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# The practice and politics of leaking

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# The practice and politics of leaking

## **Abstract**

Civic-minded people who encounter what they believe to be corrupt and illegal conduct in the workplace may take it upon themselves to release relevant confidential information. This is done either through an open disclosure, where the identity of the whistleblower is publicly known, or an unauthorised disclosure where the identity of the leaker is not revealed. This information is typically leaked to journalists or activists who may be able to seek redress. Leaking is an alternative to whistleblowing and carries fewer risks of reprisals but leakers need to be alert to pitfalls with this practice.

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# **The practice and politics of leaking**

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## **Abstract**

Civic-minded people who encounter what they believe to be corrupt and illegal conduct in the workplace may take it upon themselves to release relevant confidential information. This is done either through an open disclosure, where the identity of the whistleblower is publicly known, or an unauthorised disclosure where the identity of the leaker is not revealed. This information is typically leaked to journalists or activists who may be able to seek redress. Leaking is an alternative to whistleblowing and carries fewer risks of reprisals but leakers need to be alert to pitfalls with this practice.

## **Introduction**

In a democracy people need access to information on political, social and economic issues in order to judge whether their elected officials are acting in the public interest. However, too often their elected officials evade such scrutiny and fraud and abuse goes unchecked. Most people with access to relevant information are deterred from leaking or whistleblowing due to legislative prohibitions. They may be those embodied in official secrets acts or the case of the United States the Espionage Act (1917). The Official Secrets Act covers legislation providing for the protection of state secrets and official information and is used in the United Kingdom, India, Ireland and Malaysia. Australia does not have an Official Secrets Act but has provisions under Part VII of the Crimes Act (1914) restricting Commonwealth public servants from revealing confidential information. The U.S. Espionage Act has a more limited application. This Act only applies to the prohibition on the disclosure of government information on defence issues. While governments have aimed to keep official secrets confidential public servants with access to this material have been successful in releasing it to the public either through the press or in recent times passing it to WikiLeaks, a website for newsworthy leaks.

To draw a distinction between whistleblowing and leaking, whistleblowers are overt in their disclosure of organisational deviance, but there is a price. Bureaucracies now know where their opposition is coming from, and can isolate the whistleblowers by discrediting them, not giving them access to further information and suspending them from work. Generally leakers don't suffer these reprisals.

The definition of leaking is blurred; it can mean an unauthorised source giving information to a journalist but it can also involve an authorised source with political power and high status using the media to their advantage with little likelihood of being prosecuted (Tiffen 1989: 97). In both instances leakers are covert in their disclosure of information. The types of leaker discussed in this article are workers in the public sector who without authorisation convey

official information to recipients outside of government (Standing Committee 67). It is usually released to the media in the public interest and these leakers lack positions of high status and power. The information they provide journalists has not been processed by official channels and there is an undertaking by the journalist that the identity of the source will not be revealed. This practice provides some measure of protection to the leaker. Journalists are the usual recipients of leaked information but on occasion information is leaked to activists who can act as a spur to additional media coverage of the story (Martin 2009 206-216). There can be a range of motives for leaking not all of them altruistic. Some leaks are vexatious in nature and not in the public interest. The protection for journalists lies in checking the information with many sources and gauging their reliability (Flynn 2006 264-265).

The examples of leaking discussed in this paper are mainly Australian ones but the issue is applicable to many other countries. Leaks can come from a range of organisations; they may be governments, not-for-profit groups, corporations, environmental groups, trade unions as well as churches. This paper also mainly focuses on leaks from governments.

Not surprisingly governments and unions will not protect leakers if they are caught even when they are acting in the public interest. But there are divergent meanings of the phrase 'the public interest'. Journalists and leakers define it as information that brings accountability and transparency to government and exposes maladministration or corruption. Governments argue that they are the interpreters of the public interest and that public servants are bound by rules of confidentiality and are not free to speak out on malfeasance. As Peter Shergold, Secretary of the Department of Prime Minister and Cabinet in the Australian government explained, leaking by public servants is 'not just a criminal offence but also democratic sabotage' (Shergold 2004). Supporting this view the then National Secretary of the Community and Public Sector Union, Stephen Jones, giving evidence to the House of Representatives Standing Committee on Legal and Constitutional

Affairs in its report on whistleblowing protection, held that leaking should not be protected due to its harmful impact on the relationship between the executive and the public service. Presenting a different perspective to this committee was Peter Bennett, president of Whistleblowers Australia. He argued that the official responses to people who leak confidential information are outrageous and that leakers should be protected from civil and criminal liability (Standing Committee 2009 67).

### **The practice of leaking**

One of the difficulties for a public servant who sees evidence of what they perceive is an organisation's corrupt practice and believes that neither management nor parliament will do anything about the problem, is deciding what to do next. They may be influenced by the rhetoric of senior bureaucrats who assert that leaking undermines the trust between the executive and the public service. This might seem a compelling argument except it hides the need for information to be freely available so there is effective decision-making.

- If a leaker decides to speak to a journalist, they must first decide which media outlet is most suitable for publicising the story, whether it is a national or local outlet and what the outlet's editorial policy on the issue is. In selecting a reporter it is recommended to approach one who is experienced and has a reputation for maintaining confidentiality.
- Leakers need to understand the importance of the timing of the release of documents.
- A leaker needs to be armed with documents in order to be believed by a journalist, unless he or she is an experienced and reliable source.
- In addition knowledgeable leakers advise briefing the journalist with a clear and compelling one page summary of the key issues of the case.
- The biggest problem with passing documents across to the media is that photocopiers tend to leave a signature on the copied document, which could be dust or the electronic idiosyncrasies of the machine. So the best

way to photocopy the document/s is to use a photocopier in an offsite facility, for example, in a newsagency, library or internet cafe. When the journalist receives the document request him or her to re-photocopy the document and shred the document they had received (which is not the original). It is best to avoid using departmental photocopiers, fax machines, computers, email or telephones (The Art of Anonymous Activism 2002).

- The print media are preferable to television as print is better able to ensure the leaker's anonymity. Television productions quite often need shadow outs or use distorted voice – and the original voice sometimes can be reconstructed. Television and radio will often do stories inspired by a print story.
- Some leakers, including WikiLeaks founder Julian Assange, believe that leaking is best undertaken by one person working alone who maintains confidentiality. Again others derive safety from working in a group, with information being streamed through a designated spokesperson. In this way the journalist knows the identity of only one of the leakers. Others believe that with group involvement the security of the operation is compromised as someone in the group may drop their guard and talk openly about the leaked information.
- Leaking is unpopular with managers for it is embarrassing and can highlight workplace incompetence, inefficiency and secrecy. The leaker is left in a strong position as his or her identity is hard to uncover and they may be able to stay in the job and leak further information at some stage in the future.
- Reactions by staff members to leaks can be to find the source of the leak and pass further additional information to this source so it gets into the public arena.
- If leakers are caught it can result in the same reprisals that whistleblowers are subject to – demotion or loss of employment and in fact, to find the leakers, managers may resort to targeting innocent people and attributing

them with the leak. This can have the desired effect of making the leaker come forward with an admission of guilt.

- There are risks in leaking. The identity of the leaker may be disclosed during the course of a parliamentary inquiry or by accidental disclosure, for example when a document is passed to a journalist by fax machine.
- On the positive side leaking can influence government policy because it can result in some aspects of public policy being examined more thoroughly than they would in an environment where policy is not subject to such scrutiny (Flynn 2006).
- Further information on methods of leaking can be found in Nicky Hager and Bob Burton's book *Secrets and Lies* (Hager & Burton 1999), a booklet *The Art of Anonymous Activism* (2002) and Julian Assange's article, *How a Whistleblower Should Leak Information* (Assange 2010).

### **Case study - Medibank**

There are many instances where principled public servants have come forward to disclose waste and fraud but one that I am familiar with concerns Medibank – the precursor to Medicare – where whistleblowers and leakers disclosed information to the media, and the Joint Committee of Public Accounts (JCPA) of fraud and abuse against Medibank.

Medibank was a system of publically funded universal health care that was introduced in Australia in 1975. It enjoyed great electoral popularity but there was a defect with the scheme. It had no legislative architecture to control fraud and overservicing, and with few systems in place and inadequate staffing, the Department of Health was left to manage the situation as best it could.

Medibank's first fraud investigator and first whistleblower was Joe Shaw. In 1978 he estimated \$100m was being lost to fraud and overservicing and wrote a report outlining his concerns. He was not listened to and he resigned. Some months later, he gave it to a journalist working for Brisbane's *Courier Mail*



newspaper. The article was a page one story. Two days later Senator Mal Colston asked that Shaw's report be tabled in parliament. This request was refused. Four years later, committee members of the JCPA recognised the value of Shaw's report. This made it more difficult for senior management in the Department of Health to deny knowledge of the problem.

The second whistleblower was John Kelly, Director of the Operations Branch of the Commonwealth Department of Health. He had been asked by a senior officer of the Department of Health to provide a departmental briefing for the Minister. Kelly's estimate of the amount lost through leakage to the system was the same as Joe Shaw's estimate. Kelly was aware that this information was likely to be deleted by senior management, so using a strategy that was procedurally correct; he hid the estimate in a complicated statistical appendix in an attachment to the brief to the Minister. A senior officer in the Department of Health reading Kelly's report did not grasp the significance of the statistical data and the report was forwarded to the Minister. This figure was then sent to the Australian Medical Association (AMA) who accepted the figure as the amount lost through fraud and overservicing.

It was to be the actions of whistleblowers, leakers, the media, the AMA and the Auditor-General's office in 1981 that led the JCPA to undertake an inquiry into abuse of the Medical Benefits Schedule by medical practitioners.

A freelance journalist, Katherine Beauchamp, was employed by the JCPA from February to September 1982 to prepare questions for the committee. She interviewed whistleblowers, unauthorized confidential sources and high ranking officials. However, her use of material from leakers raised the ire of the Committee and she was suspended from her employment.

The Chairman of the Committee, David Connolly, had received leaked information that either the Victorian division of the Commonwealth Department of Health, or individual staff members of that office, had facilitated criminal fraud by some doctors (*JCPA Report 203, 1982 48*).

Connolly subpoenaed forty-one files from the Commonwealth Department of Health's Melbourne office relating to this matter. On the first day of the Committee's hearings it was announced that there would be no discussion of the forty-one files (JCPA vol. 1, 1 July 1982 303) as the citing of the names of doctors could prejudice police investigation of the trials of those mentioned in the files.

A confidential unauthorised source leaked the police report of the files to Michael Smith, an investigative journalist with Melbourne's *The Age* newspaper, who wrote the story under the headline 'Medifraud Cover-Up Suspected'. On 13 September 1982 there were further revelations. The story 'Medifraud: A Tale of Political Failure' was compiled from leaked government documents and other sources and helped put pressure on the government to complete an interim report earlier than expected. Its publication in December 1982 contained forty-five recommendations and it validated the stance taken by whistleblowers and leakers for government action on medical fraud and overservicing.

In this case study the leaker/s were successful in passing over information to the media in ways that protected their anonymity. Whoever the culprit/s were they were not caught, discredited or suspended from work. They were able to maintain the secrecy of their covert manoeuvre to get information to the media and bypass official channels. The leaker/s took documentary evidence to an experienced journalist who investigated the claims of the leaker/s, collected further evidence and wrote newspaper articles on the topic. The timing of the release of the documents was fortuitous. The editor of the newspaper was interested in white collar crime, the health debate and exposés of policy failures of the Fraser government. This was a government already weakened by scandals and leakers and whistleblowers were emboldened to make disclosures that would be effective (Flynn 2004 218).

### **The bigger picture**

Leakers and whistleblowers acted in concert and fought for media and parliamentary oversight of fraud and abuse against Medibank. These acts come under the umbrella of what political theorist, John Keane, called 'monitory democracy'. This was a new form of democracy born in the post world war two period which saw the emergence of communicative technologies – the photocopier, the scanner, the fax machine and later the Internet, mobile phones and video recorders. It enabled citizens to more effectively monitor the actions of government and with the help of the media tell others about matters that have been covered up (Keane 2009). Peter Shergold's admonition that leaking was 'democratic sabotage' is at odds with monitory democracy: the corrective to unnecessary secrecy and unaccountable power.

One influential monitor on democracy was Daniel Ellsberg, an employee of the Rand Corporation and an advisor to the Pentagon in the 1960s. Initially he was a supporter of the war in Vietnam but in the course of his employment he uncovered evidence that the Johnson administration had lied about its involvement in the war. Ellsberg decided to take action. He photocopied the evidence of the government's deception, a hefty 7,000 page set of documents called the Pentagon Papers and leaked this information to *The New York Times* in 1971 (Ellsberg 2002). There were long legal delays before the Times started to publish the documents. The government issued injunctions to prevent publication of any other papers in the series. The matter ended up in the Supreme Court which ruled against the injunctions and this generated adverse publicity for the government.

When asked whether he would have used this approach today Ellsberg replied that to avoid the legal delays he would have scanned the documents onto the Internet. Julian Assange, argued that for someone in Ellsberg's position it would be better to go to a mainstream outlet to get maximum publicity but use WikiLeaks for the storage of the documents. This has the advantage, Assange told *The New York Times*, that the material can be verified in the same way that an academic paper can be verified.

## **Learning more**

Much has changed since the inception of newspaper investigative journalism. In 2006 WikiLeaks was developed as a safe house for newsworthy leaks which are of political, historic or ethical significance. The site is located on servers in Sweden, Belgium and the United States. It maintains its own servers, keeps no logs and uses military grade encryption to protect sources and other confidential information. To date they have not released a misattributed document.

The website has had significant successes. These include the release of the Afghan War Logs, the Iraqi War Logs and US embassy diplomatic cables. The mainstream media picked up these stories on WikiLeaks and the level of publicity, which ensued, encouraged other leaking activists to send material to this site. The retaliatory action taken by the US government was to imprison the alleged leaker Bradley Manning.

Most unauthorised leakers do not meet such a fate. In fact they are successful in reaching their goals. They may be to get information via the media into the public arena, or to expose government policy to wider and more rigorous community debate. Some want to drive a wedge between the executive and the parliament by setting a doubt in the mind of politicians that they are not being well briefed by senior officers of their departments through the omission or cover-up of information. For others it is to achieve more substantial social or political reform than any parliamentary inquiry can achieve.

Julian Assange has a different agenda and a bolder ambition. He is more interested in societies being based on justice rather than on transparency and openness, although these goals can converge. In essays written in 2006 he explained his position. The goal is to “radically shift regime behaviour”. He argued,

“We must understand the key generative structure of bad governance...we must use these insights to inspire within us and others a course of ennobling and effective action to replace the structures that lead to bad governance with something better” (Assange 2006a).

He likens this bad governance to a conspiracy and by that he means the ability of political elites to hold onto power through the secrecy of their plans and actions which work to the detriment of the population. Conspiracies can be undone by mass leaking. The idea is to increase the porousness of the conspiracy's information system so that the conspiracy will turn against itself in self-defence. As the lines of communication are interrupted the information flow decreases to the point where the conspiracy is not able to govern.

Where this bold ambition leads is yet to be seen but in the meantime whether it is on WikiLeaks or in mainstream journalism leaking provides an alternative to whistleblowing or just doing nothing in the face of corruption, fraud, waste, abuse or hazards to the public. Leakers can be effective in redressing these injustices but they need to be mindful of the precautions to be taken to protect their anonymity.

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### **Biographical notes**

**Kathryn Flynn** completed her PhD at the University of Wollongong. Her interests are in Medicare fraud, public policy and the media.

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