

**EXPLANATORY MEMORANDUM TO
THE OFFICIAL SECRETS ACT 1989 (PRESCRIPTION) (AMENDMENT)
ORDER 2007**

2007 No. 2148

1. This explanatory memorandum has been prepared by the Ministry of Justice in conjunction with the Home Office and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This Order amends the Official Secrets Act 1989 (Prescription) Order 1990 (the “1990 Order”). Under the Official Secrets Act 1989 (“the Act”) it is an offence for a Crown servant to make a disclosure without lawful authority of any information within particular categories which is or has been in his possession by virtue of his position. There is a power in the Act to prescribe classes of people as Crown servants for the purposes of the Act. They are then under the same duty of confidentiality as Crown servants.

2.2 The draft Order will designate the members and employees of the Nuclear Decommissioning Authority (“NDA”), and the Board members and employees of any future subsidiary of the NDA as Crown servants for the purposes of the Act.

2.3 In addition, the draft Order will also designate the members and employees of the Independent Police Complaints Commission (“IPCC”) as Crown servants for the purposes of the Act.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 It is an offence under the Act for Crown servants (or those designated as Crown servants) and government contractors to disclose certain categories of information if they are not authorised to do so.

4.2 A Crown servant (or person designated as a Crown servant) or government contractor will commit an offence if without lawful authority he makes a damaging disclosure of documents or information relating to security, intelligence, defence, or international relations (sections 1 to 3 of the Act). He will also commit an offence if he discloses information which results in the commission of an offence, facilitates an escape from custody, impedes the prevention or detection of offences or the apprehension or prosecution of

suspected offenders, or where the disclosure would be likely to have any of these effects (section 4 of the Act). Section 4 of the Act also makes it an offence for a Crown servant (or person designated as a Crown servant) or government contractor to disclose without lawful authority any information obtained by reason of the interception of communication or about such interception. If found guilty, he will be liable to imprisonment for up to two years, or a fine, or both. It is also an offence for a Crown Servant (or person designated as a Crown servant) to retain any document contrary to his official duty, or to fail to take care to prevent the unauthorised disclosure of the document (section 8 of the Act). The penalty for this is imprisonment up to three months, or a fine, or both. There are additional offences covering disclosure of such documents by those to whom they are lawfully or unlawfully disclosed.

Nuclear Decommissioning Authority

4.3 One of the categories of protected information is information relating to defence and security. Members and employees of the NDA and subsidiaries may have access to such information insofar as it relates to nuclear technology or nuclear materials. This draft Order therefore designates them as Crown servants for the purposes of the Act.

Independent Police Complaints Commission

4.4 The Commissioners and staff of the Independent Police Complaints Commission may have access to one or more categories of protected information (in particular information to which section 4 of the Act relates) by virtue of its functions in relation to -

- a) the handling of complaints made about the conduct of persons serving with the police;
- b) the recording of matters from which it appears that there may have been conduct by such persons which constitutes or involves the commission of a criminal offence or behaviour justifying disciplinary proceedings;
- c) the manner in which any such complaints or any such matters as are mentioned in (b) are investigated or otherwise handled and dealt with.

4.5 Section 9(5) of the Police Reform Act 2002 provides that the IPCC shall not be regarded as the servant or agent of the Crown. However, by virtue of the type of information it handles, it is important to designate its members and employees as Crown servants for the purposes of the Act, while it remains the case that they shall not be Crown servants for all other purposes. The IPCC uses staff other than employees, namely police officers on secondment. Police officers on secondment are however already covered by the Act as Crown servants under the definition of this term in section 12(1)(e). The designation therefore only covers members of the Commission (the Commissioners) and its employees.

5. Territorial Extent and Application

This instrument applies to England, Wales and Northern Ireland. However, the Act provides that the offences (except those under section 8(1), (4) and (5)) can be committed by a Crown servant or British citizen anywhere in the United Kingdom.

6. European Convention on Human Rights

Gerry Sutcliffe MP has made the following statement regarding Human Rights:

In my view the provisions of the Official Secrets Act 1989 (Prescription) (Amendment) Order 2007 are compatible with the Convention rights.

7. Policy background

7.1 The Act makes it an offence for Crown servants and government contractors to disclose certain types of information. The power to prescribe additional classes of people ensures that this duty of confidentiality extends to those who have access to this type of information but who are not Crown servants or government contractors.

Nuclear Decommissioning Authority

7.2 The NDA is an executive Non-Departmental Public Body established by section 1 of the Energy Act 2004. It came into being on 1st April 2005. On that date it assumed responsibility for the decommissioning and clean up of the UK's civil nuclear legacy. It is responsible for nuclear sites previously operated by the UK Atomic Energy Authority ("UKAEA") and British Nuclear Fuels Ltd ("BNFL"). It owns the plant and facilities of BNFL and has responsibility for managing clean up at the UKAEA's sites. In this capacity, members and employees of the NDA have access to information whose disclosure could be potentially damaging.

7.3 The Boards and employees of BNFL and the UKAEA were designated as Crown servants for the purposes of the Act by the 1990 Order. Those companies retain some functions, and so their Board members and employees will continue to be designated. This draft Order will designate members and employees of the NDA and any Board members and employees of its future subsidiaries.

7.4 As the draft Order is not of general application and affects only a relatively small number of people, there has been no public consultation, and the level of interest in it is likely to be low. The Department for Trade and Industry has been consulted and those people who will be affected will be informed once the Order has been made. They are informed of the requirements of the Act when they join the NDA, and will be informed that they have been added to the Order and the effects of this through the Staff handbook and weekly Staff Meetings.

Independent Police Complaints Commission

7.5 The IPCC is a body corporate, taking up responsibility for dealing with police complaints on 1st April 2004. Its primary functions are set out at 4.4 above. During the normal course of its business, the Commissioners and employees of the IPCC have access to information whose disclosure could be potentially damaging.

7.6 The IPCC investigates or oversees the investigations of the most serious allegations of criminality or misconduct made against police officers and police staff. There is a real risk that information gathered during the course of such investigations could impede prosecutions if it was disclosed without authority.

7.7 The IPCC also conducts or oversees investigations of cases involving the death or serious injury of a person as a result of their contact with the police. These cases include deaths in police custody, death or serious injury following a police pursuit, or fatal police shootings. In such cases, in addition to the investigation into the actions of the police, there may also be a parallel criminal investigation into serious criminal acts that led to the police action. Any unauthorised disclosure of information in such cases could lead to prosecutions having to be abandoned due to potential unfairness in the trial.

7.8 During the course of these investigations and in order for the IPCC to fulfil its statutory duty, the IPCC will have access to sensitive police information that may include details of police techniques which would hamper police operations if made public and impede the prevention and detection of offences and future police operations.

7.9 In order to conduct effective investigations, the IPCC needs to maintain the trust and confidence of the public and the police service. Witnesses to serious incidents, whether from within the police service or the public, will be reluctant to provide evidence if they do not have the confidence that such information will be appropriately protected. Bringing the IPCC members and staff under the Act will provide considerable confidence that there is a strong deterrent in force to prevent unauthorised disclosure.

7.10 The Commissioners and staff of the IPCC have been consulted and further information will be supplied to IPCC staff and Commissioners once the Order has been made. The IPCC is in agreement to this Order being made and will ensure that all staff and Commissioners are informed of the requirements of the Act when they join the IPCC. Current staff and Commissioners will be informed that they have been added to the Order and the effects of this through the staff handbook and staff meetings.

7.11 This draft Order amends the 1990 Order which has been amended on five previous occasions. The Ministry of Justice does not presently intend to consolidate these Orders as each Order is of interest only to a limited class of

people and can be read in isolation. The full list of bodies designated under sections 7(5), 8(9), 12(1)(f), 12(1)(g) and 13 of the 1989 Act are listed in an Appendix to this memorandum.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no significant impact on business, charities or voluntary bodies.

8.2 There will be no impact on the public sector.

9. Contact

Diana Symonds at the Ministry of Justice Tel: 020 7035 6989 or e-mail: Diana.Symonds@justice.gsi.gov.uk or Vic Marshall at the Home Office Tel: 020 7035 0846 or e-mail: Vic.Marshall@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.

The Official Secrets Act 1989 (Prescription) Order 1990 (S.I. 1990/200)

Article 2

Article 2 of S.I. 1990/200 provides that the bodies set out in the first column of Schedule 1 to the Order and the classes of members or employees of those bodies which are set out in the second column of that Schedule are prescribed for the purposes of **section 12(1)(f)** of the 1989 Act. The bodies and the classes of members or employees of those bodies listed in Schedule 1, as amended by

- the Official Secrets Act 1989 (Prescription) (Amendment) Order 1993 (S.I. 1993/847) and
- the Official Secrets Act 1989 (Prescription) (Amendment) Order 2003 (S.I. 2003/1918)

are as follows:

British Nuclear Fuels plc	The employees of the Company
The Board of the above	The members of the Board
The United Kingdom Atomic Energy Authority	The members, officers and employees of the Authority
Urenco Limited	The employees of the Company
The Board of the above	The members of the Board
Urenco (Capenhurst) Limited	The employees of the Company
The Board of the above	The members of the Board
Enrichment Technology Company Limited	The employees of the Company
The Board of the above	The members of the Board
Enrichment Technology UK Limited	The employees of the Company
The Board of the above	The members of the Board
Urenco Enrichment Company Limited	The employees of the Company
The Board of the above	The members of the Board

2. The entry relating to Urenco (Capenhurst) Limited was inserted by S.I. 1993/847. Entries relating to Enrichment Technology Company Limited, Enrichment Technology UK Limited and Urenco Enrichment Company Limited were inserted by S.I. 2003/1918.

Article 3

3. Article 3 of S.I. 1990/200 provides that the offices which are set out in the first column of Schedule 2 to the Order and the classes of employees of the holders of those offices which are set out in the second column of that Schedule are prescribed for the purposes of **section 12(1)(g)** of the 1989 Act. The offices and classes of employees (where appropriate) listed in Schedule 2, as amended by

- the Scotland Act 1998 (Consequential Modifications) (No.1) Order 1999 (S.I. 1999/1042)
- the Scottish Public Services Ombudsman Act 2002 (Consequential Provisions and Modifications) Order 2004 (S.I. 2004/1823) and
- the Public Services Ombudsman (Wales) Act 2005 (Transitional Provisions and Consequential Amendments) Order 2006 (S.I. 2006/362)

are as follows:

Comptroller and Auditor General	
Member of staff of the National Audit Office	
Comptroller and Auditor General for Northern Ireland	
Member of staff of the Northern Ireland Audit Office	
Auditor General for Scotland	
Parliamentary Commissioner for Administration	The officers of the Commissioner who are not otherwise Crown servants
Officer of the Health Service Commissioner for England....being an officer who is authorised by the Parliamentary Commissioner for Administration to perform any of his functions and who is not otherwise a Crown servant	The officers of the Commissioners who are not otherwise Crown servants
Northern Ireland Parliamentary Commissioner for Administration	The officers of the Commissioner who are not otherwise Crown servants
Scottish Public Services Ombudsman	The officers of the Ombudsman who are not otherwise Crown servants
A private secretary to the Sovereign	

4. Entries relating to “Auditor General for Scotland” and “Scottish Public Services Ombudsman” were inserted by S.I. 1999/1042 and S.I. 2004/1823 respectively. The entry in relation to “Officer of the Health Service Commissioner” was amended by S.I. 2004/1823 and S.I. 2006/362.

Article 4

5. Article 4 of S.I. 1990/200 provides that the bodies which are set out in the first column of Schedule 3 to the Order are prescribed for the purposes of one or both of **sections 7(5) and 8(9)** of the Act as set out in the second column of that Schedule (so as to enable them, in the case of section 7(5), to give official authorisation for, or to impose official restrictions on, disclosures or, in the case of section 8(9), to give official directions for the return or disposal of documents). The bodies listed in Schedule 3 (as substituted by S.I. 2003/1918) and the sections of the Act for the purposes of which they are proscribed are:

The Civil Aviation Authority	Sections 7(5) and 8(9)
The Investigatory Powers Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000	Section 7(5)