)

The article reported the decision by a local Catholic school to admit [redacted] while rejecting other local children. The Commission had to consider whether the story, in as much as it focussed upon the daughter of [redacted] was in the public interest. It did not deny the possibility that exceptional circumstances may arise in the future in which the child of a public figure could be named in relation to a story of great public interest. However, it believed that, in this case, the naming of the child was not justifiable in the context of the article as a whole. Furthermore, the Commission noted the Code's responsibility to protect vulnerable children. In this case, it considered that [redacted] would start school at the centre of a row over the validity of her admittance and felt that the story therefore had significantly affected her welfare at a particularly crucial time.

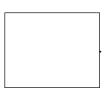
The Commission was also concerned about the apparent inaccuracy of the story. The Commission felt that the implication of the article, that [redacted] had been accepted at the school as a result of her father's position, had not been properly substantiated by the newspaper. As a result, it considered that the article was in breach of Clause 1 (Accuracy) of the Code of Practice. It therefore followed that, because the article was misleading, there could be no public interest in its contents. The breach of Clause 1 necessarily would demonstrate a breach of Clause 6 (Children) in that untrue allegations connected to a child would automatically harm her welfare and obviate the public interest defence.

The Commission - in line with the precedents set out in Section 1 - also noted the extent to which [redacted] had gone to protect the privacy of their daughter.



Daily Telegraph (Report 57, 2002)

The Commission upheld a complaint about an article which revealed the university to which [REDACTED] had applied. The application concerned [REDACTED] private choices and the Commission considered that the press must be able to demonstrate that commenting upon such applications at a crucial time in an individual's education is - in the terms of the Code - "necessary". There was no public interest in the story as the decision to apply to the university did not put [REDACTED] at odds with government policy or any public statement of his parents. However, in underlining the fact that the children of the [REDACTED] are not public figures in their own right, the Commission warned that "it is much more difficult to protect any individual where he or she begins to acquire a public profile in their own right, for instance by making public appearances. Privacy is best maintained when not compromised in any way".



Eastbourne Argus (Report 59/60, 2002)

Upholding a complaint from the father of a 12-year old victim of crime, the Commission adjudicated for the first time under the new part of Clause 10, which states that 'particular regard should be paid to the potentially vulnerable position of children who are witnesses to, or victims of, crime'. In this case the newspaper had identified the complainant's daughter – who had been the victim of an attempted kidnap – in an interview with another victim. Sufficient regard to the vulnerability of the girl had not been paid by the newspaper, and the complaint was upheld.



Welwyn and Hatfield Times (Report 61/62, 2003)

The Commission reiterated that journalists must not interview children under the age of 16 (on subjects involving their welfare) without the consent of a parent or guardian. The significance of this case was that the journalist had sought consent to a schoolboy – but from the wrong person. She had asked permission from the boy's mother's partner, rather than his mother. The Commission therefore underlined that journalists must take care to seek consent only from those in a position to give it.

CONCLUSION

This short paper - and the accompanying documentation - sets out a number of principles which guide the Commission in the application and interpretation of the Code. A number of conclusions can be drawn from this brief survey.

1. Privacy is not an absolute right. It can be compromised by the actions of an individual - or intruded into in the public interest.
2. Privacy is not a commodity that can be sold on one person's terms. The Code - which mirrors the terms of the Human Rights Act - is not designed to protect

commercial arrangements, and is at its strongest where it is safeguarding the rights to privacy of those who do most to protect themselves.

3. If a person sells material about his or her private life - or indeed talks about his or her private life in public - then they may limit their ability to complain and protect themselves in the future.
4. The protection of personal privacy does not extend to the taking of pictures in public places - or the protection of material that is about to enter the public domain.
5. Where children are concerned, the need for protection of privacy is greater - but is linked to whether or not a photograph or story impinges on the private life of a child in a way which might damage his or her welfare.

Against this background, the PCC will continue to adjudicate on whether or not the Code has been breached, taking into account not just the letter of the Code but the case law laid down by these adjudications.