

Liberal Democrat Party v The Daily Telegraph

Clauses noted: 10

Mr Tim Farron MP, President of the Liberal Democrat Party, complained to the Press Complaints Commission that a series of articles in The Daily Telegraph on 21 December 2010, 22 December 2010 and 23 December 2010 contained information which had been obtained using subterfuge in breach of Clause 10 (Clandestine devices and subterfuge) of the Editors' Code of Practice.

The complaint was upheld.

The articles quoted a number of comments made by senior Liberal Democrat MPs in their constituency surgeries which had been secretly recorded by the newspaper's journalists posing as constituents. The MPs featured included the Business Secretary, Vince Cable, in addition to Ed Davey, Steve Webb, Michael Moore, Norman Baker, Andrew Stunell, David Heath and Paul Burstow.

The complainant - who was formally acting on behalf of the MPs concerned, with their consent - said that the newspaper had embarked on a 'fishing expedition' "designed solely to entrap Members of Parliament" which had no plausible public interest justification. While robust media scrutiny of politicians was critical for a vibrant democracy, the manner in which the newspaper had sought information in this case had ramifications for the future: this would mean that MPs of all parties would be constrained from engaging in frank discussions with their constituents. He said that the practice threatened to undermine the privileged nature of the relationship between MPs and their constituents.

The newspaper denied that it had undertaken a 'fishing expedition'; rather, it had acted upon specific information it had received from parliamentarians and members of the public. In private meetings at the Conservative party conference in 2010, the editor had been informed by Conservative ministers including a Cabinet minister (themselves informed by local party activists) that the public and private views of some Liberal Democrat ministers were increasingly at odds, particularly on the issue of Coalition policies which had been backed publicly. Similar concerns had also been expressed separately to senior reporters and the issue was raised with several MPs in the course of various engagements. A consistent theme began to emerge of growing Liberal Democrat private dissatisfaction. The newspaper said that the Conservative ministers were understandably reluctant to go on the record, or provide information or contacts in Liberal Democrat constituencies to back up their concerns.

Additional enquiries with Liberal Democrat contacts had also led to claims of a growing divide within the party between those who wished to support Nick Clegg, and the Coalition in general, and those who wished for the party to assert its identity more clearly in public. Several people declined to go on the record. At the same time there were claims of Liberal Democrat tension over tuition fees with rumours of ministers wishing to resign (which were strongly denied in public). The newspaper had also been contacted by several readers with the same concerns.

After editorial discussion - where it was concluded that most of the information gathered could not be used as it might identify sources - the newspaper began to consider the decision to go undercover to test the allegations. Previous newspaper investigations using extensive subterfuge were discussed, which had not been subject to censure by the PCC. The subterfuge had been kept to a minimum and was proportionate to the circumstances - posing as members of the public at constituency surgeries. The newspaper had been informed that the apparent dissatisfaction was, or potentially was, systemic (an impression strengthened after the first approaches). As such, a decision was taken to approach as many ministers as possible, especially in view of the attempt to establish the weight of its case. While it had attempted to arrange interviews with the entire Liberal Democrat front bench, ten ministers had been visited in total.

The newspaper said that its enquiry was undertaken in the public interest: it was predicated on the fact that there was "a reasonable expectation that some legitimate public interest would be served" (a factor to which the Editors' Codebook made reference), based on information received from multiple sources. Visiting constituency surgeries was the only way to do so without disproportionate effort. All the issues related to public policy under the responsibility of the minister and nothing personal had been raised. The manner in which the reporters sought to test the allegations was shown in the transcripts of the interviews which the newspaper provided as part of its evidence.

In the event, most of the ministers expressed opinions which were at odds with their public positions and statements: Ed Davey had publicly defended Coalition cuts in October 2010 yet, in the surgery, he had said that he was "gobsmacked" by the announcement on child benefits which was "dreamed up out of the blue" and said that housing benefit cuts were "deeply unacceptable" as they were going to "hit people while they are down"; Vince Cable had spoken carefully in public about the News Corporation bid for BSkyB owing to the legal process, yet had said to the reporters that he had "declared war on Mr Murdoch" ("I have blocked it, using the powers that I have got...his whole empire is now under attack"); Michael Moore had, on the day of the visit, told the BBC that the rise in tuition fees would prevent universities being "starved of the money they need to provide quality education" and - while the issue was "difficult" - there was no "workable alternative" but, to reporters, his view was very different (the decision was "ugly", "horrific" and "a train wreck" and the party's reneging on their election pledge was "the worst crime a politician can commit"); and Paul Burstow had subsequently publicly acknowledged his embarrassment that he had said "I don't want you to trust David Cameron".

The newspaper said that its investigation had proved that the Liberal Democrat members of the Government were not consistent in their private and public statements, which it rightly brought to the attention of its readers and the wider public. The newspaper argued that a constituency surgery was not a private forum: while MPs had a duty of confidentiality to their constituents, constituents did not have such a duty for their MPs.

The complainant said that it was the public statements and comments of ministers which were the basis of collective ministerial responsibility, regardless of what other views they might hold, and which formed the basis on which politicians were judged by the electorate.

Adjudication

Clause 10 of the Code states that newspapers "must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices". It also makes clear that "engaging in misrepresentation or subterfuge...can generally be justified only in the public interest and then only when the material cannot be obtained by other means". The Commission has consistently ruled that so-called 'fishing expeditions' - where newspapers employ subterfuge and use clandestine devices without sufficient justification - are unacceptable.

In determining whether a newspaper has embarked on a 'fishing expedition', the Commission must have regard for the circumstances which led to the decision to employ subterfuge. The questions for the Commission in this case were, ultimately, as follows: had the newspaper demonstrated that it had sufficient *prima facie* grounds for investigation before its reporters were asked to go undercover, such that would justify the recording of numerous MPs at their surgeries without their knowledge; and was such an investigation (using hidden listening devices) justified in the public interest?

There was a fine balance to be struck here. The Commission accepted from the outset that there was a broad public interest in the area the newspaper had chosen to investigate: the unity of a Coalition government, which was something of a new political departure in Westminster. The Code's definition of what is in the public interest includes "preventing the public from being misled by an

action or statement of an individual or organisation" and the newspaper was seeking to highlight an apparent disparity between comments made by MPs on Coalition policies in public and comments made privately. The newspaper had said that it had acted on information from various sources, who had been unwilling to go on the record.

There were some grounds, therefore, for the newspaper's interest in this matter, and for it to devote resources to exploring how the Coalition was working in practice. In the Commission's view, the newspaper had not sought to discount the terms of the Code or the need for adherence to it. However, it felt that, nonetheless, the newspaper had reached the wrong decision in deciding to pursue subterfuge on this occasion for the following reasons.

First, the evidence on which the newspaper was acting (such as the Commission could see) was of a general nature. The newspaper did not appear to have any specific information (the significance of which could be established in advance) that the ministers in question had expressed private views at odds with Coalition policy. Rather, it was responding to broad assertions of party-wide disquiet, which perhaps could have been reported on an unattributed basis. It did so by focussing what amounted to disproportionately intrusive attention on a number of MPs (who had been selected purely on the basis of their ministerial position). This was demonstrated by the fact that - as the transcripts made clear - each minister had been asked to respond, in effect, to the same lines of questioning.

The Commission considered that there was an important dislocation here between the *prima facie* evidence and the method used to test it. It was notable, for example, that the newspaper was relying upon off-the-record comments from Conservative ministers on the subject of the Coalition to justify covert recordings of Liberal Democrats on the same subject. Those Ministers were being asked, in the Commission's view, to comment on a series of policy issues with the evident intent of establishing on which subject they might say something newsworthy.

Certainly, the level of subterfuge was - contrary to the newspaper's assertion - high. The Commission wished to make it clear that recording individuals using clandestine listening devices without their knowledge was particularly serious and intrusive, requiring a strong public interest defence. Secretly recording a public servant pursuing legitimate public business was without question a serious matter.

On this occasion, the Commission was not convinced that the public interest was such as to justify proportionately this level of subterfuge. The newspaper had provided some supporting material to establish the claim in advance that there were differences of opinion and philosophy within the Coalition government. This was, in the context of debate about politics in the UK, significant. But the Commission did not consider that it was enough to warrant the use of undercover reporters taping MPs as they went about their constituency work. The Commission had to have regard for the importance of the democratic process (which it was in the public interest to preserve), which could be threatened if journalists were to be allowed to use hidden devices to record MPs' views, expressed within the confines of their constituency surgeries, in order to test broad claims about policy matters. This was particularly the case in regard to Ministers who were required to act in accordance with the principle of collective responsibility when commenting in public.

For the Commission to have sanctioned this method, it would have had to be convinced that a high level of public interest could reasonably have been postulated in advance. It did not believe that the Telegraph - although acting no doubt with legitimate intent - had sufficient grounds, on a *prima facie* basis, to justify their decision to send the reporters in. The complaint was therefore upheld.

The Commission did feel that the newspaper had uncovered material in the public interest regarding the remarks made by Vince Cable about the News Corporation bid for BSkyB, which had led to him being divested of his role in that decision. However, there had been no suggestion that the intention of the newspaper had been to explore how he had been handling the bid (it made clear in its

coverage that Mr Cable had spoken “despite not being asked about the issue”), and the newspaper itself had chosen not to make it a focus of its first day’s coverage. The test for the Commission was whether there were grounds in the first place to justify the subterfuge: the Cable disclosures about Sky were not relevant to that.

Other published material did reveal discrepancies between what Ministers had said representing the Government and what they said to the reporters, and was related to the policy areas highlighted by the reporters (views on particular policies such as, for example, child benefits and tuition fees). The Commission had due regard to the public interest in revealing this information. But, in the end, it did not feel that the public interest was sufficient to provide justification for the subterfuge.

The Commission recognised that the issue of how journalists make use of subterfuge deserved scrutiny, and went much wider than the Telegraph’s actions on this occasion. It has undertaken to issue further guidance on the subject with a view to ensuring high standards across the industry.

Relevant rulings

Ryle v News of the World, 2001

Munro & Bancroft v Evening Standard, 2001

Monckton v Evening Standard, 2003

Adjudication issued 10/05/2011