EXPLANATORY MEMORANDUM TO

THE OFFICIAL SECRETS ACT 1989 (PRESCRIPTION) (AMENDMENT) ORDER 2012

2012 No. [DRAFT]

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

2. Purpose of the instrument

2.1 This Order would amend the Official Secrets Act 1989 (Prescription) Order 1990 (the "1990 Order") by adding Police and Crime Commissioners, Deputy Police and Crime Commissioners, the Mayor's office for Policing and Crime and its deputy, the Lord Mayor of the City of London, and the representative of the Court of Common Council acting in its capacity as the Police Authority for the City of London, so that they are then subject to the duties and offences relating to handling and disclosure of information as set out in the Official Secrets Act 1989.

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

3.1 None.

4. Legislative Context

4.1 It is an offence under the 1989 Act for Crown servants (as defined by the Act) and government contractors to disclose certain categories of information if they are not authorised to do so.

4.2 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 1989 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 1989 Act). Section 4 of the 1989 Act also makes it an offence for 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, such a person will be liable to imprisonment for up to two years, or a fine, or both. It is also an offence for a Crown Servant to retain any document contrary to that person's official duty, or to fail to take care to prevent the unauthorised disclosure of the document (section 8 of the 1989 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.

4.3 Section 1 of the Police Reform and Social Responsibility Act 2011 ("the 2011 Act") establishes a directly elected Police and Crime Commissioner for each police area in England and Wales, outside London, with the functions of securing the maintenance of an efficient and effective police force and holding the chief constable to account for the exercise of the chief constable's functions. Section 3 of the 2011 Act establishes the Mayor's Office for Policing and Crime with identical functions in relation to the metropolitan police force and the Commissioner of Police for the Metropolis. The person who is the Mayor of London occupies the Mayor's Office for Policing and Crime, by virtue of section 3(3) of the 2011 Act.

4.4 Section 18(1) of the 2011 Act allows a Police and Crime Commissioner to appoint a Deputy Police and Crime Commissioner, and to arrange for the Deputy to exercise any function of a Police and Crime Commissioner. Section 19(1) of the 2011 Act allows the Mayor's Office for Policing and Crime to appoint a Deputy Mayor for Policing and Crime who, again, may exercise any function of the Mayor's Office.

4.5 In the City of London it is the Common Council that has the function of overseeing the City of London Police Force and its Commissioner, under the City of London Police Act 1839 ("the 1839 Act"). The Common Council is headed by the Lord Mayor. Section 56 of the 1839 Act provides for the Common Council to discharge these policing functions by means of a Police Committee. It is intended that access to sensitive police information will be restricted to the Lord Mayor and a single member of the Police Committee, who is to be appointed as the representative of the Court of Common Council acting in its capacity as the Police Authority for the City of London. The latter office does not currently exist, but will be created by resolution of the Common Council before this Order is made. The Government undertakes not to make this Order unless that has been done.

4.6 Police and Crime Commissioners, Deputy Police and Crime Commissioners, the Mayor of London in that person's capacity as the occupant of the Mayor's Office for Policing and Crime, the Deputy Mayor for Policing and Crime, the Lord Mayor and the representative of the police committee of the Common Council will all have access to police information in the exercise of their functions as described above. This may include information in one or more of the categories protected by the 1989 Act, and in particular information to which section 4 relates. Police officers are already Crown servants under the 1989 Act by virtue of the definition of that term in section 12(1)(e). Because of the type of information that they may handle, it is important that the persons mentioned above are also prescribed as Crown servants for the purposes of the 1989 Act, while it remains the case that they will not be Crown servants for any other purposes.

5. Territorial Extent and Application

5.1 This instrument applies to England, Wales and Northern Ireland. However, the 1989 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

Crispin Blunt MP has made the following statement regarding Human Rights:

In my view the provisions of the Official Secrets Act 1989 (Prescription) (Amendment) Order 2012 are compatible with the Convention rights.

7. Policy background

The Official Secrets Act 1989 is the responsibility of the Ministry of Justice; the policy on which office holders are to be added by this Order is the responsibility of the Home Office.

- What is being done and why

7.1 The 1989 Act makes it an offence for Crown servants (as defined by that Act) and government contractors to disclose certain types of information or to retain or to fail to take care to prevent unauthorised disclosure of certain information. The power to prescribe additional classes of people ensures that the offences in the Act apply to those who have access to this type of information but who are not already Crown servants or government contractors for the purposes of the Act.

7.2 Each Police and Crime Commissioner will be a democratically elected individual, elected by the public electorate contained within each of the 41 police areas in England and Wales, outside London. No individual or political party can be barred from standing for public election subject to meeting the requirements of the relevant electoral legislation. Within London, the Mayor of London is the incumbent of the Mayor's Office for Policing and Crime, and within the City of London, the Lord Mayor and Common Council delegate their functions of accountability for policing to the City of London Police Committee.

7.3 By virtue of this Order, holders of the office of Police and Crime Commissioner, Deputy Police and Crime Commissioner, the Mayor's Office for Policing and Crime, the Deputy Mayor for Policing and Crime, the Lord Mayor and the representative of the Court of Common Council acting in its capacity as the Police Authority for the City of London will be treated as Crown servants for the purposes of the 1989 Act. For the purposes of national security vetting, the Government has determined that the holders of these offices will be treated in the same way as Government Ministers, Members of Parliament and members of the judiciary. In certain circumstances they will be afforded access to protectively marked material, but they will not be vetted prior to their appointment.

7.4 The Government has also considered the implications for Police Vetting– a separate standard for the police service – which focuses on assurance and checks against

criminality and corruption rather than national security threats and determined that as elected individuals, PCCs should not be subjected to Police Vetting procedures.

7.5 The Government is clear that they wish to maintain the operational independence of the Chief Constable, and that he or she should be responsible to the Police and Crime Commissioner for ensuring the safe and effective maintenance of the Queen's Peace. It is therefore envisaged that a Chief Constable may on occasion be required to brief a Police and Crime Commissioner on operational matters which may involve the disclosure to the Commissioner of sensitive material that has been sourced by the Police service and/or the Security and Intelligence Agencies. Further, it is inferred that the degree to which the Police and Crime Commissioner is briefed on operational matters and intelligence will be at the operational discretion of the local Chief Constable in close consultation with the security and intelligence agencies where necessary. This assumption is based on the current precedent for senior politicians and parliamentary committee members on either Privy Council terms or during closed committee hearings.

7.6 It is for the local Chief Constable, or the operational Gold Commander in matters that warrant a regional or national response such as Counter Terrorism, to make the operational decision as to when and to what degree he or she may be required to brief their Police and Crime Commissioner.

- Consolidation

7.7 This draft Order amends the 1990 Order which has been amended on seven 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 and persons prescribed for the purposes of sections 7(5), 8(9), 12(1)(f), 12(1)(g) and 13 of the 1989 Act is set out in the Appendix to this memorandum.

8. Consultation outcome

8.1 A public consultation in 2010 (Policing in 21st Century http://www.homeoffice.gov.uk/publications/consultations/policing-21st-century/) was conducted in order to shape and frame the subsequent Police Reform and Social Responsibility Act 2011. As part of their respective consultation responses, the Association of Chief Police Officers, Association of Police Authorities, Association of Police Authority Chief Executives, the Superintendents' Association and the Police Federation all raised concerns with regards to vetting of the proposed Police and Crime Commissioners. The Government has since considered these responses and has also further consulted with the Cabinet Office, Mayor's Office for Policing and Crime, and the City of London Police Committee and put forward the notification proposal as set out above. There has been consensus as to this being a proportionate safeguard to concerns raised, and recognition that this affords the same safeguards that apply to the Home Secretary.

9. Guidance

9.1 No general guidance is needed or required but those taking up offices listed under this Order will be made fully aware of their obligations to safeguard information or material that they may come into contact with and will be asked to sign a document on appointment setting out their obligations under the Official Secrets Act 1989.

10. Impact

10.1 The impact on business, charities or voluntary bodies is not significant.

10.2 The impact on the public sector is not significant.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 No monitoring or review is needed for this instrument.

13. Contact

Mary Hourihan at the Ministry of Justice on matters connected with the Official Secrets Act 1989, email: Mary.Hourihan@justice.gsi.gov.uk or Adam Slonecki at the Home Office on matters connected with the office holders added by this Order, email: Adam.Slonecki@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);
- the Official Secrets Act 1989 (Prescription) (Amendment) Order 2003 (S.I. 2003/1918);
- the Official Secrets Act 1989 (Prescription) (Amendment) Order 2007 (S.I. 2007/2148); and
- the Budget Responsibility and National Audit Act 2011 (Consequential Amendments) Order 2012 (S.I. 2012/725)

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
The Nuclear Decommissioning Authority	The members and employees of the Authority
Any subsidiary of the Nuclear Decommissioning Authority	The employees of the subsidiary
The Board of any subsidiary of the Nuclear Decommissioning Authority	The members of the Board
The Independent Police Complaints Commission	The members and employees of the Commission
The National Audit Office	The members and employees of the Office

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. Entries relating to the Nuclear Decommissioning Authority, any subsidiary or Board of any subsidiary and the Independent Police Complaints Commission were inserted by S.I. 2007/2148. The entry relating to the National Audit Office was inserted by S.I. 2012/725.

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);
- the Public Services Ombudsman (Wales) Act 2005 (Transitional Provisions and Consequential Amendments) Order 2006 (S.I. 2006/362); and
- the Budget Responsibility and National Audit Act 2011 (Consequential Amendments) Order 2012 (S.I. 2012/725)

are as follows:

Comptroller and Auditor General	
Member of staff of the National Audit Office that was established by section 3 of the National Audit Act 1983	
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. The entry relating to National Audit Office was amended by S.I. 2012/725.

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 1989 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 1989 Act for the purposes of which they are prescribed 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)