

Journalism via Twitter, or Fake News?

Social Media and the Limits of Journalist Privilege and Anonymous Informants

Ian Bloemendal, partner, **Nick Josey**, senior associate, and **Fergus Rees**, Clayton Utz, explain why commentators on Twitter or other forms of social media must be cautious when using information received from anonymous sources.

In recent years, social media has become one of the accepted ways of receiving updates on what is happening in the world – whether via Facebook, Twitter or some other medium. News updates are also communicated through sources beyond recognised media organisations, with individual journalists establishing their own accounts where updates on happenings and events can be provided live.

The Federal Court recently considered how a privilege afforded to journalists to protect informant identity under section 126K(1) of the *Evidence Act 1995* (Cth) applies to social media in a pre-trial ruling in the matter of *Kumova v Davison* [2021] FCA 753. Specifically, the Court considered whether the Respondent Mr Alan Davison, (owner of the Twitter handle @StockSwami (**Twitter Handle**)), was protected against being compelled to disclose the identity of his “Corporate Advisor”. The Court decided that the privilege did not apply to Mr Davison, and he was ordered to disclose the identity of his informant within 14 days.

Mr Davison joins Twitter

When a person joins Twitter, the social media site requests that you provide a short biography to be displayed at the top of your Twitter Feed. Mr Davison’s Twitter Handle read substantially as follows:

Cyncial and Cranky take on the ASX professional company operators making a play on Retail.

They can Block but they can’t stop the Swamo.

In January 2021, he added the tag “Citizen Journalist” to the end of this biography.

Mr Davison asserted that he has used the Twitter Handle since 2016 to

present his honest opinions on shares and share promoters, and to present his research on shares and the people standing behind online accounts promoting those shares.

The substantive proceedings related to six tweets by Mr Davison that Mr Kumova alleged were defamatory of him by suggesting that he had engaged in insider trading, misleading the market, and the provision of inside information in relation to New Century Resource’s planned acquisition of the Goro Nickel Mine. Mr Davison denied that those allegations arose from the natural and ordinary meaning of the tweets and he pleaded a series of defences including justification and contextual truth.

Relevant to the pre-trial application was the fact that Mr Davison had engaged in discussions with a “corporate advisor” prior to at least one of the relevant tweets. Those discussions informed a tweet published on 20 May 2020 which stated:

\$NCZ in trading halt to ann [sic] an acquisition. It’s no secret he’s been telling all his mates pre \$IGO merger that Goro Nickel project was a planned acquisition. Makes a Mockery of this cleansing statement @ASX @asicmedia

The Court noted that the information provided by the “corporate advisor” could legitimately be characterised as commercially sensitive and “inside” information, and information presumably not then otherwise known in the market.

As part of his defence, Mr Davison asserted that he was entitled to withhold the identity of this “corporate advisor” on the basis of journalist privilege. Mr Kumova argued that Mr Davison did not have access to this privilege, for a number of reasons:

- first, he alleged that Mr Davison was not a journalist;
- second, Mr Davison’s Twitter Handle did not provide “news”; and
- third, the information communicated to Mr Davison by the “corporate advisor” was not given pursuant to a “promise” not to disclose the identity of that person, being a “promise” given before the information was in fact provided.

Mr Kumova therefore applied under section 126K(2) of the Act for an order that Mr Davison provide details of the “corporate advisor”.

What is “Journalist Privilege?”

Section 126K(1) of the Act states (subject to a public interest test in subsection 2) that:

If a journalist has promised an informant not to disclose the informant’s identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.

Essentially, it can protect journalist sources against disclosure in circumstances where information relevant to a story or update is provided to the journalist on the basis of a promise to protect confidence or similar.

The terms “informant”, “journalist”, and “news medium” are relevantly defined within section 126J of the Act:

informant means a person who gives information to a journalist in the normal course of the journalist’s work in the expectation that the information may be published in a news medium.

journalist means a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.

news medium means any medium for the dissemination to the public or a section of the public of news and observations on news.

These definitions were considered by the Court in determining the application brought by Mr Kumova.

Who is a journalist?

The Court noted that a “journalist” need not be formally engaged in a profession or business as a “journalist” or remunerated for the dissemination of that which is published. Those requirements are not expressly required by the statutory definition, nor are they impliedly required from the phrase “engaged and active in the publication of News”.

What was important, however, was how Mr Davison regarded the account, the manner in which the information was communicated to him by the “corporate advisor”, and the nature and character of what else could be found by those accessing the Twitter Handle feed.

In considering these matters, the Court found that Mr Davison was **not** a journalist, basing its findings on the following:

- first, the Court held that the biography for the Twitter Handle was “not the hallmark of a “journalist”, as that term is normally understood, to publish – not “news” – but a “cynical and cranky take” on information and to publish material – not for the purpose of publishing “news” – but for the purpose of “defending and vindicating [oneself].”
- second, the entirety of the publications subject to complaint and the character and nature of other material that could be accessed on the Twitter Handle suggested that Mr Davison was not acting as a “journalist” – rather, he simply provided commentary on the market as an interested observer.

The Court also briefly considered the tagline of “Citizen Journalist” and

noted that it was, at best, a “loose self-description”. (Saying it about yourself doesn’t make it so).

The Twitter Feed as a “News Medium”

As to whether the Twitter Handle was a “news medium”, the Court observed that the relevant considerations were how Mr Davison regarded his account, the manner in which the information was communicated to him by the “corporate advisor”; and the nature and character of what else can be found by those accessing the Twitter Handle’s feed.

Having regard to those considerations, the Court held that the Twitter Handle’s feed was not a “news medium” for the purposes of the Act for several reasons:

- first, the Twitter Handle biography indicated that the account was “far from objective” and it was not the purpose of the Mr Davison’s Twitter feed to be a “news medium”. The profile also lacked any express statement that the purpose of the feed was disseminating “news”.
- second, there was a significant amount of material on Mr Davison’s Twitter feed that could not be described as “news”. The Court noted that, while some tweets had the hallmarks of journalism, the account fell short of being a “news medium” because:
- ...a “news medium” must remain a medium which is routinely or regularly used by journalists as a medium primarily, or at least substantially, for the publication of “news” as opposed to a medium which may from time to time be the source of “news”

Importantly, it was also noted that, although the conclusion with respect to “news medium” overlaps with the former conclusion that Mr Davison was not a “journalist”, the two are separate considerations. The Court held that this is made self-evident from the separate definitions of “journalist” and “news medium” in the Act.

A promise not to disclose an informant’s identity

The Court held that under section 126K(1) of the Act, any promise not to disclose the identity of an informant must be:

- made anterior to the provision of the information; and
- must be an express “promise” in respect to the provision of identifiable information (as opposed to any promise that may otherwise be inferred, or any promise that could be implied by reference to, for example, the character of the information being disclosed).

Mr Davison failed to prove that any such promise made to his informant before he was provided the relevant information. While the evidence indicated that there was a “promise” not to disclose the identity of the “corporate advisor” it was inadequate to establish that it was made prior to receipt of the commercially sensitive information.

What it means for you

The Court did not make a general ruling that a social media or Twitter feed could **not** be considered a “news medium” under the Act. Rather, the Court confined its ruling to Mr Davison’s Twitter Handle only. A person’s Twitter feed could still be considered “news” for the purposes of the application of the journalist privilege under the Act.

That said, commentators on Twitter or other forms of social media must be cautious when using information received from anonymous sources. They will only be able to protect their sources under the Act, if they can prove that they are “journalists” operating on a “news medium” and received the confidential information from the informant only after first making a promise that their identity would not be disclosed.

It is therefore important to consider the Twitter or social media feed as a **whole** – not purely viewing it through the lens of the relevant tweet, or a person’s self-description as a journalist.

Sources of information also need to be careful if they are publishing information to a commentator or ‘journalist’ that is potentially defamatory. If their identity is discovered they may find themselves named as a defendant to a defamation action.