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Is your source ever really safe?

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Doctor David Kelly told the House of Commons Foreign Affairs Select Committee that one lesson he had learned was never to talk to journalists. Despite the valiant attempts by Andrew Gilligan, the BBC and Susan Watts, the confidentiality he had hoped for as an anonymous, non-attributable source had crumbled. Susan Watts had tried to conceal the identity of her source from the curiosity and demands of her employer; it is also likely that the Government, through intelligence voice-pattern analysis of published quotations and other forms of surveillance, would have had a good idea that Kelly had been the person voicing criticism to Gilligan and other journalists. The political violence of the battle between the Government and the BBC forced Kelly to surrender the confidentiality he had hoped for.

In the Commons committee room, Kelly struggled to throw the politicians off the scent. Just as the BBC was happy for the Government to be given the impression that Gilligan's single source had been in the intelligence services, Dr Kelly was happy for the politicians to think that he could not have been the source for the "sexed up" charge. He did not want to be unmasked as the person who had produced the name "Campbell" and indicted a personalised culture of propaganda and exaggeration that politically distorted intelligence in the run-up to war.

This has been a bloody affair for journalism and governance. The ethics of media and politics have been subjected to a forensic trial never seen before. The Hutton inquiry has been primarily about issues of right and wrong and not law. Hutton will be pronouncing on what ought to have been done according to good conscience and moral standards, rather than what had to be done according to the law.

The British media has also been subjecting itself to an agonising ritual of soul-searching and bitter recrimination. Andrew Gilligan and the BBC, to their credit, have shown humility in admitting their mistakes - Gilligan confessed he was not thinking straight when he admitted to politicians on the Commons' Foreign Affairs Select committee that he believed Dr Kelly had been the source for Susan Watts's *Newsnight* report. Their regret has been coloured with the gloom of hindsight. There has been no rectitude or justice to be won in this wretched affair.

The actions and words of journalists, civil servants and politicians destroyed the self-esteem of one of the world's foremost experts on weapons of mass destruction. Dr Kelly was a vital asset for the United Kingdom. He was trashed, and driven to take his own life when he was trying to tell the truth about the unreliability of the claim that Iraq could launch weapons of mass destruction within 45 minutes.

A basic principle in law has been in the background to this affair. Scribbled in a Downing Street minute when politicians and civil servants scrambled to deal with the implications of Dr Kelly's death was the expression "duty of care". Had Government properly executed its duty of care to Dr Kelly? Had journalism fulfilled its duty of care to the scientist who

had been prepared to speak out and whistle-blow on the misuse of intelligence? Again, with the benefit of hindsight, could the practice of journalism have done more to protect Dr Kelly? Is confidentiality so absolute an obligation that journalists should not surrender that confidentiality to their editors and proprietors? And does confidentiality extend beyond the grave?

The codes of journalism appear to be very clear. The UK National Union of Journalists took the initiative in drawing up a code of ethics in 1936 and it is the bedrock of the language of the code of practice set down by the Press Complaints Commission. Article 7 of the NUJ rulebook states: "A journalist shall protect confidential sources of information." The obligation brooks no qualification. The duty is deontological. In philosophical terms this means that not protecting the source is *always* wrong.

The PCC code is also categorical. Article 15 on confidential sources states: "Journalists have a moral obligation to protect confidential sources of information." As with the First Amendment of the U.S. constitution, the confidentiality rule does not explain how it should be applied in different contexts. Nor does it allow any public interest exception to its clause on confidentiality. The NUJ code permits transgressions on the basis of the public interest. This includes "preventing the public from being misled by some statement or action of an individual or organisation" and "exposing hypocritical behaviour by those holding high office".

British law on journalists' sources is teleological or morally consequentialist. In other words, the absolute rule is compromised, and as a result journalism is vulnerable to the attentions of the judicial balancing exercise. Section 10 of the 1981 Contempt of Court Act states: "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible unless it is established to the satisfaction of the court that it is necessary in the interests of justice or national security or for the prevention of disorder or crime."

The *Guardian*'s then editor Peter Preston paid a heavy price for thinking in 1984 that this would be legal protection for the story his paper had published on the arrival of Cruise missiles at Greenham Common. The source had been civil servant Sarah Tisdall, who had anonymously leaked a document. The codes did not provide specific guidance on the obligation to unknown sources for sensitive documents. But British journalism learned a horrible lesson.

Avoiding the martyrs

In post-industrial capitalist societies the judiciary enforcing the will of the executive tends to avoid making martyrs out of journalists and editors, and will attempt to "sequestrate the assets" of the employing media corporation. This takes the decision of protecting sources out of the hands of the journalists and into the control of business managers and directors. Decisions will be based on the grounds of commercial reality rather than journalistic principle. The hyper and postmodernist state controls journalism economically through debt and market economic forces. The penalties for journalists through the ages have moved from tongue removal, branding, nose and ear slitting, hanging, and imprisonment to the economic and social annihilation of financial disablement and unemployment.

There is no need to lose the moral high ground by forcing journalists to pack their toothbrushes and enjoy the hospitality of prison board and lodgings. The State realised its mistake in 1963 when the *Daily Mail*'s Brendan Mulholland received six months and the *Daily Sketch*'s Reg Foster four months for refusing to disclose sources to the Radcliffe Inquiry into the Vassall sex and spy scandal. A rather tawdry affair was immediately transformed into a crusade for press freedom and journalistic martyrdom.

To discourage whistle-blowers the State has only to demonstrate that journalistic confidentiality is a worthless pledge made to those tempted to inform. This is why public servants who speak out have to be exposed, humiliated and jailed. The Appeal Court ordered *The Guardian* to give up Sarah Tisdall's document or be sequestrated, and Sarah went to prison. Former MI5 officer David Shayler had to be jailed. Everything was done to embarrass and legally and financially harass the journalists who dealt with him. A secret court order was obtained to discover all the telephone calls and credit card transactions made by Steve Panter of the *Manchester Evening News* when he investigated the failure to prosecute the prime suspect for the IRA's destruction of Manchester's city centre.

The pattern of law-making in relation to journalists' sources has served only to weaken the reputation and integrity of journalism. Journalists are entitled to some protection against police powers of search and seizure, but this is severely limited. Under the Police and Criminal Evidence Act 1984, "excluded material" includes "journalistic material acquired or created for the purposes of journalism". Excluded material is information and writing (notebooks or computerised information) that is held in confidence. Journalistic material not held in confidence is also protected in that the police have to use a special procedure to obtain it. But in practice, circuit judges more often than not give the police permission to seize such material through a court application. Most photographic and film material acquired through reporting requires special procedure if the police wish to seize it.

But the police more often than not override these shields when investigating any kind of crime; not just the serious and dramatic criminal offences of murder, terrorism and espionage. (The Terrorism Act 2000 and Anti-Terrorism, Crime and Security Act 2001 have created new offences of "withholding information on suspected terrorist offences". Journalists face prosecution if, during the course of their work, there is a failure to report the discovery of information about terrorism that might be of material assistance to the police.)

The Data Protection Acts 1988 and 1998 serve only to control journalists who set up and maintain structured systems of storing personal information about people. The exemptions for journalistic purposes are not absolute - they are not exempt from the requirement to register or give notification if they operate personal data systems. For the everyday reporter this is a bureaucratic and cumbersome law that most journalists can avoid only by not setting up or maintaining huge filing systems on individuals.

The Official Secrets Act 1989 was designed to stop "crown servants" from disclosing to journalists classified and sensitive information. There is no public interest defence for them and the British judiciary was not prepared to create one for David Shayler in the light of the Human Rights Act.

Journalists are an irrelevance if the State can terrify its employees into remaining silent. Journalists can be prosecuted only if they try to publish information they know to be damaging to national security and other sensitive categories of information. It is clear that

the State is much more likely to prosecute civil servants, police officers and spies rather than journalists, because there is a greater likelihood of obtaining a conviction.

The civil law on confidentiality is frequently used to prevent publication based on leaked documents and information from whistle-blowers. A public interest defence should be possible to defeat injunctions based on confidentiality, but journalism has to be much more defensive and protective of its sources and the degree to which it openly co-operates with judicial and police inquiries. The tactics of journalism and the process of protecting sources therefore need to move to a more stringent and deontological methodology. This is a key lesson to be learned from what emerged during the Hutton enquiry. Where possible, steps must be taken to place the story into the "privilege shields" of a press conference, public or council meeting, or better still in Parliament, so that it is fully propelled into the public domain and protected from libel litigation.

Steps for protection

If a document is relied on to support a potentially defamatory report, the original or a copy should be retained for any future justification defence. Everything must be done to avoid tipping off the people or organisation being investigated. If the document supports a sensitive national security issue, some consideration should be given to returning the document to the source. Accurate notes should be made from it. If a media organisation is unlucky enough to be served with an injunction which demands the source document, it is obvious there will be characteristics that would identify who provided it.

If the confidentiality of a source has been guaranteed, steps should be taken to protect the source by using a code of identification in all the notes and records of meetings and conversations. Credit cards, mobile phones, swipe cards and the attention of CCTV cameras should all be avoided during meetings so that the source cannot be geographically triangulated to journalistic encounters. The use of computers and e-mails in relation to all dealings with the source should be avoided as their secrets are easily yielded. Every effort should be made to disguise the style of style of language and syntax the source uses to make it impossible to secure identification through voice pattern and text analysis. Confidential sources should certainly be informed if they are being recorded - it is obvious that such recordings could incriminate the source in the future.

The nature of the contract of confidentiality should be made clear. Dishonesty and misrepresentation on the part of the source will end the agreement. The nature of the guarantee should be clear. The source should know if the journalist might have to disclose the confidence to the editor or proprietor. The question of whether the confidence will endure beyond death should also be cleared up.

Whatever the outcome of the Hutton Inquiry, the BBC, Andrew Gilligan, Susan Watts and other journalists clearly did all they thought they could do to protect Dr David Kelly as a source. But the fact remains that they did not do enough to prevent him from being bullied by the Government into giving himself up and then being abandoned in a virtual no-man's land of media and political frenzy.