
Confidential Information and the Media

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In the battle for readers, listeners and viewers, competition in the media industry for “exclusive” news is never-ending. Journalists and news organisations go to great lengths to obtain information, stretching, bending and sometimes breaking the rules in their attempts to keep the public informed and keep ahead of the competition. News organisations have an essential role in our democratic society, keeping an eye on government, private organisations and people in general, but their methods of obtaining information have been much criticised and debate often rages over whether certain information should have been published. At the centre of the controversy are the public’s right to be informed and the right of individuals and organisations to maintain secrecy or enforce a confidence. The law attempts to balance these competing interests.

A widely accepted test for confidential information is whether or not the information was disclosed for a limited purpose.¹ Courts have recognised that a person – including a journalist and their source – who receives information of a confidential nature, communicated in circumstances of confidence, cannot make or threaten to make unauthorised use of that information.² In order to be confidential, information must have the necessary quality of confidence; it must not be something that is public property and public knowledge.³ The obligation can be imposed by contract, the relationship between confider and confidee, or implied by the subject matter and circumstances of communication. Underlying government policies reflect the position that mere tittle-tattle should not be legally protected even though disclosed “in confidence”,⁴ but commercially valuable trivia may be protected.⁵ Consequently, government secrets whispered between colleagues or a personal secret from a friend⁶ could be subject to an equitable obligation of confidence. Commercial information that may be passed to a journalist is protected if it is a “trade secret”⁷ or if the idea or method is secret despite the components being in the public domain.⁸

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¹ *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd* (1981) 33 ALR 31 per Rath J at 46.

² *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 per Megarry J at 47.

³ *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203.

⁴ *Supra* n 2 at 48.

⁵ *Argyll v Argyll* [1967] Ch 302.

⁶ *Stephens v Avery* [1988] 2 All ER 477.

⁷ *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37.

⁸ *Supra* n 3.

Government Secrecy

Governments represent public rather than private interests and so different considerations apply to documents produced by government than those which apply to individuals and private organisations.⁹ The legal principles were clarified in the 1976 *Crossman Diaries case* where Lord Widgery CJ said material would be protected only if public interest in the publication being restrained outweighed public interest in its publication.¹⁰ The decision was followed in Australia in *Commonwealth v John Fairfax & Sons*¹¹ where Mason J said:

It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of the information is that it enables the public to discuss, review and criticise government action ... Unless disclosure is likely to injure the public interest, [the information] will not be protected.¹²

This view was supported in *Attorney-General (UK) v Heinemann Publishers Pty Ltd*¹³ where McHugh JA said governments and their agencies had a constitutional duty to act in and further the public interest. This cannot be achieved by applying the same rules that protect commercial or personal information provided in breach of confidence. The Commonwealth Constitution creates a system of representative government¹⁴ and these officials, as well as government departments, have a legal and moral duty to act in the best interests of the citizens who democratically elected them.

The Danger Zone

Journalists are often given information in confidence and many major news stories involve a journalist obtaining secret or leaked information. But everyone, including journalists, has an obligation to respect confidentiality and journalists have also assumed an ethical obligation.¹⁵

If confidential information is not proprietary in nature and there is no proprietary right attached to it, then the mere act of taking is not a ground for liability.¹⁶ However, equitable notions of good faith and conscience provide the basis for an obligation of confidentiality¹⁷ that is backed by public policy. Obligations of confidence imposed by contract are easily discernible and the extent of publication is determined by the agreement between the parties.¹⁸ Of greater importance under Principle 4 of the Press Council statement regarding publication of news obtained by dishonest or unfair means are obligations imposed by virtue of the relationship between parties or implied by the subject matter and circumstances of the communication. The broad policy and

⁹ RP Meagher, MWC Gummow and JRF Lehane *Equity: Doctrines and Remedies* (3rd edn, Butterworths, Sydney, 1992) at 883.

¹⁰ *Attorney-General (UK) v Jonathon Cape* [1976] QB 752 at 770.

¹¹ (1980) 147 CLR 39.

¹² *Ibid* at 51-52.

¹³ (1987) 10 NSWLR 86 at 191.

¹⁴ Sections 7 and 24.

¹⁵ Australian Journalists' Association Code of Ethics, s 3.

¹⁶ G Wei 'Surreptitious Taking of Confidential Information' (1992) *Legal Studies* 302.

¹⁷ *Ibid*.

¹⁸ M Evans *Outline of Equity and Trusts* (3rd edn, Butterworths, Sydney, 1996) at 170.

equitable principles which apply are that a person who receives information in confidence must not take unfair advantage of it.¹⁹

Cases where citizens “blow the whistle” on corruption have received increasing media attention, but whistleblowers are still victimised or shunned by society.²⁰ The typical whistleblower is an employee such as in the English case *Lion Laboratories Ltd v Evans*²¹ or a person in a position from which they can observe the democratic process at work.²² A legal obligation will be imposed if a reasonable person in the shoes of the recipient would have realised certain information was being given in confidence.²³ Unauthorised use of confidential information may be unconscious, but is nevertheless a breach of the law.²⁴

Proceedings to restrain disclosure may also be instigated against the media for allegedly facilitating or procuring someone else’s breach.²⁵ In cases involving a whistleblower or other person who leaks information, the media are often not a party to the original communication. However, this does not excuse the media, which has an enormous capacity to disseminate information, from liability. It is not important whether the third party acquired the information innocently or for value²⁶ and so both chequebook journalism and “old fashioned” news techniques may land a journalist and their organisation in court. A media organisation that acquires information as a result of another’s breach of confidence will be restrained from publishing it from the moment they knew or ought reasonably to have known of its confidential nature.²⁷ This implies journalists have an obligation to check the accuracy of information and, by neglecting to take such measures, they leave themselves open to the legal consequences. Failure to check information also leaves news organisations in danger of falling foul of defamation laws, which, although they have been criticised for restricting press freedom, are nonetheless the law. Australian law does not recognise the importance of establishing a freedom to disclose information despite the changing nature of society where, increasingly, information is power.²⁸

Privacy and Information Obtained by Reprehensible Means

As was recognised by Megarry VC in *Malone v Metropolitan Police Commissioner*,²⁹ there is no legal test for a surreptitious taker of confidential information. This has led to uncertainty, making it difficult for the media to judge where they stand, especially regarding the increasingly popular field of investigative journalism. A person who obtains information by dishonest, unlawful or surreptitious means may not have been given the information “in confidence”, but this should not prevent them from being

¹⁹ *Seager v Copydex Ltd* [1967] 2 All ER 415.

²⁰ Q Dempster *Whistleblowers* (ABC Books, Sydney, 1997).

²¹ [1984] 2 All ER 417.

²² Examples include police officers and public servants.

²³ *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

²⁴ *Consul Developments Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373.

²⁵ A Stewart and M Chesterman ‘Confidential Material: The Position of the Media’ (1992) 14 *Adel LR* 2.

²⁶ *Wheatley v Bell* [1982] 2 NSWLR 544.

²⁷ *Supra* n 5; *Talbot v General Television Corp Pty Ltd* [1981] RRC 1.

²⁸ L John in J Henningham (ed) *Issues in Australian Journalism* (Longman Cheshire, Melbourne, 1990) at 1967

²⁹ [1979] 1 Ch 345.

treated in a similar way to a consensual recipient of confidential information.³⁰ The issue is whether such a person has a right to the unlawfully or dishonestly obtained information. Journalists and their sources cannot defend themselves merely by saying they obtained the information by their own hard work as an industrious eavesdropper.³¹ When sitting in judgement on a journalist or media organisation that obtained information in this way, Australian courts are likely to follow *Franklins v Giddins*³² where Dunn J equated a thief who stole information to a traitorous servant.

Incidents where journalists obtained information by dishonest or unfair means include taking photos,³³ using sophisticated listening devices or surveillance equipment, and failing to disclose their identity. These are generally not only a breach of the law of confidence, but may constitute an invasion of privacy and breach of journalistic ethics. State and Territory legislation usually prohibits the use of listening devices to eavesdrop on private conversations.³⁴ However, a party to a conversation in Victoria, Queensland, Western Australian and the Northern Territory, is generally free to make a recording without telling the other parties.³⁵ But the situation is more complicated and even if it is permissible to record a conversation, it will usually be illegal to replay the material for publication or to publish material obtained from the recording without the consent of all parties to the conversation.³⁶ Although some states³⁷ allow publication of illegally obtained material if it is in the public interest to do so, this defence is unlikely to apply to journalists because courts are reluctant to find that invasions of privacy by the media are in the public interest.³⁸

We live in a society that places a high value on personal privacy and yet our society thrives on publicity,³⁹ in one breath condemning the media for an intrusion and in the next lapping up the sordid details. Public figures rely on the media to further their cause and careers, but where and when does the legitimate exercise of news gathering end and privacy begin? Perhaps a useful starting point is to recall that “the role of the press is the central democratic function of casting a sceptical eye on the processes and personnel of politics and power and ... keeping the public informed of the results”.⁴⁰ This statement rightly supports the view that the private lives of private citizens should not be subject to press scrutiny which should instead focus on public figures and their ability to perform their job.

³⁰ *Supra* n 18.

³¹ *Concrete Industries (Monier) Ltd v Gardner Bros & Perrott (WA) Pty Ltd* Vic SC, 18 August 1977 (unreported).

³² [1978] Qd R 72; cited with approval by Mason J in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 50.

³³ *HRH Princess of Wales v MGN Newspapers Ltd* (1993) 1 MLR 21.

³⁴ For example *Invasion of Privacy Act* 1971 (Qld); *Listening Devices Act* 1984 (NSW); *Listening Devices Act* 1969 (Vic).

³⁵ G Gibson *The Journalist's Companion to Australian Law* (Melbourne University Press, 1998) at 166.

³⁶ M Armstrong, D Lindsay and R Watterson *Media Law in Australia* (3rd edn, Oxford University Press, Melbourne, 1995) at 182. The *Telecommunications (Interception) Act* 1979 (Cth) prohibits intercepting, authorising interception or doing anything that might enable interception of “a communication passing over a telecommunications system”.

³⁷ Queensland, Victoria, South Australia, Western Australia, Northern Territory.

³⁸ *Shiel v Transmedia Productions Pty Ltd* [1987] Qd R 199 at 211.

³⁹ A Besley ‘Ethical issues’ in A & R Chadwick (eds) *Journalism and the Media* (Routledge, London, 1992) at 77

⁴⁰ *Ibid* at 80.

Developments in investigative journalism, which Gurry describes as ranging from a rigorous examination and syntheses of publicly available materials to intrusive espionage, have raised fears about privacy⁴¹ – one of the most basic human rights entrenched in the *Universal Declaration of Human Rights* in 1948.⁴² Although there is a growing trend towards protecting the community from media intrusions, Australian law does not specifically recognise a right to privacy.⁴³ Judicial opinion, such as comments made by Gray J, who expressed sympathy for the applicants in *Cruise and Kidman v Southern Press Pty Ltd*,⁴⁴ appears to support a limited right to privacy, but this competes with the basic right of freedom of speech. Privacy, however, may be protected incidentally through actions such as trespass, nuisance, assault, defamation, negligence and breach of confidence.⁴⁵

The Public Interest Debate

The law recognises that in some circumstances a person will be justified in disclosing confidential information, but Australian courts have demanded that disclosure be in the public interest, not merely of public interest.⁴⁶ This test is strictly applied and the traditional view, that “there is no confidence as to the disclosure of iniquity”,⁴⁷ remains an important guiding principle. The test has been widened since the decision in *Initial Services Ltd v Putterill* where Lord Denning MR found that “the exception should extend to crimes, frauds and misdeeds ... provided always – and this is essential – that the disclosure is justified in the public interest”.⁴⁸ But this is not an invitation to publish and be damned. In *Francome v Mirror Newspapers Ltd*,⁴⁹ Sir John Donaldson stressed that public interest should be distinguished from the interests of the press and would be just as well served by giving the information to the police as by publishing it.

Australian judges remain reluctant to embrace a broader interpretation of public interest. In *Commonwealth v John Fairfax*,⁵⁰ Mason J considered that it would be legitimate to publish confidential information “so as to protect the community from destruction, damage and harm”.⁵¹ English courts have taken the iniquity principle a step further, finding that disclosure is legitimate whenever public interest in publication outweighs public interest in confidentiality.⁵² Australian courts are yet to accept this approach, which has so far been frowned upon,⁵³ but the English balancing test seems sensible and

⁴¹ F Gurry ‘Breach of Confidence’ in PD Finn (ed) *Essays in Equity* (Law Book Company, Sydney, 1985) at 110.

⁴² Article 12.

⁴³ *Victoria Park Racing and Recreational Grounds Company Ltd v Taylor* (1937) 58 CLR 47; *Ettingshausen v Australian Consolidated Press* (1993) 1 MLR 2; *Cruise and Kidman v Southdown Press Pty Ltd* (1994) 1 MLR 84.

⁴⁴ (1994) 1 MLR 84.

⁴⁵ P Gore *Privacy and the media – where to now?* A paper delivered at a Business Law Education Centre seminar on Media Law and Practice, Session 7, May 1998.

⁴⁶ *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417.

⁴⁷ *Gartside v Outram* (1856) 26 LJ Ch 113 per Wood V-C at 114.

⁴⁸ [1968] 1 QB 396 at 405.

⁴⁹ [1984] 2 All ER 408.

⁵⁰ (1980) 147 CLR 39.

⁵¹ *Ibid* at 57.

⁵² *Supra* n 46.

⁵³ *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 95 ALR 87 per Gummow J; *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31 per Rath J; *David Syme & Co Ltd v GMH Ltd* [1984] 2 NSWLR 294 per Hutley JA.

could gain judicial recognition in the future. Some legal commentators see it as simply taking the present conception of iniquity to its logical conclusion.⁵⁴

Use of a document may be restrained even where it comes independently into the hands of the media⁵⁵ and this is where the balancing interests approach is extremely useful. In *X v Y*⁵⁶ the court granted an injunction to prevent publication of a newspaper article revealing the names of medical practitioners who had AIDS. The information had been leaked to the newspaper by health authority employees, but the court held that public interest in maintaining the confidentiality of hospital records outweighed public interest in publication. The major difficulty that has confronted the courts has been to determine what is in the public interest. Courts have been guided by a simple inquiry: How is the public interest best served – by disclosure or non-disclosure?⁵⁷

One of the most significant decisions regarding press freedom and privacy was *Stephens v Avery*,⁵⁸ where a newspaper published information about a lesbian relationship disclosed by the plaintiff to Mrs Avery. The House of Lords appears to have approved this application of the principle regarding unauthorised communication of personal confidences. In *A-G v Guardian Newspapers Ltd (No 2)*,⁵⁹ Lord Keith emphasised that respecting a confidence was in the public interest and said encouragement of such respect “may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence”.⁶⁰ The exception applies only where the disclosure advances a recognisable public interest, of which there are three broad categories: Prevention of harm, improvement in the administration of justice, and realisation of the democratic ideal.⁶¹

Public interest in the prevention of harm generally applies to disclosures relating to the contemplated or continued commission of civil or statutory wrongs.⁶² Decisions have also reflected the proposition that courts will not uphold a confidence where prevention of disclosure would be medically dangerous to the public.⁶³ In *Church of Scientology v Kaufman*,⁶⁴ Goff J held that public interest could not be advanced by a disclosure that was simply beneficial to the public, while others have sought to confine public interest to the exposure of continuing or future misconduct.⁶⁵ However, courts will generally not enforce a confidence concerning a crime.⁶⁶

⁵⁴ *Supra* n 25.

⁵⁵ *Supra* n 9.

⁵⁶ (1988) 2 All ER 648.

⁵⁷ *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341 per Powell J at 340.

⁵⁸ *Supra* n 6.

⁵⁹ [1988] 2 All ER 545.

⁶⁰ *Ibid* at 638.

⁶¹ J Pizer ‘The Public Interest Exception to the Breach of Confidence Action: Are the Lights about to Change?’ (1994) 20 *Mon ULR* 67.

⁶² *Initial Services Ltd v Putterill* [1968] 1 QB 396.

⁶³ See *Hubbard v Vosper* [1972] 2 QB 84; *Church of Scientology v Kaufman* [1973] RPC 627 where the court focused on the impact certain activities would have on the public.

⁶⁴ [1973] RPC 627.

⁶⁵ *British Steel Corporation v Granada Television* [1981] AC 1096 per Wilberforce J at 1169.

⁶⁶ *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461.

Disclosures exposing misleading conduct are more problematic. Lord Denning MR, in *Initial Services Ltd v Putterill*,⁶⁷ refused to strike out the defence of just cause or excuse where the plaintiffs falsely attributed a price increase to the introduction of a new tax. He labelled these actions conduct amounting to a fraud on the public. Australian courts have not, however, supported the view expressed in *Woodward v Hutchins*⁶⁸ that disclosure of confidential information is justifiable to set the record straight. This concept was proposed and rejected by the court in *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd*⁶⁹ where Rath J said courts must have regard to more weighty and precise matters than a public interest in the truth being told.

It is generally recognised that disclosure must be to the proper authority and courts have stressed that the media are rarely considered a "proper authority".⁷⁰ However, courts have recognised that there may be grounds which justify widespread disclosure through the media, as in *Kaufman's case*⁷¹ where the information affected the community as a whole, and in *Lion Laboratories v Evans*⁷² where the proper authority had an interest in restraining disclosure.

Press Freedom

In our democratic society, the media has a legitimate role in providing information that might not otherwise be accessible to the public.⁷³ However, the public's right to know is still not an accepted concept. The right to free speech is restricted by law, including the laws of confidence and defamation which, according to Burnet, help government tighten the noose on freedom of expression.⁷⁴ Of particular concern are interlocutory injunctions for breach of confidence actions⁷⁵ which have considerable potential to limit freedom of expression, especially where they prevent a third party such as the media from legitimately informing the public about issues of public concern.⁷⁶ Despite calls for increased press freedom, the judiciary remains reluctant to recognise the important role this institution plays in society. Sir John Donaldson MR, while agreeing that the media were an essential foundation of a democracy, said they tended to confuse the public interest with their own interest.⁷⁷ While in *Emcorp Pty Ltd v ABC*,⁷⁸ where the defendant trespassed in order to gain access to information, Williams J said that by abusing its right to freedom of speech the defendant had lost the benefit of that right and therefore publication could not be justified. Two years earlier a New South Wales court had stated that although courts possessed power to restrain trespassers from publishing information which they had obtained while breaking the law, they were reluctant to do so unless issues of confidential information were involved.⁷⁹

⁶⁷ *Supra* n 62.

⁶⁸ [1977] 2 All ER 751.

⁶⁹ *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd* (1980) 33 ALR 31 at 55-57; Rath J was cited with approval in *Corrs Pavey v Collector of Customs* (1987) 74 ALR 428.

⁷⁰ *Supra* n 62 at 405-6.

⁷¹ *Supra* n 62.

⁷² *Supra* n 21.

⁷³ *UK Spycatcher case (No 2)* [1990] AC 109 per Scott J at 156.

⁷⁴ D Burnet in A Besley & R Chadwick (eds) *Ethical Issues in Journalism and the Media* (Routledge, London, 1992) at 50

⁷⁵ *Ibid.*

⁷⁶ This occurred in *Attorney-General (UK) v Times Newspapers Ltd* [1991] 2 WLR 994.

⁷⁷ *Francome v Mirror Group Newspapers* [1984] 2 All ER 408 at 413.

⁷⁸ [1988] 2 Qd R 169.

⁷⁹ *Lincoln Hunt v Willesee* (1986) 4 NSWLR 457.

Other media freedoms are useless without the right to approach and record sources of information, and to receive those sources in confidence where necessary.⁸⁰ Exponents of media freedom strenuously argue that public interest in the free flow of information demands scope for protecting sources, however, journalists and their sources have no special legal rights. In a powerful dissent in *British Steel v Granada Television*,⁸¹ Lord Salmon argued that freedom of the press, and “much of the information to which the public of a free nation were entitled” would disappear if the media were not immune from disclosing sources of information.⁸² But he has received little judicial support. Also lacking support are the views of Lord Denning MR, a staunch advocate of press freedom, who stressed the media should rarely be restrained from publishing information: “Prior restraint is such a drastic interference with the freedom of the press that it should only be ordered when there is a substantial risk of grave injustice”.⁸³ Others⁸⁴ have stressed that the media has no right to these special privileges.

In the unanimous decision in *John Fairfax & Sons v Conjuangco*,⁸⁵ the High Court held that although the free flow of information was a vital ingredient of investigative journalism, and an important feature of our democratic society, providing absolute protection to a confidence set such a high value on a free press and freedom of information as to leave others without an effective remedy with regard to defamatory material. Thus courts have indicated that personal privacy is a higher priority than press freedom. Pizer considers that the media, as the eyes and ears of the general public, must act for the public’s benefit.⁸⁶ He supports the view that even if they retain their right to free speech, the media should be restrained from publishing information where the public interest is not served by widespread dissemination.⁸⁷

Conclusion

Attempts by the media to publish confidential information or information obtained by dishonest and unfair means can cause legal and ethical dilemmas. The media in Australia have no special right to protect sources who leak information or “blow the whistle” and their right to publish confidential information is legally and morally restricted. News organisations may find themselves performing a difficult balancing act as they weigh these obligations against their duty to keep the public informed. As businesses in a highly competitive economic climate, their chief goal is monetary, yet the media also provides an essential service and an important outlet for average citizens to voice their opinions. The law attempts to balance the public right to disseminate information with the right of an individual to protect information and privacy. The enforcement of confidences through a breach of confidence action promotes trust throughout society, but in some situations it may prevent disclosure of matters of serious public concern. A duty of confidence must therefore be subjected to important limitations such as the public interest exception.

⁸⁰ *Supra* n 36.

⁸¹ [1981] 1 All ER 417.

⁸² *Ibid* at 467-75.

⁸³ *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1.

⁸⁴ *UK Spycatcher (No 2)* [1990] 1 AC 109.

⁸⁵ (1988) 165 CLR 346.

⁸⁶ *Supra* n 61.

⁸⁷ *Ibid*.

The media must treat cautiously information obtained through leaks and whistleblowers. They must be aware of their legal and ethical responsibilities, ensure the accuracy of facts and investigate their options before publishing. The press and other arms of the media must critically evaluate the way they gather news. Their job is not only to entertain, but to inform and act as a watchdog over government and other major organisations such as banks and unions. To do this effectively they may have to bend the rules and look behind each party's agenda, but they must not allow the competitive media environment or personal bias to force them into relying on dishonest or unfair means to obtain information. This could result in a loss of credibility in the eyes of the public and thus destroy one of the most important institutions in our society. Despite the uncertainty of some areas of the law, it must never be treated with contempt.