



David Kaye

UN Special Rapporteur on the Promotion and Protection
of the Right to Freedom of Opinion and Expression
Office of the High Commissioner for Human Rights
Geneva, Switzerland

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Submission to the study on the protection of sources and whistleblowers

Dear Mr Kaye,

Thank you for providing WikiLeaks with the opportunity to contribute to the consultation on protection of sources and whistleblowers and to offer recommendations based on our experience in this area.

We are hoping that you find our submission useful in the preparation of your 2015 report to the UN General Assembly. We also accept that this submission may be posted on the web page of the Office of the High Commissioner for Human Rights.

If you have any questions about the issues discussed in this submission or you require any additional information, do not hesitate to contact us.

We wish you success in your mission.

Yours sincerely,

Julian Assange
Editor-in-chief of WikiLeaks

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Submission of WikiLeaks **to the study on the protection of sources and whistleblowers**

Consultation by the UN Special Rapporteur on the Promotion and Protection
of the Right to Freedom of Opinion and Expression

June 2015

About WikiLeaks

WikiLeaks is a not-for-profit media organisation, established in 2006, that aims to bring important news and information to the public. WikiLeaks provides an innovative, secure and anonymous way for sources to supply information to us through our electronic dropbox which, in return, enables us to publish important information in the form of original source material. We also develop and adapt technologies to support these activities, including how to overcome blocking of any address with WikiLeaks in the name, and provide instructions how to submit the material in a way that sources cannot be traced. Anonymisation occurs in all stages of our work and multiple parts of WikiLeaks must cooperate in confidentiality with each other to ensure that our sources are not identified.

The most notable publications of WikiLeaks so far include those related to:

- War, killings and torture, for example US Guantanamo Bay's main operational manuals or the classified US military files related to wars in Iraq and Afghanistan.
- International politics, for example diplomatic cables of the USA or Saudi Arabia or the Global Intelligence Files concerning the private intelligence firm Stratfor.
- Trade and corporate transparency, for example publication of around 10.000 pages of a secret contract between the German federal government and the Toll Collect consortium (a private operator group for heavy vehicle tolling systems), the draft of the Anti-Counterfeiting Trade Agreement (ACTA), the Trans-Pacific Partnership (TPP) or Trade in Services Agreement (TISA).
- Ecology and climate, for example the confidential draft "circle of commitment" Copenhagen climate change agreement or three suppressed videos from Japan's fast-breeder reactor Monju on the 1995 sodium coolant disaster, or the internal study of Trafigura about the health effects of waste dumping in Africa.
- Large-scale corruption, for example in Kenya, East Timor, Iceland, Tunisia or Egypt.
- Censorship technology and internet filtering, for example in China, Thailand or Libya.

Due to this work, WikiLeaks has sustained various attacks designed to silence our publication activities, our journalists and collaborators and our anonymous sources and to compromise our systems but, as far as we can ascertain, we have never exposed any of our sources.

WikiLeaks therefore welcomes the decision of the UN Special Rapporteur on Freedom of Expression ("Special Rapporteur") to focus his 2015 report to the UN General Assembly on the protection of sources and whistleblowers. We believe that the free flow of information is essential to democracy since it allows the public to have access to a wide range of resources and outlets about current events and history, and to make choices about its governance. In order to

enable access to such information, it is necessary to protect the sources of information and those who gather and facilitate information flows. The elaboration of guidance and recommendations to states in this area has never been more timely.

Based on WikiLeaks' experience, we urge the Special Rapporteur to consider the following issues in the preparation of his report.

1. The Special Rapporteur should highlight that protection of sources must be granted to "covered persons"

WikiLeaks supports the position that the right of protection of sources should be enjoyed by all who gather and disseminate information to the public. It should not be granted only to "traditional" or "professional" media and/or journalists (that is, those who enjoy some form of official recognition or approval, for example through official registration or accreditation). It should also be granted to all persons involved in the different stages of the publishing process.

Thanks to digital technologies, people no longer receive information only through "traditional" media outlets. Electronic media, independent news outlets, bloggers, academics, think tanks, freelancers or human rights organisations and activists are important sources of information and rely on sources that might wish to remain anonymous. The regional human rights bodies have acknowledged this trend in their standards on protection of sources, by either omitting the term "journalist" from the definition of those who are granted this protection¹ or by adopting a broad definition of the term "journalist".² However, such guarantees are not necessarily recognised in domestic laws, including in countries where the press has traditionally benefited from a strong protection (for example, see the recent debate on the US Federal Shield Law).³

Importantly, the relationship between those who publish information and their sources is far more complex than it might appear at first sight. In our experience of publishing classified information, it is rare that the full sourcing relationship is simply between one journalist and one source. The relationship is more often of a chain type rather than one-to-one. In the various stages of publishing, the person who initially received the confidential information becomes a source to others in the next stage of the publishing process. In each stage, more people are enfolded into being a new "source" in the chain (including within a media organisation) or new persons might need to make a previous step in this chain confidential. During WikiLeaks' release of US diplomatic cables in co-operation with international media outlets, Julian Assange, WikiLeaks' editor-in-chief, was allegedly both a recipient of the confidential material and also a source to other media outlets as well as the staff within his own organization. At the same time, the attempts of the US Government to gain access to confidential sources has not been limited to the WikiLeaks editor-in-chief but encompasses a wider net of staff members and collaborators.

WikiLeaks therefore believes that it is important to recognise a number of different scenarios in which confidential information is shared and confidentiality maintained as a crucial component in providing protection. The Special Rapporteur's report is therefore an opportunity to

¹ For example, the Declaration of Principles on Freedom of Expression by the Inter-American Commission on Human Rights, 19 October 2000, states that "every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential".

² For example, Recommendation No. R (2000)7 of the Committee of Ministers to Member States of the Council of Europe on the right of journalists not to disclose their sources of information, 8 March 2000.

³ For example, Jason Stverak, Media Shield Law Should Focus On Protecting, Not Defining, Journalists, *Forbes*, 4 April 2014.

unequivocally state that the protection of sources must be afforded to all involved in information processing and dissemination, whether or not they formally work in the media or journalism industry.

In order to avoid disputes about who is and who is not “journalist”, WikiLeaks recommends that the Special Rapporteur introduces a concept of “persons covered by the right of protection of sources”. Covered persons with the right of protection of sources should be defined broadly as all communicators, both natural and legal persons, who are regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.⁴ It should be irrelevant whether this is done through publishing a national newspaper, running an online media outlet, blogging, tweeting or standing on a street corner and shouting the news at those who pass by. Further, the protection should be granted to all persons who by virtue of their involvement in the publishing process acquire knowledge of information identifying a source, including through the collection, editorial processing or dissemination of this information.⁵

2. The Special Rapporteur should deplore all forms of retaliation against those who wish to maintain the confidentiality of sources

The right to confidentiality of sources traditionally referred to the entitlement of journalists or media not to be *judicially compelled* to reveal the identity of a confidential source or to reveal any information which would be likely to lead to the identification of the source.

WikiLeaks is aware that in many instances governments and law enforcement do resort to courts and judicial processes to order journalists to reveal their sources. At the same time, in our experience, the efforts to gain access to sources’ identities are far more diverse and insidious. The state agencies do not necessarily go after those who publish information openly through the courts, but instead engage in a variety of measures that are designed to retaliate against the publishing activities, to compromise the confidentiality relations and to gain access to sources’ identities. The tactics we have experienced in our work include but are not limited to the following measures:

- Attempts by state agencies to destroy WikiLeaks’ credibility: For example, in 2008 the US Army Counter-Intelligence Center produced a classified report on the “threat” posed by WikiLeaks to the US Army, stating that shaking the trust on which WikiLeaks relies should be one of the major tools used to deter sources from leaking documents to us.⁶ We have also experienced a sustained campaign by several governments, in particular the US and the UK, against our activities. This has been done through characterising our activities as “terrorist” and deliberate attempts to distinguish between the legitimacy of our publishing activities and those of “traditional” media.
- Exerting pressure on companies that provide services to WikiLeaks: For example, in 2010 Senator Joseph Lieberman, the Chairman of the US Senate Homeland Security Committee, requested Tableau Software to stop providing us with visualisation services and Amazon to stop hosting us on its cloud service.⁷

⁴ Based on the definition in Recommendation No R(2000)7 of the Council of Europe Committee of Ministers, cited above.

⁵ Recommendation No R(2000)7 of the Council of Europe Committee of Ministers, cited above.

⁶ Iain Thomson, US military plan to destroy Wikileaks leaked, *V3*, 15 March 2010.

⁷ Charles Arthur and Josh Halliday, WikiLeaks fights to stay online after US company withdraws domain name, *The Guardian*, 3 December 2010.

- Exerting pressure on financial institutions to stop processing donations and payments: For example, in December 2010 PayPal, MasterCard, Visa, Bank of America and Western Union refused to accept payments and allow funds to be transferred to WikiLeaks.⁸
- Exerting pressure on social media and Internet companies in relation to our publishing activities: For example, in 2010 US prosecutors subpoenaed Twitter for the accounts of several people linked to WikiLeaks.⁹ In December 2014, it was revealed that the US Government has been engaged in the collection of all location information, email contents, contacts and social media accounts of several WikiLeaks affiliates and staff. In December 2014, Google informed us that it had handed over emails and data of three WikiLeaks staff based on a secret search warrant issued by a federal judge in 2012 and had been under a gag order about the warrant. Google continues to be under gag orders related to the WikiLeaks investigation (although it is engaged in litigation to try to lift it), which underscores the intrusive nature and scope of the related orders.¹⁰
- Employing various intimidation tactics against WikiLeaks staff, including public calls for the assassination, kidnapping and harm of Mr Assange and other WikiLeaks staff.¹¹
- Launching a criminal investigation for a variety of national security crimes against WikiLeaks staff while also denying them due process rights: For example, in February 2010 the US Government launched a secret criminal investigation against Julian Assange, described as “unprecedented in both scale and nature”.¹² Despite the fact that the investigation is ongoing and in its fifth year, its secret nature prevents Mr Assange from challenging its lawfulness in court. Some of the investigations also relate to assisting whistleblowers, for example helping Edward Snowden to reach safety.
- Refusal to respect the right to political asylum: Mr Assange has been granted the right to political asylum by the Government of Ecuador under the terms of the 1951 Refugee Convention, partially due to the existence of a well-founded risk to his life and security. He has spent three years inside the Ecuadorian Embassy in London as the UK has refused to grant him safe passage to Ecuador and vowed to immediately arrest him should he leave the Embassy.

WikiLeaks’ experience clearly shows that those who publish information based on confidential sources must be prepared to sustain more than just the possibility of being compelled to reveal their sources based on a court order. They must expect that they will face considerable harassment by state agencies, including legal, political and technical measures. They must presume that all of their electronic communication will be intercepted; that efforts will be made to decrypt coded communications; and that these efforts might eventually succeed. They should

⁸ Banking Blockade, WikiLeaks, See: <https://wikileaks.org/Banking-Blockade.html>.

⁹ Scott Shane and John F Bums, U.S Subpoenas Twitter Over WikiLeaks Supporters, *New York Times*, 8 January 2011.

¹⁰ Google hands data to US Government in WikiLeaks espionage case, WikiLeaks, 26 January 2015. See: <https://wikileaks.org/google-warrant.html>

¹¹ For example, Lawyer condemns calls for assassination of WikiLeaks founder, *NBC News*, 28 June 2013 or Kuhner: Assassinate Assange?, *The Washington Times*, 2 December 2010.

¹² Philip Dorling, Assange targeted by FBI probe, US court documents reveal, *Sydney Morning Herald*, 20 May 2014.

be also aware that all movements of their staff and collaborators will be observed through various tracking tools; that any electronic funds transfers will be traced or prevented; and that their organisation might also be subject to covert measures or infiltration by law enforcement.

WikiLeaks urges the Special Rapporteur to recognise the complexity of measures and tactics that some governments employ against those who publish information based on confidential sources and deplore them in his report. The report should acknowledge that such measures are not necessarily limited to judicial orders of disclosure but are far-reaching and are employed against various people along the chain of the publication process. Consequently, the report should instruct states to refrain from such measures and forms of retaliation and to fully respect the right of protection of sources.

3. The right of protection of sources should be granted in absolute terms

WikiLeaks is aware that under the current international human rights standards, the right to maintain confidentiality of sources, derived from the right to freedom of speech, is not an absolute right. It might be restricted under certain circumstances, namely under the three-part test as elaborated by international human rights bodies. The test is applied by courts by balancing the importance of the public interest in maintaining confidentiality (for the purposes of ensuring reporting) with other interests, in particular national security and the rights of others.

WikiLeaks finds that this approach to confidentiality of sources is structurally and conceptually defective. In our experience, if sources know that their identity might be revealed at some point, they will just withhold the relevant information and remain silent. We also doubt that we would inspire confidence in our sources if we promised to conceal their identity only to the extent it meets a three-part legal test, which moreover can be interpreted differently by different courts. Individuals would be hesitant to reveal information if they are not afforded true and full confidentiality, unless, of course, they are assured that we would rather face criminal and other sanctions than break the confidentiality. We also believe that the possibility of being compelled to disclosure (however restricted) is a reason why many traditional journalists do not treat a promise of confidentiality as an absolute one. The “burning of sources” – that is, the revelation of their identity despite the promise of confidentiality – is not an isolated occurrence.

WikiLeaks believes that the right to protection of sources should be absolute for all information, including serious criminality; in fact, serious criminality specifically. As noted above, without being assured of full anonymity, the source would not provide the information and so the serious criminality would not be reported. For example, the source involved in child abuses would not come forward and the abuses would go even further undetected by the police. If even the mere existence of such criminality finds its way to public consciousness, the police can start an investigation into the allegations. We therefore believe that the ability to keep the source of such information confidential provides the public with a benefit that should outweigh the interest in accessing evidence that the police are unable (or often unwilling) to find through their own investigative methods.

WikiLeaks suggests that the relationship on which the protection of sources is based should be analogous to other situations where individuals are not entitled to disclose information they have been given in confidence despite recognising this can harm other interests, for example the lawyer–client or priest–penitent relationship and other relationships where individuals have placed upon them the obligation of secrecy. The reasons for respecting the confidentiality privilege in such situations is a recognition that this serves some public or social interest. In all of these situations, the law acknowledges that although it is difficult (or sometimes impossible) to obtain the information by other means, it does not compel the recipient to reveal the

information because of other societal benefits. For example, in lawyer–client confidentiality, the interest is a proper administration of justice and fair trial as it allows lawyers to provide necessary legal advice. In the priest–penitent relationship, the confidentiality is recognised in order to ensure the freedom of religion: the respect of the religious confession is a part of the ability to practice one’s religion and it also ensures that some priests are not placed at risk of ex-communication.

Based on these analogies, WikiLeaks recommends an absolute protection of sources in relation to publishing activities should be based on public benefit in access to information which would otherwise not be published. In particular, this information frequently relates to major wrongdoing, abuses of power or other important interests, and supplies the public with knowledge and resources to check those with power. This serves the interest of democratic and accountable governance.

At the same time, WikiLeaks is aware of instances where confidential information is provided to others for purposes other than to make them public. Hence, we recommend that the crucial aspect in providing the confidential information must be the fact that the recipient was provided the truthful information for publishing purposes. This would exclude instances where the information is shared for fraudulent reasons, such as insider trading.

In summary, WikiLeaks proposes the following criteria for determining when the protection should be afforded:

- The individual or entity claiming the protection must fall under the definition of “covered persons”, as outlined above.
- The source provides the information in order to make it public, and the recipient receives it with the intent to engage in publishing activity.
- The information is provided by the source under the condition that the identity of the source will not be disclosed and confidentiality is essential in seeking the relationship in the first place.

We urge the Special Rapporteur to reject the approach that the confidentiality of sources can be restricted and to call for an absolute protection (absolute privilege) for those who meet the criteria outlined above.

4. Protection should be granted to all information in the public interest

Protection of sources by those who receive confidential information and those who reveal confidential information (“whistleblowers”) go hand in hand. Despite the increased recognition of the importance of protecting whistleblowers, WikiLeaks finds that the current protection regarding what information falls within the protected category is inadequate.

Broadly, although international law recognises that those who release information about certain wrongdoing should be protected against legal, administrative or employment-related sanctions¹³ or unjustified treatment,¹⁴ it also establishes qualifying conditions for such protection. For example:

¹³ For example, *Declaration of Principles on Freedom of Expression in Africa*, Adopted at the 32nd Session, October 2002.

¹⁴ UN Convention Against Corruption, A/58/422, adopted on 1 October 2003, in force from 14 December 2005.

- Disclosure of information is in good faith and on reasonable grounds.¹⁵
- Disclosure is in the public interest and oversight mechanisms are not adequate.¹⁶
- Disclosure does not actually harm and is not likely to harm a legitimate national security interest, or the public interest in knowing the information outweighs the harm from disclosure.¹⁷
- The individual disclosing the information reasonably believed that there was a significant risk that making the disclosure internally and/or to an independent oversight body would have resulted in the destruction or concealment of evidence, interference with a witness, or retaliation against the person, or a third party reasonably believed that the public interest in having the information revealed outweighed any harm to the public interest that would result from disclosure.¹⁸

Restricting the protection only to those who meet the above criteria creates not only confusion regarding what constitutes “proper and worthy” whistleblowing but also deters individuals for coming forward with important information in fear of retaliation.

WikiLeaks believes that the protection should go beyond these standards and should cover all who reveal information in the public interest. At the same time, the term “public interest” should be defined broadly as information that is of interest to the public. We suggest that instead of determining “public interest” in terms of the “public good” in the classical sense, it should be based on the concept of newsworthiness.

The term “newsworthiness” is often defined in the codes of ethics adopted by media associations or defined by those who bring information to the public.¹⁹ We note that typically the following factors would be considered when determining information to be newsworthy:

- Timeliness of the information – which would include especially information that is new, censored or restricted and has not previously been in the public domain. Alternatively, it can include information that has been made public previously elsewhere and is in the public interest but did not have proper news analysis when first released.
- Significance – especially of political, ethical, diplomatic or historical significance, which enables individuals, organisations and society at large to check those in power.
- Prominence – especially information regarding public officials and public figures.

¹⁵ UN Convention Against Corruption, cited above.

¹⁶ Grand Chamber of the European Court of Human Rights, *Guja v. Moldova*, Application no. 14277/04, 12 February 2008.

¹⁷ The Johannesburg Principles: National Security, Freedom of Expression and Access to Information, 1996.

¹⁸ Global Principles on National Security and the Right to Information, The Tshwane Principles, 2013.

¹⁹ For example, WikiLeaks adopted criteria for what information we accept, see <https://wikileaks.org/Submissions.html>.

- Impact of the information – especially if the effect of the information involves some general principle that in turn has impact upon a wider situation or affecting a number of people, issues and processes.

We find that these criteria provide useful guidance in defining public interest that should be recognised by the Special Rapporteur.

Conclusion

In conclusion, WikiLeaks reiterates that the limited guarantees of protection for sources in international law at present make those who publish information received under the promise of confidentiality an easy target for legal and political actions of retaliation. Bringing important information to the public cannot exist if legal guarantees are too narrow or subject to broad interpretation. Undermining the protection of sources undermines the very essence of enabling the free flow of information.

WikiLeaks highlights the following recommendations:

- The UN Human Rights Council must adopt a comprehensive resolution on the protection of sources and whistleblowers, and acknowledge their importance for enabling the free flow of information as a key condition for democracy and good governance.
- Governments must recognise the right to confidentiality of sources and protection of whistleblowers in their national laws and practices.
- Governments must refrain from the broad range of legal, political and technological tactics employed in retaliation against those who wish to maintain the confidentiality of their sources, or to compromise that confidentiality.
- The right to protection of sources in both international and national law should be granted to all communicators who are regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication and to all who by virtue of their involvement in the publishing process, acquire knowledge of information identifying a source, including through the collection, editorial processing or dissemination of that information.
- The right to protection of sources should be absolute, subject to the conditions outlined in our submission.
- All those who release information to the public should be protected against legal, administrative or employment-related sanctions. The public interest should be defined broadly as information that is of interest to the public or deemed newsworthy.

We hope that the Special Rapporteur will reflect on these recommendations in the forthcoming report and advocate for the highest attainable standards in this area.