

Government Response to the Tenth Report of
Session 2008-09 from
The Public Administration Select Committee:
Leaks and Whistleblowing in Whitehall



Government Response to the Tenth Report of Session 2008-09 from
The Public Administration Select Committee:
Leaks and Whistleblowing in Whitehall

Presented to Parliament
by the Minister for the Cabinet Office and for
the Olympics, London and Paymaster General
by Command of Her Majesty

March 2010

© Crown Copyright 2010

The text in this document (excluding the Royal Arms and other departmental or agency logos) may be reproduced free of charge in any format or medium providing it is reproduced accurately and not used in a misleading context. The material must be acknowledged as Crown copyright and the title of the document specified.

Where we have identified any third party copyright material you will need to obtain permission from the copyright holders concerned.

For any other use of this material please contact the Office of Public Sector Information, Information Policy Team, Kew, Richmond, Surrey TW9 4DU or
e-mail: licensing@opsi.gov.uk
ISBN: 9780101786324

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID P002358198 03/10

Printed on paper containing 75% recycled fibre content minimum.

GOVERNMENT RESPONSE TO THE TENTH REPORT OF SESSION 2008-09 FROM THE PUBLIC ADMINISTRATION SELECT COMMITTEE: LEAKS AND WHISTLEBLOWING IN WHITEHALL

The Government is grateful to the Committee for its detailed consideration of this important issue. The Government's response to the conclusions and recommendations set out in the Committee's Tenth Report of the 2008-09 Session is set out below.

Effects of Leaks from the Civil Service

1. Leaks by civil servants undermine trust within government, call into question the impartiality of the Civil Service and may also serve to stifle effective policy debate within government. Nonetheless, there is a tension between the need for trust within government and the right of the public to be fully informed on matters of genuine public interest. (Paragraph 12)

The Government agrees with the Committee's conclusion that leaks by civil servants undermine trust within government. When leaks occur they can have a corrosive effect on the relationship between Ministers and the civil service and debilitating implications for the conduct of good and effective government.

The Government also agrees that the public has a right to be informed. That is why the Freedom of Information Act 2000 was passed. There are also established procedures for raising concerns if a civil servant feels that Parliament or the public have been misled. These procedures are robust, so there can never be circumstances where leaks can be acceptable.

This coherent approach to information management is reflected in consolidated guidance to departments on the use of official information, published in November 2009, which is attached as an appendix to this response.

Public Interest Leaking – Conclusions

2. There is a strong public interest in a Civil Service which is able to act impartially to support the government of the day. Leaks by civil servants undermine the trust that is necessary to this relationship. Leaks for partisan political reasons are especially deplorable. The Civil Service Code is clear that information should not be disclosed without authorisation and the leaking of information by civil servants for political purposes, to undermine government policy or for personal gain, is reprehensible. (Paragraph 24)

The Government agrees with the Committee, and echoes its strong condemnation of the leaking of information by civil servants for political purposes or personal gain.

3. Despite this, there are exceptional circumstances in which a civil servant could be justified in leaking material in order to expose serious wrongdoing. This would need to have followed a failure of proper channels both of disclosure and challenge within government. In short, it must be a last resort. The provisions of the Public Interest Disclosure Act 1998 cover the majority of these circumstances and the Act sets an appropriate balance between the

competing interests of maintaining a trustworthy Civil Service and protecting the public interest. (Paragraph 25)

4. The Civil Service Code also includes the requirement not to mislead ministers, Parliament or others. A civil servant who is aware that the public or Parliament has been deliberately misled by the government has a duty to put this right. This should involve taking the matter to the Civil Service Commissioners so that they can establish the facts independently. If they agree that there is a case to answer, they should have the power to report on the situation to Parliament and disclose the information concerned. However, where Parliament has been misled and decisions are about to be taken on the basis of this misleading information, giving an urgency to the situation, it may be that a report direct to a select committee chairman can be justified as a last resort. (Paragraph 26)

The Government believes that correct use of the existing channels, including the protections provided by the independent Civil Service Commissioners and the Public Interest Disclosure Act 1998, should negate the need for disclosure of material outside of those circumstances.

The Government's view is that the procedures in place under the *Civil Service Code* are clear and robust. The *Civil Service Code* sets out at paragraphs 15–17, the procedures for civil servants to raise matters of concern within the department. The *Code* makes clear at paragraph 18 that a civil servant may also raise matters direct with the Civil Service Commissioners. The Government believes that these mechanisms would allow for cases to be considered urgently if required. The Civil Service Commissioners have also confirmed that any complaint made to them where there is a pressing deadline to resolve will be handled as a matter of urgency.

The Government does not believe that it is necessary to introduce a further reporting tier into the process that would risk blurring the lines of civil servants' accountability as set out in the *Civil Service Code*.

Freedom of Information

5. The Freedom of Information Act established the principle that government information should be made public, subject to exceptions, and provides a mechanism by which the public interest merits of disclosure can be determined. Government needs to recognise that this changes the principles that apply to the disclosure of official information, balancing the traditional duty of confidentiality to ministers with the statutory duty to provide information to the public. This means that there may be circumstances in which a civil servant could properly take action to prompt a request under the act (Paragraph 30)

6. The existence of Freedom of Information provides a legitimate alternative to leaking information and in so doing should weaken the public interest case for leaking. This will only be the case, however, if government departments act within the spirit of the legislation, in particular by proactively publishing as much information as possible and by ensuring that requests under the Act are responded to quickly and fully.(Paragraph 31)

The Government agrees with the Committee that Freedom of Information legislation has transformed both the practice of disclosure and the public's expectations. Departments proactively release a wide range of information through their publication schemes. The Government is committed to responding to requests for information in a timely manner, and as fully as possible in line with the provision of the legislation. The Government believes that if a civil servant has concerns about the use of official information or any other concern, then by far the most effective way of raising them is through the appropriate channels, including the independent Civil Service Commissioners, as set out in the *Civil Service Code*.

Political leaking and self-authorisation

7. The partial, premature or anonymous disclosure of information damages trust and morale within government; in particular, leaking against ministers or departments undermines Cabinet-based government. This applies to the anonymous release of departmental information by ministers as much as it does to leaks by special advisers or civil servants. However, no government has seemed able or willing to stamp out this practice. (Paragraph 35)

Unauthorised disclosure of official information can never be sanctioned and the corrosive effect of such disclosures cannot be underestimated. It is for these reasons that the *Ministerial Code*, *Civil Service Code* and *Code of Conduct for Special Advisers* all reinforce the issue of confidentiality of official information.

8. Special advisers are, in theory, subject to the same rules regarding the disclosure of information as other civil servants. However, only the responsible minister has the power to discipline a special adviser for leaking information. In practice, this is unlikely where the adviser has been acting in what they believe to be the minister's interests. We do not believe this is a desirable situation. The Civil Service Commissioners may be the appropriate body to investigate alleged breaches of this nature, possibly under the proposed power to initiate their own investigations.

Whilst such investigations would make recommendations, the imposition of disciplinary proceedings would ultimately have to remain with the minister. Where ministers did not act on the Commissioners' recommendations, the Commissioners should report to Parliament. We believe that this would go some way to ensuring a consistent approach to leaking within government. However, political leaking is a problem that can only be tackled by a change in political culture. (Paragraph 36)

Special Advisers are temporary civil servants. They are bound by the duty of confidentiality set out in the *Civil Service Code*, and also by the *Code of Conduct for Special Advisers*. Any civil servant who has a concern about the activities of a special adviser can raise the matter with the Civil Service Commissioners. However, special advisers are appointed by Ministers, and the Government believes that responsibility for their management and conduct, including discipline, rightly rests with the Minister who made the appointment. If the Civil Service Commissioners had concerns about the activities of special advisers which they felt were not being acted upon, there is provision for them to raise the matter in their annual report or by publication of a special report.

Misconduct in Public Office

9. The intention in passing the 1989 Official Secrets Act was to limit those areas in which it would be a crime to leak official information. The use of misconduct in public office charges in connection with the leaking of information raises concerns that the boundaries established by the 1989 Act may be becoming blurred. It is important that this common law offence is not used to subvert the clearly expressed will of Parliament in limiting the scope of offences under the Official Secrets Act.(Paragraph 46)

10. This does not mean that misconduct in public office could never be an appropriate charge where there had been a leak of official information; but there would need to be evidence of serious criminal misconduct beyond the leak itself: for example that an individual had taken payment in return for disclosing the information.(Paragraph 47)

11. The recent very public disclosure of the expenses and allowances of Members of Parliament has shown how the leaking of information can sometimes serve the public interest. However, there were suggestions at the time that the information might have been sold for personal gain. If this were true, the police decision not to investigate the leak might seem surprising. Those with access to official information should not benefit personally from its unauthorised release without criminal consequence, even where there is a strong public interest in its release. (Paragraph 48)

For the Government's part, we fully understand Parliament's intentions in passing the 1989 Official Secrets Act. As the guidance published in November 2009 makes clear, in considering whether a leak meets the high threshold for referral to the police, a crucial part of that decision making process is an honest and robust assessment of the damage incurred against the provisions of the 1989 Act or other relevant criminal statute.

More generally, both the police and the Crown Prosecution Service (CPS) are entirely and rightly operationally independent of Government. Therefore, the Government can never dictate the scope of police investigations, nor, if charges are brought, under which offence. The Committee's conclusions on both the offence of misconduct in public office, and on the case of the disclosure of MPs' expenses and allowances, are therefore matters for the police and the CPS.

How are leaks investigated?

12. The evidence we have received suggests that internal leak investigations rarely find the culprit. In part this is a result of a political culture that tolerates low-level political leaking. We are sympathetic to the position of permanent secretaries, who would not wish to invest heavily in leak investigations only to find that leaks originate with ministers or their advisers. A change in political culture is therefore a crucial step towards the effective investigation of leaks. We also recommend that the Cabinet Office review the resources available to leak investigators to ensure they can meet the increasing demands placed upon them by email and other electronic communication. (Paragraph 53)

The Government agrees that improving internal capability to detect leaks is vital to addressing the wider problems identified by the Committee. A number of significant improvements have already been made. As the recently published guidance notes, departments can now call on approved professional investigators to assist them in finding leakers. The new guidance also stresses the importance of a positive information management and information security culture within departments as the best protection against leaks.

Police Involvement

13. We agree with the Home Affairs Committee that Cabinet Office guidance on the investigation of leaks should be revised to ensure that the police are invited to investigate only where there is evidence that a criminal offence under the Official Secrets Act has taken place. Police involvement may also be appropriate where internal investigation has brought to light evidence of other impropriety, such as a financial arrangement, that could lead to misconduct in public office charges as discussed above. (Paragraph 61)

No part of Government is above the law and the police have the right and duty to investigate suspected crime. Government departments need to be ready to refer to the police any evidence that a criminal offence may have been committed and it will then be for the police to decide whether there is sufficient evidence to launch an investigation. In respect of leaks, the process for consideration of police involvement is set out in the November 2009 guidance. The Government accepts that the threshold for referral to the police is high. In practice, in most cases it will involve a suspected breach of the 1989 Official Secrets Act under one of the categories of damage set out in that law. Consideration might also be given if there was evidence of criminal misuse of personal or economic data, or of corruption. In his report to the Home Secretary, published in October 2009, HM Chief Inspector of Constabulary, Dennis O'Connor outlined a protocol for consideration of police involvement in leak investigation, and this has been adopted.

Access to Information

14. Care needs to be taken when considering individuals with an active political past for appointment to sensitive posts within the Civil Service. We do not, however, believe that a political, or journalistic, background should be a bar to such appointments where the individual has been open about their past during recruitment and demonstrated a willingness and ability to act with impartiality and appropriate confidentiality. In general, we would not expect temporary workers to have access to sensitive information. (Paragraph 68)

The Government agrees with the Committee's conclusions. The key point is that all civil servants must be able to demonstrate their ability to conduct themselves in accordance with the *Civil Service Code* values of integrity, honesty, objectivity and impartiality, including political impartiality. The *Code* makes clear that civil servants must "serve the Government, whatever its political persuasion, to the best of your ability in a way which maintains political impartiality and is in line with the requirements of this Code, no matter what your own political beliefs are", and that civil servants "must act in a way which deserves and retains the confidence of Ministers, while at the same time ensuring that you will be able to establish the same

relationship with those whom you may be required to serve in some future Government”.

Whistleblowing procedures in Whitehall

15. The structure for whistleblowing within the Civil Service allows individuals to raise concerns within their line management chain, provides for an alternative source of advice to that chain in nominated officers and provides for direct appeal to an oversight body. However, there is a lack of clarity in the Civil Service Code regarding the circumstances in which an individual civil servant is allowed or encouraged to approach law enforcement or regulatory bodies with concerns they may have. We recommend that the Code is amended to give greater clarity on this issue and the circumstances when such disclosures would be protected under PIDA. (Paragraph 75)

The Government is reviewing and updating the whistleblowing guidance in the *Directory of Civil Service Guidance* and the *Civil Service Management Code* to provide greater clarity on the circumstances in which an individual civil servant is allowed or encouraged to approach law enforcement or regulatory bodies with concerns they may have, and the circumstances when such disclosures would be protected under PIDA. The *Civil Service Management Code* (of which the *Civil Service Code* is part) sets out the mandatory regulations and instructions to departments and agencies regarding the terms and conditions of service of civil servants.

16. We have previously recommended that the Civil Service Commissioners should have complete operational and financial independence from the executive and the ability to initiate their own investigations enshrined in statute. We continue to hold this view. (Paragraph 76)

17. We recommend that, where appropriate action has not been taken by Civil Service management following their investigations, the Commissioners should be able to report this to Parliament. These reforms would add to the Commissioners’ credibility as an independent investigative body. (Paragraph 77)

The Government’s position on these issues remains as set out in its response to both the Public Administration Select Committee and the Joint Committee. The Government’s *Constitutional Reform and Governance Bill* is currently before Parliament.

Advice and procedures for potential whistleblowers

18. We recommend that the Cabinet Office take a lead role in ensuring that all government departments’ whistleblowing advice and policies follow best practice in the field – beginning by reviewing its own advice and procedures. In particular, guidance should make clear the alternatives to the line management chain, the possibility of taking matters to the Civil Service Commissioners and the protection offered by the Public Interest Disclosure Act. This guidance should be easily accessible to all grades. (Paragraph 80)

The Government agrees with the Committee that it is important that departmental guidance and advice is accessible to all staff and is clear in covering the channels that staff should follow if they do have concerns under the *Civil Service Code*. This will be reflected in the review and update of existing whistleblowing guidance. The Cabinet Office will review its own advice and procedures for Cabinet Office staff.

The Government does however also take the view that the adequacy or otherwise of internal whistleblowing procedures had nothing to do with the issues around the specific Home Office leaks case referred to in the report, and stronger guidance or procedures was not the issue in this particular instance.

Civil Servants' attitudes towards whistleblowing

19. Permanent Secretaries have the authority and duty under certain circumstances to tell their ministers that there are concerns about a particular course of action. The evidence we received suggests there is work to be done to ensure that the civil servants that work for them have the procedures, channels of communication and supportive culture to allow those concerns to reach that stage. (Paragraph 86)

The updated guidance to departments on whistleblowing will reinforce the importance of appropriate channels of communication and a supportive culture within departments for staff at all levels that gives them confidence to raise concerns, and reassurance that they will not suffer detriment in doing so.

Awareness of the Civil Service Code and Civil Service Commissioners

20. Although awareness of the role of the Civil Service Commissioners appears to have improved in the last year, they still receive a very low number of appeals considering the size of the Civil Service. Whilst we were told that awareness is increasing among the Senior Civil Service, it is clearly very low outside it. Department heads should actively promote the Code amongst lower grades and ensure that guidance on whistleblowing is accessible and well known. We recommend that departments track the number of cases considered by nominated officers to assess progress and welcome the Civil Service Commissioners' audit of departmental procedures.(Paragraph 91)

21. We are concerned that awareness of the Civil Service Code, the authoritative statement of Civil Service values, does not appear to be universal. The Civil Service Code should be integral to the work of civil servants from their first day. We recommend that the Cabinet Office take steps to ensure all departments and agencies comply with the Commissioners' checklist of best practice. It is particularly important that all new civil servants are introduced to the Civil Service Code, rather than merely told about its existence, on the day that they join and that this is followed up as part of their induction training. (Paragraph 92)

26. It is important that new civil servants should be informed about their duty of confidentiality when they join. It also important that this induction should include a counter-balancing exposition of the public's right to be informed and make clear the channels that exist for raising concerns and seeking advice where the two appear to come into conflict. (Paragraph 102)

The *Civil Service Code* is integral to the work of all civil servants, and it is important that the core Civil Service values, standards of behaviour, and rights and responsibilities set out in the *Civil Service Code* are recognised and understood by civil servants from day one. Detailed explanation of the *Civil Service Code* forms a vital part of the departments' induction procedures for all new entrants to the Civil Service, and it is also important that departments regularly undertake activities to ensure that all staff remain aware of the Civil Service values and their obligations and rights under the *Code*. Last year, for the first time, standard questions about the *Civil Service Code* were included in departments' annual *People Surveys*, and the results showed that 75% of staff across the Service are aware of the *Code*.

The Government recognises the importance of the role of the Civil Service Commissioners in hearing appeals under the *Civil Service Code*, and of civil servants at all levels understanding the Commissioners' role. The results of the Commissioners' audit last year of departments' activities to uphold and promote the values in the *Civil Service Code* and investigate concerns under it, have been useful in identifying areas of good practice, and areas for improvement. Following this, the Commissioners have published new guides that clearly explain how they investigate appeals under the *Code*, the standards they work to, and the outcomes that can be expected. Departments report annually to the Commissioners on the number of *Code* cases that have been investigated within the department.

The updated guidance to departments will reinforce the importance of all departments following the checklist of best practice drawn up in 2007 by the Civil Service Commissioners working with Permanent Secretaries. Drawing on the results of their recent audit, the Commissioners are helping departments to improve their practices and procedures to ensure that they have robust and effective arrangements in place. The Commissioners will also report on departmental practices in their annual reports. Similar questions on the *Civil Service Code* will be included in future *People Surveys* in order to benchmark progress on raising awareness.

Possible reforms

22. It is essential that staff have confidence that using whistleblowing procedures will be a positive experience and not be damaging to their careers. (Paragraph 96)

23. Relatively little consideration appears to have been given to support for whistleblowers once they have raised concerns in good faith. Committed civil servants are extremely unlikely to follow approved channels for whistleblowing if they fear that their careers could suffer as a result; they may see an anonymous disclosure to the press as safer. We recommend that the Cabinet Office, departmental heads and Civil Service Commissioners look closely at how they can improve the safety, perceived and real, of whistleblowing procedures. (Paragraph 97)

24. Dr Woods-Scawen of the Committee on Standards in Public Life argued that leadership was key in ensuring people were willing to come forward with concerns and that the failure of an organisation to respond well to whistleblowing, in particular the victimisation of those who raise complaints,

were failures of senior management. He said that senior management should be held directly to account for such failings. We agree.(Paragraph 98)

The Government recognises the importance of leadership in encouraging a culture where staff are willing to come forward with concerns without fear of negative consequences. It is vital for civil servants to have confidence in the appropriate channels for disclosure. Following their recent audit, the Civil Service Commissioners have identified leadership as a key area for attention, and have recommended that within departments there should be a clear statement to staff from senior leaders that the department encourages and supports them in raising issues of concern. This will be reflected in the updated whistleblowing guidance.

25. Nominated officers could have an important role to play in raising awareness of, and willingness to use, whistleblowing arrangements by staff outside the Senior Civil Service, bridging the gap between front-line civil servants and the Commissioners by providing a ‘friendly face’ that staff can seek advice from without being seen to be necessarily raising a complaint. At present, however, nominated officers are often senior people, which may intimidate staff at lower grades and those most likely to need their advice. We agree with Sir Suma Chakrabarti that nominated officers should be evenly spread across grades and offices. Where possible, nominated officers should be individuals with other pastoral roles, such as welfare officers, to improve their visibility, to make them more approachable and to ensure consistency in advice. (Paragraph 100)

The Government agrees that nominated officers play an important role, and that they should be an accessible presence to staff, including staff at more junior levels. Drawing on the results of the Commissioners’ recent audit, the Cabinet Office is working with the Commissioners on initiatives to improve the resources and support available to nominated officers and spread best practice.

27. For whistleblowing procedures to be credible they have to be as fast as is necessary. It is of little use if a whistleblower’s concerns are vindicated six months after the effective decisions are taken. We welcome the First Civil Service Commissioner’s statement that she would act immediately if an urgent concern was brought to her and expect that senior civil servants would do likewise. However, we recognise that the need for investigation, however swift, of official complaints introduces a delay that some whistleblowers may not be prepared to countenance. If they fail to use the available channels, they need to be prepared to accept the consequences. (Paragraph 104)

The Government recognises the importance of being able to investigate concerns with urgency, and, like the First Civil Service Commissioner, would act immediately if it were to be necessary.

Non-civil servants

28. Public sector employees in non-departmental public bodies, government agencies and private contractors working for the Civil Service should have similar whistleblowing procedures to civil servants. In particular they should have access to an external oversight body, similar to the Civil Service Commissioners. (Paragraph 107)

The Government agrees that there should be arrangements in place to allow staff of non-departmental public bodies (NDPBs) and similar public bodies to raise concerns about improper conduct. All NDPBs and equivalent organisations should adopt a Code of Conduct for staff which, in addition to other provisions, sets out the procedures by which staff can raise concerns. The Cabinet Office issues a *Model Code for Staff of Executive NDPBs* which provides guidance on the form and content of Codes. This encourages NDPBs to put in place arrangements which allow staff, under certain circumstances, to raise concerns externally (usually with a nominated official in the relevant Government department). The Cabinet Office is currently reviewing the *Model Code*.

Private contractors would be expected to raise any concerns in line with their individual terms of employment.

Departmental culture

29. The evidence we received suggests that a high proportion of leaks by civil servants happen because they feel that information is being ignored or suppressed in policy debate. Government departments should foster a culture of vigorous internal policy debate where dissent is encouraged even on the most sensitive of political topics. The hierarchical nature of the Civil Service can hinder people who are experts in their field, but who are not at the highest levels of seniority, from being able effectively to raise concerns over the direction of policy. We believe this is something that needs to be addressed by heads of department when looking at departmental policy-making processes. (Paragraph 112)

The Government agrees that it is important to build a culture within departments that encourages and supports openness, debate, and challenge amongst staff.

The *Civil Service Code* makes clear at paragraph 10, that civil servants must not 'ignore inconvenient facts or relevant considerations when providing advice or making decisions' and also makes clear that civil servants must not 'frustrate the implementation of policies once decisions are taken by declining to take, or abstaining from, action which flows from those decisions'.

Official information: standards of conduct and procedures

Introduction

1. This guidance paper sets out for civil servants the standards of conduct expected of them in handling official information, including duties of openness and honesty, the importance of adhering to authorised procedures for disclosing information, and the options available for raising concerns. It also sets out high level principles governing how Government departments and agencies (including devolved administrations) should approach responding to unauthorised disclosure of Government information by civil servants.
2. This guidance draws on the relevant laws passed by Parliament covering official information, including the Freedom of Information Act 2000¹, the Official Secrets Act 1989, the Public Interest Disclosure Act 1998, and others. It also draws on the Civil Service Code, with which all civil servants must comply, and the Civil Service Management Code, which incorporates the Civil Service Code and forms the basis of detailed departmental policies to which employees are contractually bound. This high level paper is supplemented by more detailed internal guidance on various aspects of handling official information, including more detailed operational guidance on the investigation of unauthorised disclosures.

The Civil Service Code

3. The Civil Service Code sets out the standards of behaviour expected of all civil servants. It is part of the terms and conditions of civil servants. It requires civil servants to act in a way consistent with the principle of open and accountable democratic Government. It places an obligation on civil servants to be open and honest, and to tell the truth. The Code states that “civil servants must handle information as openly as possible within the legal framework”, and they must not knowingly mislead Ministers, Parliament or others. It also states that civil servants must comply with the law and to uphold the administration of justice and not to disclose official information without authority.

Open and accountable Government

4. A key pillar of open and accountable Government is the Freedom of Information Act 2000. This enshrines a statutory obligation on public authorities to disclose official information on request, unless that information falls under an exemption specified in the Act. Exemptions range from disclosures which can harm national security, the economy, or international relations, to those involving personal data and information supplied in confidence, or disclosures that would harm the conduct of public business. Some official information, for example intelligence information, is exempted entirely from the scope of the Act. The application of other objections is subject to a public interest test. The Act also places an obligation on public authorities proactively to disclose information about the work of the organisation. It also makes it a criminal offence to destroy information for the purposes of preventing its disclosure under the Act.

¹ In Scotland, the Freedom of Information (Scotland) Act 2002

5. It is essential that departments make all civil servants aware both of the provisions of the Code and the Freedom of Information legislation and their own organisation's internal procedures and guidance for dealing with the disclosure of official information.

The necessary protection of official information

6. Both the law and the Civil Service Code also recognise that the effective conduct of Government business depends on the proper management of official information. This needs to be done by having clearly defined procedures and processes through which official information is considered for release. Some information held by Government is particularly sensitive and Parliament has recognised this in legislation. The best known example is the Official Secrets Act 1989, which outlines a range of areas including damage to national security, international relations and law enforcement, where unauthorised disclosure can constitute an offence. Other statutes make it a criminal offence to disclose certain information, the disclosure of which could damage the functioning of the UK economy. It can also be a criminal offence to disclose personal information, for example that provided by citizens under law for statistical purposes.
7. More generally, it is important for good Government that information is properly managed and the Ministers and policymakers have a safe space in which to conduct their deliberations before finalising the decisions for which they are accountable. The Freedom of Information Act recognises this requirement by providing exemptions for the formulation of Government policy and the effective conduct of public affairs, subject to a public interest test.
8. Therefore, unauthorised disclosure, or leaks, of official information, whether or not it falls under one of the categories covered specifically by the criminal law, is inimical to good Government. As the Public Administration Select Committee noted², "leaks are damaging to trust within Government and trust in Government. In particular, they endanger Ministers' confidence in the civil service". This damage to the trust that is essential for effective Government can therefore seriously impair the ability of a Government department, Agency or Administration to carry out the functions entrusted to it by Ministers and Parliament.
9. For these reasons, the Civil Service Management Code is absolutely clear that "civil servants must not, without relevant authorisation, disclose official information which has been communicated in confidence within Government or received in confidence from others". This duty continues to apply after a civil servant has left Crown employment. This duty of confidentiality is also reflected in the section on integrity in the Civil Service Code, which also states that civil servants "must not misuse [their] official position, for example by using information acquired in the course of [their] official duties to further [their] private interests or those of others. Finally, the Code also sets out a requirement to use official resources, which includes official information, for the purposes for which they are provided, and avoid being "influenced by improper pressure from others or the prospects of personal gain".

² *'Leaks and Whistleblowing in Whitehall', HC83, August 2009*

10. For these reasons, unauthorised disclosure of information by civil servants constitutes a serious disciplinary offence. Leaking is absolutely wrong and inhibits effective, accountable Government. If a civil servant is found to have perpetrated a leak he or she can expect to face disciplinary action, with consequences up to and including dismissal.

Public Interest Disclosure and Raising Concerns

11. The law, the Civil Service Code and the Civil Service Management Code all recognise that there can be circumstances where employees can have legitimate concerns about conduct within their organisation and provides appropriate and protected routes for raising these concerns. The Civil Service is committed to ensuring that no one within the Service suffers any penalty for raising concerns through appropriate channels.

12. The Public Interest Disclosure Act 1998 provides statutory protection within both the public and private sectors to employees who disclose information where they have a reasonable belief that the information relates to one of five categories of “protected disclosures”, covering criminal offences, failure to comply with legal obligations, miscarriage of justice, health and safety, and environmental damage. Additionally, it covers any information relating to attempts to conceal exposure of any of these categories. Under the Act, public authorities have a duty to designate an authorised person to whom such disclosures should be made.

13. The Civil Service Code includes a duty on all employers within the Civil Service to make staff aware of the provisions of the Code and provide appropriate means for raising any concerns about actions which conflict with it, including misleading Ministers, Parliament or others. It also places an obligation on departments and agencies (including devolved administrations) to ensure the concern is dealt with. In the first instance, the Code encourages civil servants to raise concerns internally within the line management chain or with the nominated officer in each organisation who advises staff on the Code. Evidence of criminal or unlawful activity should be reported to the police or other appropriate authorities. If a civil servant believes that his or her concerns have not received what they consider to be a reasonable response, they may, under the Code, report the matter to the Civil Service Commissioners, who operate entirely independently of Ministers and Civil Service management. Alternatively, the Commissioners will also consider taking a complaint directly. Specific arrangements also apply in the security and intelligence agencies.

14. Taken together, the provisions of the law and the Civil Service Code should provide effective mechanisms for raising concerns about compliance with the Civil Service Code and wider matters of concern. Therefore, there should be appropriate mechanisms for dealing with concerns and unauthorised disclosure, or leaking, is not an acceptable vehicle.

Investigations of unauthorised disclosures

15. In the event of an unauthorised disclosure or leak, Government departments and agencies (including devolved administrations) have established procedures and designated officers who can investigate the incident or incidents and take a view on appropriate action.
16. The Permanent Secretary for each department or devolved administration is responsible overall for security within that organisation, including the security of official information. Each organisation also has a designated Departmental Security Officer (DSO) who supports the Permanent Secretary in applying the security policies of the organisation. Security policies for each organisation are set within an overarching framework – the Security Policy Framework – which is owned by the Cabinet Office. Consistent with this wider framework, the Cabinet Office has a role in supporting departments and organisations in the investigation of leaks and more detailed internal guidance is available to Departmental Security Officers. It is not published as it discloses investigative procedures and its publication would therefore undermine its effectiveness.
17. The first step in a leak investigation is for the department or organisation affected to establish what information has been disclosed, and to undertake an impact and damage assessment. This should be done under the auspices of the Departmental Security Officer on behalf of the Permanent Secretary. The Cabinet Office should also be informed about the leak. As part of the impact and damage assessment, a view should be taken on whether the leak appears to be a single event or part of a series of leaks. The damage assessment should also look carefully at the content of the information disclosed and any protective security classification, the scope of the distribution of the information, and possible motives for its disclosure. Based on this, the assessment should take a preliminary view on the likelihood of identifying who was responsible for the leak, so that this can be factored in to a consideration of options.
18. Importantly, the assessment should include a realistic and honest assessment of the extent of the damage done to the reputation of the organisation, and the extent to which the leak undermines the effective discharge of Government policy or that of the relevant devolved administration. If national security, personal data, or other criminal offences are involved, the damage assessment must include a clear, objective assessment of the impact in this respect. Cases where espionage, terrorism, or infiltration are suspected should be reported immediately to the Cabinet Office who will inform the relevant national authority.
19. Once the impact and damage assessment has been completed, the decision on further action rests with the Permanent Secretary of the Department or devolved administration, supported by his or her DSO, and drawing on Cabinet Office advice if appropriate. What is proportionate is a key factor in this decision. If the Permanent Secretary decides, on the basis of the impact and damage assessment, that further action is required, a number of options are available. For example, the DSO could be asked to conduct an internal inquiry. It is also open to the Permanent Secretary to request from the Cabinet Office that an internal investigation is launched under the auspices of one of the approved list of internal

investigators held by the relevant organisation. Whatever route is chosen, civil servants are required to cooperate with these internal investigations, consistent with their duties under the Code not to mislead.

20. It is longstanding procedure that press offices do not comment on leaked documents.

Considerations relating to police involvement

21. The police are entirely operationally independent of Government and have the right and duty to investigate criminal activity wherever it occurs. No part of Government is above the law. In respect of unauthorised disclosure of official information under, for example, the Official Secrets Act, if the police find evidence of a suspected breach of the criminal law, it is entirely within the powers of the police to begin an investigation under their own auspices, whether or not the Government has raised the incident with them.

22. In cases where internal Government or administration consideration gives rise to concerns as to whether the criminal law has been broken, great care should be taken in deciding whether or not to refer the matter to the police. The impact and damage assessment is crucial in this regard. Embarrassment or reputational damage to the Government or a particular department or administration, although very damaging to the Government's or administration's ability effectively to discharge its business, is not in itself sufficient grounds for referral to the police. There needs to be sufficient evidence to give rise to serious concern that the Official Secrets Act or other criminal law may have been breached. As noted earlier, these laws can include those relating to the protection of personal data or information which protects the economic wellbeing of the UK.³ It can also include various corruption offences, where, for example, a criminal offence may have been committed because of the acceptance of a financial incentive.

23. Further guidance on consideration of police involvement is set out in the *Protocol on Leak Investigations* proposed by HM Inspector of Constabulary in September 2009. The Government has accepted this recommendation and the protocol is reproduced as Annex A to this guidance. As the protocol notes, the threshold for involving the police in a leak investigation is high, with a presumption that the police should not be involved unless there are reasonable grounds for believing that an Official Secrets Act 1989 offence, or other serious criminal offence, has been committed. The protocol also notes that when a police investigation has been launched, the police will keep in contact with all relevant parties, including the Government when appropriate. Operational decisions in criminal investigations remain a matter for the police alone. The guidance also requires the police to assess the impact of Parliamentary privilege during the investigation, should that be relevant.

24. Any police involvement in the investigation of leaks or unauthorised disclosures occurring in Scotland (whether from the UK or the devolved government) will of

³ By helping to identify and manage risks to personal data, Privacy Impact Assessments (PIAs) can prevent situations where accidental breaches of the law may arise, or where the development of a new process or system might, if unchecked by the sort of scrutiny that PIAs provide, present easier opportunities for corruption such as the sale of official data.

course take place in accordance with Scots Law and the Police will be subject to direction by the Crown Office and Procurator Fiscal Service.

25. The Cabinet Office, which is responsible for the Government's overall Security Policy Framework, must be consulted in any consideration of referral of a leak to the police, to ensure that decisions are consistent with this protocol.

Official information: promoting a culture of awareness

26. HM Chief Inspector of Constabulary also noted the importance of both preventative security and investigative capability in ensuring the highest standards of information security. The Government believes that the most important factor in ensuring that official information is treated in a way that upholds the values of the civil service is a positive culture of awareness across departments and administrations of the laws, Codes and procedures which relate to official information and the values that underpin them.

27. In particular, departments and devolved administrations should ensure:

- that all civil servants are aware of their responsibilities to be open and honest, to avoid in all circumstances misleading Ministers, Parliament and others, and of their specific obligations under law in respect of Freedom of Information and Data Protection;
- that all civil servants are aware that official information should not be disclosed without authority and that they have a full understanding of the importance of trust within Government, and that the unauthorised disclosure of information betrays that trust and seriously damages the effectiveness of Government. As such, it can be a serious disciplinary offence which can result in dismissal, and is entirely inconsistent with the values of the civil service. Officials should also be aware of the specific criminal laws governing their conduct in relation to official information;
- that all civil servants are aware of the correct procedures by which they should raise concerns about actions that breach the law or the Civil Service Code, and the statutory and other protections offered to them;
- that their departments have a pro-active security policy which makes staff aware of all relevant policies and procedures, and that they have an active, risk-based approach to information security. It is particularly important that staff understand the importance of selecting the correct protective markings: giving information overly low classifications gives rise to risk of inadvertent disclosure, whilst overly high classification risks discrediting the procedures needed for handling genuinely sensitive information. It is also important that departments actively identify particular areas at risk and look closely, and regularly review, practices in respect of information security in these areas including through the use of Privacy Impact Assessments.

28. This positive awareness of how to strike the right balance with respect to official information, underpinned by robust policies and high quality internal capabilities should underpin a prevention-based approach by all departments and administrations which will help ensure adherence to proper conduct, consistent with the Civil Service code and Civil Service values.

**Cabinet Office
November 2009**

Annex A – Protocol on Leak Investigations

Step 1 – Internal investigation

It is the responsibility of Government Departments to ensure they have a security regime in place which: is fit for purpose; prevents leaks; encompasses whistle blowing; and fosters a culture of integrity regarding disclosure of information. Leaks should be investigated by suitably experienced internal investigators capable of exploiting investigative opportunities, with analytical support when appropriate. Before referral to the CO, Departments should be able to present a clear intelligence/evidence based package, meeting the threshold required to instigate police involvement.

Step 2 – Meeting the threshold for police involvement

The threshold for police involvement is high. Only in leak cases where the CO believes there is intelligence/evidence to suggest the criteria of Official Secrets Act criminality have been reached or in leak cases where the criteria have not been reached but there is compelling grounds to suspect a serious offence⁴ has been committed should a case be presented to the Gateway process. Before moving to the Gateway stage, consideration should be given to the proportionality of police involvement, likely outcomes and other internal resolution options.

Step 3 – The Gateway Process

The Gateway can be accessed only through nominated Single Points of Contact (SPOCs). These SPOCs should occupy senior executive positions within the CO and other relevant participant organisations. In the case of the MPS the level has been suggested at Deputy Commissioner. The DPP and Commissioner of the MPS have agreed to high level Gateway representation as a useful development. Other representatives may be invited to attend as appropriate. The panel of SPOCs will assess the strength of the intelligence/ evidence package and decide whether it meets the threshold for police investigation. At this early stage the panel should consider likely outcomes and other resolution options, eg using appropriate regulatory authorities; whether an investigation represents the best use of police resources; and if it is in the public interest to investigate. The panel might also require further scoping of the case to take place before deciding upon the next step. Each organisation represented clearly has its own responsibilities and independence in this process; the objective is to see if collective agreement can be secured on the value of going forward. It is also understood, that at any stage, each of these organisations can exercise their individual independence as necessary given their different roles. Notwithstanding this principle, in extraordinary circumstances it may be necessary for the police to act outside these guidelines and not to fetter their independence by

⁴ The Chief Inspector's report notes that in future leak investigations there should be a presumption in favour of the police not being involved unless there are: a) Reasonable grounds for believing an offence under the *Official Secrets Act 1989* (OSA) has been committed. b) Reasonable grounds for believing a serious criminal offence has been committed as an integral part of a leak(s), such as the example where an official is subject to bribery or corruption, or very exceptional cases which seriously threaten the UK in economic or integrity terms.

doing so. These situations would be exceptional and require a transparent rationale for taking such action.

Step 4 – Scoping

The Gateway Panel may request further work to assist in their considerations of the most appropriate course of action. This may be undertaken by the CO/ Department or jointly with the police if they are able to bring added value to the process. If the police are engaged it should be clearly understood that this is not the start of an investigation, which should only commence once agreed by the Gateway Panel. Whilst undertaking the scoping, cognisance should be taken of the criteria applied in the Gateway.

Step 5 – Police investigation

Once an investigation has commenced progress should be regularly reviewed against all resolution options including ceasing to investigate. In common with national best practice derived from other high risk cases, police will establish an early relationship with a senior level CPS lawyer and take advice at key stages of the investigation. When the investigation has Parliamentary implications, seeking advice from a Parliamentary official at an appropriate stage of the investigation would be advisable. Both these relationships should be separate to any formal police review process.

Step 6 – Regular review

This should be an ongoing process involving the Police, CPS and any other representative adding value. It is suggested that the introduction of someone not forming part of the investigation command team, who can independently challenge decision making, would be an asset to the quality of decision making. The purpose of the review is to take stock of the investigation. By considering the likely outcomes, resolution options and other relevant factors, the review will be capable of deciding the most appropriate course of action. In doing so, levels of actual harm or damage as revealed by the investigation will inform the police/CPS decisions as to public interest.

Step 7 – Resolution options

At the conclusion of the investigation – assuming it has passed through the review process – there will be a determination of how the case will be concluded. The DPP will first decide whether any criminal proceedings should be pursued. In the event of there being no proceedings other resolution options should be considered.



information & publishing solutions

Published by TSO (The Stationery Office) and available from:

Online

www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail

TSO

PO Box 29, Norwich, NR3 1GN

Telephone orders/General enquiries: 0870 600 5522

Order through the Parliamentary Hotline Lo-Call 0845 7 023474

Fax orders: 0870 600 5533

E-mail: customer.services@tso.co.uk

Textphone: 0870 240 3701

The Parliamentary Bookshop

12 Bridge Street, Parliament Square

London SW1A 2JX

Telephone orders/General enquiries: 020 7219 3890

Fax orders: 020 7219 3866

Email: bookshop@parliament.uk

Internet: <http://www.bookshop.parliament.uk>

TSO@Blackwell and other Accredited Agents

Customers can also order publications from:

TSO Ireland

16 Arthur Street, Belfast BT1 4GD

Tel 028 9023 8451 Fax 028 9023 5401

ISBN 978-0-10-178632-4



9 780101 786324