The PCC and the Freedom of Information Act
By Julian Petley
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Journalists have been at the forefront of those calling for a Freedom of Information Act, and are rightly concerned at the catalogue of obfuscation and evasion which requests for disclosure under the new Act have encountered. And yet the body which regulates their profession, the Press Complaints Commission, looks set, with the connivance of the DCMS, to evade the Act altogether.

Last year, a working group within the Department for Constitutional Affairs was set up to determine which private organisations could be considered as exercising 'functions of a public nature' under section 5 of the Act. It drew up a list of criteria that could be used to identify such bodies, and on this basis a list was proposed by government departments.

The PCC is conspicuous by its absence. However, one of the working group's papers makes it abundantly clear that the PCC could indeed be defined as a public body for the purposes of the Act. Firstly, it suggests that bodies may perform public functions 'if they regulate commercial and professional activities to ensure compliance with proper standards', deploying techniques such as rule-making, adjudication and other forms of dispute resolution. Step forward the PCC's *Code of Practice*. Swiftly followed by its *Annual Review 2003*, which announces that 'much is rightly made of the Commission's success in resolving disputes. The Commission recognises that there will be some cases where only an adjudication is appropriate, but on the whole it believes that its role is to negotiate amicable settlements to cases where possible'. QED.

Secondly, the document notes that the courts have recognised a non-statutory regulatory body as exercising a public function, if, 'but for the existence of the body, the government would inevitably have intervened to regulate the activity in question'. As Geoffrey Robertson and Andrew Nicol argue in *Media Law*: 'the PCC is exercising a recognised public adjudicative function, as a government-brokered alternative either to a Calcutt-devised complaints tribunal or to a privacy law introduced by Act of Parliament'. Here again, it is the PCC itself that has provided – repeatedly – the grounds for considering it a public body for the purposes of the Act. For example, its aims and objectives, as set out in its *First Annual Report 1991* include: 'to secure support from the public, parliament and the Press for maintaining self-regulation of the Press'. And shortly after his appointment as chair of the PCC, Lord Wakeham told the *Press Gazette*, 17 April 1995, that 'it's the task of the PCC and the industry to make [the] system of self-regulation so successful that nobody can seriously want to pursue the statutory option'.

The advantages of the PCC being considered a public authority for the purposes of the Act are surely obvious. I recently brought together a number of accounts by dissatisfied complainants to the PCC ('A Modern Day Circumlocution Office?', in *Satisfaction Guaranteed? Press Complaints Systems Under Scrutiny*, MediaWise, 2004), and a recurrent criticism of the organisation was that it was highly opaque. What many complainants particularly disliked was the way in which it stitched up behind-the-scenes deals with offending newspapers and then presented these to complainants on a take-it-or-leave-it basis. Were the PCC to be considered a public authority in this context, then a complainant unhappy at their treatment by the Commission could ask to see all correspondence relating to their complaint in order to find out just what the PCC had been up to on their behalf. And, of course, exactly the same option would be open to any journalist dissatisfied with the PCC's handling of a complaint against an article by them.

On the other hand, the disadvantages – to the PCC – are equally clear. To apply the FOI to the PCC might well reveal evidence of brief and unsatisfactory consideration of cases, conflicts of interest, and communications with newspapers which have not been divulged to the complainant. Nor is the PCC likely to welcome a measure which would undoubtedly make it easier for its journalistic critics – such as *The Guardian*'s Roy Greenslade – to gather further evidence of what they see as the unsatisfactory way in which it all too frequently handles complaints.

Given the considerable energy expended by Lord Wakeham in trying to exempt the press – alone amongst British institutions – from the Human Rights Act, one suspects that his successor, Sir Christopher Meyer, has assiduously lobbied the DCMS to ensure that the PCC is Freedom of Information-proof. However the DCMS denies that, on this subject, any meetings between the two parties have taken place, or any correspondence exchanged. Thus the only course of action now is to make a request for disclosure under – yes, you guessed – the Freedom of Information Act. One can almost hear the shredders whirring...

Suspicions of a deal were amplified when Estelle Morris, in response to a parliamentary question from Clive Soley, stated that: 'The Freedom of Information Act does not apply to the Press Complaints Commission (PCC) as it is not a public authority. The Government strongly believes that a press free from any state intervention is fundamental to democracy. Designating the PCC a public authority would not be compatible with the Government's support for an independent body overseeing press regulation'. However, the more honest answer is that the PCC is not a public authority for the purposes of the Act simply and solely because the DCMS has refused to propose it as such. Furthermore, to suggest that allowing complainants to find out how the PCC has dealt with their cases is a form of state intervention that might somehow or other imperil democracy is to stretch the bounds of credulity well beyond breaking point. Indeed, precisely the opposite is the case, as Maurice Frankel of the Campaign for Freedom of Information pointed out to me: 'many independent statutory regulators – including the Parliamentary Ombudsman, the Police Complaints Commission, the Equal Opportunities Commission and even the Information Commissioner, who enforces the FOI Act – are subject to the Act, and no-one suggests that this compromises their work. Openness is an essential ingredient of accountability, a safeguard against arbitrariness and a means of demonstrating to the public that bodies are acting properly – not a threat to their independence'.

In the case of the Human Rights Act, the PCC was worried that, were it considered a 'public authority' for its purposes, then, as Richard Shannon puts it in his official hagiography – sorry, history – of the Commission, *A Press Free and Responsible*, the courts would ultimately be able 'to confer upon it disciplinary powers and thus make it into their definition of a truly effective regulatory body'. The Commission would therefore become 'a rung in a legal ladder, a punishment squad rather than a conciliation service'.

And so the ever-industrious Lord Wakeham, conveniently ignoring the fact that PCC decisions were already amenable to judicial review, warned that if complainants to the PCC were able to challenge its decisions in the courts or to secure legal remedies for breach of its editorial code, then 'my task of seeking to resolve differences … would no longer be a practical proposition'. Similarly, the PCC is hardly likely to welcome its inclusion under the Freedom of Information Act if this would enable dissatisfied complainants to discover exactly how the PCC had set about the business of 'conciliation' and 'resolving differences' in their particular cases.

In the end, however, the PCC lost the HRA argument, having to content itself with an amendment proposed by Wakeham himself which required courts to have particular regard to the importance of the right to freedom of expression in any action against the media. The courts were also required to have particular regard to any relevant privacy code in these cases, which is a clear reference to the PCC's *Code of Practice*. The fact that the PCC most definitely is a public authority for the purposes of the HRA strengthens even further the argument that it should be considered as a body with public functions for the purposes of the Freedom of Information Act.

One suspects that the real reason for the PCC's exclusion from the list of public authorities lies in the government's desire to avoid a row with the press, especially with an election approaching. Thus dissatisfied complainants to the PCC are denied a potentially valuable resource, and an opportunity to cast light onto the murky workings of the PCC is lost. Still, openness and accountability in a press organisation – that would never do, would it?