# Responsible journalism—the ethics of press leaks

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**Commercial analysis: The past couple of years have seen a string of high-profile leaks where information was given to the press. John Stables, barrister at 5RB Chambers, predicts that the means for more and larger leaks will make for greater exposure of confidential and secret information in the future.**

## What are the different approaches newspapers/journalists/publishers have taken when dealing with large-scale high-profile leaks?

This is a matter of editorial policy rather than law. Obvious considerations for a publisher will be whether the:

- subject matter of the leak fits its news agenda and readership or audience
- interests affected by the leak are ones to which the publisher is sympathetic
- leak appears to be more potential legal or political trouble than it's worth, and so on

Payment may be sought by the leaker. There is no absolute bar in law or in the regulators' codes on a publisher paying for leaked material, as, for example, the Daily Telegraph did for details of MPs' expenses. But any decision to pay for leaked information would have to take careful account of the law on, among other things, misconduct in public office—from the publisher's point of view, conspiracy or aiding and abetting—and the Bribery Act 2010. Public interest considerations will play a central part in any such decision—especially where iniquity is exposed—though it should be noted that official secrets legislation contains no public interest defences for publishers.

If leaked material is extensive and significant—like, say, the MPs' expenses data or the Panama Papers—a publisher may well wish to run a series of articles over time. That requires careful planning of the order of publication, bearing in mind editorial considerations of the initial 'splash' and then how best to develop the story, and the possibility that breaking the story might attract swift legal action with the potential for early injunctions and other orders against the publisher.

## From a legal point of view, what obligations are news outlets/journalists under before releasing such information and what are the most important steps newspapers/publishers have to take before releasing such information?

There are no 'obligations', in the sense that any particular step or decision is of itself mandatory in law. In particular, there is no legal obligation to notify a subject about the impending publication of confidential or private information. However, there are some steps that one would usually expect a newspaper or broadcaster to take before publishing to safeguard its own interests and those of the source. The nature of the source and of the material will dictate which apply in any particular case.

If the source is identifiable but not known to the publisher, he or she should be checked out. Sources have sometimes been accused by those they leak against of doctoring material or being misleadingly selective in what they have leaked—bad faith may be present—and conmen and pranksters are hardly unknown, especially where payment is sought.

Similarly, leaked documentation should be examined very carefully for any sign that it is not, or is less than, what it appears to be. Though it was not the product of a supposed leak, the Hitler Diaries episode is instructive in that respect. Less dramatically, it may be that what is otherwise genuine material may show evidence of missing pages or parts, or may reveal that it is likely to have been an early draft of a document that went no further. The information revealed by a leak may have been superseded—checking dates and subsequent announcements and events is likely to be necessary.

If the leak is of information only, ie not of documentary evidence of the information, a publisher will usually need to verify the information, usually by corroboration from other sources but may seek further information from the source. This may also be necessary for documentary evidence, depending on the circumstances. Knowledge of and confidence in the source will be particularly important to the question of verification, as will the physical detail of any material.

If a risk of libel arises from publication, it will usually be necessary to approach the person or company concerned to put to them the gist of the allegations to be made—though only close to publication and if possible without giving away the fact of the leak or details of it.

As with all aspects of this area of journalism, the question of public interest in disclosure will attach to all decisions about steps taken pre-publication.

## Beyond the legally required steps, do you have any best practice tips?

The most significant threat for a publisher will be injunctive relief to restrain publication and to compel the publisher to deliver up any material it has been passed. Such a remedy will usually be applied for by way of an action in breach of confidence.

Orders for the surrender of information and material under the *Norwich Pharmacal* jurisdiction are also common—see *Norwich Pharmacal Co and others v Commissioners of Customs and Excise* [1973] 2 All ER 943—the subject of the leak is likely to want to find and take action against the leaker. The victims of leaks may also report the leak as a criminal complaint, usually as theft if documents or other physical material has been passed on, or under official secrets provisions if the information is subject to those.

The best tips for combatting restraint of publication are careful concealment of the fact of the leak and timely marshalling of arguments and evidence as to the public interest in disclosure. If the subject of the leak does move to restrain publication, or further publication, a publisher's rights under article 10 of the European Convention on Human Rights will be in play. Arguments are likely to have to be made in a hearing at very short notice. Any attempt to restrain publication will have to meet the tests contained in section 12 of the Human Rights Act 1998, which itself requires the court to have 'particular regard' to the public interest in publication.

As to delivery up and *Norwich Pharmacal* orders, the best advice for publishers and journalists is to be as 'old school' as possible. Where practicable, any documents should be typed out in new versions and the originals handed back to the source or destroyed (photocopying the documents may be adequate but photocopies can retain identifying marks). Communication with a source should be by means other than the publishing organisation's or journalist's own email and phones (best is to meet discreetly in person). If possible, documents should be received in hard copy only and no record of them placed on electronic networks—although very large 'data dump' leaks will need to be held electronically to be searchable and of practical journalistic use.

If no documentation belonging to the subject of the leak and no records tracing back to the source are retained, injunctions and production orders have nothing to bite on.

The same considerations apply to the potential for searches by law enforcement agencies, generally the police. Search powers within the Police and Criminal Evidence Act 1984 (PACE 1984)—which for journalistic material require a warrant issued by a senior judge—are those most often used. Also, leaked documentation may amount to stolen goods so handling and dealing with the originals should be avoided or minimised.

A court may of course simply order a journalist to divulge the identity of the leaker.

Section 10 of the Contempt of Court Act 1981 affords some comfort to journalists by providing that a court may not order that a source be disclosed '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'. Clause 14 of the Independent Press Standards Organisation Editor's Code of Practice is helpful here too. Even so, such orders can be made. In which case, a journalist will have to choose between betraying the source and being fined and imprisoned.

## What happens if newspapers get it wrong? Are there any sanctions that could be imposed?

Assuming the authenticity of the leaked information, 'getting it wrong' will generally fall into two categories:

- a publisher miscalculates the strength of its position in law, ie is held liable in law for the disclosure per se, and
- a publisher makes statements that go beyond what the leaked information will support

In respect of a publisher that miscalculates the strength of its position, the most likely problem will be that it fails to satisfy the court that its publication of leaked material was in the public interest. This concept, near all-pervasive in actions against the media, is key to defences against:

- claims in breach of confidence
- breach of the Data Protection Act 1998 (DPA 1998)
- misuse of private information

Injunctions and damages are potentially available in all of these causes of action.

Two general points that have emerged from relatively recent litigation should be stressed in this context. First, the Court of Appeal has held that pecuniary loss is not required for compensation for distress to be available under DPA 1998, s 13 as was previously understood (see *Vidal-Hall and others v Google Inc (The Information Commissioner intervening)* [2015] EWCA Civ 311, [2015] All ER (D) 307 (Mar)). Second, the level of compensation likely in cases of misuse of private information may well have increased substantially following the colossal awards handed down in *Gulati and others v MGN Ltd* [2015] EWHC 1482 (Ch), 2015] All ER (D) 199 (May) upheld on appeal. This followed judicial predictions that the days of modest recovery in privacy actions were ending (see Tugendhat J's comments in *Spelman v Express Newspapers* [2012] EWHC 355 (QB), [2012] All ER (D) 51 (Mar) at para [114]). The facts of the claimants' awards in *Gulati*, which concerned phone hacking on an industrial scale, do set them apart, but the trend is unmistakably upwards.

As to a publisher which makes statements that go beyond what the leaked information will support, where imputations of wrongdoing arise from the publication of leaked information, a publisher will be risking libel suits. Financial and business information is particularly prone to difficulties in that respect.

The Panama Papers provide a good and topical example. The use of off-shore jurisdictions, anonymous companies and complex trust arrangements to move and shelter money may raise suspicions of illegal activity—of money laundering, say, or tax evasion—but these may merely reflect perfectly legal activity aimed at, for example, the minimisation of tax liability. Similarly, proven crooks and despots may use these techniques, as may entirely blameless people. Confusing and conflating the intentions behind the structures' use or linking the more unattractive sort of client to others could easily lead to legal problems. Where an imputation is of criminality or corruption it is more or less certain to be defamatory, at least for individuals, both at common law and under the higher test within the Defamation Act 2013—and that no such meaning was intended is irrelevant in the law of defamation. Publishers need to tread very carefully indeed.

## Is it relevant how the information was obtained in the first place and, if so, what difference does it make, and how does this change the steps that should be taken before publication?

This is really a question about information gained through criminal means. Perhaps surprisingly, the answer is that how the source got the information is not in practice usually as important as one might think. Although when information has been obtained criminally a publisher should be prepared for the attentions of the police, and dealing with such material may be a more sensitive operation ethically.

The key is to be concerned with the information, not its procurement. Journalists should try to be told as little as possible about how confidential information was obtained as the criminal provenance of information may be the trigger for a disclosure application. But many leaks will be unlawful one way or another—in contrast to authorised 'leaks'—and the steps outlined above that should be taken with any leaked material will apply in any event.

In the context of huge hacked caches of material, the prospect of identifying the hackers by reference to the material passed to journalists is so remote in any event that law enforcement agencies would be unlikely to try, other than in, perhaps, cases of official secrets.

Yet again, the public interest in publication should guide the decisions taken.

## What are the trends in this area of law? What are your predictions for future developments?

From a technical perspective, the ease with which all information can be copied and distributed now allows for far greater volumes of material to be leaked. Huge amounts of information can be stored and transferred very simply and very quickly. Computer hacking and other electronic security breaches have also become more sophisticated and widespread.

Together with the opportunities provided by electronic techniques for anonymity, we can confidently expect more mass disclosure of information than in the past.

However, the law remains less favourable to journalists and publishers than it should be. Given the centrality to this subject of freedom of expression and the public interest it is inevitable that the most significant cases against the media are taken to the European Court of Human Rights (ECtHR) and that some of the greatest influence in this area comes from those decisions.

Despite the welcome effect of some important ECtHR cases, notably *Goodwin v United Kingdom* (Application no 17488/90) [1996] 22 EHRR 123, *Telegraaf Media Nederland Landelijke Media BV v Netherlands* (Application no 39315/06) and *Financial Times v United Kingdom* (Application no 821/03) [2010] 50 EHRR 46, the ECtHR has also reached decisions adverse to proper journalistic freedoms such as that in *Keena and Kennedy v Ireland* (Application no 29804/10) [2014] ECHR 1284 in which the court disapproved of leaked documents having been destroyed to protect the source.

The means for more and larger leaks will make for greater exposure of confidential and secret information in the future. At the same time, though, the legal uncertainties that surround journalist and source protection, and law enforcement agencies' sometimes high-handed use of powers of investigation, will require that those in the media pursue their profession fearlessly and with society's wider support.

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