

Protecting Sources and Whistleblowers in a Digital Age – An Update

Events have moved fast since our report was written and printed. There have been a number of relevant developments related to source protection and whistleblowing. It is not possible to provide a comprehensive survey of these, but there are some issues that we should address in this addendum. As mentioned in the report, we will continue to offer periodic updates on the severity of the threat to source protection in 2017 via the Institute of Advanced Legal Studies website and blog: <http://bit.ly/infolawpolicy>.

Digital Economy Bill

In our report, we indicated that at the time of writing, a particular area of concern was the Digital Economy Bill and its provisions on the sharing of information between public authorities. We referred to clause 34, which deals with the confidentiality of personal information, subject to change as the Bill moved through Parliament. This indeed is the case, and in the current draft bill, HL Bill 102, clause 34 refers to the disclosure of information to water and sewerage undertakers. The relevant clause is now 37. No doubt it may change again.

Our concern was that this clause did not sufficiently protect investigative journalism and whistleblowers. To an extent this concern has been reduced by the addition of cl 37 (2) (i) which creates a defence where there is publication for the purposes of journalism in the public interest, following the intervention of the National Union of Journalists and other groups. (A similar defence can be found in cl 54 (2) (i)). If this becomes law, it would alleviate some concerns, but it would not remove them. Problems remain as to the potential ambit and application of this defence, and how it will be interpreted by the courts. It is a thorny legal problem about what should be considered as ‘journalism’, and so it is difficult to predict who – or what activity - will benefit from this defence. Additionally, even if journalists are better protected in law, we must not neglect the question of whether sources and whistleblowers are adequately protected.

Law Commission proposals on Protection of Official Data

Another contemporary and well-publicised concern have been aspects of the Law Commission’s proposals on protection of official data.¹ These have been severely criticised by a number of media organisations and civil society organisations. Three proposals have attracted particular attention. First, a suggested increase in the criminal penalty for leakers; second, a definition of espionage that includes obtaining sensitive information, as well as passing it on; and third, the Law Commission’s disinclination to recommend a general or journalism-specific statutory public interest defence.

The Law Commission has indicated that these are merely proposals, and they to a large extent are an attempt to codify and update already existing laws. While true, this does not alleviate our concern about their effect on whistleblowing and source protection. A consolidating act that replicates the deficiencies of already existing law is no improvement on the existing law, and the

¹ <http://www.lawcom.gov.uk/project/protection-of-official-data/>

absence of a public interest defence in actions that relate to whistleblowing of officially secret material is – in our view – a significant omission. For another, given the context described in our report of technological and legal threats to journalistic source protection, a consolidating act would further weaken the already strained protections that exist for journalists’ sources.

Consequently, in addition to the 10 recommendations we make in the report, we would add:

It is vital that any new legislation on official data, official secrets and espionage - as proposed by the Law Commission in February 2017 - protects journalists and whistleblowers who disclose information in the public interest.

A new President of the United States

Finally, it is surely not contentious to say that Donald Trump’s tenure as President of the United States has had a turbulent start. The new president takes an unprecedented approach to his dealings with the media and his use of social media. Events – such as the disclosures leading to the resignation of US national security adviser Michael Flynn – highlight the value and importance to democratic debate of whistleblowing in the public interest.² This demonstrates, in our view, quite how important it is that journalists who receive such material are able to protect their sources. If this were not the case, the public would not see material that helps provide a clearer and accurate picture of important contemporary events – particularly vital when the US administration has expressed such overt hostility to the mass media.

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² See, for example, <https://theintercept.com/2017/02/14/the-leakers-who-exposed-gen-flynn-s-lie-committed-serious-and-wholly-justified-felonies/>