The Journal of **Public Inquiry**

A Publication of the Inspectors General of the United States

Fall/Winter 2003

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Theft and Misuse of Government Information

Most people have a general understanding that improper release of certain categories of information, such as classified documents or Privacy Act[1] information, is wrong and that doing so may result in criminal charges. Notorious examples of these cases range from FBI agents who become spies and provide classified information to foreign countries to illegal interceptions of wireless telephone calls that are tape recorded and then released to the news media. More mundane examples may involve administrative penalties for the improper release of Privacy Act information. What these examples and others have in common is a statute that protects a particular category of information from improper disclosure by imposing criminal penalties.[2]

There is also a broad category of nonpublic government information that is not protected by a specific criminal statute, but its improper release may, nevertheless, be equally as detrimental to government as improper release of the information is specifically protected by a criminal statute. Examples of this type of information may include the amounts of sealed bids, recommendations for a policy that have not yet been adopted, draft agency decisions, drafts of proposals for rules, and opinions or recommendations of government attorneys. Although a specific statute does not

[1] 5 U.S.C. § 552a.

[2] *See, Id*. (Privacy Act information); 18 U.S.C. § 793 (national defense information); 18 U.S.C. § 794 (national defense information); 18 U.S.C. § 1902 (crop information); 18 U.S.C. § 1905 (trade secrets); 18 U.S.C. § 1906 (bank examination information); 18 U.S.C. § 1907 (farm credit information); 18 U.S.C. § 2511(c) (communications interceptions).

protect this information, the improper release of such information can be prosecuted as a crime under the general theft of government property statute 18 U.S.C. § 641.[3]

The protection provided by 18 U.S.C. § 641 is based on two distinct theories. The first is the technical larceny of property, namely the government supplies that were used in creating the document that memorializes the information.[4] The second has its origins in the common law action of trover—conversion of property occurring when the owner's rights to that property are seriously interfered with so as to justify compensating the owner for the full value of the property.[5]

Larceny—The Theft of a Record

Larceny is generally the unlawful taking and carrying away of another person's property with the intent to permanently deprive that person of the possession of the property.[6] Government records are government property. If a person copies a government record by using government equipment and supplies, those duplicate copies likewise belong to the government.[7] The fact that the person who made the copies was not authorized to do so does not alter the nature of the character of the records as government property.[8] As a form of government property, the asportation of the originals or copies, as records, is well within the fair warning of the statute in that it "proscribes all larceny-type offenses."[9]

Although this theory hinges on the theft of the tangible property that memorializes the information, the value of the information is not limited to the value of the paper and toner. While the statute allows for a cost valuation (i.e. the cost of the paper and toner), it also allows for the value as face, par or market. Market value is determined by what a willing buyer will pay a willing seller and, if no commercial market exists for a contraband item, the value of the record may be determined by reference to a thieves' market.[10] If the government can prove the value of the information exceeds $1,000 by reference to a thieves' market, that value would be a basis for enhancing the nature of the prosecution from a misdemeanor to a felony.[11]

Conversion—The Misuse of a Thing of Value

It is not always necessary for a thief to take the paper that memorializes the information. Easily memorized small amounts of information may be just as valuable as volumes of printed information. Examples of this type of information include amounts of bids in a sealed bidding situation, knowing in advance an agency's regulatory decision, or even who may be the subject of an investigation. When information is improperly released without the theft of the tangible property

[3] 18 U.S.C § 641 provides: Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contact for the United States or any department or agency thereof; . . . [s]hall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

[4] *See*, United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976) (The defendants were convicted of misappropriation of government records consisting of photocopies of official files. Although the photocopies were made without authorization, the photocopies were government records because one of the defendants used government supplies and equipment to make the photocopies).

[5] *See,* Restatement (Second) of Torts § 222A (1965).

[6] *See,* United States v. Coachman, 727 F.2d 1293, 1302, 234 U.S.App.D.C. 194, 203 (1984); BLACK'S LAW DICTIONARY 885 (7th ed. 1999).

[7] DiGilio, 538 F.2d at 977.

[8] *Id.*

[9] *See, Id.* at 978.

[10] *Id.* at 979.

[11] *Id.* at 978-82, *see, cf.,* United States v. Jeter, 775 F.2d 670, 680-81 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142, 106 S.Ct. 1796, 90 L.Ed.2d 341 (1986) (the court applied a conversion theory when valuing the information based on a thieves market rather value of the carbon copies).

that memorializes that information, that conduct is a misuse of the information that is akin to theft of the intangible information and it is as equally proscribed by 18 U.S.C. § 641.

At common law, conversion provided a tort remedy to the owner whose material property was taken from him.[12] That remedy made the owner whole for the loss of the use of the property. This theory works very well when dealing with tangible property and some measurable loss of use. The theory is less clearly applicable when the property is intangible nonpublic information that is improperly disclosed to a third party. This is particularly evident considering that when nonpublic information is improperly disclosed what is taken are the benefits of ownership of the information without the loss of the physical possession of the information.

What is central to the prosecution under a conversion theory is that the information itself must have some value and that the improper release of the information lessens that value. As stated earlier, the value is not limited to the expense of producing or memorializing the information itself. The true value of a document or record is the content and the paper itself generally has little value apart from its content.[13] In fact, the primary motivation in pursuing an investigation and eventual prosecution and/or personnel action is the loss of the value of the information once the improper release occurs.

Although this reasoning has been accepted by almost every circuit that has considered this issue,[14] the Ninth Circuit, in a case in 1959, held that conversion was limited to tangible property.[15] In that case, the court found that appropriating the services of another did not constitute a thing of value under 18 U.S.C. § 641. Since then, however, the Ninth Circuit seemed to embrace the notion that a "thing of value," as the term is used in other criminal statutes, does include intangible property.[16] In 1986, the court stated that the validity of the earlier holding as binding authority had been seriously undermined and appeared to have been rejected.[17] Despite that statement, the court continues to find that information in an intangible form cannot be the subject of a prosecution based on conversion under 18 U.S.C. § 641.[18]

In enacting 18 U.S.C. § 641, Congress codified more than the common law principles of larceny.[19] The section is broader and includes acts of misuse and abuse of government property.[20] The Supreme Court interpreted 18 U.S.C. § 641 as applying to "acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions."[21] Between the common law offense of embezzlement and larceny lies a gap in which the

[12] *See,* Restatement (Second) of Torts § 222A (1965).

[13] United States v. Lambert, 446 F.Supp. 890, 894 (D. Conn. 1978), *aff'd*, 601 F.2d 69 (2d Cir 1979).

[14] *See, e.g.,* United States v. Matzkin, 14 F.3d 1004, 1020 (4th Cir. 1994); Jeter, 775 F.2d at 680; United States v. May, 625 F.2d 186, 191-92 (8th Cir. 1980); United States v. Croft, 750 F.2d 1354, 1359-62 (7th Cir. 1984); United States v. Girard, 601 F.2d 69, 71 (2d Cir.), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979).

[15] Chappell v. United States, 270 F.2d 274, 277 (9th Cir. 1959).

[16] *See,* United States v. Schwartz, 785 F.2d 673. 680-81 (9th Cir. 1986) (holding assistance in arranging a merger between union was a thing of value under 18 U.S.C. §1954); United States v. Sheker, 618 F.2d 607, 609 (9th Cir. 1980) (holding information regarding the whereabouts of a witness was a thing of value under 18 U.S.C. § 912); United States v. Friedman, 445 F.2d 1076 (9th Cir), *cert.denied*, 404 U.S. 958, 92 S.Ct. 326, 30 L.Ed.2d 275 (1971) (implicitly holding that government information is a thing of value under 18 U.S.C. § 641).

[17] Schwartz, 785 F.2d at 681 n4.

[18] *See,* United States v. Tobias, 836 F.2d 449, 451 (9th Cir. 1988); United States v. Hulberg, Nos. 90-50659, 91-50000, 1992 WL 16802 (9th Cir. Feb. 4, 1992).

[19] *See,* United States v. Matzkin, 14 F.3d 1014, 1020 (4th Cir. 1994).

[20] *See, Id.*

[21] Morissette v. United States, 342 U.S. 246, 269 n.28, 72 S.Ct. 240, 253, 96 L.Ed. 288 (1952).

intangible information fits nicely. "To fill this gap, Congress included the word 'steal,' a word 'having no common law definition to restrict its meaning as an offense, and commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the right and benefits of ownership . . . .'"[22] While at common law this remedy is available only for the conversion of tangible property, the inclusion of the phrase "thing of value" in 18 U.S.C. § 641 expands the statute's protection to intangible property.[23]

The Value May Determine Whether It Is Larceny or Conversion

There are instances when the intangible nature of information will prevent a true valuation. If the monetary value of the information itself cannot be proved, the government must establish that a larceny of the record occurred; and the government may not resort to theory of conversion because without proof of a monetary value, the "thing of value" element of conversion has not been proven.[24] This point is illustrated by comparing two cases: one involving contracting bids, the other involving information from a draft administrative law judge's opinion.

In the contracting bid case,[25] the defendant paid a procurement official for information related to scheduling, quality, and biding that was not available to the public. The payments from the defendant to the procurement official started at $200 and eventually increased to $1,000. Part of the information the defendant received was that his client's bid was $50 million less than the main competitor's bid. The value of this information was far greater than the amount paid for it or what it would cost to copy the bid proposal. "This information was of great value to the government because the unauthorized use of this bid amount would allow [the defendant's] client to increase its bid by many millions and still be the low bidder on the procurement."[26] In this case it was not necessary to prove that tangible property was removed from the government's possession.

In the draft administrative law judge's opinion case,[27] a clerical employee who was responsible for formatting the opinion provided a copy of the draft opinion to a party to the litigation. The party in the litigation also happened to be the clerical employee's outside employer. The party did not request, solicit, or offer to pay for the draft opinion. In fact, when the party received the draft opinion, they provided it to their attorney who then notified the administrative law judge. Although there are circumstances where this information might have some monetary value, in this case there was no known monetary value. Rather, the value of the information was the nonmonetary loss of the integrity of the judicial process. While this particular type of loss in the value might be quite detrimental to an agency, the government was limited to valuing the information based upon the technical larceny of the supplies used to create the copies of the draft opinion.[28]

Intent and the First Amendment

Equally as important as value is criminal intent because without criminal intent there is no crime. Although the statute imposes the requirement of the government to prove that the conversion was "knowingly" and "without authority," these requirements do not equate with criminal intent. For that, the text of the statute is silent. Nevertheless, the

[22] United States v. Lambert, 446 F.Supp. at 894 (quoting Crabb v. Zerbst, 99 F2d 562, 565 (5th Cir. 1938)).

[23] *See,* United States v. Collins, 56 F.3d 1416, 1419, 312 U.S.App.D.C. 346, 349 (1995).

[24] *See,* DiGilio 538 F.2d at 978-79.

[25] Matzkin, 14 F.3d at 1014.

[26] *See, Id.* at 1021.

[27] *See,* OIG, NLRB Semiannual Report Oct. 2000 at 12-13.

[28] *See, c.f.,* DiGilio, 538 F.2d at 978-79.

statute has been interpreted to require criminal intent despite its failure to explicitly refer such a mental state—intent to commit a wrongful deed without justification, excuse, or defense.[29]

Closely linked to the notion of criminal intent is the constitutional protection of free speech. "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. . . . [S]ecrecy in government is fundamentally antidemocratic, perpetuating bureaucratic errors."[30] The use of a criminal statute to regulate the flow of information can raise particularly sensitive constitutional issues of overbreath and vagueness. This is especially true in light of the fact that 18 U.S.C. § 641 is a general theft statute that criminalizes many types of larceny offenses rather than a statute that specifically criminalizes the improper use of a particular type of information that has been deemed to require greater protection.

To remedy this potential conflict with the First Amendment principles of overbreath and vagueness in this context, 18 U.S.C. § 641 has been interpreted as "neither authorizing nor prohibiting the transfer of particular types of information."[31] "The section must be read as merely establishing a penalty for the violation of other, more particular prohibitions against disclosures."[32] In addition to proving the disclosure of information, the government must also prove that the disclosure of information was affirmatively prohibited by other Federal statutes, administrative rules and regulations, or longstanding government practices.[33]

Conclusion

There are countless reasons that may cause a person to disclose nonpublic government information. Without regard to whatever the particular reason may be, the loss of sensitive information can be very detrimental to a program or mission of an agency. If an agency has not already done so, the agency should enact internal rules and practices prohibiting the improper disclosure of information. Once the internal rules and practices are in place, OIG investigations should carefully consider the reason for the improper disclosure of information to determine if a crime has occurred.[34]

[29] Morissette, 342 U.S. at 263-74.

[30] Lambert, 446 F.Supp. at 890 (quoting New York Times Co. V. United States, 403 U.S. 713, 724-25, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (Douglas, J., concurring)).

[31] *See,* Lambert, 446 F.Supp. at 899.

[32] *Id.*

[33] *Id.*

[34] United States v. Lambert, 446 F.Supp. at 890, is a good case involving these issues that could be used as an example when presenting an investigation to a prosecutor. This case involved the sale of informant information by Drug Enforcement Administration agents.