CPS

The Crown Prosecution Service. The CPS incorporates RCPO.

Prosecuting Cases Where Public Servants Have Disclosed Confidential Information to Journalists

How to use this Legal Guidance

New chapter added 27 July 09

Principle

This guidance addresses cases where it is alleged that a public servant (including, but not restricted to, prison officers, police officers or, indeed, CPS employees) has misused their privileged access to confidential information and have transmitted confidential material to the press. There is usually a clear public interest in safeguarding confidential information and in deterring those who might be tempted, for whatever reason, to disclose it, including by the threat of prosecution.

However, this is not the only aspect of public interest involved. Freedom of the press is regarded as fundamental to a free and democratic society.The ability of a journalist to protect a source of information is afforded significant protection by the law, even where the relevant information has been obtained in breach of confidence. Further, the courts have defined the term 'journalist' widely to include someone who is employed by, or acts on behalf of, a news media organisation.

From the European and domestic case law the following principles emerge:

- As a matter of general principle the 'necessity' of any restriction of freedom of expression

must be convincingly established,

- Limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the court.
- The exercise of the jurisdiction should meet a 'pressing social need', and
- The restriction should be proportionate to a legitimate aim which is being pursued.

Ultimately, each case must be determined on its own facts and merits, weighing up the conflicting public interests, where they arise. The fact that these two aspects of the public interest can conflict with each other means that the investigation and prosecution of cases involving the leaking of confidential information to journalists can present especial difficulty. For example, the courts have demonstrated a reluctance to order disclosure of journalistic sources. Additionally, the courts have on occasion disapproved of certain investigative techniques where this can be said to have 'a chilling effect' on journalistic freedom. As a result, the evidence obtained has been excluded and this can result in the case failing the evidential stage of the Full Code Test. It is also possible that in extreme cases the fact that the court finds that Article 10 has been breached can lead to the prosecution being stayed as an abuse of process.

Guidance

Potential Offences

The most likely charges for prosecuting the leaking of confidential and/or sensitive documents include:

- Offences contrary to the Official Secrets Act 1989 Act.The 1989 Act makes it an offence for a Crown servant, government contractor or an individual subject to a notification to make an unauthorised disclosure of damaging information about security and intelligence, defence or international relations. The maximum penalty under the Act is 2 years' imprisonment. Prosecutions for offences under the 1989 Act require the prior consent of the Attorney General except for offences contrary to section 4(2) where the consent of the DPP is required. Offences under the Official Secrets Act will be prosecuted by the Counter Terrorism Division (CTD). See further, below, on the procedure to be followed for referring cases involving offences allegedly committed by or involving journalists and their sources.
- Offences contrary to the Theft Acts, relating to the dishonest appropriation of documents, computer discs and the like.
- Obtaining or disclosing personal data contrary to section 55 of the Data Protection Act 1998. This would cover data stored on the Police National Computer. The offence is punishable only by way of a fine (the statutory maximum after summary conviction, an unlimited fine on indictment). Proceedings not instituted by the Information Commissioner require the consent of the DPP. Subsection 55(2) sets out a list of possible defences including justification in the public interest or for the purposes of preventing or detecting crime.
- Misconduct in a public office. This is a common law offence which has existed for many years. As the Court of Appeal noted in the case of *Attorney General's Reference No.3 of 2003 [2004] EWCA Crim 868*, the circumstances in which the offence may be committed are broad and the conduct which may give rise to it is diverse. There are four essential

elements of the offence, namely:

1. the suspect must be a public official acting as such
2. s/he must have wilfully breached his/her public duties;
3. the breach must have been such a serious departure from acceptable standards as to constitute a criminal offence; and to such a degree as to amount to an abuse of the public's trust in the public official; and
4. there must have been no reasonable excuse or justification.

The third and fourth elements are critical. They make it clear that not every act of misconduct by a public official is capable of amounting to a criminal offence. There is a threshold and it is a high one. In particular, as the Court of Appeal recognised in the case of *AG's Reference No.3 of 2003*, to attract criminal sanctions, the misconduct in question would normally have to amount to an affront to the standing of the public office held and to fall so far below the standards accepted as to amount to an abuse of the public's trust in the office holder.

Special Protection for Journalists' Sources

(1) The European Convention Framework

In relation to offences under sections 1(1)(a) and 4(1) and 4(3)(a) of the Official Secrets Act 1989 the prosecution is not required to prove that the disclosure was damaging or was not in the public interest, and accordingly, the defendant is not entitled to a defence on the basis that the disclosures made were in the public interest, or that he or she thought they were. Further; the House of Lords has determined that the restrictions on disclosure of information within the Official Secrets Act 1989 do not breach Article 10: *R v Shayler [2003] 1 AC 247* (see below, Reviewing Cases involving Leaks to Journalists).

Other than as stated above, prosecutions for the disclosure of confidential information to journalists are susceptible to challenge on the grounds that both parties to the disclosure have a Convention right to free expression. The right to freedom of expression includes the right to receive and impart information and is guaranteed by Article 10 of the Convention in the following terms:

"10 (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..."

Freedom of expression is a qualified right, in other words it can be interfered with to achieve a balance with other fundamental rights. The circumstances in which freedom of expression can be restricted are set out in sub-paragraph (2) of Article 10:

"10 (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

In this context, it is also necessary to be aware of Recommendation No R (2000) 7 of the Committee of Ministers to Member States. The Recommendation is not legally binding but is of assistance in interpreting and applying the rights and guarantees of the Convention itself including Article 10. Among other principles, Recommendation 7 provides as follows (emphasis added):

Principle 1

Domestic law and practice in member States should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) and the principles established herein, which are to be considered as minimum standards for the respect of this right.

Principle 3

a) The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph b, there ***exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.***

b) The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. Reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. The legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- an overriding requirement of the need for disclosure is proved,
- the circumstances are of a sufficiently vital and serious nature,
- the necessity of the disclosure is identified as responding to a pressing social need, and
- member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

c) The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

Principle 6

a) The following measures **should not be applied** if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:

i. Interception orders or actions concerning communication or correspondence of journalists or their employers,

ii. Surveillance orders or actions concerning journalists, their contacts or their employers, or

iii. Search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

b) Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

It can be seen that, in cases involving journalists, Principle 6 would appear to rule out many of the normal covert techniques. However, the prohibition is not absolute. Principle 6 refers to, and thus adopts, the same exception as Principle 3 which contemplates the possibility that there may be cases where overriding requirements of the public interest make it necessary to interfere with the general right of a journalist to keep sources confidential.

But the joint effect of Recommendation 7 and Article 10 (which is the primary source), is that very important factors will be required to outweigh the general right of a journalist to keep sources confidential. It is therefore important that offences are not investigated in ways which are contrary to Principle 6, unless the circumstances are sufficiently serious and vital to warrant this.

The leading European authority on disclosure of journalists' sources is *Goodwin v United Kingdom (1996) 22 EHRR 123*. In that case the European Court of Human Rights (ECtHR) placed particular emphasis on the role of the press in a democratic society and the part played in that role by the principle that in general a journalist should not be required to disclose sources. At paragraph 39 of the Court's judgment it said (with emphasis added):

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms.Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect of an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified ***by an overriding requirement*** *in the public interest. These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under Article 10(2).*

(2) Protection for Journalists' sources under Domestic Law

A similar approach to that adopted in Article 10 of the convention can be found in the Contempt of Court Act 1981, section 10 which provides:

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 be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Journalistic material is also afforded statutory protection from seizure even where a lawfully warranted search is being carried out: see the Police and Criminal Evidence Act 1984 (PACE),

sections 8, 11 and Schedule 1.

In addition, **The Public Interest Disclosure Act 1998** (PIDA) protects individuals who make certain disclosures of information in the public interest and allows such individuals to bring action in respect of victimisation. A 'qualifying disclosure' under PIDA means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:

- That a criminal offence has been committed is being committed or is likely to be committed.
- That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.
- That a miscarriage of justice has occurred is occurring or is likely to occur.
- That the health or safety of any individual has been is being or is likely to be endangered.
- That the environment has been, is being or is likely to be damaged, or
- That information tending to show any matter falling within any one of the preceding paragraphs has been is being or is likely to be deliberately concealed.
- A disclosure can also be a qualifying disclosure if the relevant failure is of an exceptionally serious nature (section 43H).

The PIDA is a civil, not a criminal statute. However, an understanding of the PIDA may be helpful in considering whether alleged behaviour should be investigated as a crime, whether there is a pressing social need for the interference with freedom of expression and whether a prosecution is a proportionate way to obtain that pressing social need.

Following the passing of PIDA, many public sector organisations adopted written 'whistle-blowing' policies to protect employees who disclosed confidential information in certain circumstances. The CPS, for example, has such a policy. Prosecutors should make enquiries of the police to discover whether the alleged behaviour in any particular case would be treated by the organisation involved as a disciplinary matter that could be managed by internal procedures.

Whistle-blowers are expected to follow the internal policy of their organisation (where there is one) so that a disclosure 'staircase' may be said to exist involving internal disclosure, regulatory disclosure, wider public disclosure and disclosure to Members of Parliament and the media. Wider public disclosure can only be protected under PIDA where there is justifiable cause for going wider and where the particular disclosure is reasonable. However, whistle-blowing involving a disclosure made straight to the media can be protected without taking each step at a time where the organisation about whom the disclosure has been made has a record of ignoring, discouraging or suppressing whistle-blowing concerns.

The most relevant domestic case (in which *Goodwin v UK* was applied) relates to the leaking of information from a special hospital to a journalist: *Ashworth Hospital Authority v MGN Ltd, [2002] 1 WLR 2003* and Mersey Care NHS Trust-v-Ackroyd, [2007] EWCA Civ 101. In *Ashworth* Lord Woolf CJ stated that disclosure of a journalist's source would not be ordered 'in the interests of justice' within section 10 of the Contempt of Court Act 1981 unless it was necessary and proportionate in the circumstances of the case. In *Mersey Care NHS Trust* (the same case, *Mersey Care NHS* being the successor to the Ashworth Hospital Authority) it was held that the judge at first instance had correctly directed himself that the question was whether, at the time of the judgment, it was necessary in the sense of there being an overriding interest amounting to a pressing social need, and proportionate, for the Court to

order the sources to be disclosed.

In *Ashworth*, Lord Woolf endorsed the approach of the ECtHR as set out in Goodwin. In his speech he emphasised that Section 10 and Article 10 have a common purpose in seeking to enhance the freedom of the press by protecting journalistic sources. Both Section 10 and Article 10 make it clear that the court has to be sure that a sufficiently positive case has been made out in favour of disclosure before disclosure will be ordered.

(3) Summary of Legal Protections for Journalists' Sources

Statute and European and domestic case law all make it clear that:

1) freedom of expression is one of the most important rights in the Convention;

2) any restriction on that right must be necessary in democratic society, which in turn requires that:

- it has a legitimate aim, such as the prevention of crime or the protection of the rights of others, as set out in Article 10(2),
- the aim must reflect a 'pressing social need', i.e. be sufficiently important to justify the restriction,
- the restriction must be rationally related to that aim, and
- a fair balance must be struck between the rights of the individual and the general interest of the community;

3) the necessity for the restriction must be convincingly established in view of the importance of freedom of expression. The domestic courts must apply the principle of proportionality in this way under the HRA: see *Huang v Secretary of State for the Home Department [2007] 2 AC 167, paragraph 19.*

The consequence for investigators and prosecutors is that, in cases which rely on the disclosure of journalistic sources or on covert techniques which involve or amount to the revealing of a source's identity, the prosecution will have to satisfy the court that the admission of evidence that reveals the identity of a journalistic source is exceptionally required by a pressing social need and that it is proportionate in the circumstances of the case. This can be done in appropriate cases but, in discharging this burden, the prosecution will have to rebut the presumption that it is always prima facie contrary to the public interest that press sources should be disclosed.

This suggests that prosecution (or even a criminal investigation) should be seen as a last resort reserved for the most serious of cases. If that is done, cases are more likely to be held to be compatible with Article 10.

Reviewing Cases involving Leaks to Journalists

The starting point for the review of all cases is the Code for Crown Prosecutors. Prosecutors must review any case, involving the alleged leaking of confidential information to journalists or those employed on behalf of a news media organisation, in accordance with the Code. It is important to appreciate that not every leak of such material will constitute a criminal offence.

Such cases will almost inevitably raise serious considerations about freedom of expression

and public interest which must be considered as part of the review process. In relation to some potential offences, consideration of the public interest may impact on the evidential stage of the Code Test as well as the public interest stage itself.

Prosecutors are reminded, however, that there is no public interest defence available to offences under the Official Secrets Act 1989. This was decided in the case of *R v Shayler* (ibid). In Shayler, the House of Lords ruled that, that having regard to the entirety of the 1989 Act, and giving sections 1(1)(a), s. 4(1) and s. 4(3)(a) their natural and ordinary meaning, a defendant could not rely on a defence that he believed it to be in the national or public interest to make a disclosure. There was no obligation, under the relevant sections of the 1989 Act, on the prosecution to show that disclosure was not in the public interest nor any opportunity for a defendant to show that he thought disclosure was in the public interest.

The court accepted that the provisions of the 1989 Act amounted to a restriction upon freedom of expression but found that the aim behind the restriction was directed to the objectives set out in Article 10(2) of the Convention as enacted in Schedule 1 of the Human Rights Act 1998. The 1989 Act did not prohibit disclosure under any circumstances. It simply restricted disclosure unless lawful authority had been obtained. Where authorisation was refused unreasonably, that refusal could be challenged by way of judicial review. The House of Lords therefore found that sections 1(1)(a), 4(1) and 4(3) of the 1989 Act were compatible with Article 10 and upheld the restriction on free speech contained in the Act.

Evidential considerations

Subject to that, it will be necessary to consider the possible impact of Article 10 on the admissibility of evidence.

Addressing the following questions may help determining the impact of Article 10:

1) On the facts and in the circumstances of this case, is Article 10 engaged at all?

2) If it is, is the suspect, or any of the suspects, entitled to the protection that Article 10 affords to journalists and their sources notwithstanding that they have themselves, on the prosecution case, committed a serious criminal offence or offences

3) If Article 10 is engaged and they are therefore entitled to its protection, do any of the exceptions in Article 10, paragraph 2, apply to make interference with the right justifiable?

4) If there was a violation, how likely is it that the trial judge will exercise his discretion to exclude the evidence obtained in breach of that protection and/or stay the case on the basis of abuse? In addressing this question the following considerations are likely to be of relevance:

- the reasonableness or otherwise of the disclosure,
- the seriousness of the alleged failure or wrong-doing that is the subject of the leak,
- the seriousness of the harm caused by the disclosure and whether it was likely to continue,
- an assessment of the likelihood of repetition and the need to prevent further disclosure,
- the motivation behind the disclosure, in particular whether or not the disclosure was made for personal gain; this is not definitive, however, because if the underlying wrong-doing is serious enough, the courts will protect the confidentiality of journalists'sources

even where the source is 'a disloyal and greedy individual, prepared for money to betray his employer confidences' (per Law LJ in the *Ashworth Hospital Authority* case),

- the person to whom the disclosure is made, and
- whether any other remedy was available, for instance under a whistle-blowing policy that demonstrated its effectiveness.

Public interest considerations

Several of the criteria set out above can also be applied when assessing the public interest in instituting or continuing a prosecution, if it is decided that sufficient admissible evidence exists to satisfy the evidential stage of the Full Code Test.

For instance, it may be necessary to weigh up the seriousness of the harm caused by the disclosure against the seriousness of the alleged failure or wrong-doing that is the subject of the leak. It is important that a breach of confidence that might best be considered as a disciplinary matter should not be elevated to a criminal offence simply by virtue of the fact that the person leaking the information is a public servant.Conversely, a decision that the facts do not cross the high threshold that would justify a criminal prosecution, does not condone or excuse conduct that is contrary to a disciplinary Code and possibly susceptible to civil action as a breach of employment contract or a breach of confidence (as the word "confidential" is understood under civil law). It is simply a judgement that the conduct falls short of the criminal law.

Possibility of Appeal from Judge's Ruling on Disclosure of Sources

The balancing of the considerations which are relevant to the question whether it is necessary and proportionate to order the disclosure of the journalist's source, is essentially a matter for the trial judge and not for an appellate court. Where the trial judge has come to a determination on the issue, the Court of Appeal will normally respect that decision unless it is persuaded that the judge erred in principle or reached a conclusion that was plainly wrong (per Sir Anthony Clarke MR in *Mersey Care NHS Trust v Ackroyd [2007] EWCA Civ 101 at paragraph 36*).

Referral of Cases to Special Crime Division (SCD)

All cases involving journalists or journalists' sources are to be referred in the first instance to SCD. See Casework Referral elsewhere in Legal Guidance. After consideration by SCD some cases may, by agreement, be handled at Area or Sector level by suitably qualified lawyers, or referred to Counter Terrorism Division if consideration is being given to charging an offence under one of the Official Secrets Acts.
