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PREM 19/2501

PART 2

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SECRET

CONFIDENTIAL FILING

REF ID OF THE OFFICIAL SECRETS
ACT.

SECURITY

PROPOSED PROTECTION OF OFFICIAL
INFORMATION BILL.

PART 1: MAY 1979

ENFORCING THE DUTY OF CONFIDENTIALITY PART 2: NOV 1987

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
4.11.87		31.5.88					
9.11.87		2.6.88					
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PART 2 ends:-

HOMG OFFICE to FCO 19.7.88

PART 3 begins:-

FGIB 10 PM

7.11.88

From: THE PRIVATE SECRETARY

CONFIDENTIAL



cc PK
HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

19 July 1988

Dear Lyn,

AW
COO
17/2

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

with request if required.

Thank you for your letter of 27 June recording the Foreign Secretary's continuing doubts about the proposal to take extraterritorial jurisdiction in new legislation over offences committed abroad by government contractors of foreign nationality.

The Home Secretary is not at present persuaded that this proposal should be dropped but suggests that the matter should be pursued by officials to see whether any measure of agreement can be obtained. Officials here will be writing to your Department shortly and will copy their letter to other interested Departments.

Copies of this letter go to the Private Secretaries to members of OD(DIS), the Lord Chancellor, the Lord President, the Lord Advocate, the Secretary of State for Trade and Industry, the Minister of State (Privy Council Office), the Attorney General and Sir Robin Butler.

Yours sincerely,

P J C MAWER

Lyn Parker, Esq

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SCH 141R

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

13 July 1988

DEBATE ON THE WHITE PAPER ON REFORM OF
SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

The Prime Minister has seen the Home Secretary's minute of 12 July in which he seeks her agreement to pursue arrangements for a debate later this month on the White Paper on the Reform of Section 2 of the Official Secrets Act. As I explained on the telephone the Prime Minister had some initial reluctance to a debate this month. She believes that there could well be comments in the debate on the civil law; indeed the matter has already been raised in the press and on the radio. She has, however, agreed to the Home Secretary's proposal for a debate this month on the direct understanding that the Government Ministers make no reference to the civil side in their contribution to the debate. You will know from my conversation on the telephone this is a point to which the Prime Minister attaches considerable importance.

I am copying this letter to the Private Secretaries to the Lord President, the Lord Privy Seal, the Attorney General, the Chief Whips in both Houses and Sir Robin Butler.

N. L. WICKS

Philip Mawer, Esq.,
Home Office

CONFIDENTIAL

CONFIDENTIAL



Act this day.

Prime Minister

Agree to a debate
later this month?

PRIME MINISTER

(Urgent decision needed in view
of need to arrange Parliamentary
Business.)
N.C.W.

DEBATE ON THE WHITE PAPER ON REFORM OF
SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

Solve as no reference to civil side

The Lord President, the Attorney General and I met last night to consider the timing of the debate which has been promised. There is now a possibility that the Lords' judgment on the "Spycatcher" case will not be given until October. In the light of developments since the Attorney General minuted me on June 10, we were persuaded that the advantage lies with a debate before the Recess, whether or not the judgment has been given. To delay the debate until after an October judgment would mean that we would be expected to react immediately to the Lords' decision and might have to offer a view on complex and sensitive issues in haste. Furthermore, we would be accused of ducking a debate, despite the promise in the White Paper that it would take place in July. It might be alleged that we recognise that our proposals are difficult to defend and that we have no intention of taking note of opposing views, since by the time of a debate after the Recess we would have had to make considerable progress in preparing a Bill.

2. The Attorney General believes that the position has been considerably eased by the removal of any reference in the White Paper to reviewing the civil law in the light of the Lords' judgment. We were able to avoid any substantive comment on civil law questions in the wake of publication of the White Paper and in these circumstances a debate before the Recess should pose no threat to our arguments in the "Spycatcher" case. He now has no objection to a debate this month.

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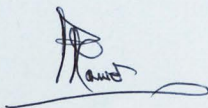
3. I believe that there are strong advantages to an early debate. The launch of the White Paper has gone reasonably well. We have the initiative and ought to take advantage of it by pressing on. To leave the issue to simmer over the Recess makes it more likely that myths about our intentions will become established and that those opposing us will have adequate time to regroup and choose on what ground to attack. A debate in October will stir the issue up, against the background of a possibly unhelpful Lords' decision, only a matter of weeks before our Bill will be introduced. A debate this month followed by the Recess is more likely to ensure that the Bill meets a positive reception. The business managers can find a day.

The matter has already been raised in the press & on radio. I doubt whether it can be avoided now

4. We shall, of course, continue to avoid in the debate any comment on the civil law, by emphasising that the White Paper concerns only the criminal law and that no comment on the civil law is possible until the Lords have given their judgment in the "Spycatcher" case and there has been time to consider the judgment.

I would be glad to know whether you agree that we should pursue arrangements for a debate later this month. The Lord President, the Attorney General and I would, of course, be happy to discuss the matter with you.

I am copying this minute to the Lord President, the Lord Privy Seal, the Attorney General, the Chief Whips in both Houses, and Sir Robin Butler.



APPROVED BY THE HOME SECRETARY
AND SIGNED IN HIS ABSENCE

12 July

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SECURITY: Official
Secret A2





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every NP +
so could be sent to
Departmental study.
W.C.B.
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ma.

QUEEN ANNE'S GATE LONDON SW1H 9AT

29 June 1988

Dear Colleague

WHITE PAPER ON REFORM OF
SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

I am today laying before Parliament the White Paper on reform of Section 2 of the Official Secrets Act 1911, which I announced in the House on 15 December last year would be forthcoming this session. I write to let you know the main features of our proposals.

We have taken into account previous proposals but have tried to look afresh at the issues in the light, in particular, of criticisms made of the Protection of Official Information Bill which the Government introduced in 1979, and of the debate in January on Richard Shepherd's Bill. We believe that the proposals in the White Paper provide the basis for legislation which would be at the same time effective and enforceable and also reasonable and likely to command respect.

As a result of Section 2, it is a criminal offence to disclose any official information without authority. But it has long been accepted that Section 2 is too wide and too weak. A good deal of information simply does not require the protection either of the criminal law or of disciplinary arrangements. Other information is adequately protected by the normal processes of discipline which operate between the Crown and its employees. Only a relatively small proportion of information requires the protection of the criminal law. Our proposals would confine the scope of the law to this third category.

We propose that the disclosure without authority of information acquired by a Crown servant or government contractor in the course of his duties should be covered by new legislation only if it relates to security or intelligence, defence, international relations or interception, or if it has been obtained in confidence from another government or international organisation, or if it would be useful in the commission of criminal offences or escape from custody. It would be an offence to disclose without authority any information on interception, any information obtained in confidence from another government or international organisation, or any information useful in the commission of criminal offences or escape from custody. Subject to one point which I mention below, it would be an offence to disclose without authority information relating to security or intelligence, defence or international relations only if the prosecution could satisfy the court that some specific harm was likely to result from the disclosure. Separate and tightly drawn tests of harm are proposed for each of these categories. Our proposal that it should be for the courts

/cont.....

(i.e. in many cases a jury) to consider whether a disclosure is harmful and therefore criminal represents a considerable change compared with the present law, and goes further than proposals previously put forward. Ministerial certificates, which were a feature of the Franks Committee Report and of the 1979 Bill, form no part of our new proposals.

The one point which I mentioned earlier is this. We propose that it should always be an offence for a member or former member of the security and intelligence services or those working closely with these services to disclose any information relating to security or intelligence. We do not think it right or reasonable to require the prosecution to prove that particular harm was likely to arise from an unauthorised disclosure where that disclosure was made by those whom the nation trusts to carry on their work in complete secrecy.

A Crown servant or government contractor would have a defence that he did not know and had no reasonable cause to believe that the disclosure would be likely to result in harm. For any other defendant, such as a journalist, the prosecution would have to prove that he knew or had reasonable cause to believe that the specified harm was likely to arise from his disclosure.

We do not propose to provide a public interest defence. Our proposal to introduce specific tests of harm and to put all the decisions in the hands of the courts totally alters the context. The object of our proposals is to define clearly in what circumstances disclosure of information is against the public interest. A general public interest defence would undermine the purpose of tests of harm and make it impossible to achieve any clarity in defining what official information it is criminal to disclose.

We have also considered how to handle cases where information disclosed has already been published. Where the White Paper proposes a test of harm, the prosecution would have to prove that such harm would be likely to occur and, if no harm arises because the information is already publicly available, the prosecution would be unable to prove its case. In the other categories, however, the Government considers that disclosure is harmful in all circumstances, for example when it is made by a member or former member of the security and intelligence services.

We also propose to create other offences relating to the safekeeping of documents and failure to return them when required; but it would not (as now) be an offence merely to receive official information.

The effect of the Government's proposals is dramatically to narrow the scope of the criminal law in this area. I hope that you will consider the White Paper fully and carefully. We intend to take the views of Parliament by means of debates in both Houses, and we shall also of course want to hear other comments on our proposals. We shall aim to bring early legislation before Parliament.

This is an important issue which successive Parliaments have failed to resolve. Unanimity of view on any set of proposals is unlikely. But the Government's approach offers the prospect of an effective and acceptable reform of the law in an area which for many years has been universally recognised as unsatisfactory. I hope that having considered the proposals, you will feel able to give them your support.

Conner,

Douglas Hurd.

1. It is my view that the disclosure of information of this kind should be made only in the most exceptional circumstances. It is not the policy of the Government to disclose information of this kind to the public. It is the policy of the Government to keep such information secret. It is the policy of the Government to keep such information secret. It is the policy of the Government to keep such information secret.

The only exception to this rule is where the disclosure of information of this kind is in the public interest. It is the policy of the Government to keep such information secret. It is the policy of the Government to keep such information secret. It is the policy of the Government to keep such information secret.

It is my view that a government contractor would have a defence that he did not know and had no reasonable cause to believe that the disclosure would be likely to result in harm. For any other defendant, such as a journalist, the prosecution would have to prove that he knew or had reasonable cause to believe that the specified harm was likely to arise from his disclosure.

We do not intend to provide a public interest defence. Our proposal to introduce specific tests of harm and to put all the decisions in the hands of the courts would alter the context. The effect of our proposals is to define closely in what circumstances disclosure of information is against the public interest. A general public interest defence would undermine the purpose of tests of harm and make it impossible to achieve anything like the degree of control which is essential to national security.

We have also considered how to handle cases where information disclosed has already been published. Where the White Paper proposes a test of harm, the prosecution would have to prove that such harm would be likely to occur and, if so, harm would be caused by the information already publicly available. The prosecution would be unable to prove its case. In other circumstances, however, the Government considers that disclosure is harmful in all circumstances, for example when it is made by a member of a former member of the security and intelligence services.

We also propose to create new offences relating to the safekeeping of documents and failure to ensure that such documents are not lost (as now) be an offence relating to security and intelligence information.

The effect of the new proposals is to strengthen the Government's power to control the disclosure of information of this kind. It is the policy of the Government to keep such information secret. It is the policy of the Government to keep such information secret. It is the policy of the Government to keep such information secret.

Official Secrets Act 1911

3.31 pm

The Secretary of State for the Home Department (Mr. Douglas Hurd): With permission, Mr. Speaker, I wish to make a statement about reform of section 2 of the Official Secrets Act 1911.

In a debate in this House on 15 January, I explained that the Government had, since the previous April, been studying proposals for the reform of section 2, and that I hoped to bring forward proposals in the form of a White Paper in June.

I have laid the White Paper before the House today. We have aimed to find proposals that are effective, enforceable and reasonable. We hope to break the deadlock that has beset this question throughout its recent history.

We have taken careful note of the criticisms made of the Government Bill introduced in 1979, together with comments and suggestions made since then, including during the debate on the Bill introduced in January by my hon. Friend the Member for Aldridge-Brownhills (Mr. Shepherd). As a result, the proposals in the White Paper include some major changes to, as well as similarities with, previous attempts at reform. I invite right hon. and hon. Members to read the White Paper in full, but I offer the House now an outline of the main points.

The essence of the proposals is that it would no longer be a criminal offence, as it is under the present law, to disclose any official information without authority. The scope of the legislation would be confined to the very small amount of information that it is in the whole nation's interest to keep secret and which would therefore continue to have the protection of the criminal law. Other information which cannot be disclosed without breaching the trust between Ministers and officials, or which a Crown servant has been instructed not to disclose, would continue to be protected by normal disciplinary arrangements.

Six categories of official information would be within the scope of our proposed legislation. They are information relating to defence, international relations, security and intelligence, the interception of communications, information received in confidence from other Governments and from international organisations and, finally, information which is likely to be useful in the commission of crime or in helping a prisoner to escape from custody. These are the areas which we think the legislation should cover. We do not propose that the criminal law should any longer apply to, for example, economic information, or to Cabinet documents or ministerial correspondence in general. Nor do we now think it necessary for information received in confidence from firms or individuals to be covered by a general law on official secrets. These proposals represent a further narrowing compared with the 1979 Bill.

We think it should continue to be an offence for any person to disclose any information relating to or obtained by interception, or any information received in confidence from other Governments or international organisations because any such disclosure damages the national interest. We accept, however, that not all information in the defence and international relations categories needs the protection of the law. We therefore propose that the disclosure of information falling within these categories should be an offence only if it is likely to result in specified

damage to the national interest. Proposed tests of damage are set out in the White Paper. Hon. Members will see that they are narrower and more specific than the broad test of serious injury to the interests of the nation which was recommended by the Franks committee and contained in the 1979 Bill. They are designed to leave no doubt about the reasons for including information within these categories in official secrets legislation. The same applies to information likely to be useful in the commission of crime or in helping prisoners to escape. In this case, a test of damage is built into the categorisation, and the prosecution would have to show that the test was satisfied.

For information relating to security and intelligence, we propose a distinction between those whom the nation trusts to carry on their work in complete secrecy, on the one hand, and of those outside the field of operation of the security and intelligence services on the other. For members and former members of those services, together with a number of other people who work in close association with them, we propose that it should be an offence to disclose any information concerning the work of the services or to make any statement which purports to disclose such information. For other persons—that is, for people who are not or who have not been members of those services or in related work—we propose that the disclosure of official information and security intelligence should be an offence only if it can be established positively that it was likely to damage the operation of the security and intelligence services.

If disclosure of information within a particular category is to be an offence only if it can be established that it meets a specified test of harm, then the old question arises—by whom and by what means is this to be decided? The Franks committee, and the Government in that 1979 Bill, proposed that the question should be conclusively settled by ministerial certificate. This was one of the main points of criticism of that Bill. My hon. Friend the Member for Aldridge-Brownhills later suggested that a certificate by a Minister should be reviewable by some other person or body. Under our new proposals, however, there are no ministerial certificates. The harm likely to arise from the disclosure would be a matter for the court alone to determine on the basis of argument from the prosecution and the defence. In relation to persons other than Crown servants, the prosecution would have to prove not only that the specified harm was likely to arise but that the accused person knew or could reasonably have been expected to know that it was likely to arise. We are putting our trust in the impartial determination of a jury.

The abandonment of ministerial certificates, and introduction of specific tests of harm for the courts to determine, are major changes from previous proposals. They provide a new framework within which other proposals, made in the context of the 1979 Bill, must be considered afresh. I have in mind particularly the suggestions that there should be a defence of prior publication and a general defence that publication was in the public interest. Within the framework of these new proposals, we do not think it right to provide an overriding defence of prior publication. In our proposals, arguments about the effect of a second disclosure are for the judgment of the courts within the ambit of the specific tests of harm set by Parliament. So it would be possible on this basis for the court to conclude that further harm was unlikely to arise from the disclosure in question because there had been a previous disclosure which had already caused the

[Mr. Douglas Hurd]

harm. But we think it would be wrong to rule out the possibility of prosecution altogether just because the information had already been published elsewhere — perhaps in different form to a different audience. Nor do we think it right to introduce the uncertainty into the law which a general public interest defence would inevitably entail.

These are the main features of our proposals as set out in the White Paper. They represent a considered attempt to find the basis for a wide measure of agreement in replacing section 2, which all of us wish to do. If carried into effect, they should dispel any notion that the criminal law is being used to protect information simply because its disclosure would be embarrassing to Governments, still less merely because it is official information. But the law must firmly address the problem of disclosures which are truly damaging to the public interest, and provide clear and enforceable definitions and procedures to enable this to be done.

The House should have an opportunity to debate the proposals before they are put into legislative form. We shall take careful note also of views expressed outside the House. We shall then want to move to early legislation to introduce a fair and effective alternative to section 2.

Mr. Roy Hattersley (Birmingham, Sparkbrook): Is the Home Secretary aware that many hon. Members — perhaps the majority — believe that prosecution under any Official Secrets Act should be possible only when the disclosure of information has genuinely damaged or prejudiced the national interest? In his statement the right hon. Gentleman has sought to give the impression that he supports that view, and that the arbitrary and unjustified application of an official secrets law is now to be abandoned. A reading of the White Paper, as distinct from the Home Secretary's statement, shows that not to be true.

We welcome, of course, the removal from the provisions of any Official Secrets Act the omnibus clause covering every item of Government information. We agree that many instances of improper revelation are more suitable for internal disciplinary procedures than for the criminal law. Our real concern relates to paragraphs 41 and 42 of the White Paper, which deal with what is called the security services. These are services which in Britain, as in other democracies, should be subject to general parliamentary scrutiny.

Does the Home Secretary recall that many of the repressive and authoritarian acts perpetrated by the Government over the past nine years have been justified by invoking the name of the security services? Is he aware that that catch-all provision still applies? Indeed, in some ways it is reinforced and made respectable. Does the Home Secretary recall that in the debate in January he derided the present law, which is so ridiculous as technically to make the publication of a Civil Service canteen menu an offence? Paragraphs 41 and 42 make it clear that the unauthorised revelation of the menus at Curzon street, or GCHQ is to become a criminal offence. Everything that the Home Secretary defines as "relating to security" is automatically the subject of criminal prosecutions without any of the safeguards which his statement has emphasised.

Is the Home Secretary aware that until the behaviour of the security forces is no longer cloaked in impenetrable

legal protection, most people will continue to believe, in the words of paragraph 32 of the White Paper, that information is being withheld and

"protected by the criminal law merely for fear of political embarrassment"?

Will the right hon. Gentleman confirm that any revelation of any information that is said to be "related to security" — "related to security" on the Minister's own definition — will be a criminal offence when carried out by members of the security service, ex-members of the security service, those who work with them and support them, whose who are in frequent contact with them and those who deal with them on a regular basis? These are all areas — and there are more — that have been discredited by section 11 of the old Act, which the Home Secretary pretends that he is in some way removing and abolishing. Will he tell the House how the term "relating to security" is to be defined? Unless it is circumscribed by an exact precision it will allow Ministers to include within that automatic category for criminal prosecution anything that they wish to include. There is no doubt that while the Home Secretary represents this as a libertarian move, Mr. Clive Ponting, who was found not guilty under the existing Act, would certainly be convicted under the provisions that the Home Secretary has set out today. [HON. MEMBERS: "Hear, hear."] I anticipated that a number of Government Members below the Gangway would cheer. They may be pleased by that provision but they cannot claim that it liberalises the present law.

If Ministers claim that the security services are involved and are connected with almost anything they care to put within that category, none of the defences that the Home Secretary so strongly emphasised will apply. There will be no defence in terms of the national interest not having been damaged. The Minister will have arbitrary and authoritarian power to include within the criminal prosecution section whatever he or his successor chooses to include. Nor will that test apply — although the Home Secretary gave a different impression in his statement — in one other respect. According to paragraph 51 of the White Paper, the "harmful to public interest" defence does not apply to information obtained from other Governments. I assume that, ironically, that was included to please and placate the United States of America, whose Senate and Congress would not give house room to the proposals that the Home Secretary is making today.

There are many other inadequacies, shortcomings and omissions. There is the absence of a public interest defence, and the fact that although something may already have been published, it can still be the subject of criminal prosecution if its publication is repeated. There is also included within the catch-all, omnibus definition of security matters those things which ex-members of the security services or their associates may say and which happen to be untrue, or are no more than pub talk, but which will nevertheless be automatically regarded as damaging to the public interest.

We shall return to all those shortcomings in the debate. The point that really must be driven home today is this. Today's newspapers, for reasons we can only guess at, predicted a draconian White Paper, and that is what we have been given. However, it is a different White Paper from that which the newspapers predicted — but it is just as bad and just as unacceptable in a free society. Anyone who reads the White Paper rather than relies on and trusts the Home Secretary's statement will know that to be a fact.

From: THE PRIVATE SECRETARY

SECRET 4A-B



HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

28 June 1988

One Minute -

to see the line proposed.

Dear Nigel,

MG

N. C. U.

28-6

**OFFICIAL SECRETS WHITE PAPER:
BRIEFING ON SECURITY SERVICE LEGISLATION**

It is possible that Ministers might have to respond to questions about possible legislation for the Security Service following publication of the Official Secrets White Paper tomorrow. While the possibility is not high, it would be unwise to proceed on the assumption that awkward questions will not be asked.

... Against this possibility, officials have prepared the attached ascending series of responses. The aim would be to stop at the first answer, and to use the final answer only as a last resort before refusing to comment further. If at all possible, the Home Secretary will seek to rest on the position that Ministers have all along made clear their view that the present arrangements for ensuring the accountability of the Security Service through Ministers are satisfactory, and that their position on this remains unchanged.

I am copying this letter and enclosure to Trevor Woolley (Cabinet Office).

Yours sincerely,

P J C Mawer

P J C MAWER

Nigel Wicks, Esq, CBE

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B

OFFICIAL SECRETS WHITE PAPER: LINES TO TAKE

Is the Government working on legislation to put the Security Service on a statutory basis?

As the White Paper makes clear, provisions relating to the unauthorised disclosure of information by members of the security and intelligence services would be included in the legislation we propose for the reform of official secrets.

[if pressed]

That is a wholly different matter and would raise the issue of the oversight of the Security Service which the House has discussed from time to time and on which the Government's view is clear and unchanged.

[Not to be used unless unavoidable]

[The Security Service work well and very effectively under the present arrangements. There are many people who owe their lives to the work of the service, not least in the fight against terrorism, and we have no intention of upsetting that.]

SECRET

28.1.

PM 28



Prime Minister²
to note.

N.C.U.
23.6

CONFIDENTIAL

PRIME MINISTER

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

I have seen the recent correspondence concerning Douglas Hurd's proposals for reforming Section 2 of the Official Secrets Act.

I welcome the proposals but would like to make two points.

In my view, Government policy should whenever possible be expounded by Ministers rather than officials. But there are of course occasions when civil servants have to speak on Ministers' behalf; and they may, as the draft suggests, unwittingly disclose sensitive information, in discussion or under questioning (whether in select committees or outside Parliament altogether). As I understand it, the effect of our proposals will be to increase the risk to them of criminal charges, and some protection may be needed for officials in particularly exposed positions eg information officers.

Secondly, if in future it is a criminal offence to disclose certain kinds of information, but not an offence to disclose others, we may find that a climate of opinion is created in which, even though the Government does not share that view, it is seen as more acceptable to procure access to or improperly disclose sensitive information, eg Ministerial discussions of matters which are not themselves secret or confidential but which are highly contentious politically. In that case, the Civil Service must be resolute in disciplining offenders, despite pressures to the contrary. The advantage lies with going ahead, but we should note that there may be a price to pay.

/ I am sending copies of this minute to Cabinet colleagues.

16 June 1988

P W

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MEMORANDUM FOR THE SECRETARY OF STATE

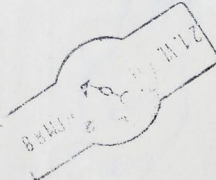
I have seen the report of the investigation conducted by the Department of State regarding the activities of the [redacted] in the [redacted] area.

I believe the report is well written and contains a great deal of information.

In view of the fact that the [redacted] is a very active organization, it is necessary to keep the Department of State informed of its activities. The report indicates that the [redacted] is engaged in a variety of activities, including the collection of funds, the recruitment of new members, and the dissemination of propaganda. It is also noted that the [redacted] is active in the [redacted] area, and that it is in contact with the [redacted] in the [redacted] area.

It is noted that the [redacted] is a very active organization, and that it is engaged in a variety of activities, including the collection of funds, the recruitment of new members, and the dissemination of propaganda. It is also noted that the [redacted] is active in the [redacted] area, and that it is in contact with the [redacted] in the [redacted] area.

I am sending copies of this report to the Department of State.



020
From: THE PRIVATE SECRETARY



CONFIDENTIAL

MS
HB
2
Home Office
QUEEN ANNE'S GATE
LONDON SW1H 9AT

28 June 1988

Dear Nigel,

LAUNCH OF THE WHITE PAPER ON REFORM OF
SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

..... The Home Secretary thought that his Cabinet colleagues might find it helpful to have the attached question and answer summary of the Government's proposals for the reform of section 2 of the Official Secrets Act 1911 which will be set out in the White Paper to be published tomorrow.

I am copying this letter and the summary to the Private Secretaries to all Cabinet Ministers and to Sir Robin Butler.

Yours sincerely,

P J C MAWER

N L Wicks, Esq., CB.

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und 3.30 pm on 29/6/88.

THE GOVERNMENT'S PROPOSALS FOR THE REFORM OF SECTION 2 OF THE
OFFICIAL SECRETS ACT 1911

Section 2 of the Official Secrets Act 1911 makes it an offence for any person to disclose any information acquired by a Crown servant or government contractor in the course of his duties. The scope of this law has long been recognised as far too wide. But there has been no general agreement on the way in which the law should be reformed. The Government considers that the time has come for a further attempt to be made to narrow the scope of the law. It has put forward proposals which it believes would mean that the criminal law would protect, and protect effectively, that information, and only that information, which cannot be disclosed without the serious risk of unacceptable harm to the public interest.

What information would be covered by new legislation?

The Government's proposals cover six categories of information. These are: information relating to security or intelligence, to defence or to international relations, information obtained in confidence from other governments or international organisations, information whose disclosure would be likely to be useful in the commission of offences or in helping a prisoner to escape and information about or obtained by the interception of communications.

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Would it be an offence to disclose any information in these categories?

It would be an offence to disclose any information obtained in confidence from other governments or intergovernmental organisations or any information whose disclosure would be likely to be useful in the commission of offences or in helping a prisoner to escape or any information about or obtained by the interception of communications. It would also be an offence for a member of the security or intelligence services or someone working closely with the services to disclose any information relating to security or intelligence.

But it would only be an offence for someone else to disclose information relating to security or intelligence if the disclosure was likely to damage the operation of the security and intelligence services. Similarly it would only be an offence to disclose information relating to defence if the disclosure was likely to prejudice the capability of the armed forces to carry out any of their defence tasks or to lead to a risk of loss of life, injury to personnel or damage to equipment or installations or to prejudice dealings between the Government and the government of another state or an international organisation. And it would only be an offence to disclose information relating to international relations if the disclosure would be likely to jeopardise or seriously obstruct the promotion or protection of

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United Kingdom interests abroad or to prejudice dealings between the Government and the government of another state or an international organisation or to endanger the safety of a British citizen.

Who would decide whether information was useful in the commission of offences or whether the disclosure of information relating to security or intelligence, defence or international relations would be likely to lead to the specified harmful consequences?

These would be matters for the courts alone to decide. The prosecution would have to produce evidence to prove these questions beyond reasonable doubt and the defence would be able to put forward its own evidence to rebut the prosecution case.

What happens if the person who disclosed information relating to security or intelligence, defence or international relations did not know what the specified harmful consequences were likely to result?

If he is a Crown servant or government contractor, he will not be guilty of an offence if he can satisfy the court, on the balance of probabilities, that he did not know or have any reason to believe that the consequences of his disclosure were likely to be

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harmful. In any other case the prosecution will have to prove, beyond reasonable doubt, that the accused did know or have reason to believe that harmful consequences were likely to result from his disclosure.

What if the information has already been made public?

The Government considers that the disclosure of information relating to or obtained by interception and of information obtained in confidence from other governments or intergovernmental organisations is harmful in all circumstances, whether or not the information has previously been made public. For the disclosure of the remaining categories of information the prosecution will have to show that, despite the fact that the information has previously been made public, the disclosure is likely to be harmful: it will have to prove that the information is still useful in the commission of offences or escape from custody or that the disclosure of information relating to security or intelligence, defence or international relations would be likely to result in the specified harm.

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What about a person who makes a disclosure because he believes the public have a right to know certain information?

The object of the Government's proposals is to ensure that the criminal law only penalises disclosures of information which are likely to result in harm to the public interest. Whatever a person's motive, it is criminally irresponsible to make a disclosure knowing that it is likely to result in such harm.

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criminal law only penalizes disclosures of information which are
likely to result in harm to the public interest. Whether a
person's disclosure is a result of his responsibility of care
disclosure is likely to result in such harm.



CCBY
T. B. Ks.

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Action This day. S. A. B.

One Minute

to see

N. C. U.

28.6.

PRIME MINISTER

LAUNCH OF THE WHITE PAPER ON REFORM OF
SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

ms

..... I thought you would wish to know what I propose to say in the House tomorrow about our proposals for reform of section 2. I attach a draft of my Statement. As you will see, I intend simply to set out the main features of our proposals and urge a constructive attitude to reform.

..... 2. I am also enclosing the question and answer briefing on which I shall be drawing in replying to questions in the House and from the press. You and the colleagues to whom this minute is copied may find this of use if questions are put to you in the House or elsewhere about our proposals.

3. I propose also to write to all Members of the House of Commons tomorrow with a summary of the proposals, in the hope of reducing ill-informed comment, and there will be the usual Central Office brief in the Whips' Office for our own backbenchers.

4. The House of Lords hearing of the "Spycatcher" case ended last Thursday and, as expected, Judgment was reserved. As you will see, I do not propose to offer any comment on the case or the possibility of reform of the civil law.

5. Copies of this minute and of the enclosures go to the Lord President, the Lord Privy Seal, the Chief Whip, the Secretaries of State for Foreign Affairs, Defence, Scotland

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and Northern Ireland, the Attorney General and the Minister of State, Privy Council Office, and to Sir Robin Butler. I am also circulating to all Cabinet colleagues, separately, a shorter brief on the proposals for use as necessary.

Douglass Hurd

28 JUNE 1988

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HOME SECRETARY STATEMENT ON
REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911
3.30 PM., WEDNESDAY, 29 JUNE 1988

With permission, Mr Speaker, I wish to make a statement about reform of Section 2 of the Official Secrets Act 1911.

In a debate in this House on 15 January, I explained that the Government had since the previous April been studying possibilities for the reform of section 2, and that I hoped to bring forward proposals in the form of a White Paper in June.

I have laid the White Paper before the House today. We have aimed to find proposals which are effective, enforceable and reasonable. We hope to break the deadlock which has beset this question throughout its long history.

We have taken careful note of the criticisms made of the Government Bill introduced in 1979, together with comments and suggestions made since then, including in the debate on the Bill introduced in January by my honourable Friend the Member for Aldridge-Brownhills. As a result, the proposals in the White Paper include some major changes, as well as similarities, compared with previous attempts at reform.

/I invite Rt Hon

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I invite Rt Hon and hon Members to read the White Paper in full. But I offer the House now an outline of the main points.

The essence of the proposals is that it would no longer be a criminal offence, as it is under the present law, to disclose any official information without authority. The scope of the legislation would be confined to the very small amount of information which it is in the whole nation's interest to keep secret and which should therefore have the protection of the criminal law. Other information which cannot be disclosed without breaching the trust between Ministers and officials, or which a Crown servant has been instructed not to disclose, would continue to be protected by normal disciplinary arrangements.

Only six categories of official information would be within the scope of our proposed legislation. These are information relating to defence; international relations; security and intelligence; the interception of communications; information received in confidence from other governments and from international organisations; and, finally, information which is likely to be useful in the commission of crime or in helping a prisoner to escape from custody. These are the areas which we think the legislation must cover. We do not propose that the criminal law should any longer apply to, for example, economic information, or to Cabinet documents or Ministerial correspondence in general.

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/Nor do we

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3.

Nor do we now think it necessary for information received in confidence from firms or individuals to be covered by a general law on official secrets. The proposals thus represent a further narrowing compared with the 1979 Bill.

We think it should continue to be an offence for any person to disclose any information relating to or obtained by interception, or any information received in confidence from other governments or international organisations. Any such disclosure damages the national interest. We accept, however, that not all information in the defence and international relations categories needs the protection of the law. We therefore propose that the disclosure of information falling within these categories should be an offence only if it is likely to result in specified damage to the national interest. Proposed tests of damage are set out in the White Paper. They are narrower and more specific than the broad test of serious injury to the interests of the nation which was recommended by the Franks Committee and contained in the 1979 Bill. They are designed to leave no doubt about the reasons for including information within these categories in official secrets legislation. The same applies to information likely to be useful in the commission of crime or in helping prisoners to escape from custody. In this case, a test of damage is built into the categorisation, and the prosecution would have to show that the test was satisfied.

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For information relating to security and intelligence, we propose a distinction between the position of those whom the nation trusts to carry on their work in complete secrecy, on the one hand, and of those outside the field of operation of the security and intelligence services on the other. For members and former members of these services, together with a number of other persons who work in close association with them, we propose that it should be an offence to disclose any information concerning the work of the services or to make any statement which purports to disclose such information. For other persons, however, we propose that the disclosure of official information should be an offence only if it can be established positively that it was likely to damage the operation of the security and intelligence services.

If disclosure of information within a particular category is to be an offence only if it can be established that it meets a specified test of harm, the question arises by whom and by what means this is to be decided. The Franks Committee, and the Government in its 1979 Bill, proposed that the question should be conclusively settled by Ministerial certificate. This was one of the principal points of criticism of that Bill. Others later suggested that a certificate by a Minister should be reviewable by some other person or body. Under our new proposals, however, there are no Ministerial certificates. The harm likely to arise from the disclosure would be a matter for the court alone to determine on the basis of argument from the prosecution and

/the defence.

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the defence. In relation to persons other than Crown servants, the prosecution would have to prove not only that the specified harm was likely to arise but also that the accused person knew or could reasonably have been expected to know that it was likely to arise. We are putting our trust in the impartial determination of a Jury.

The abandonment of Ministerial certificates, and introduction of specific tests of harm for the courts to determine, are major changes from previous proposals. They provide a new framework within which other proposals, made in the context of the 1979 Bill, must be considered afresh. I have in mind particularly suggestions that there should be a defence of prior publication and a defence that publication was in the public interest. Within the framework of our new proposals, we do not think it right to provide an overriding defence of prior publication. In our proposals, arguments about the effect of a second disclosure are for the judgment of the courts within the ambit of the specific tests of harm set by Parliament. It would be possible on this basis for the court to conclude that further harm was unlikely to arise from the disclosure in question because there had been a previous disclosure which had already caused the harm. But we think it would be wrong to rule out the possibility of prosecution altogether, just because the information had already been published elsewhere - perhaps in different form to a different audience. Nor do we think it right to introduce the uncertainty into the law which a public interest defence would inevitably entail.

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/These, Mr Speaker,

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6.

These, Mr Speaker, are the main features of the Government's proposals as set out in the White Paper. They represent a considered attempt to find the basis for a wide measure of agreement in replacing section 2, which all of us wish to do. If carried into effect, they should dispel any notion that the criminal law is being used to protect information simply because its disclosure would be embarrassing to governments, still less so merely because it is official information. But the law must firmly address the problem of disclosures which are truly damaging to the public interest, and provide clear and enforceable definitions and procedures to enable this to be done.

Mr Speaker, it remains the Government's wish that the House should have an opportunity to debate the proposals before the Recess. We shall also take careful note of views expressed outside this House. We shall then want to move to early legislation to introduce a fair and effective alternative to section 2.

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GENERAL

A1 THE PROPOSALS ARE TOO RESTRICTIVE

Our aim has been to narrow the criminal law as far as possible while still safeguarding information the disclosure of which would cause an unacceptable degree of harm to the public interest. Those who wish to go further must explain how they can do so without causing such harm.

A2 THE PROPOSALS WILL COVER INFORMATION WHICH IS MERELY EMBARRASSING

The White Paper makes it quite clear that we do not think it right to use the criminal law to prevent the disclosure of information which is merely embarrassing. Our proposals are concerned only with disclosure which will cause an unacceptable degree of harm to the public interest.

A3 SECTION 2 SHOULD SIMPLY BE REPEALED

I suggest that the Hon Member reads paragraph 2 of the White Paper and notes in particular what the Franks Committee had to say on this matter. Section 2 cannot simply be repealed without risking serious danger to the security and well-being of the nation.

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A4 IT IS FAIR TO PENALISE THOSE WHO ARE ENTRUSTED WITH SECRETS,
BUT WRONG TO PENALISE THE PRESS FOR DOING THEIR JOB

That view is mistaken, because it treats the criminal law in this area as if it were merely a reinforcement of Civil Service discipline. We want to narrow the criminal law so as to cover only those disclosures which cause unacceptable harm to the public interest. Once that is done, it becomes all the clearer that it does not matter who makes the disclosure.

A5 DISCIPLINARY PROCEDURES PROVIDE AN ADEQUATE SANCTION FOR
CROWN SERVANTS WHO LEAK SECRETS

Disciplinary procedures understandably have a role to play, and the proposals clearly envisage that some matters which now fall within the criminal sphere will fall to be dealt with as disciplinary matters. But there remain some matters which, if disclosed, would cause too much harm to the public interest to be dealt with by discipline alone. In any event disciplinary action is a sanction only against people with careers ahead of them; it cannot be applied to former Crown servants. We have made a genuine attempt to find where the boundary lies between disclosures which should be criminal and those for which disciplinary proceedings are adequate.

A6 WHY DID IT TAKE THE GOVERNMENT SO LONG TO PRODUCE ITS
PROPOSALS?

The White Paper deals with issues to which successive governments have failed to find effective or acceptable solutions. It would not have been sensible to rush our consideration of these issues. What we are seeking is the basis for workable and permanent reform. We believe that our proposals provide such a basis.

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A7 WHEN DOES THE GOVERNMENT INTEND TO INTRODUCE LEGISLATION?

The Hon Member is aware that I cannot offer him a precise answer. We want to have sufficient time to consider all the comments we receive on our proposals. But when I first announced last December our intention of publishing the White Paper I said that I hoped to do so with a view to early legislation. It is still our intention to have early legislation.

A8 WHEN WILL THE DEBATE TAKE PLACE?

That is a matter for my Rt Hon Friend the Leader of the House, but I hope that it will be before the House rises for the Summer Recess.

A9 WHY DID THE GOVERNMENT NOT CONSULT OUTSIDE INTERESTS IN PREPARING ITS PROPOSALS?

In the light of the history of this issue it seemed to us that the most sensible way to proceed was for the Government to set out its proposals and to receive comments on them. But, of course, in preparing our proposals we were aware of a wide range of views on how section 2 should be reformed. [In previous Sessions, when the Government made no proposals but said that it was willing to consider views, it was criticised for not giving a lead.]

A10 THE GOVERNMENT HAS NO INTENTION OF TAKING NOTICE OF COMMENTS MADE ON ITS PROPOSALS

We would not have produced this White Paper and we would not be arranging a debate if we did not want to hear other views. We would have gone straight for legislation.

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CATEGORIES OF INFORMATION

B1 ON WHAT BASIS DID THE GOVERNMENT CHOOSE THESE CATEGORIES?

We looked to cover the bare minimum of kinds of information which could not be disclosed without unacceptable harm to the public interest. Hence the small number of definable categories set out in the White Paper.

B2 WHAT DOES 'SECURITY OR INTELLIGENCE'/'DEFENCE'/'INTERNATIONAL RELATIONS' MEAN?

When we come to legislation it will be necessary to give these terms a precise definition. But for the purpose of discussion of the general shape of the proposals these general terms speak well enough.

B3 THE GOVERNMENT IS WRONG NOT TO COVER INFORMATION PROVIDED IN CONFIDENCE BY COMPANIES OR INDIVIDUALS

We entirely agree that such information should not be made public and that in some circumstances it should be an offence to disclose it, as it is in a number of instances by virtue of specific legislation. But we did not believe that it was right to give blanket protection to all information provided in confidence in legislation whose object would be to protect only information which could not be disclosed without an unacceptable degree of harm to the public interest.

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B4 IS NOT 'INTERCEPTION' COVERED BY 'INTELLIGENCE' OR
'INFORMATION USEFUL IN THE COMMISSION OF CRIME'

There is some overlap. But we envisage that the interception category would cover much other information which would not fall within any other category. Our intention is that the disclosure of any information obtained by authorised interception, or information relating to such interception, should be an offence.

B5 'INFORMATION RECEIVED IN CONFIDENCE FROM OTHER GOVERNMENTS
ETC' IS COVERED BY 'INTERNATIONAL RELATIONS'

We see the harm arising from the disclosure of information provided in confidence by another government as being of a different kind from that arising from the disclosure of information relating to international relations. We see a need for a separate category of information none of which can lawfully be disclosed.

B6 NEW LEGISLATION SHOULD COVER INFORMATION IN OTHER CATEGORIES
[EG BUDGET SECRETS]

We have aimed to reduce the scope of the criminal law to the minimum necessary to protect the public interest. There are other categories [such as budget secrets] which contain information which it will be Government policy not to disclose. But we concluded that the degree of harm to the public interest which would be likely to result in such instances was not sufficient to justify the application of criminal safeguards.

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TESTS OF HARM

Security or intelligence

C1 WHO ARE THE SECURITY AND INTELLIGENCE SERVICES?

The Hon Member knows that it is not the practice to disclose details of the organisation of the services. We mean those services consisting of Crown servants serving in a civil capacity which are devoted wholly to security or intelligence duties.

C2 IS IT DAMAGING TO THE OPERATION OF THE SERVICES TO REPORT THAT THEY ARE BREAKING THE LAW?

Under our proposals what is or is not damaging to the operation of the services is to be decided by the courts. The Hon Member's question cannot sensibly be answered except by the courts in particular cases.

C3 IT IS DANGEROUS TO ALLOW ANY INFORMATION ON SECURITY OR INTELLIGENCE TO BE DISCLOSED

The object of our proposals is that the criminal law should penalise disclosure only where it would result in an unacceptable degree of harm to the public interest. So far as information relating to security or intelligence is concerned, it seemed to us that any disclosure by a member of the security and intelligence services met this test. But we were not persuaded that the same applied to any disclosure by those outside the services.

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C4 THE TEST OF HARM SHOULD BE BROADER (EG' DAMAGE THE SECURITY OF THE NATION')

If the courts are to be able to judge whether the test of harm is met and the prosecution and defence are to have the opportunity to introduce concrete and relevant evidence, the test must be clear and specific.

C5 TO ALLOW THE PROSECUTION TO RELY ON EVIDENCE RELATING TO THE 'CLASS OR DESCRIPTION' OF INFORMATION DISCLOSED WOULD ALLOW A PERSON TO BE CONVICTED FOR DISCLOSING TRIVIAL INFORMATION

The prosecution will have to satisfy the court that the information disclosed is truly of the class or description alleged. It will be open to the defence to argue that the information does not belong to the class or description alleged but to a less serious one.

C6 EXAMPLE OF THE 'CLASS OR DESCRIPTION' PROPOSAL

If a newspaper publishes a list of people who it says are our intelligence agents, it ought not to be necessary to prove to the court that each and every one of the persons named is in fact an agent. It ought to be possible for the case to proceed on the basis that publishing a list of agents is obviously harmful.

C7 WOULD IT BE AN OFFENCE TO DISCUSS WHETHER EG HOLLIS WAS A SPY

Our proposals are not intended to inhibit the discussion of matters of public interest, provided such discussion is not based on the disclosure of information which would be likely to damage the operation of the security and intelligence services. But if such discussion is used as a cloak for harmful disclosures, the proposed legislation would bite and rightly so.

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Special offence

C8 SINCE ALL WORTHWHILE INFORMATION ABOUT THE SERVICES COMES FROM MEMBERS, THE SPECIAL OFFENCE MAKES THE 'CONCESSION' OF A TEST OF HARM FOR DISCLOSURE BY EG THE PRESS WORTHLESS

Our proposals in respect of unauthorised disclosures by members of the security and intelligence services stand on their own merits. It is clearly harmful to the public interest for those who are entrusted with the nation's security to betray that trust and in our view is rightly criminal. The same argument does not apply to those outside the services and we have made separate provision for them.

C9 THERE SHOULD BE SOME FORM OF PARLIAMENTARY/PUBLIC OVERSIGHT OF THE SERVICES

This is a subject which we discuss at regular intervals. I have nothing to add today to what I have said before: there is provision for oversight of the services and I believe it works well.

C10 THE SPECIAL OFFENCE WOULD PENALISE THE DISCLOSURE OF TRIVIAL INFORMATION

In the area of security and intelligence it is difficult to say whether any information is trivial. In isolation it may be. Taken with other information it may not. The rule must be, if you belong to a secret service, you must not talk about your work. That is what the public expect from the security and intelligence services and the overwhelming majority of our public servants in this area abide loyally and willingly by this rule.

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C11 WHO WOULD BE DESIGNATED?

There are various people in the armed services and the Civil Service who either provide support to the security and intelligence services or whose duties involve close contact with the services. We think that some of these at least are so close to the services that the same requirements ought to apply to them. [But we have not decided how many this applies to or who they are, and it will be difficult for me to give much information publicly].

C12 HOW MANY PEOPLE WOULD BE DESIGNATED?

We have not decided to whom the designation power would be applied. If we decide to provide this power in legislation, I would expect to be able to give some indication to the House at that time as to how it would be used.

C13 WHICH MINISTER WOULD DESIGNATE?

We would expect it normally to be the Minister in charge of the department to which the staff in question belong.

C14 IT IS OPPRESSIVE TO PENALISE THE DISCLOSURE OF INFORMATION WHICH ONLY PURPORTS TO BE TRUE

We considered this matter very carefully before we decided that this was the right course. The Hon Member must tell us his own solution to the problems set out in paragraph 43 of the White Paper. I do not think it is oppressive to require a member of the security and intelligence services not to talk, truthfully or untruthfully, about his work.

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C15 WOULD THE EXTENSION OF THE OFFENCE TO PURPORTED INFORMATION MEAN THAT EX-MEMBERS OF THE SERVICES COULD NOT EXPRESS OPINIONS?

There is nothing in the Government's proposals which would prevent the expression of opinion. But they would penalise a member or former member of the services who dressed up disclosures of information as an expression of opinion.

C16 WOULD THE EXTENSION OF THE OFFENCE TO PURPORTED INFORMATION MEAN THAT EX-MEMBERS OF THE SERVICES [LIKE JOHN LE CARRE] COULD NOT WRITE SPY NOVELS?

There is nothing in the Government's proposals which would stop an ex-member of the services writing a spy novel. But they would catch someone who intended to disclose facts under a veneer of fiction.

Defence

C17 THE TESTS ARE NOT SPECIFIC ENOUGH

There will be a chance to look closely at these tests once they have been converted into precise legislative proposals. While I accept that they should be as specific as possible, they must also encompass all the kinds of harm to the public interest which may be caused by the disclosure of defence secrets.

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C18 WHY IS THE GOVERNMENT PROPOSING THE SAME TEST OF
'PREJUDICING DEALINGS WITH ANOTHER GOVERNMENT ETC' FOR BOTH
DEFENCE AND INTERNATIONAL RELATIONS?

There are circumstances where the disclosure of defence
information, to a friendly power for example, does not endanger
this country's defences but causes genuine harm to the public
interest by prejudicing dealings with a third country whose
defences are endangered by the disclosure.

C19 WOULD PONTING/TISDALL HAVE BEEN CONVICTED UNDER THESE
PROPOSALS?

There is no point in me speculating about what a court might have
done if it had had to take account of considerations which it was
not in fact required to address. Our approach has been to try to
find the right principles, not to target the proposals on
individual cases.

International relations

C20 THE TESTS ARE NOT SPECIFIC ENOUGH

There will be a chance to look closely at the tests once they
have been converted into legislative proposals. While I accept
that they should be as specific as possible, they must also
encompass all the kinds of harm to the public interest which may
be covered by the disclosure of information about international
relations.

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Information obtained in confidence from other governments or international organisations

C21 THERE SHOULD BE A TEST OF HARM

The White Paper explains why any betrayal of another state's confidences damages our relations with that state and others and reduces the willingness of other states to keep the confidences with which we entrust them. That is the inevitable result of any disclosure of this nature and we see no point therefore in providing any test of harm.

C22 WHAT IS THE PUBLIC INTEREST IN PROTECTING THE SECRETS OF A TOTALITARIAN REGIME?

The nature of the regime which provided the information or the harm it suffers from the disclosure is not the key point. It is in the interests of the United Kingdom that we show that we can be trusted with other states' secrets. Otherwise we cannot expect other states to protect our secrets, nor will they or others be willing to trust us with sensitive information in the future.

C23 IT IS WRONG TO USE THE UK CRIMINAL LAW TO PROTECT THE SECRETS OF EG THE UNITED NATIONS

We are not proposing to protect the confidence of international organisations solely in the interests of those organisations. The simple fact is that, if we do not show ourselves willing to protect such confidences, we will not be trusted with them, our own confidences may not be respected and we will not be able to operate effectively within those organisations to protect and advance this country's interests.

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Information useful to criminals etc

C24 MUCH INNOCENT MATERIAL MAY BE USEFUL TO CRIMINALS

We will need to be careful about how we express this idea in legislation but the intention is perfectly clear and, I would have thought, beyond dispute.

Interception

C25 THERE SHOULD BE A TEST OF HARM

Interception is a vital weapon against terrorism and serious crime and in the protection of national security. If it is to remain effective, it must continue to be a secret weapon. I do not believe that there is any information which can be disclosed without harm to the public interest.

C26 WOULD IT BE AN OFFENCE TO REVEAL THAT INTERCEPTION WAS BEING MISUSED?

There is nothing in the Government's proposals that would prevent general discussion of the control of interception. But any assertion or allegation which was a vehicle for the disclosure of official information about or obtained by interception would be obviously harmful and would rightly be caught. Any individual who believes that his post or telephone has been intercepted can apply to the Tribunal established under the Interception of Communications Act 1985

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C27 WHAT IS COVERED BY THE INTERCEPTION CATEGORY?

Two things. Firstly, the produce of the interception where it is necessary to authorise such an operation for example to prevent or detect serious crime. Secondly, information relating to how such an operation was conducted. Such disclosures could clearly jeopardise that or a future operation.

C28 DOES THIS CATEGORY COVER BUGGING OPERATIONS?

If you mean the authorised interception of the public telecommunications system where this is necessary in the interests of national security then yes. But I am not about to be drawn into discussions of operational matters. It is a well understood and soundly based practice adopted by successive Governments not to comment on security and intelligence matters.

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PUBLIC INTEREST DEFENCE

D1 THERE SHOULD BE A PUBLIC INTEREST DEFENCE

Those who have supported a public interest defence must recognise that the Government's proposals would entirely change the context of the argument. We are now proposing that the harm to the public interest caused by disclosure should be defined and should, when it is not self-evident, be proved to the satisfaction of a court. A general, catch-all defence would seriously detract from the clarity which we hope can be achieved in the new law. I hope those who have favoured this defence will read carefully what the White Paper says and consider whether it really has a place in a tightly drawn scheme of the kind we are proposing.

D2 A PERSON COULD BE CONVICTED EVEN THOUGH THE BENEFIT FROM HIS DISCLOSURE FAR OUTWEIGHED THE HARM

The tests of harm which we are proposing set a high threshold. No person is justified in knowingly causing such serious damage to the public interest, even in the hope of doing good. He must find other ways of pursuing his aims.

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D3 THE GOVERNMENT RESISTS THIS DEFENCE BECAUSE IT WANTS TO CONCEAL MISCONDUCT, EVEN LAW-BREAKING

The Government has no interest in concealing misconduct by Crown servants. These proposals go further than any Government has been prepared to go before [and further than the Bill introduced by my Hon Friend the Member for Aldridge Brownhills] in putting all the issues before the court. I fail to see how this can be interpreted as an attempt to conceal evidence of misconduct.

PRIOR PUBLICATION DEFENCE

E1 IT IS WRONG THAT A PERSON SHOULD BE CONVICTED FOR REPEATING SOMETHING HE READ SOMEWHERE

No-one could be convicted of repeating information relating to security, intelligence, defence or international relations unless the prosecution can prove that his disclosure was likely to cause the specified harm to the public interest and he knew it. Nor could he be convicted for disclosing information useful to criminals unless the prosecution can show that the information is still likely to be useful despite the fact that it has been published before. As to information about interception or information obtained in confidence from other governments, the White Paper explains why we consider that any disclosure of such information is harmful.

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E2 WHY IS DISCLOSURE OF INFORMATION OBTAINED IN CONFIDENCE FROM ANOTHER GOVERNMENT HARMFUL IN ALL CIRCUMSTANCES?

The harm that arises from the disclosure of this kind of information is to the confidence of other states in our ability or willingness to protect their secrets and consequently to their willingness to trust us with such secrets or to offer protection to ours. Any disclosure of such information, whether it has been disclosed before or not, will cause this harm.

OTHER OFFENCES

F1 IT SHOULD NOT BE AN OFFENCE FOR A CROWN SERVANT TO FAIL TO TAKE CARE OF DOCUMENTS IF HE HAS NO INTENTION THAT THEY SHOULD BE DISCLOSED

We are talking about information whose disclosure would cause unacceptable harm to the public interest. For a Crown servant to fail in his duty to protect such information in his possession is seriously irresponsible. In our view it is criminally irresponsible.

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PENALTIES

G1 TWO YEARS' IMPRISONMENT IS TOO LITTLE

This is the present level in section 2 and it is what the Franks Committee suggested. Nevertheless, if there were a widespread view that it is inadequate, we would certainly want to consider the arguments.

CIVIL SERVICE DISCIPLINE

H1 WHAT INFORMATION WOULD IT BE A DISCIPLINARY OFFENCE TO DISCLOSE?

The position is, and will continue to be, similar to the position in other employment. It may not be possible to delineate all the circumstances in which disciplinary action will or will not be instigated; but the guiding principle is that a disclosure which represents a breach of the trust which exists between the Government of the day and its servants, or which is of information which it has been made clear ought not to be disclosed, will be liable to be treated as a disciplinary matter.

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H2 WHAT CHANGES TO THE PRESENT DISCIPLINE ARRANGEMENTS WILL BE INVOLVED?

No change of substance is required, but it will be desirable for the position to be stated clearly. As the White Paper explains, it will be necessary for this purpose to amend the conduct rules for Crown servants to reflect the fact that the criminal law will no longer protect all official information. Departmental rules and guidance will also need to be revised. The Civil Service unions will be fully consulted on any proposals for change. Until it is clear what reforms are to be made, it will not be possible to finalise all the necessary amendments to the conduct rules and Departmental rules.

H3 THE GOVERNMENT WILL RECLAIM THROUGH THE DISCIPLINARY CODE THE GROUND IT IS GIVING UP IN THE CRIMINAL LAW

Section 2 prohibits the disclosure of any information which a Crown servant acquires in the course of his duty. We have no intention of using the Disciplinary Code to prohibit all disclosures. As at present, there will be a great deal of information which Crown servants will be able to make available; much of it they will be encouraged to make available. The Disciplinary Code is used now in circumstances when it is disproportionate to prosecute. We intend that it should continue to be used where it is used now; the only difference is that the alternative of prosecution will not be available.

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CLASSIFICATION

I1 PROSECUTION SHOULD ONLY BE POSSIBLE IN RESPECT OF CLASSIFIED DOCUMENTS (KEEP TO THE FRANKS PROPOSALS)

It is necessary to take account of disclosures of information acquired orally, or put into fresh documentary form; and it is not necessary or even very helpful to pin the law to classification when the courts themselves will be considering the harm likely to result from a disclosure. Equally, in the context of the Government's proposals, there is no reason to rule out prosecution just because there is no formally classified document.

I2 THERE SHOULD BE PROPOSALS FOR THE REGULATION OF CLASSIFICATION (AS IN THE 1979 BILL)

Under our proposals, there is no possibility that any person will be convicted simply because a document has been overclassified. I see no occasion therefore for elevating what remains an administrative practice, however important, to a statutory basis.

I3 HOW WILL A JOURNALIST/CIVIL SERVANT BE ABLE TO TELL WHETHER DISCLOSURE WOULD BE AN OFFENCE?

If a person does not know and has no reason to believe that the disclosure of a particular piece of information would meet the criteria set out in the legislation, he commits no offence. But it is right to assume that civil servants and government contractors will normally know the value of information which comes to them in their work. It will be for them to show that they did not. For other people the prosecution will have to prove that they knew the likely effect of their disclosures. If they did not there would be no offence.

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CIVIL LAW/'SPYCATCHER'/CAVENDISH

J1 THE GOVERNMENT'S PROPOSALS ARE INCONSISTENT WITH ITS ATTITUDE IN THE VARIOUS 'SPYCATCHER' CIVIL PROCEEDINGS

We consider that it is both criminal and a breach of his civil duty for a member or former member of the security and intelligence services to disclose information acquired in the course of his duties.

J2 IN WHAT CIRCUMSTANCES WOULD THE GOVERNMENT USE THE CIVIL LAW IN FUTURE IF THE PROPOSALS BECOME LAW?

The civil and the criminal law serve different purposes. The fact that it may be an offence for a person to make a certain disclosure does not mean that we should do nothing and wait for the criminal law to take its course if we believe that he is going to make the disclosure. Nor need civil proceedings be confined to matters which might also affect criminal sanctions. If we consider that it is in the public interest that the disclosure should not be made, and we believe that we have a good case at civil law for seeking an injunction to prevent it, it is our duty to seek it. Whether the person is subsequently proceeded against for a criminal offence is not for the Government to decide.

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J3 WILL THE GOVERNMENT UNDERTAKE TO ACCEPT THE HOUSE OF LORDS' JUDGEMENT IN THE 'SUNDAY TIMES', 'GUARDIAN' AND 'OBSERVER' CASE AND NOT LEGISLATE TO CHANGE THE CIVIL LAW OF CONFIDENCE?

[The Government's appeal in this case is still before the House of Lords]. [The House of Lords have not given their judgement on the Government's appeal in this case], and it would therefore be wrong for me to make any comment on the matter.

J4 WOULD PETER WRIGHT/ANTHONY CAVENDISH BE COMMITTING AN OFFENCE UNDER THE GOVERNMENT'S PROPOSALS?

That would be a matter for the courts to decide, not me.

J5 THE GOVERNMENT HAS HAD TO CONCEDE TESTS OF HARM BECAUSE OF THE COURT'S REFUSAL TO UPHOLD AN ABSOLUTE BAN ON DISCLOSURE OF INFORMATION

The civil and the criminal law are quite separate. We have approached the question of what disclosures should be criminal on its own terms, in accordance with the usual criteria applied to criminal offences, and in an effort to find reasonable and effective proposals.

FREEDOM OF INFORMATION

K1 REFORM OF SECTION 2 MUST BE ACCOMPANIED BY ACTION ON FREEDOM OF INFORMATION

The question of what information it should be a criminal offence to disclose is quite separate from the question of a public right of access to some of that information which it is not an offence to disclose. We remain unconvinced that legislation to give a statutory general right of access to official information would suit our system of government. I hope that Rt Hon and Hon Members will be ready to approach reform of section 2 on its own merits.

K2 IF THE GOVERNMENT IS SINCERE IN SAYING THAT IT WANTS TO NARROW THE SCOPE OF THE CRIMINAL LAW AS FAR AS POSSIBLE, IT MUST RECOGNISE THE ARGUMENTS FOR MAKING MORE INFORMATION PUBLICLY AVAILABLE

A substantial volume of official information is now made public, significantly more than in the 1970s. But that is quite a different matter from granting a right of access. We believe that Governments have the same right as any other body, consistent with their duty to answer to Parliament, to decide what information to release.

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THE SHEPHERD/BETHELL BILL

L1 THE GOVERNMENT'S PROPOSALS ARE CLOSELY RELATED TO
MR SHEPHERD'S

There are certainly many similarities, as there are between my Hon Friend's Bill and the Bill introduced by the Government in 1979. But we have gone further than he did in giving the courts responsibility for deciding whether a disclosure is harmful. That change alters the whole shape of the legislation and I trust that the House will recognise its full value and impact.

L2 THE GOVERNMENT HAS MADE CONCESSIONS BECAUSE OF THE SUPPORT
FOR MR SHEPHERD'S BILL

That is hardly logical. If we were being dragged into reform, we need have gone no further than my Hon Friend's Bill. But in the central issue of Ministerial certificates, which my Hon Friend retained, we have gone much further. We have got rid of them.

L3 WHY COULD THE GOVERNMENT NOT HAVE TOLD THE HOUSE THE WAY ITS
THOUGHTS WERE GOING DURING THE SECOND READING DEBATE ON
MR SHEPHERD'S BILL?

I made our position quite clear at the time. It would not have been sensible to offer the House a partially formed plan when we could not be certain how it would look at the end of the day. The right thing to do was to get on and finish our proposals and put them all before the House as a package, which we now do.

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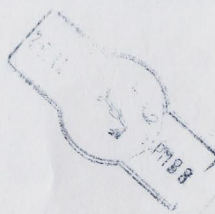
J4 COULD THE GOVERNMENT NOT HAVE COLLABORATED WITH MR SHEPHERD
SO THAT THERE COULD HAVE BEEN REFORM IN THIS SESSION?

We have produced this White Paper as soon as we reached
conclusions on all the issues. Obviously we had not reached
these conclusions in January and we were not therefore in a
position to discuss them with my Hon Friend, any more than we
were in a position to publish the White Paper then.

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14 COULD THE GOVERNMENT NOT HAVE COLLABORATED WITH MR BRENNER
SO THAT THERE COULD HAVE BEEN REFORM IN THIS SESSION?

We have produced this White Paper as soon as we reached
conclusions on all the issues. Obviously we had not reached
these conclusions in January and we were not therefore in a
position to discuss them with my Hon Friend, any more than we
were in a position to publish the White Paper then.





QUEEN ANNE'S GATE LONDON SW1H 9AT

27 June 1988

Pare Minutes

N. C. U.

28.6

Dear Peter,

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

WITH NEW?

I was interested to see your minute of 16 June to the Prime Minister.

I agree that there is always a risk of a Crown servant - whether a Minister or an official - acting in good faith but going further than he intended or was wise. But I do not think there is any real risk of prosecution in such circumstances. In any event, the present proposals do not increase the risk of prosecution. On the contrary, they reduce it. In the first place, the accused will have a defence (not available to him under the present law) that he did not realise that his disclosure was likely to result in the specified harm or that he believed with reasonable cause that he was authorised to make it. Second (although this is a detail not apparent from the text of the White Paper), it is proposed that the Bill should make it an offence for a Crown servant to disclose information "contrary to his official duty", rather than (as at present) "to a person other than a person to whom he is authorised to communicate it". The new formula puts the burden of proof on the prosecution in the normal way rather than appearing to put it on the defence as the present law is seen as doing. It was recommended by the Franks Committee, whose report discussed the point you have raised, as reflecting more closely the actual practice of the Civil Service and as sufficient to ensure that a Crown servant would not be convicted in the absence of mens rea. Where, for example, an information officer made an error of discretion, I do not think it could be established that he was acting contrary to his official duty. If, however, he had been specifically instructed not to disclose a particular piece of information, but did so, he would in principle be liable, although that is not to say that he need always be prosecuted.

Bearing in mind the converse problem, of officers using an appearance before a Select Committee or pressure from the press as an excuse for deliberate disclosures contrary to their Departmental duty, I do not think it would be wise to extend further formal protection in such circumstances.

The Rt Hon Peter Walker, MBE., MP.

/over

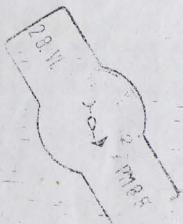
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2.

On your second point, I accept that the withdrawal of the criminal law from many types of information will, at least on the surface, reduce the inhibitions of those who wish to disclose or who seek access to such information, and that disciplinary arrangements have an important part to play in protecting it. But, in judging how much of a sacrifice this is, we must bear in mind the difficulty of actually obtaining a conviction in such circumstances under the present law, given the climate of feeling against its use in cases which are merely embarrassing. By the same token, if it can no longer be argued that section 2 is merely a repressive instrument for obtaining convictions against people who are guilty only of professional misconduct, if that, there should be a better chance of convictions and salutary sentences in the most important cases.

I am copying this letter to the Prime Minister and other Cabinet colleagues.

One,
Dwyer.



CONFIDENTIAL



10 DOWNING STREET

Prime Minister

The Spycatcher
hearing has finished.

The Home Secretary
plans to publish the
White Paper on Wednesday
next.

N. L. W.

23.6

CONFIDENTIAL



10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

16 June 1988

Dear Alison,

PUBLICATION OF THE OFFICIAL SECRETS ACT WHITE PAPER

The Prime Minister has considered the Lord President's minute of 15 June about the publication of the White Paper on the Official Secrets Act. She agrees in the circumstances described in the Lord President's minute that the White Paper should be published in the week beginning 27 June after the House of Lords hearing on the Wright case has been completed. The Prime Minister agreed too that the debate on the White Paper should take place towards the end of July after judgement in this case has been given.

I am sending a copy of this letter to the Private Secretaries to the Home Secretary, the Chief Whip, the Attorney General and Sir Robin Butler.

Yours truly
Nigel Wicks

(N.L. WICKS)

Ms. Alison Smith,
Lord President's Office.

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PRIME MINISTER

PUBLICATION OF WHITE PAPER ON OFFICIAL SECRETS ACT

Following the Attorney General's minute of 10 June setting out the views of Robert Alexander QC that there was a risk in the publication of the White Paper before the Lords' judgement is given in the 'Spycatcher' appeal, I discussed the matter this morning with the Home Secretary, the Attorney, the Chief Whip and Sir Robin Butler. It was agreed that I should report to you the outcome of that discussion.

Our view was that if all reference in the White Paper to the civil law - essentially the end of paragraph 5 - is omitted, then the risk in publishing the White Paper before the Lords' judgement is greatly diminished. As Douglas Hurd pointed out, if the White Paper were not published in June there would be a period of intense speculation about what it would contain when it did appear, which would itself be an unfortunate background for the Lords' consideration of their judgement. On this basis the White Paper could be published in the week beginning 27 June, a few days after the hearing is expected to finish, but before the judgement. If the question of changes to the civil law were raised at that stage, then a blocking answer would be devised. I understand that Patrick Mayhew has discussed this with Robert Alexander, and they agree that this strategy goes a long way to meet the anxieties Mr Alexander raised.

So far as a debate is concerned, we have provisionally allowed time for it in the latter part of July. This should enable it to take place after the Lords' judgement, which is presently expected around 15 - 20 July, and would also meet the commitment to holding the debate before the summer recess. If judgement is delayed, we would need to look at the position again. We recognised the strong arguments put by Douglas Hurd for giving the House the opportunity to discuss the White Paper soon after its publication and so before there was much chance for controversy to develop, but did not rule out altogether the prospect of postponing the debate until the overspill, if need be.

I am copying this minute to Douglas Hurd, David Waddington, Patrick Mayhew and Sir Robin Butler.

Alan Smith

PP JW

(approved by the Lord President
and signed in his absence.)

15 June 1988



Mr. Wright

1 c. Mr. Wright

HOME OFFICE
QUEEN ANNE'S GATE
LONDON: SW1H 9AT

13 June 1988

Sir A. Butler

*Advice well
come forward in the
light of the
meeting at X.*

*We must consider
the H.L. case -*

cc - Mr. Weston
Mr. Dinwiddie

*more important
than others to
this date*

Dear Sir, N C W
14.6

CABINET OFFICE	
A ... 6191	
14 JUN 1988	
FILING INSTRUCTIONS	
FILE No.	

PUBLICATION OF WHITE PAPER ON OFFICIAL SECRETS ACT

We spoke this morning about the Attorney General's minute to the Home Secretary of 10 June seeking a postponement of the publication of the White Paper. You mentioned that the Lord President wished to have a meeting with the Home Secretary, the Attorney General and the Chief Whip about this issue, and I understand that this has now been arranged for 9 a.m. on Wednesday, 15 June.

I thought it might be helpful if before that meeting I registered the Home Secretary's view that every effort must be made to stick by the undertakings previously given that the White Paper would be published in June. I know that the Home Secretary has been fortified in this view by the leading article revealing some of the Government's proposals in yesterday's "Sunday Times". He believes that delaying beyond the end of June will be particularly problematic because of the difficulty of providing any decent reason in public for the delay.

I am copying this letter to Michael Saunders (Attorney General's Office), Murdo Maclean (Chief Whip's Office) and Trevor Woolley (Cabinet Office).

Yours sincerely,

Philip Lawton

P J C MAWER

From: THE PRIVATE SECRETARY



CONFIDENTIAL

CMO - WITHDRAWN

HOME OFFICE

QUEEN ANNE'S GATE

LONDON SW1H 9AT

13 June 1988

A/B
17/5/88
see Mawer to
Woodley
SECURITY: HANDLING
20 Docs
Pt 2

N.C.U.

Dear Nigel,

WHITE PAPER ON REFORM OF SECTION 2 OF THE
OFFICIAL SECRETS ACT 1911

.....
The White Paper was sent for printing on Friday, 10 June. The Prime Minister and other members of the Cabinet will wish to have a copy of the final version, and this is enclosed. It takes in comments made on the version circulated with my letter to you of 2 June, including the amendment suggested in your letter of 6 June.

The Home Secretary had it in mind the lay the White Paper on 22 June. However, there may be problems with this date now that the start of the House of Lords hearing of the Government's appeal in the "Spycatcher" case has been put back by 24 hours. I will write again when the position is clear.

Copies of this letter and the White Paper go to the Private Secretary to all Cabinet Ministers and to Sir Robin Butler.

Yours sincerely,

P J C MAWER

N L Wicks, Esq., CBE.

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CMO

REFORM OF SECTION 2 OF THE
OFFICIAL SECRETS ACT 1911

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INTRODUCTION

1. Section 2 of the Official Secrets Act 1911 has long been regarded as unsatisfactory and in need of reform. Early last year the Government decided to set in hand work which would allow it to determine whether it should make a further attempt to narrow and clarify the law on the protection of official information. The work began in April 1987, and by the end of the year had reached the stage where the Government concluded that it would in due course be right to put proposals for reform to Parliament. The Home Secretary accordingly announced in reply to a Parliamentary Question on 15 December 1987 that, when the work was brought to a conclusion later in the same Session, he would lay before Parliament a White Paper setting out the Government's proposals for the reform of section 2, with a view to early legislation. In the course of the debate on 15 January this year on the Second Reading of the Protection of Official Information Bill introduced by Mr Richard Shepherd MP, the Home Secretary said that he hoped to publish the White Paper in June. This is the promised White Paper.

2. The following chapters set out the Government's proposals for the reform of section 2 of the 1911 Act. The Government proposes no amendment to section 1, which deals with various espionage activities carried out "for any purpose prejudicial to the safety or interests of the State". There is no widespread dissatisfaction with section 1. On the contrary, it is sometimes suggested that the protection which section 1 provides for official information is fully adequate and that section 2 is simply unnecessary. This, however, is a misconception. Section 1 deals with the disclosure of information useful to an enemy with the specific purpose of prejudicing the safety or interests of the state. The relative gravity of such conduct is reflected in the higher maximum penalty for an offence under section 1 than for an offence under section 2, which deals with disclosure for other purposes of information useful to an enemy and with other disclosures harmful to the public interest. Without section 2 there would be insufficient protection for information the disclosure of which, for

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example, would undermine national security, help terrorists, impair the ability of the armed forces to defend the country or damage relations with other states, leading to commercial loss or even endangering the lives of British citizens abroad. The Franks Committee (see paragraph 9) considered carefully whether section 2 could simply be repealed. It concluded that:

"whether one takes a broad or narrow view of the kinds of official information requiring the protection of the criminal law, section 1 does not provide full protection. Effective protection requires that the law should cover leakage of information, as well as espionage."

The Committee accordingly recommended that section 2 should be replaced, not repealed.

3. The Government accepts the view that protection must continue to be given to certain information which section 1 does not fully protect. It believes that it is right to use the criminal law to prohibit disclosure of such information because of the degree of harm to the public interest which may result.

4. However, section 2 in its present form undoubtedly goes too wide. The object of the Government's proposals is to attain a better definition of when, assuming that section 1 of the 1911 Act does not apply, the disclosure of official information should be a criminal offence.

5. This White Paper is principally concerned with information which would, under the Government's proposals, be protected by the criminal law. It does not, therefore, address such matters as the question of public access to official information not covered by the Government's proposals. That is a separate issue which does not arise directly out of the reform of section 2. Nor does it deal with matters affecting the civil law, which may have to be considered in the light of the outcome of current litigation relating to the book "Spycatcher".

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THE NEED FOR REFORM

Scope of section 2

6. Section 2 is a complex provision which creates a number of closely linked offences. It applies to information originally obtained by a person holding office under the Crown by virtue of that office or by a government contractor or his staff by virtue of his contract. It applies not only to information which is held by Ministers, Crown servants and government contractors but also to information originally obtained by them which is then entrusted to another person in confidence; or, of course, to information which is simply obtained by another person in contravention of the Official Secrets Acts. It is an offence for any person to communicate such information except to someone to whom he is authorised to communicate it or to whom it is his duty in the interest of the state to communicate it. Thus, if a Crown servant hands a document to an unauthorised person, it is an offence and, if that person, knowing that the Crown servant had contravened section 2 in giving it to him, passes it on to another unauthorised person, that is also an offence.

7. In addition, section 2 provides that it is an offence to use the information for the benefit of any foreign power or in any other manner prejudicial to the safety or interests of the state; to retain documents which the holder has no right to retain or to fail to comply with a direction from a lawful authority to return them; to fail to take reasonable care of or to endanger the safety of documents; to communicate information relating to "munitions of war" directly or indirectly to a foreign power or in any other manner prejudicial to the safety or interests of the state; or to receive any information knowing or having reasonable cause to believe that it is communicated in contravention of the Official Secrets Acts.

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Defects

8. The drafting of section 2 is archaic and, in places, obscure. But the central objection is to its scope. It penalises the disclosure of any information obtained by a person holding office under the Crown or a Government contractor in the course of his duties, however trivial the information and irrespective of the harm likely to arise from its disclosure. The "catch-all" nature of section 2 has long been criticised. Although in practice prosecutions are not brought for the harmless disclosure of minor information, it is objectionable in principle that the criminal law should extend to such disclosure. The excessive scope of section 2 has also led to its public reputation as an oppressive instrument for the suppression of harmless and legitimate discussion. Because section 2 goes so much wider than what is necessary to safeguard the public interest, its necessary role in inhibiting harmful disclosures is obscured.

Previous attempts at reform

9. Along with the disadvantages of section 2, the need for an effective and enforceable alternative which would command general support has also long been recognised. The first major initiative to devise such an alternative was the Departmental Committee, under Lord Franks of Headington, established in 1971 by a previous Conservative Government to review the operation of section 2 and make recommendations. The Committee reported in 1972. It recommended the replacement of section 2 by a new statute which would cover only official information in specified categories. It would have been an offence to disclose without authority any information in certain categories; but for information in other categories, unauthorised disclosure would have been an offence only if it was likely to cause serious injury to the interests of the nation. The Committee's recommendations depended heavily on the security-classification of information. In particular, arrangements were proposed whereby a

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Minister would have certified before any prosecution that the information concerned was correctly classified at a level which meant that it was considered that the disclosure would cause at least serious injury to the interests of the nation. His certificate would have been conclusive evidence in any legal proceedings.

10. A White Paper published in July 1978 by the Labour Government, "Reform of Section 2 of the Official Secrets Act 1911" (Cmnd 7285), set out proposals for legislation which closely followed the Franks Committee recommendations, although not all of the categories of information recommended by the Franks report would have been covered. Among the recommendations of the Franks Committee which these proposals retained were the dependence on the classification of information and the role of the Minister in certifying conclusively that the information was properly classified at a level which meant that its disclosure was considered likely to cause serious injury to the interests of the nation.

11. When the new Government took office in 1979, it prepared a Bill to amend section 2. This closely followed the Labour Government's proposals. But it would have further reduced the number of categories of information protected by the criminal law, and it abandoned the dependence on the classification of information. The role of the Minister before prosecution was retained, but he would have been certifying directly that the disclosure of certain information would be likely to cause serious injury to the interests of the nation (or endanger the safety of a United Kingdom citizen). Despite following so closely the Franks Report and the Labour Government's White Paper, the Bill was widely criticised when it was introduced in the House of Lords in October 1979. The major specific areas of criticism were, first, the provision for conclusive Ministerial certificates and, second, the fact that the Bill would have made it an offence for anyone to disclose any information held by the Government relating to security or intelligence. Although the Bill received a Second Reading, it was clear to the Government that there was little chance of its commanding general acceptance, and it was withdrawn.

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12. Besides these Government initiatives to reform section 2 there have been a number of Private Members' Bills over the last 20 years which have proposed various reforms of the provision.

The way forward

13. As this history indicates, section 2 as it stands has few, if any, defenders, and successive Governments have agreed that it should be reformed. But it has been difficult to find agreement on the precise nature of the reform. The recommendations of the Franks Committee have naturally dominated discussion of this issue since they were published in 1972, and have remained a necessary and valuable reference point for the Government's present consideration of the reform of section 2. But the Government has tried to look afresh at the issues, taking into account the criticisms of its 1979 Bill and the development of Parliamentary and public thinking in recent years. It believes that the proposals which follow would allow the creation of new legislation to replace section 2 which would be easily comprehensible, readily applicable by the courts and widely accepted as useful and necessary.

OBJECTIVES AND PRINCIPLES OF THE GOVERNMENT'S PROPOSALS

14. The central concern of any reform of section 2 is to determine in what circumstances the unauthorised disclosure of official information should be criminal. For this purpose it is not sufficient that the disclosure is undesirable, a betrayal of trust or an embarrassment to the Government. So far as Crown servants are concerned there is a range of circumstances in which the disclosure of information may properly constitute a disciplinary offence, but the intervention of the criminal law would not be justified (paragraphs 71-73 discuss this further). There may also be circumstances in which it is right for the Government to seek to enforce its rights on behalf of the public under the civil law of confidence, notwithstanding that no

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prosecution for a criminal offence is possible. As explained in paragraph 3, what justifies the application of the criminal law, where disclosure is not caught by section 1 of the 1911 Act, is the degree of harm to the public interest which may result. The objective of the Government's proposals is to narrow the scope of the present law so that the limited range of circumstances in which the unauthorised disclosure of official information needs to be criminal are clearly defined. This will ensure that no-one need be in doubt in what circumstances he would be liable to prosecution, and enable the courts to enforce the law without any undue burden of proof being placed either on the defence or on the prosecution.

Ministerial certificates

15. Under the Government's 1979 Bill it would have been an offence to disclose information relating to defence or international relations the unauthorised disclosure of which would be likely to cause serious injury to the interests of the nation or endanger the safety of a United Kingdom citizen. As explained in paragraph 10, the question whether the disclosure of particular information was likely to have these effects was, under the Bill, to be determined by a certificate from the relevant Minister which could not have been challenged by the defendant in the subsequent legal proceedings for the offence of disclosure. As also explained in paragraph 10, this procedure descended directly from a recommendation in the report of the Franks Committee which was intended simply to constitute a check on the correctness of classification. The rationale for leaving to a Minister the judgement of the potential effect of the disclosure of certain information on the interests of the nation is obvious. Because of his responsibilities within the Government for the area to which the information concerned relates, the Minister is uniquely qualified to make a judgement on the damage to the public interest likely to arise from its disclosure.

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16. This proposed arrangement was, however, criticised as placing too much power in the hands of Ministers. It was argued that, since the defendant would not be able to challenge the Minister's certificate, an essential element of the offence would not be considered by the courts but would be decided by the Minister alone. There would be no restraint on a Minister issuing a certificate, even if circumstances did not objectively justify it. The Minister would not be seen as disinterested and there would always be the suspicion of political bias.

17. The Government recognises the force of these arguments. Various arrangements have been proposed since 1979 whereby the power to certify would be shared between the Minister and some other person or body or would pass to another person or body. But no other body or individual shares the Minister's responsibility for safeguarding the interests of the nation and none is therefore as well or better placed to make or review the necessary judgement.

18. The Government accepts the arguments against the procedure previously proposed for conclusive Ministerial certificates as to the likelihood of serious damage to the interests of the nation. It believes that if the issue is not to be decided by a Minister it must, like all other issues relating to the reformed offence, be left to the courts. The Government accordingly proposes that, where it is necessary for the courts to consider the harm likely to arise from the disclosure of particular information, the prosecution should be required to adduce evidence as to that harm and the defence should be free to produce its own evidence in rebuttal. The burden of proof would be on the prosecution, in the normal way. There would be no Ministerial certificates.

19. The Government is proposing (see paragraph 66) that the central offence of disclosure should in England and Wales be triable either in the magistrates' courts or in the Crown Court. The effect would be to

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give the opportunity to any person accused of disclosing information in contravention of the new legislation to put his case before a jury. (In Scotland, in accordance with normal procedure, it is for the Crown to decide whether the offence is serious enough to be prosecuted on indictment and therefore before a jury).

Tests of harm to the public interest

20. As mentioned in paragraph 15, the test proposed in the 1979 Bill, following Franks, was

"likely to cause serious injury to the interests of the nation or endanger the safety of a citizen of the United Kingdom and Colonies."

The first part of this formulation embodies a very general concept. While this was practicable in conjunction with the procedure for Ministerial certificates, it would be unreasonable to expect the courts to apply such a broad test. While it is acceptable to speak in general terms of the need to protect information where disclosure would harm the public interest, a more specific definition is required in any new legislation if the prosecution, the defence and the court are to be able to make judgements as to the harm likely to arise from disclosure of particular information.

21. The Government has considered whether to return to the system proposed by the Franks Committee whereby the classification of information is the essential determinant of the offence. But this approach was abandoned in 1979 and the Government has concluded that it should not be readopted. The arguments are set out in paragraphs 74-76.

22. The Government considers that as far as possible any test of harm

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should be concrete and specific if it is to be applied by the courts. At this practical level, the harm likely to arise from the disclosure of different kinds of information is not the same in all respects in each case. The Government therefore proposes separate tests of likely harm for the different categories of information to be covered by future legislation.

23. The following paragraphs discuss, first, which categories of information should be covered by a new Bill, and second, what, if any, tests of likely harm to the public interest should be applied to each.

CATEGORIES OF INFORMATION TO BE COVERED BY NEW LEGISLATION

24. In any new legislation to replace section 2, it is necessary to identify those areas in which the disclosure of at least some information may be sufficiently harmful to the public interest to justify the application of criminal sanctions. The number of such areas is in fact small. For the most part, even if disclosure may obstruct sensible and equitable administration, cause local damage to individuals or groups or result in political embarrassment, it does not impinge on any wider public interest to a degree which would justify applying criminal sanctions.

Defence, security and intelligence

25. The most obvious areas in which the public interest needs to be protected are those where the protection of the nation from attack from outside or from within is involved. Clearly new legislation must protect information relating to defence (including civil preparedness) and information relating to security and intelligence.

26. Indeed, in one respect the Government considers that it is necessary to go further than the present law. Increasing international cooperation in recent years on defence and on

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international problems such as terrorism has meant that a growing amount of sensitive information is being shared with other governments, often through the medium of international organisations. At present, if such information is disclosed abroad, it is not an offence to publish it in this country. The Government believes that there is a gap in the law here which is liable to inhibit effective international cooperation. It accordingly proposes that, when information in these categories has been provided in confidence to another government or international organisation and has been improperly disclosed abroad, its further disclosure in this country should be treated in the same way as if the original disclosure had taken place in this country.

International relations

27. Another area where the disclosure of certain information may lead to serious consequences for the nation is that of international relations. A disclosure which disrupts relations between this country and another state may result in measures by that state against British interests and resident British citizens or anti-British public reaction within that state, putting at risk the property or even the lives of British citizens. The arguments set out in the previous paragraph in relation to information provided in confidence to other governments or international organisations apply also to information relating to international relations, and the Government proposes to provide similar protection in respect of this information.

Information obtained in confidence from other governments or international organisations

28. Somewhat similar considerations apply to information provided by other governments or international organisations on conditions requiring it to be kept in confidence. But besides the direct consequences which the disclosure of such information may have on

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relations between this country and the state which provided the information, such disclosure has a wider disruptive effect on international diplomacy. If it appears that this country is unwilling or unable to protect information given in confidence, it will not be entrusted with such information. The Government's ability to function effectively in international diplomacy and in relation to international organisations, and consequently its ability to protect and promote this country's interests, will thereby be impaired. Furthermore, the ability and willingness of this country to protect the secrets of another state are likely to determine the willingness of that state to protect this country's secrets.

Information useful to criminals

29. It is clearly sensible that there should be an inhibition on the disclosure of official information which is likely to be useful in the commission of crime, in helping a prisoner to escape from lawful custody or to terrorists. Similarly information which, if disclosed, would obstruct the prevention or detection of an offence or the offender's arrest or prosecution also needs to be protected.

Interception

30. There is a particular sensitivity about the interception of telephone calls, mail and other forms of communication. It is an exceptional but vital instrument which is used, for the protection of society, when other means are not available. Successive Governments have recognised that properly controlled interception for limited purposes, such as national security or the prevention and detection of crime, is not only justified but essential in the public interest. The effectiveness of interception would be much reduced if details of the practice were readily available. But it is not only the means by which interception is practised which need to be protected. The information gathered by its use, even where it is not

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covered by one of the other categories already mentioned, ought not to be publicly available. Interception inevitably involves interference, without their knowledge, with the privacy of those whose communications are intercepted. Such interference is acceptable in the public interest only if those responsible for interception maintain the privacy of the information obtained.

Categories not covered by present proposals

31. All the categories of information mentioned above were covered by the Government's 1979 Bill, and the Government proposes that they should be covered by new legislation.

32. The Government remains of the view, which was also taken in 1979, that it is not necessary or right for criminal sanctions to apply to Cabinet documents as a class or to advice to Ministers as a class. Documents of this kind will be protected by the proposals if their subject matter merits it, but their coverage en bloc would fuel suspicions that information was being protected by the criminal law merely for fear of political embarrassment.

33. Nor is it considered necessary to protect economic information as a class. Protection will be provided by disciplinary procedures and, where necessary, by specific legislation on particular subjects.

34. The 1979 Bill would have protected information provided in confidence to Crown servants or government contractors by firms, other bodies and individuals. This reflected a recommendation of the Franks Committee. It is clearly right that when sensitive commercial or personal information is provided to the Government it should not be lightly disclosed. But the Government has concluded that it would not be right to give blanket protection to all information offered in confidence in legislation designed to protect only that information the disclosure of which would seriously harm the public interest.

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35. For the most part the Government takes the view that the civil remedies available to those providing information, and the disciplinary procedures which would penalise disclosure by a Crown servant, provide sufficient protection for private information. However, there are circumstances, particularly where information is provided under a statutory requirement, where, as the Franks Committee argued, it is in the public interest that private information is given the protection of the criminal law. There are already a number of specific offences relating to the disclosure by Crown servants of particular information provided under statutory requirements. The Government is considering whether the reform of section 2 and the consequent narrowing of the range of information protected by the criminal law would leave without a criminal safeguard any private information provided to the Government in confidence which merits such protection. A particular area for consideration, for example, is information provided to the tax authorities. Consideration will, if necessary, be given to the creation of separate specific offences of disclosure.

CIRCUMSTANCES IN WHICH DISCLOSURE WOULD BE AN OFFENCE

36. Crown servants will in the normal course of their duties properly disclose information in the categories which the Government proposes should be covered in new legislation. The same is true of Government contractors. It is obviously not intended that such disclosures should be caught by the new legislation, and references to disclosure in the following paragraphs should accordingly be read as excluding disclosures of that kind.

37. As explained in paragraphs 20-22, the Government considers that disclosure of information in the categories to be covered by new legislation should be an offence only where a certain degree of harm to the public interest is likely to result, and that the definition of

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the harm which is to be a condition of the offence need not and should not be the same in all respects for each category of information. The following paragraphs accordingly consider what test of harm, if any, should be attached to each category of information.

Security and intelligence matters

38. Under the Government's 1979 Bill the disclosure by any person of any information relating to security and intelligence would have been an offence. As explained in paragraph 11, this was a source of criticism. The Government does not now propose that new legislation should make all such disclosures an offence. It proposes instead that legislation should make a distinction between disclosures by members and former members of the security and intelligence services and disclosures by other persons; and that, in the latter case, the prosecution should have to show that the disclosure was likely to damage the operation of the security and intelligence services.

39. Because of the exceptional sensitivity of this area of information, however, there is a particular difficulty in bringing prosecutions in some cases which would be exacerbated by the need to show that the proposed test of harm had been met. In order to prove the truth of the information at present, and in order to satisfy the test of harm if the Government's proposal is adopted, evidence may need to be adduced which involves a disclosure which is as harmful as or more harmful than the disclosure which is the subject of the prosecution. Because of this danger it is not always possible to bring a prosecution at all. The Government considers that it is not in the public interest that those who wish to disclose information which damages the operation of the security or intelligence services (for example by revealing details of their operations or identifying personnel) should be able to do so with impunity, simply by reason of the sensitivity of the subject matter.

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40. The Government proposes to meet this difficulty by providing that the prosecution should have to prove either that the disclosure was likely to damage the operation of the security or intelligence services or that the information concerned was of a class or description the disclosure of which would be likely to damage the operation of the services. This would allow the arguments before the court to be less specific. The prosecution would have to satisfy the court that a particular disclosure was of a certain class or description, and that disclosure of information of that class or description was likely to damage the operation of the services.

41. While the Government believes that this proposed test of harm is in general adequate to safeguard the interests both of the defendant and of the security and intelligence services, it considers that different arguments apply to the unauthorised disclosure of information by members or former members of those services. It takes the view that all such disclosures are harmful to the public interest and ought to be criminal. They are harmful because they carry a credibility which the disclosure of the same information by any other person does not, and because they reduce public confidence in the services' ability and willingness to carry out their essentially secret duties effectively and loyally. They ought to be criminal because those who become members of the services know that membership carries with it a special and inescapable duty of secrecy about their work. Unauthorised disclosures betray that duty and the trust placed in the members concerned, both by the State and by people who give information to the services.

42. The Government accordingly proposes that it should not be necessary for the prosecution to adduce evidence of the likely damage to the operation of the security or intelligence services when information relating to security or intelligence has been disclosed by a member or former member of one of those services.

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43. The difficulties described in paragraph 39, arising from the fact that a trial may lead to the disclosure of information more sensitive than has already been disclosed, need particularly to be overcome where the defendant is a member or former member of the security or intelligence services. It is clearly not in the public interest that a person who is entrusted with the protection of the security of the country, and who betrays that trust, should be able to escape prosecution because of the very sensitivity of the information with which he has been entrusted. Furthermore, as a general policy, Governments do not comment on assertions about security or intelligence: true statements will generally go unconfirmed, and false statements will normally go un denied. As a result, and because of the particular credibility attaching to statements about security or intelligence by members of the services concerned, the circulation of misinformation by a member of the services may, in a different way, be as harmful as his disclosure of genuine information.

44. The Government proposes to meet these problems by making it an offence for a member or former member of the security or intelligence services to make any disclosure which is either of information relating to security or intelligence or which purports to be of such information or which is intended to be taken as such.

45. These issues have been discussed in terms of the "security and intelligence services". But the arguments apply not only to actual members and former members of the services but also to those who work closely in support of or who are in frequent contact with the services, such as certain members of the armed forces who provide technical support for the services, or officials in specified posts in certain Departments who deal with the services on a regular basis as part of their normal duties. These non-members have the same sort of access to sensitive information relating to security or intelligence, and to the operation of the services, as members themselves. It seems

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right that it should similarly be an offence for any of these non-members to disclose any information relating to security or intelligence or to make any statement which purports to be a disclosure of such information.

46. However, some of these non-members occupy such sensitive posts only temporarily. The special offence should only apply in respect of information acquired in such posts. For any disclosure of information relating to security or intelligence acquired in a previous or subsequent post it should be necessary for the prosecution, as normal, to satisfy the courts that the operation of the security or intelligence services was likely to be damaged.

47. In order to give effect to these proposals, the Government proposes that there should be a power for the responsible Minister to designate individuals or groups whose duties necessarily involve extensive familiarity with the work of the security and intelligence services as having the same criminal liability as members of these services in respect of the disclosure of information relating to security or intelligence.

48. The list of persons designated would not, for obvious reasons, be made public. But the persons concerned would be notified individually; and criminal liability would attach only after the individual officer concerned had received notification of his liability.

Defence

49. As regards the disclosure of information relating to defence, the Government proposes that the prosecution should have to prove that the disclosure was likely either to prejudice the capability of the armed forces to carry out any of their defence tasks or to lead to a risk of loss of life, injury to personnel or damage to equipment or installations or to prejudice dealings between the Government and the government of another state or an international organisation.

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International relations

50. It is proposed that disclosure of information relating to international relations should be an offence if it can be shown that the disclosure would be likely to jeopardise or seriously obstruct the promotion or protection of United Kingdom interests abroad, or to prejudice dealings between the Government and the government of another state or an international organisation, or to endanger the safety of a British citizen.

Information obtained in confidence from other governments or international organisations

51. As explained in paragraph 28, the harm arising from the disclosure of information provided by other governments or international organisations on conditions requiring it to be held in confidence is not simply the disruption of relations between the Government and the other government or the organisation concerned. There is a wider damage to the standing of the United Kingdom in relation to all governments and international organisations. For that reason any unauthorised disclosure is harmful, and the Government sees no purpose in setting a test of harm which is bound to be satisfied in every instance.

Information useful to criminals

52. The category of information whose disclosure would be likely to be useful in the commission of offences or to terrorists, or in helping a prisoner to escape from custody, already carries its own test of harm within it. The prosecution need to prove that the information would be likely to be useful for one of these obviously harmful purposes. There is no need or scope for any additional test of harm in respect of this category.

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Interception

53. Finally, paragraph 30 sets out the reasons why the disclosure of information relating to the process of interception or obtained by those means is harmful. It seems to the Government that no information relating to this process can be disclosed without the possibility of damaging this essential weapon against terrorism and crime and vital safeguard of national security. Similarly no information obtained by means of interception can be disclosed without assisting terrorism or crime, damaging national security or seriously breaching the privacy of private citizens. The Government does not therefore consider that a specific test of harm can be formulated or, indeed, is necessary or appropriate for this category of information.

THE LIABILITY OF THE DISCLOSER

54. The previous paragraphs have considered in what circumstances the unauthorised disclosure of certain information should be an offence. The next question is whether it should be an offence whoever makes the disclosure. As has been made clear earlier in the White Paper, the Government considers that what justifies making the unauthorised disclosure of certain information a criminal offence is the degree of harm to the public interest in which it is likely to result. Since the unauthorised disclosure of such information by, say, a newspaper may be as harmful as disclosure of the same information by a Crown servant, the Government believes that it would not be sufficient for the new legislation to apply only to disclosure by Crown servants. The objective of official secrets legislation is not to enforce Crown service discipline - that is not a matter for the criminal law - but to protect information which in the public interest should not be disclosed. Such protection would not be complete if it applied to disclosure only by certain categories of person. The Government accordingly proposes that the unauthorised disclosure by any person of information in the specified categories in circumstances where harm is likely to be caused should be an offence.

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55. However, although the justification for applying the criminal law in this area is the harm that disclosure may cause, it would not be right to make disclosure criminal except where the discloser knows or can reasonably be expected to know that the disclosure would be likely to cause harm. In applying this principle a distinction can be drawn between the liability of Crown servants and government contractors and of other people, including the media.

56. In general it is reasonable to assume that a Crown servant knows the value of the information that comes to him in the course of his duties, and that, if he discloses information likely to cause harm, he knows what he is doing. There will be circumstances, however, in which a Crown servant intends to act properly and indeed acts reasonably, but unwittingly makes a harmful disclosure. In such circumstances the Government proposes that it should be open to him to claim the defence that he could not reasonably have been expected to realise the harm likely to be caused by his disclosure. The same arguments apply equally to a government contractor who discloses information which he receives in the course of his contract.

57. For a person who is not a Crown servant or government contractor, the Government considers that the opposite presumption should be made: that, unless proved otherwise, such a person does not know that disclosure of particular information in the categories to which the Government proposes to attach a test of harm would be likely to result in that harm. The Government accordingly proposes that, in such cases, the prosecution should have to prove not only that the disclosure would be likely to result in harm but that the person who made the disclosure knew or could reasonably have been expected to know that harm would be likely to result.

A PUBLIC INTEREST DEFENCE

58. Suggestions have been made that the law should provide a general

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defence that disclosure was in the public interest. The object would be to enable the courts to consider the benefit of the unauthorised disclosure of particular information, and the motives of the person disclosing it, as well as the harm which it is likely to cause. It is suggested, in particular, that such a defence is necessary in order to enable suggestions of misconduct or malpractice to be properly investigated or brought to public attention.

59. The Government recognises that some people who make unauthorised disclosures do so for what they themselves see as altruistic reasons and without desire for personal gain. But that is equally true of some people who commit other criminal offences. The general principle which the law follows is that the criminality of what people do ought not to depend on their ultimate motives - though these may be a factor to be taken into account in sentencing - but on the nature and degree of the harm which their acts may cause.

60. In the Government's view, there are good grounds for not departing from the general model in this context; and two features of the present proposals particularly reinforce this conclusion. First, a central objective of reform is to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the proposals in this White Paper are designed to concentrate the protection of the criminal law on information which demonstrably requires its protection in the public interest. It cannot be acceptable that a person can lawfully disclose information which he knows may, for example, lead to loss of life simply because he conceives that he has a general reason of a public character for doing so.

61. So far as the criminal law relating to the protection of official information is concerned, therefore, the Government is of the mind that there should be no general public interest defence and that any argument as to the effect of disclosure on the public interest should take place within the context of the proposed damage tests where applicable.

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A DEFENCE OF PRIOR PUBLICATION

62. Under the Government's 1979 Bill it would not have been an offence to disclose without authority information in certain categories if the defendant could show that the information had been made available to the public before his disclosure. The rationale for this defence was that, if the information in these categories was publicly available, a second disclosure could not be harmful. It seems to the Government that this rationale is flawed. There are circumstances in which the disclosure of information in any of the categories which the Government proposes to cover in new legislation may be harmful even though it has previously been disclosed. Indeed, in certain circumstances a second or subsequent disclosure may be more harmful. For example, a newspaper story about a certain matter may carry little weight in the absence of firm evidence of its validity. But confirmation of that story by, say, a senior official of the relevant Government Department would be very much more damaging. In such circumstances, the Government considers that the official should still be subject to criminal sanctions. Similarly, the publication of a list of addresses of persons in public life may capture the interest of terrorist groups much more readily than the same information scattered in disparate previous publications.

63. The Government does not, therefore, propose that there should be an absolute defence of prior publication for any category of information. But in cases in which the prosecution would under the Government's proposals have to show that disclosure was likely to result in harm, the offence would not be made out if no further harm is likely to arise from a second disclosure. The prior publication of the information would be relevant evidence for the court to consider in determining whether harm was likely to result from a second disclosure, but it would not be - and, in the Government's view, should not be - conclusive.

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64. In those cases in which the proposals in this White Paper do not provide for the question of harm to be an issue in determining whether an offence has been committed, that is precisely because the Government considers that any disclosure of information in such cases is harmful; and that applies irrespective of whether the information has previously been made public in some form. If information is published unlawfully, it is difficult to see why it should ipso facto become lawful at any time thereafter to publish the information as widely as and in whatever form the publisher chooses.

OTHER OFFENCES, ENFORCEMENT AND EXTENT

Other offences

65. The central mischief at which the Government's proposals are aimed is the unauthorised disclosure of information the publication of which is harmful to the public interest. However, there are actions which conduce to this central mischief and which the Government considers should be criminal. At the lower end of the scale of seriousness, there is the Crown servant who culpably fails to take sufficient care of documents containing information the unauthorised disclosure of which would be an offence. At the upper end is the person who reveals to a person, who he knows is going to use the knowledge, how to gain access to information the unauthorised disclosure of which would be an offence. The Government proposes that both should be an offence. The Government also proposes that it should be an offence for any person who is wrongfully in possession of a document containing information whose unauthorised disclosure would be an offence to fail to return the document when required to do so.

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It is not, however, proposed that mere receipt of such information (as in the present law) should be an offence.

Penalties

66. For the central offence of deliberate disclosure, the Government proposes that the new legislation should provide the same maximum penalty on indictment as for the present offences under section 2: two years' imprisonment or a fine or both. On summary conviction it proposes, as in its 1979 Bill, that the maximum penalty should be six months' imprisonment or a fine not exceeding £2000 or both.

67. The Government considers that the same maximum penalties should be applicable to the offence of revealing how to gain access to information the unauthorised disclosure of which would be an offence. Knowingly to facilitate the disclosure of such information is as culpable as to disclose it oneself. The other offences mentioned in paragraph 65 are less serious, and the Government proposes only summary penalties, although it considers that the power of imprisonment should be available given that, for example, the disclosure of a document which a person refuses to return might lead to loss of life.

Powers of investigation and arrest

68. It will be necessary to ensure that the police have adequate powers to investigate the new offences. It will, for example, be necessary for England and Wales to designate the central offence as an "arrestable offence" for the purposes of the Police and Criminal Evidence Act 1984.

Authority for prosecution

69. At present, under sections 8 and 12 of the Official Secrets Act

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1911, no prosecution may be brought under section 2 in England and Wales or Northern Ireland except by or with the consent of the Attorney General. The Government proposes that, under the new legislation, no prosecution should be brought in respect of information relating to security, intelligence, defence, international relations or interception or information provided by other governments or intergovernmental organisations on conditions requiring it to be held in confidence except by or with the consent of the Attorney General. Prosecutions in respect of information useful in the commission of offences or in escape from lawful custody would rest with the Crown Prosecution Service in England and Wales; in Northern Ireland they would require the consent of the Director of Public Prosecutions for Northern Ireland. In Scotland the Lord Advocate is responsible for all prosecutions.

Territorial extent

70. The Government proposes that the new legislation should apply throughout the UK and that it should be possible to extend it by Order in Council to the Channel Islands and the Isle of Man. By virtue of section 10(1) of the Official Secrets Act 1911, section 2 offences may be committed abroad by "British officers or subjects". The Government proposes to retain the spirit of this provision by giving the United Kingdom courts jurisdiction over offences under the new legislation if committed abroad by a British citizen, Crown servant or government contractor.

THE FUTURE ROLE OF THE CIVIL SERVICE DISCIPLINE CODE

71. The result of implementing the Government's proposals would be that only a very small proportion of the information in the hands of Crown servants would be protected by the criminal law. That does not mean, however, that there will be no inhibition on the disclosure of any of the information which the criminal law will no longer protect.

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The Government still has the duty to keep the private confidences of citizens and others. More generally, Ministers will continue to determine what information should be disclosed and to account to Parliament for those decisions. In practice Ministers already make a great deal of information public or authorise Crown servants to do so on their behalf.

72. The Civil Service Discipline Code already provides penalties for unauthorised disclosures which can be invoked where it is not thought right to bring a prosecution under section 2. The Discipline Code will continue to be applied against unauthorised disclosure of information.

73. Once new legislation is in place it will be necessary to amend the conduct rules for Crown servants, in particular the rules covering the disclosure of official information, in consultation with the Civil Service trade unions, to reflect the fact that the criminal law no longer protects all official information. Departmental rules and guidance will also need to be revised to ensure that it is clear to Crown servants what types of information they cannot disclose without authority without rendering themselves liable to criminal or, as the case may be, disciplinary action.

THE SECURITY CLASSIFICATION OF INFORMATION

74. As explained in paragraph 21, the Government does not intend to rely on the security classification of information as a test of harm likely to be caused by the disclosure of that information. Although the Government's 1979 Bill departed to some extent from the Franks Committee approach in this respect, it did contain provision for regulating the classification of information and documents relating to defence or international relations. Under that Bill, however, the harm arising from the disclosure of such information would have been certified by a Minister. The Government sees no need for legislative

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provisions relating to classification under the scheme it is now proposing, in which neither the classification of information nor the opinion of a Minister plays a crucial part.

75. Under the Government's proposals the question of the harm arising from disclosure will be a matter on which the prosecution have to satisfy the court. The fact that a document was classified at a certain grade is not evidence of likely harm; it is only evidence of the view of the person who awarded the classification. Moreover, it is evidence only of the view taken at the time of classification; circumstances may have changed by the date of the disclosure. The grade of classification may be relevant in a prosecution as evidence tending to show that the defendant had reason to believe that the disclosure of the information was likely to harm the public interest, but the prosecution will have to adduce separate evidence to prove that the disclosure was indeed likely to cause such harm.

76. But within the Crown service the classification of documents will, of course, continue to play an essential administrative role in the handling of information and will be relevant in disciplinary proceedings for the unauthorised disclosure of information not covered by the new legislation. The fact that classification plays no part in the Government's proposals in no way diminishes the duty on Crown servants to ensure that documents are given an accurate grading.

CONCLUSION

77. This White Paper presents a set of proposals the central objective of which is to apply the criminal law to those, and only those, who disclose a limited range of information without authority knowing or having good reason to know that to do so is likely to harm the public interest. The proposals would not apply criminal sanctions to disclosures which are not likely to harm the public interest, nor to anyone who could not reasonably have been expected to foresee the effect of his disclosure.

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78. Responsible media reporting would not be affected by the Government's proposals. They represent a restriction on freedom to publish, but any legislation in this area must limit that freedom. The law already constrains in various ways what may be published in order to avoid damage to private interests. It is right that constraints should also be imposed to prevent unacceptable damage to the public interest.

79. Under the Government's proposals it will be for the courts, and the courts alone, to decide whether the disclosure of particular information is criminal. The Government is entrusting the safeguarding of the public interest to the jury.

80. The Government believes that the proposals set out in this White Paper would result in clear and intelligible legislation which juries could apply readily and equitably. The legislation would apply to culpable acts without drawing in harmless or innocent actions. It would merit and receive the confidence of the public and of juries.

81. The Government intends to initiate debates in both Houses of Parliament on its proposals in July. It will then consider the opinions expressed in those debates, and the comments which it receives from other sources on the proposals, with a view to early legislation.

SEC: official secrets Act

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17. The Government's proposal would not be affected by the Government's proposal. The Government's proposal is to amend the law already contained in various ways which will be published in order to avoid damage to public interests. It is right that the Government should also be prepared to prevent unnecessary damage to the public interest.

18. Under the Government's proposal it will be for the benefit, and the Government should be able to decide whether the interests of particular interests is vital. The Government is willing to accept the suggestion of the public interest on the part.

19. The Government believes that the proposal set out in this White Paper would result in clear and immediate legislation which would apply to all cases of emergency. The legislation would apply to all cases of emergency without drawing in business or industry. It would result in the consolidation of the public and of the law.

20. The Government intends to initiate debate in both Houses of Parliament on its proposals in July. It will then consider the opinions expressed in these debates, and the comments which it receives from other sources on the proposals, with a view to early legislation.



From: THE PRIVATE SECRETARY



cc 81
HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

13 June 1988

Dear Tony,

OFFICIAL SECRETS ACT: WHITE PAPER

The Home Secretary has asked me to write, following the front page story in the "Sunday Times", written by their defence correspondent and obviously benefiting from briefing by someone familiar with the White Paper proposals.

There is always a danger that, once some details are in public circulation, others in the know may be less guarded about revealing further detail in general conversation with journalists. In this way, we could have unintended publication of the entire proposals.

The Home Secretary is concerned that this should not happen and that we should endeavour to avoid any further leakage before publication.

I should be most grateful, therefore, if you could draw this note to the attention of anyone in your Department who may have had sight of the proposals.

I am copying this letter to Nigel Wicks (No 10), the Private Secretaries to other Cabinet Ministers, and Trevor Woolley (Cabinet Office).

Yours sincerely,

P J C MAWER

A C Galsworthy, Esq.

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File DAS
CC PC

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

MR CUTHBERT-BROWN
CABINET OFFICE

OD(DIS) MEETING AFTER CABINET ON 16 JUNE

This is just to record my conversation with you this morning in which I said that the Prime Minister would like to postpone this meeting of OD(DIS) until after the House of Lords hearing and judgement, for the same reasons that were set out in the Attorney General's minute of 10 June to the Home Secretary on the Publication of the White Paper on the Official Secrets Act.

You may well think that, while it is possible to delay the discussion of the paper until after the House of Lords hearing, there are good reasons why it should not be delayed until after the judgement on the case. If that is indeed the case, perhaps you could let met have advice so that the Prime Minister can further consider the timing of the discussion of this paper.

I am sending a copy of this minute to John Weston (Cabinet Office).

N.L.W.

N. L. WICKS
13 June 1988

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Pine Minister ²

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Postponement of the
OSA White Paper until the
spill over will pose
great problems.

But let us see what
the Home Secretary says.

HOME SECRETARY

N. C. U.

10-G.



cc - Mr. Weston
Mr. Dwyer
Mr. Barrie
Mr. Langdon

CABINET OFFICE	
A	6058
10 JUN 1988	
FILING INSTRUCTIONS	
FILE No.	

PUBLICATION OF WHITE PAPER ON OFFICIAL SECRETS ACT

We spoke yesterday about the various Parliamentary and other constraints relating to the timing of publication of your White Paper on reform of section 2 of the Official Secrets Act.

As you know, the House of Lords have put back the start of the "Spycatcher" appeal. It will now begin on 14 June and is expected to finish on 22 June.

I have just had a final consultation with Robert Alexander QC, who is leading for us in the Lords. He sees a real risk in the publication of the White Paper before the Lords' judgment is given. This is because judgment is unlikely to be much before the end of July, and therefore after the Parliamentary debate will have taken place. The debate is bound to extend into the civil law of confidentiality, especially since the White Paper will make reference to the possibility of our legislating in this field, depending on the outcome of the "Spycatcher" litigation. The Law Lords are sure to read the White Paper and sure to read the debate. There is a real risk that the force of our arguments on the adverse practical consequences of rejecting our appeal will be diminished if the notion gains currency that, if the appeal is rejected, the Government will legislate to change the civil law. If the Lords get that idea, they may be more inclined to take an academic rather than a practical view, to our disadvantage. I see much force in that.

I am clear, therefore, that I must ask for publication in the spill over. If, however, there are overwhelming reasons why this is not practicable, I think it essential that at the least publication should be postponed until after the

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conclusion of argument. Even on the last day of argument the newspapers' Counsel could be expected to dwell on the Government's intentions as evidenced by the newly published White Paper, thereby creating a most damaging and unwelcome diversion. So Thursday, 23 June should be the very earliest date. To allow for the case lasting longer than anticipated my own strong preference would be for a date early in the following week.

I am copying this to the Lord President and the Chief Whip and to Sir Robin Butler.

pag

10 June 1988

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...on the fact that the newspaper
...to be expected to dwell on the Government's position as evidenced
by the newly published White Paper, thereby creating a most damaging and
...to the Government. It is also possible that the newspaper
...to allow for the case having longer than anticipated up own strong performance
...to be for a date early in the following week.

I am copying this to the Lord President and the Chief Whip and to Sir Robin
Baker.

pm

10 June 1982

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B.0151

PRIME MINISTER

c Sir Robin Butler

OD(DIS) Meeting after Cabinet on 16 June

Chairman's Brief

ENFORCING THE DUTY OF CONFIDENTIALITY

ATTENDANCE

1. All members of the Sub-Committee except the Defence Secretary will attend, namely the Foreign and Commonwealth Secretary, the Home Secretary, the Lord President and the Attorney General. The Lord Chancellor, the Lord Privy Seal, the Lord Advocate and the Paymaster General are also invited.

BACKGROUND

2. The meeting will discuss the fourth report of the Official Group on Enforcing the Duty of Confidentiality (OD(DIS)(88)44), which draws together the results of further work commissioned by Ministers in response to the Official Group's third report (OD(DIS)(88)2) and the paper on the way ahead in and after the Wright case (OD(DIS)(88)22) discussed by OD(DIS) on 14 March.

3. The meeting will take place during the House of Lords hearing on Wright (due to start on 14 June). Section I of the paper indicates how the further work now done by officials fits into the range of measures (including reform of Section 2 of the Official Secrets Act (OSA)) which Ministers have been considering. Paragraph 1.6 outlines the shape of the possible package which, subject to the House of Lords decision on Wright, is emerging.

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*It would be better
to postpone this meeting
until after the HPL
judgment - the
same nervous for
which we
are
postponing
the White Paper
not*

cc b7d



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HANDLING

4. The covernote to OD(DIS)(88)44 suggests that the meeting might particularly focus on the points for decision listed in Section III of the paper. You may wish to treat these as your Agenda. For ease of reference they are repeated below, with additional comments.

Reform of the civil law

a. Subject to the House of Lords judgment on Wright, should there be legislation on the civil (as opposed to the criminal) law on the duty of confidentiality of members and former members of the security and intelligence services, to include also others to be covered by the proposed "special offence"? If so, should officials submit detailed proposals after the House of Lords judgment has been analysed? (paragraphs 2.3-2.6)

The outline of possible legislation is set out in paragraphs 2.4 to 2.6. Paragraph 2.7 outlines the main problems of legislation. Do the Foreign Secretary, Home Secretary, Attorney General and Lord Chancellor nevertheless agree (at least) that in the light of the judgment officials should submit detailed proposals? Should any legislation apply to all persons (including "alongsiders" and "supporters") to be covered by the "special offence"? (Home Secretary and Foreign Secretary)

b. Should any such proposals, if adopted, be presented as part of, or separately from, the Bill to reform Section 2 of the OSA? (paragraph 2.8)

As paragraph 2.8 explains, the White Paper will contain an appropriate marker in case Ministers decide that a separate Bill is impracticable. On the other hand, the Home Secretary would probably oppose inclusion of civil law reform in the Official Secrets



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Bill, on the grounds that it might put the latter at risk (see sub-paragraph 2.7.ii). The Lord Chancellor, the Lord President and the Attorney General may also wish to comment.

c. During the debate on the White Paper on reform of Section 2, should anything further be said on possible reform of the civil law? (paragraphs 2.7-2.8)

The Sub-Committee may consider that the marker in the White Paper is sufficient, and that the Home Secretary cannot refer to the Government's approach to revision of the civil law if the debate on the White Paper takes place before the House of Lords judgment. On the other hand, it would appear necessary, if the Government intends to amend the civil law, to find an opportunity of outlining the Government's proposals at some stage in the autumn, before the Official Secrets Bill is introduced.
(Home Secretary, Lord President, Lord Privy Seal)

Terms of employment

d. Should the Civil Service Pay and Conditions of Service Code (the Code) be amended in line with Sir Robert Armstrong's revised note of December 1987? If so, should draft amendments be discussed with the Civil Service unions before the bill to reform Section 2 is introduced? (paragraph 2.12)

As indicated in sub-paragraph 8.a of Annex B, Sir Robert Armstrong's note of December 1987 on the duties and responsibilities of public servants set out unambiguously the general duty of all civil servants, serving or retired, not without authority to make disclosures which breach their obligation to keep the confidences to which they become privy in the course of their work. If the Sub-Committee



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agrees that the need in any event to amend the Code following OSA reform provides a convenient opportunity to bring the Code into line with Sir Robert Armstrong's note, it would probably be tactically wise to discuss draft amendments with the Civil Service unions before the Official Secrets Bill is introduced. (Paymaster General)

Assignment of copyright

e. Should the work on assignment of future copyright be placed in abeyance (subject to contingent formulation of an exclusion provision for information unrelated to the assignor's work), pending the decision on whether to legislate on the duty of confidentiality of members of the security and intelligence services? (paragraph 2.22)

Paragraph 2.15 warns that assignments of future copyright might be unenforceable in North America and leading Western European countries. Paragraph 2.21 points out that such assignments would be inconsistent with the Government's basic approach to the duty of confidentiality of members of the security and intelligence services, and that legislation on the duty would reduce the case for taking steps to secure copyright title for the Crown. Only a little more work would be required to draft an exclusion provision for information unrelated to the assignor's work (paragraph 2.18). Subject to that and to the decision on reforming the civil law to incorporate a statutory duty of confidentiality, the Sub-Committee may agree that this avenue should not be explored further. (Home Secretary, Foreign Secretary, Attorney General)



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Pensions

f. Should a judicial tribunal procedure, to cover all public servants, be introduced to close the jurisdiction loophole to pensions forfeiture? (paragraph 2.24)

g. Should conviction for the proposed "special offence" be a ground for forfeiture? (paragraph 2.26)
These two questions might be taken together.

Paragraph 2.24 summarises the case for the judicial tribunal procedure, which arguably is merited - for all public servants - irrespective of Ministers' other decisions. But the Sub-Committee may consider that it would not be worth introducing legislation on this unless the same Bill also lowered the offence threshold by making the proposed "special offence" a ground for forfeiture. Paragraph 2.26 points to the practical limitations in the face of judicial review and challenge under the European Convention on Human Rights. Would legislation be justified? (Foreign Secretary, Home Secretary, Paymaster General, Lord President)

h. When should any legislation on "f" and "g" be introduced? Should it be presented separately from the Bill to reform Section 2? (paragraph 2.27)

Paragraph 2.27 warns that no suitable legislative vehicle is in prospect, other than the Official Secrets Bill. The Home Secretary would probably argue against incorporating pensions legislation in his Bill. On the other hand, the Paymaster General may be reluctant to introduce separate legislation, and may suggest that it would be politically prudent and more economical of Parliamentary time to wrap up pensions measures (and for consistency any legislation on the duty of confidentiality) in the one



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Bill which the Government has already decided to include in the 1988-89 programme. The Attorney General and the Lord Chancellor may have views on the legal propriety of mixing apples and pears in this way. The Lord President and the Lord Privy Seal may wish to comment on Parliamentary handling aspects. Alternatively, how soon should any separate legislation on pensions be introduced? (Lord President, Foreign Secretary, Home Secretary, Paymaster General)

NEXT STEPS

5. You may like to suggest that there is a further meeting in September to review decisions made at this meeting and further work, in the light of analysis of the House of Lords ruling.

P J Weston

10 June 1988



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With which the Government has already decided to
include in the 1955 program. The decision
concerns not only the (State) but also the
large majority of states which are in the
way. The (State) and the (State) will
also be concerned in this program. The
Government, however, has not decided yet whether
to include in the program the (State) and
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include in the program the (State) and the (State).

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is the result of the (State) and the (State)
of the (State) and the (State).



U. S. DEPARTMENT OF STATE

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Comments on this subject should
be referred to

THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

CONFIDENTIAL

Philip Mawer Esq
Principal Private Secretary to the
Secretary of State for the Home Department
Home Office
Queen Annes Gate
London
SW1H 9AT

9 June 1988

Dear Philip,

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT, 1911

The Attorney General ^{at flag} has seen copies of the Home Secretary's minutes of 13 and 20 May 1988 to the Prime Minister, and the draft White Paper on the reform of Section 2 of the Official Secrets Act, 1911. He has no comments to add to those already made by Ministerial colleagues. ^{at flap}

I am copying this to the Private Secretaries to other members of OD(DIS); to the Private Secretaries to the Lord Chancellor, the Lord President, the Lord Advocate, the Secretary of State for Trade and Industry, the Chief Whip and the Minister of State (Privy Council Office); and to Trevor Woolley.

Yours sincerely,
Chris Newell

C W P NEWELL

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From: THE PRIVATE SECRETARY



CONFIDENTIAL

101
HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

9 June 1988

Dear Nigel,

WHITE PAPER ON REFORM OF SECTION 2
OF THE OFFICIAL SECRETS ACT 1911

top enc.

Thank you for your letter of 6 June.

We will delete "only" from the second sentence of paragraph 30, as the Prime Minister suggests.

I am sending a copy of this letter to Sir Robin Butler.

Yours sincerely,

P J C Mawer

P J C MAWER

N L Wicks, Esq., CBE.

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SECURITY: OSA Pt. 2



From: THE PRIVATE SECRETARY



HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

7 June 89

Dear Nigel,

You asked for the
affirmed summary of
the new official security
proposals for the
Prime Minister's use
this evening.

Yours sincerely
Nick

Nigel Wicks Esq.

GOVERNMENT'S PROPOSALS FOR REFORM OF SECTION 2 OF THE OFFICIAL
SECRETS ACT 1911

Under section 2 of the 1911 Act it is an offence to disclose without authority any information which a Crown servant or government contractor has acquired in the course of his duties. It is generally accepted that this is much too wide but there has been little consensus on the nature of reform.

2. The Government proposes that the disclosure without authority of information acquired by a Crown servant or Government contractor in the course of his duties should be covered by new legislation only if it relates to security or intelligence, defence, international relations or interception, or if it has been obtained in confidence from another government or international organisation or if it would be useful in the commission of criminal offences or escape from custody.

3. It would be an offence to disclose without authority any information on interception, any information obtained in confidence from another government or international organisation or any information useful in the commission of criminal offences or escape from custody. It would be an offence to disclose without authority information relating to security or intelligence, defence or international relations only if the

prosecution could satisfy the court that some specific harm was likely to result from the disclosure. A separate test of harm is proposed for each category. The fact that it would be for the courts (which means, in many cases, the jury) to consider whether a disclosure was harmful and therefore criminal is a considerable change in the present law and goes further than proposals put forward by this or previous Governments.

4. For information relating to security or intelligence (or purporting to relate to security or intelligence), however, the Government proposes that the prosecution should not have to prove that harm was likely to arise where the disclosure was made by a member of the security and intelligence services or persons, designated by a Minister, who work closely with the services.

5. A Crown servant or government contractor would have a defence that he did not know and had no reasonable cause to believe that the disclosure would be likely to result in harm. For any other defendant the prosecution would have to prove that he knew or had reasonable cause to believe that the specified harm was likely to arise from his disclosure.

6. The Government does not propose to make provision to allow the defendant to argue that his disclosure was in the public interest, a defence which has been suggested by some in Parliament and outside who are interested in reform of section

2. The object of the Government's proposals is to define in what circumstances disclosure of information is against the public interest and the Government does not consider it sensible or feasible to expect magistrates or a jury to balance the alleged wrongs to the public interest. Nor does the Government consider it right to provide that there should be no offence if the information disclosed has been disclosed before, another defence sometimes proposed. Where the Government proposes a test of harm, the prosecution would have to prove that such harm would be likely to occur and, if no harm arises because the information is already publicly available, the prosecution would be unable to prove its case. In the other categories the Government considers that disclosure is harmful in all circumstances.

7. The Government also proposes to create other offences relating to the safekeeping of documents and failure to return them when required which fall short of actual disclosure.

8. The effect of the Government's proposals would be that it would cease to be a criminal offence for Crown servants to disclose most of the information with which they deal. However, the Civil Service Discipline Code already provides penalties for unauthorised disclosure where it is decided not to prosecute under section 2 and the Code will continue to be applied against unauthorised disclosures.

6. The object of the Government's proposals is to define in what circumstances disclosure of information is against the public interest and the Government does not consider it desirable or feasible to expect registrars or a jury to balance the alleged damage to the public interest, nor does the Government consider it wise to provide that there should be no offence if the information disclosed has been disclosed before, another person has been prosecuted, or the Government proposed a prosecution. Where the Government proposed a prosecution, the prosecution would have to prove that such harm would be likely to occur and, if no harm arises because the information is already publicly available, the prosecution would be unable to prove its case. In the other categories the Government considers that disclosure is harmful in all circumstances.

7. The Government also proposes to create other offences relating to the withholding of documents and failure to return them when required which fall short of actual disclosure.

8. The effect of the Government's proposals would be that it would cease to be a criminal offence for Crown servants to disclose part of the information with which they deal. However, the Civil Service Discipline Code already provides penalties for unauthorized disclosure where it is decided not to prosecute under section 1 and the Code will continue to be applied against unauthorized disclosures.



CONFIDENTIAL



me PAMAAC

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

6 June 1988

Dear Philip,

WHITE PAPER ON REFORM OF SECTION 2
OF THE OFFICIAL SECRETS ACT 1911

I have shown the Prime Minister the further draft of the White Paper on the reform of the Official Secrets Act which you attached to your letter of 2 June.

The Prime Minister has asked that the Home Secretary should consider the following small amendment to paragraph 30 of the draft text. The second sentence of that paragraph, referring to interception, says:

"It is an exceptional but vital instrument which is used, for the protection of society, only when other means are not available."

She wonders whether it is wise to insert the word "only" and would not wish to do so unless it has already been used publicly in such connection before.

I am copying this letter to Sir Robin Butler but am not copying it more widely.

*Yours sincerely
Nigel Wicks*

N. L. WICKS

Philip Mawer, Esq.,
Home Office.

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From: THE PRIVATE SECRETARY

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HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

6 June 1988

Dear Tony,

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

The ^{flap} Home Secretary has given further consideration to the point offered by Sir Geoffrey Howe on what is now paragraph 64 of the draft White Paper.

The Home Secretary remains of the view that it is better not to highlight the special offence at this point, but he is anxious that the omission of any reference to it should not be regarded as misleading. We therefore propose that the question of cases in which there is to be no test of harm (and in which there will therefore be no occasion to raise the issue of prior publication) should be dealt with in more general terms, as

I am copying this letter and its enclosure to the Private Secretaries to members of the Cabinet and to Sir Robin Butler.

Yours sincerely,

P J C MAWER

A C Galsworthy, Esq.,

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(revised)

64. In those cases in which the proposals in this White Paper do not provide for the question of harm to be an issue in determining whether an offence has been committed, that is precisely because the Government considers that any disclosure of information in such cases is harmful; and that applies irrespective of whether the information has previously been made public in some form. If information is published unlawfully, it is difficult to see why it should ipso facto become lawful at any time thereafter to publish the information as widely as and in whatever form the publisher chooses.

OTHER OFFENCES, ENFORCEMENT AND EXTENT

Other offences

65. The central mischief at which the Government's proposals are aimed is the unauthorised disclosure of information the publication of which is harmful to the public interest. However, there are actions which conduce to this central mischief and which the Government considers should be criminal. At the lower end of the scale of seriousness, there is the Crown servant who culpably fails to take sufficient care of documents containing information the unauthorised disclosure of which would be an offence. At the upper end is the person who reveals to a person, who he knows is going to use the knowledge, how to gain access to information the unauthorised disclosure of which would be an offence. The Government proposes that both should be an offence. The Government also proposes that it should be an offence for any person who is wrongfully in possession of a document containing information whose unauthorised disclosure would be an offence to fail to return the document when given a formal

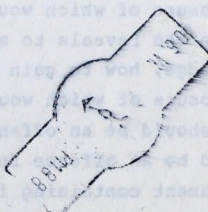
(Continued)

44. In those cases in which the proposals in this White Paper do not provide for the question of harm to be an issue in determining whether an offence has been committed, that is precisely because the Government considers that any disclosure of information in such cases is harmful, and that applies irrespective of whether the information has previously been made public in some form. If information is published unlawfully, it is difficult to see why it should then become lawful at any time thereafter to publish the information as widely as and in whatever form the publisher chooses.

OTHER OFFENCES, EMPLOYMENT AND EXTENT

Other offences

45. The central mischief at which the Government's proposals are aimed is the unauthorized disclosure of information the publication of which is harmful to the public interest. However, there are occasions which contrast to this central mischief and which the Government considers should be criminal. At the lower end of the scale of seriousness, there is the Crown servant who culpably fails to take sufficient care of documents containing information the unauthorized disclosure of which would be an offence. At the upper end is the person who knows he is going to use the information for gain to disclose the unauthorized information. The Government proposes that both should be offences. The Government also proposes that it should be an offence for any person who is wrongfully in possession of a document containing information whose unauthorized disclosure would be an offence to fail to secure the document when given a formal



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INTRODUCTION

1. Section 2 of the Official Secrets Act 1911 has long been regarded as unsatisfactory and in need of reform. Early last year the Government decided to set in hand work which would allow it to determine whether it should make a further attempt to narrow and clarify the law on the protection of official information. The work began in April 1987, and by the end of the year had reached the stage where the Government concluded that it would in due course be right to put proposals for reform to Parliament. The Home Secretary accordingly announced in reply to a Parliamentary Question on 15 December 1987 that, when the work was brought to a conclusion later in the same Session, he would lay before Parliament a White Paper setting out the Government's proposals for the reform of section 2, with a view to early legislation. In the course of the debate on 15 January this year on the Second Reading of the Protection of Official Information Bill introduced by Mr Richard Shepherd MP, the Home Secretary said that he hoped to publish the White Paper in June. This is the promised White Paper.

2. The following chapters set out the Government's proposals for the reform of section 2 of the 1911 Act. The Government proposes no amendment to section 1, which deals with various espionage activities carried out "for any purpose prejudicial to the safety or interests of the State". There is no widespread dissatisfaction with section 1. On the contrary, it is sometimes suggested that the protection which section 1 provides for official information is fully adequate and that section 2 is simply unnecessary. This, however, is a misconception. Section 1 deals with the disclosure of information useful to an enemy with the specific purpose of prejudicing the safety or interests of the state. The relative gravity of such conduct is reflected in the higher maximum penalty for an offence under section 1 than for an offence under section 2, which deals with disclosure for other purposes of information useful to an enemy and with other disclosures harmful to the public interest. Without section 2 there would be insufficient protection for information the disclosure of which, for

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example, would undermine national security, help terrorists, impair the ability of the armed forces to defend the country or damage relations with other states, leading to commercial loss or even endangering the lives of British citizens abroad. The Franks Committee (see paragraph [9]) considered carefully whether section 2 could simply be repealed. It concluded that:

"whether one takes a broad or narrow view of the kinds of official information requiring the protection of the criminal law, section 1 does not provide full protection. Effective protection requires that the law should cover leakage of information, as well as espionage."

The Committee accordingly recommended that section 2 should be replaced, not repealed.

3. The Government accepts the view that protection must continue to be given to certain information which section 1 does not fully protect. It believes that it is right to use the criminal law to prohibit disclosure of such information because of the degree of harm to the public interest which may result.

4. However, section 2 in its present form undoubtedly goes too wide. The object of the Government's proposals is to attain a better definition of when, assuming that section 1 of the 1911 Act does not apply, the disclosure of official information should be a criminal offence.

5. This White Paper is principally concerned with information which would, under the Government's proposals, be protected by the criminal law. It does not, therefore, address such matters as the question of public access to official information not covered by the Government's proposals. That is a separate issue which does not arise directly out of the reform of section 2. Nor does it deal with matters affecting the civil law, which may have to be considered in the light of the outcome of current litigation.

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THE NEED FOR REFORM

Scope of section 2

6. Section 2 is a complex provision which creates a number of closely linked offences. It applies to information originally obtained by a person holding office under the Crown by virtue of that office or by a government contractor or his staff by virtue of his contract. It applies not only to information which is held by Ministers, Crown servants and government contractors but also to information originally obtained by them which is then entrusted to another person in confidence; or, of course, to information which is simply obtained by another person in contravention of the Official Secrets Acts. It is an offence for any person to communicate such information except to someone to whom he is authorised to communicate it or to whom it is his duty in the interest of the state to communicate it. Thus, if a Crown servant hands a document to an unauthorised person, it is an offence and, if that person, knowing that the Crown servant had contravened section 2 in giving it to him, passes it on to another unauthorised person, that is also an offence.

7. In addition, section 2 provides that it is an offence to use the information for the benefit of any foreign power or in any other manner prejudicial to the safety or interests of the state; to retain documents which the holder has no right to retain or to fail to comply with a direction from a lawful authority to return them; to fail to take reasonable care of or to endanger the safety of documents; to communicate information relating to "munitions of war" directly or indirectly to a foreign power or in any other manner prejudicial to the safety or interests of the state; or to receive any information knowing or having reasonable cause to believe that it is communicated in contravention of the Official Secrets Acts.

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Defects

8. The drafting of section 2 is archaic and, in places, obscure. But the central objection is to its scope. It penalises the disclosure of any information obtained by a person holding office under the Crown or a Government contractor in the course of his duties, however trivial the information and irrespective of the harm likely to arise from its disclosure. The "catch-all" nature of section 2 has long been criticised. Although in practice prosecutions are not brought for the harmless disclosure of minor information, it is objectionable in principle that the criminal law should extend to such disclosure. The excessive scope of section 2 has also led to its public reputation as an oppressive instrument for the suppression of harmless and legitimate discussion. Because section 2 goes so much wider than what is necessary to safeguard the public interest, its necessary role in inhibiting harmful disclosures is obscured.

Previous attempts at reform

9. Along with the disadvantages of section 2, the need for an effective and enforceable alternative which would command general support has also long been recognised. The first major initiative to devise such an alternative was the Departmental Committee, under Lord Franks of Headington, established in 1971 by a previous Conservative Government to review the operation of section 2 and make recommendations. The Committee reported in 1972. It recommended the replacement of section 2 by a new statute which would cover only official information in specified categories. It would have been an offence to disclose without authority any information in certain categories; but for information in other categories, unauthorised disclosure would have been an offence only if it was likely to cause serious injury to the interests of the nation. The Committee's recommendations depended heavily on the security classification of information. In particular, arrangements were proposed whereby a

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Minister would have certified before any prosecution that the information concerned was correctly classified at a level which meant that it was considered that the disclosure would cause at least serious injury to the interests of the nation. His certificate would have been conclusive evidence in any legal proceedings.

10. A White Paper published in July 1978 by the Labour Government, "Reform of Section 2 of the Official Secrets Act 1911" (Cmd 7285), set out proposals for legislation which closely followed the Franks Committee recommendations, although not all of the categories of information recommended by the Franks report would have been covered. Among the recommendations of the Franks Committee which these proposals retained were the dependence on the classification of information and the role of the Minister in certifying conclusively that the information was properly classified at a level which meant that its disclosure was considered likely to cause serious injury to the interests of the nation.

11. When the new Government took office in 1979, it prepared a Bill to amend section 2. This closely followed the Labour Government's proposals. But it would have further reduced the number of categories of information protected by the criminal law, and it abandoned the dependence on the classification of information. The role of the Minister before prosecution was retained, but he would have been certifying directly that the disclosure of certain information would be likely to cause serious injury to the interests of the nation (or endanger the safety of a United Kingdom citizen). Despite following so closely the Franks Report and the Labour Government's White Paper, the Bill was widely criticised when it was introduced in the House of Lords in October 1979. The major specific areas of criticism were, first, the provision for conclusive Ministerial certificates and, second, the fact that the Bill would have made it an offence for anyone to disclose any information held by the Government relating to security or intelligence. Although the Bill received a Second Reading, it was clear to the Government that there was little chance of its commanding general acceptance, and it was withdrawn.

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12. Besides these Government initiatives to reform section 2 there have been a number of Private Members' Bills over the last 20 years which have proposed various reforms of the provision.

The way forward

13. As this history indicates, section 2 as it stands has few, if any, defenders, and successive Governments have agreed that it should be reformed. But it has been difficult to find agreement on the precise nature of the reform. The recommendations of the Franks Committee have naturally dominated discussion of this issue since they were published in 1972, and have remained a necessary and valuable reference point for the Government's present consideration of the reform of section 2. But the Government has tried to look afresh at the issues, taking into account the criticisms of its 1979 Bill and the development of Parliamentary and public thinking in recent years. It believes that the proposals which follow would allow the creation of new legislation to replace section 2 which would be easily comprehensible, readily applicable by the courts and widely accepted as useful and necessary.

OBJECTIVES AND PRINCIPLES OF THE GOVERNMENT'S PROPOSALS

14. The central concern of any reform of section 2 is to determine in what circumstances the unauthorised disclosure of official information should be criminal. For this purpose it is not sufficient that the disclosure is undesirable, a betrayal of trust or an embarrassment to the Government. So far as Crown servants are concerned there is a range of circumstances in which the disclosure of information may properly constitute a disciplinary offence, but the intervention of the criminal law would not be justified (paragraphs [71-73] discuss this further). There may also be circumstances in which it is right for the Government to seek to enforce its rights on behalf of the public under the civil law of confidence, notwithstanding that no

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prosecution for a criminal offence is possible. As explained in paragraph 3, what justifies the application of the criminal law, where disclosure is not caught by section 1 of the 1911 Act, is the degree of harm to the public interest which may result. The objective of the Government's proposals is to narrow the scope of the present law so that the limited range of circumstances in which the unauthorised disclosure of official information needs to be criminal are clearly defined. This will ensure that no-one need be in doubt in what circumstances he would be liable to prosecution, and enable the courts to enforce the law without any undue burden of proof being placed either on the defence or on the prosecution.

Ministerial certificates

15. Under the Government's 1979 Bill it would have been an offence to disclose information relating to defence or international relations the unauthorised disclosure of which would be likely to cause serious injury to the interests of the nation or endanger the safety of a United Kingdom citizen. As explained in paragraph [10], the question whether the disclosure of particular information was likely to have these effects was, under the Bill, to be determined by a certificate from the relevant Minister which could not have been challenged by the defendant in the subsequent legal proceedings for the offence of disclosure. As also explained in paragraph [10], this procedure descended directly from a recommendation in the report of the Franks Committee which was intended simply to constitute a check on the correctness of classification. The rationale for leaving to a Minister the judgement of the potential effect of the disclosure of certain information on the interests of the nation is obvious. Because of his responsibilities within the Government for the area to which the information concerned relates, the Minister is uniquely qualified to make a judgement on the damage to the public interest likely to arise from its disclosure.

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16. This proposed arrangement was, however, criticised as placing too much power in the hands of Ministers. It was argued that, since the defendant would not be able to challenge the Minister's certificate, an essential element of the offence would not be considered by the courts but would be decided by the Minister alone. There would be no restraint on a Minister issuing a certificate, even if circumstances did not objectively justify it. The Minister would not be seen as disinterested and there would always be the suspicion of political bias.

17. The Government recognises the force of these arguments. Various arrangements have been proposed since 1979 whereby the power to certify would be shared between the Minister and some other person or body or would pass to another person or body. But no other body or individual shares the Minister's responsibility for safeguarding the interests of the nation and none is therefore as well or better placed to make or review the necessary judgement.

18. The Government accepts the arguments against the procedure previously proposed for conclusive Ministerial certificates as to the likelihood of serious damage to the interests of the nation. It believes that if the issue is not to be decided by a Minister it must, like all other issues relating to the reformed offence, be left to the courts. The Government accordingly proposes that, where it is necessary for the courts to consider the harm likely to arise from the disclosure of particular information, the prosecution should be required to adduce evidence as to that harm and the defence should be free to produce its own evidence in rebuttal. The burden of proof would be on the prosecution, in the normal way. There would be no Ministerial certificates.

19. The Government is proposing (see paragraph [66]) that the central offence of disclosure should in England and Wales be triable either in the magistrates' courts or in the Crown Court. The effect would be to

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give the opportunity to any person accused of disclosing information in contravention of the new legislation to put his case before a jury. (In Scotland, in accordance with normal procedure, it is for the Crown to decide whether the offence is serious enough to be prosecuted on indictment and therefore before a jury).

Tests of harm to the public interest

20. As mentioned in paragraph [15], the test proposed in the 1979 Bill, following Franks, was

"likely to cause serious injury to the interests of the nation or endanger the safety of a citizen of the United Kingdom and Colonies."

The first part of this formulation embodies a very general concept. While this was practicable in conjunction with the procedure for Ministerial certificates, it would be unreasonable to expect the courts to apply such a broad test. While it is acceptable to speak in general terms of the need to protect information where disclosure would harm the public interest, a more specific definition is required in any new legislation if the prosecution, the defence and the court are to be able to make judgements as to the harm likely to arise from disclosure of particular information.

21. The Government has considered whether to return to the system proposed by the Franks Committee whereby the classification of information is the essential determinant of the offence. But this approach was abandoned in 1979 and the Government has concluded that it should not be readopted. The arguments are set out in paragraphs [74-76].

22. The Government considers that so far as possible any test of harm

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should be concrete and specific if it is to be applied by the courts. At this practical level, the harm likely to arise from the disclosure of different kinds of information is not the same in all respects in each case. The Government therefore proposes separate tests of likely harm for the different categories of information to be covered by future legislation.

23. The following paragraphs discuss, first, which categories of information should be covered by a new Bill, and second, what, if any, tests of likely harm to the public interest should be applied to each.

CATEGORIES OF INFORMATION TO BE COVERED BY NEW LEGISLATION

24. In any new legislation to replace section 2, it is necessary to identify those areas in which the disclosure of at least some information may be sufficiently harmful to the public interest to justify the application of criminal sanctions. The number of such areas is in fact small. For the most part, even if disclosure may obstruct sensible and equitable administration, cause local damage to individuals or groups or result in political embarrassment, it does not impinge on any wider public interest to a degree which would justify applying criminal sanctions.

Defence, security and intelligence

25. The most obvious areas in which the public interest needs to be protected are those where the protection of the nation from attack from outside or from within is involved. Clearly new legislation must protect information relating to defence (including civil preparedness) and information relating to security and intelligence.

26. Indeed, in one respect the Government considers that it is necessary to go further than the present law. Increasing international cooperation in recent years on defence and on

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international problems such as terrorism has meant that a growing amount of sensitive information is being shared with other governments, often through the medium of international organisations. At present, if such information is disclosed abroad, it is not an offence to publish it in this country. The Government believes that there is a gap in the law here which is liable to inhibit effective international cooperation. It accordingly proposes that, when information in these categories has been provided in confidence to another government or international organisation and has been improperly disclosed abroad, its further disclosure in this country should be treated in the same way as if the original disclosure had taken place in this country.

International relations

27. Another area where the disclosure of certain information may lead to serious consequences for the nation is that of international relations. A disclosure which disrupts relations between this country and another state may result in measures by that state against British interests and resident British citizens or anti-British public reaction within that state, putting at risk the property or even the lives of British citizens. The arguments set out in the previous paragraph in relation to information provided in confidence to other governments or international organisations apply also to information relating to international relations, and the Government proposes to provide similar protection in respect of this information.

Information obtained in confidence from other Governments or international organisations

28. Somewhat similar considerations apply to information provided by other Governments or international organisations on conditions requiring it to be kept in confidence. But besides the direct consequences which the disclosure of such information may have on

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relations between this country and the state which provided the information, such disclosure has a wider disruptive effect on international diplomacy. If it appears that this country is unwilling or unable to protect information given in confidence, it will not be entrusted with such information. The Government's ability to function effectively in international diplomacy and in relation to international organisations, and consequently its ability to protect and promote this country's interests, will thereby be impaired. Furthermore, the ability and willingness of this country to protect the secrets of another state are likely to determine the willingness of that state to protect this country's secrets.

Information useful to criminals

29. It is clearly sensible that there should be an inhibition on the disclosure of official information which is likely to be useful in the commission of crime, in helping a prisoner to escape from lawful custody or to terrorists. Similarly information which, if disclosed, would obstruct the prevention or detection of an offence or the offender's arrest or prosecution also needs to be protected.

Interception

30. There is a particular sensitivity about the interception of telephone calls, mail and other forms of communication. It is an exceptional but vital instrument which is used, for the protection of society, ^{when} only when other means are not available. Successive Governments have recognised that properly controlled interception for limited purposes, such as national security or the prevention and detection of crime, is not only justified but essential in the public interest. The effectiveness of interception would be much reduced if details of the practice were readily available. But it is not only the means by which interception is practised which need to be protected. The information gathered by its use, even where it is not

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covered by one of the other categories already mentioned, ought not to be publicly available. Interception inevitably involves interference, without their knowledge, with the privacy of those whose communications are intercepted. Such interference is acceptable in the public interest only if those responsible for interception maintain the privacy of the information obtained.

Categories not covered by present proposals

31. All the categories of information mentioned above were covered by the Government's 1979 Bill, and the Government proposes that they should be covered by new legislation.

32. The Government remains of the view, which was also taken in 1979, that it is not necessary or right for criminal sanctions to apply to Cabinet documents as a class or to advice to Ministers as a class. Documents of this kind will be protected by the proposals if their subject matter merits it, but their coverage en bloc would fuel suspicions that information was being protected by the criminal law merely for fear of political embarrassment.

33. Nor is it considered necessary to protect economic information as a class. Protection will be provided by disciplinary procedures and, where necessary, by specific legislation on particular subjects.

34. The 1979 Bill would have protected information provided in confidence to Crown servants or government contractors by firms, other bodies and individuals. This reflected a recommendation of the Franks Committee. It is clearly right that when sensitive commercial or personal information is provided to the Government it should not be lightly disclosed. But the Government has concluded that it would not be right to give blanket protection to all information offered in confidence in legislation designed to protect only that information the disclosure of which would seriously harm the public interest.

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35. For the most part the Government takes the view that the civil remedies available to those providing information, and the disciplinary procedures which would penalise disclosure by a Crown servant, provide sufficient protection for private information. However, there are circumstances, particularly where information is provided under a statutory requirement, where, as the Franks Committee argued, it is in the public interest that private information is given the protection of the criminal law. There are already a number of specific offences relating to the disclosure by Crown servants of particular information provided under statutory requirements. The Government is considering whether the reform of section 2 and the consequent narrowing of the range of information protected by the criminal law would leave without a criminal safeguard any private information provided to the Government in confidence which merits such protection. A particular area for consideration, for example, is information provided to the tax authorities. Consideration will, if necessary, be given to the creation of separate specific offences of disclosure.

CIRCUMSTANCES IN WHICH DISCLOSURE WOULD BE AN OFFENCE

36. Crown servants will in the normal course of their duties properly disclose information in the categories which the Government proposes should be covered in new legislation. The same is true of Government contractors. It is obviously not intended that such disclosures should be caught by the new legislation, and references to disclosure in the following paragraphs should accordingly be read as excluding disclosures of that kind.

37. As explained in paragraphs [20-22], the Government considers that disclosure of information in the categories to be covered by new legislation should be an offence only where a certain degree of harm to the public interest is likely to result, and that the definition of

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the harm which is to be a condition of the offence need not and should not be the same in all respects for each category of information. The following paragraphs accordingly consider what test of harm, if any, should be attached to each category of information.

Security and intelligence matters

38. Under the Government's 1979 Bill the disclosure by any person of any information relating to security and intelligence would have been an offence. As explained in paragraph [11], this was a source of criticism. The Government does not now propose that new legislation should make all such disclosures an offence. It proposes instead that legislation should make a distinction between disclosures by members and former members of the security and intelligence services and disclosures by other persons; and that, in the latter case, the prosecution should have to show that the disclosure was likely to damage the operation of the security and intelligence services.

39. Because of the exceptional sensitivity of this area of information, however, there is a particular difficulty in bringing prosecutions in some cases which would be exacerbated by the need to show that the proposed test of harm had been met. In order to prove the truth of the information at present, and in order to satisfy the test of harm if the Government's proposal is adopted, evidence may need to be adduced which involves a disclosure which is as harmful as or more harmful than the disclosure which is the subject of the prosecution. Because of this danger it is not always possible to bring a prosecution at all. The Government considers that it is not in the public interest that those who wish to disclose information which damages the operation of the security or intelligence services (for example by revealing details of their operations or identifying personnel) should be able to do so with impunity, simply by reason of the sensitivity of the subject-matter.

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40. The Government proposes to meet this difficulty by providing that the prosecution should have to prove either that the disclosure was likely to damage the operation of the security or intelligence services or that the information concerned was of a class or description the disclosure of which would be likely to damage the operation of the services. This would allow the arguments before the court to be less specific. The prosecution would have to satisfy the court that a particular disclosure was of a certain class or description, and that disclosure of information of that class or description was likely to damage the operation of the services.

41. While the Government believes that this proposed test of harm is in general adequate to safeguard the interests both of the defendant and of the security and intelligence services, it considers that different arguments apply to the unauthorised disclosure of information by members or former members of those services. It takes the view that all such disclosures are harmful to the public interest and ought to be criminal. They are harmful because they carry a credibility which the disclosure of the same information by any other person does not, and because they reduce public confidence in the services' ability and willingness to carry out their essentially secret duties effectively and loyally. They ought to be criminal because those who become members of the services know that membership carries with it a special and inescapable duty of secrecy about their work. Unauthorised disclosures betray that duty and the trust placed in the members concerned, both by the State and by people who give information to the services.

42. The Government accordingly proposes that it should not be necessary for the prosecution to adduce evidence of the likely damage to the operation of the security or intelligence services when information relating to security or intelligence has been disclosed by a member or former member of one of those services.

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43. The difficulties described in paragraph [39], arising from the fact that a trial may lead to the disclosure of information more sensitive than has already been disclosed, need particularly to be overcome where the defendant is a member or former member of the security or intelligence services. It is clearly not in the public interest that a person who is entrusted with the protection of the security of the country, and who betrays that trust, should be able to escape prosecution because of the very sensitivity of the information with which he has been entrusted. Furthermore, as a general policy, Governments do not comment on assertions about security or intelligence: true statements will generally go unconfirmed, and false statements will normally go undenied. As a result, and because of the particular credibility attaching to statements about security or intelligence by members of the services concerned, the circulation of misinformation by a member of the services may, in a different way, be as harmful as his disclosure of genuine information.

44. The Government proposes to meet these problems by making it an offence for a member or former member of the security or intelligence services to make any disclosure which is either of information relating to security or intelligence or which purports to be of such information or which is intended to be taken as such.

45. These issues have been discussed in terms of the "security and intelligence services". But the arguments apply not only to actual members and former members of the services but also to those who work closely in support of or who are in frequent contact with the services, such as certain members of the armed forces who provide technical support for the services, or officials in specified posts in certain Departments who deal with the services on a regular basis as part of their normal duties. These non-members have the same sort of access to sensitive information relating to security or intelligence, and to the operation of the services, as members themselves. It seems

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right that it should similarly be an offence for any of these non-members to disclose any information relating to security or intelligence or to make any statement which purports to be a disclosure of such information.

46. However, some of these non-members occupy such sensitive posts only temporarily. The special offence should only apply in respect of information acquired in such posts. For any disclosure of information relating to security or intelligence acquired in a previous or subsequent post it should be necessary for the prosecution, as normal, to satisfy the courts that the operation of the security or intelligence services was likely to be damaged.

47. In order to give effect to these proposals, the Government proposes that there should be a power for the responsible Minister to designate individuals or groups whose duties necessarily involve extensive familiarity with the work of the security and intelligence services as having the same criminal liability as members of these services in respect of the disclosure of information relating to security or intelligence.

48. The list of persons designated would not, for obvious reasons, be made public. But the persons concerned would be notified individually; and criminal liability would attach only after the individual officer concerned had received notification of his liability.

Defence

49. As regards the disclosure of information relating to defence, the Government proposes that the prosecution should have to prove that the disclosure was likely either to prejudice the capability of the armed forces to carry out any of their defence tasks or to lead to a risk of loss of life, injury to personnel or damage to equipment or installations or to prejudice dealings between the Government and the government of another state or an international organisation.

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International relations

50. It is proposed that disclosure of information relating to international relations should be an offence if it can be shown that the disclosure would be likely to jeopardise or seriously obstruct the promotion or protection of United Kingdom interests abroad, or to prejudice dealings between the Government and the government of another state or an international organisation, or to endanger the safety of a British citizen.

Information obtained in confidence from other governments or international organisations

51. As explained in paragraph [28], the harm arising from the disclosure of information provided by other governments or international organisations on conditions requiring it to be held in confidence is not simply the disruption of relations between the Government and the other government or the organisation concerned. There is a wider damage to the standing of the United Kingdom in relation to all governments and international organisations. For that reason any unauthorised disclosure is harmful, and the Government sees no purpose in setting a test of harm which is bound to be satisfied in every instance.

Information useful to criminals

52. The category of information whose disclosure would be likely to be useful in the commission of offences or to terrorists, or in helping a prisoner to escape from custody, already carries its own test of harm within it. The prosecution need to prove that the information would be likely to be useful for one of these obviously harmful purposes. There is no need or scope for any additional test of harm in respect of this category.

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Interception

53. Finally, paragraph [30] sets out the reasons why the disclosure of information relating to the process of interception or obtained by those means is harmful. It seems to the Government that none of the information which Crown servants possess in relation to this process can be disclosed without the possibility of damaging this essential weapon against terrorism and crime and vital safeguard of national security. Similarly no information obtained by means of interception can be disclosed without assisting terrorism or crime, damaging national security or seriously breaching the privacy of private citizens. The Government does not therefore consider that a specific test of harm can be formulated or, indeed, is necessary or appropriate for this category of information.

THE LIABILITY OF THE DISCLOSER

54. The previous paragraphs have considered in what circumstances the unauthorised disclosure of certain information should be an offence. The next question is whether it should be an offence whoever makes the disclosure. As has been made clear earlier in the White Paper, the Government considers that what justifies making the unauthorised disclosure of certain information a criminal offence is the degree of harm to the public interest in which it is likely to result. Since the unauthorised disclosure of such information by, say, a newspaper may be as harmful as disclosure of the same information by a Crown servant, the Government believes that it would not be sufficient for the new legislation to apply only to disclosure by Crown servants. The objective of official secrets legislation is not to enforce Crown service discipline - that is not a matter for the criminal law - but to protect information which in the public interest should not be disclosed. Such protection would not be complete if it applied to disclosure only by certain categories of person. The Government accordingly proposes that the unauthorised disclosure by any person of information in the specified categories in circumstances where harm is likely to be caused should be an offence.

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55. However, although the justification for applying the criminal law in this area is the harm that disclosure may cause, it would not be right to make disclosure criminal except where the discloser knows or can reasonably be expected to know that the disclosure would be likely to cause harm. In applying this principle a distinction can be drawn between the liability of Crown servants and government contractors and of other people, including the media.

56. In general it is reasonable to assume that a Crown servant knows the value of the information that comes to him in the course of his duties, and that, if he discloses information likely to cause harm, he knows what he is doing. There will be circumstances, however, in which a Crown servant intends to act properly and indeed acts reasonably, but unwittingly makes a harmful disclosure. In such circumstances the Government proposes that it should be open to him to claim the defence that he could not reasonably have been expected to realise the harm likely to be caused by his disclosure. The same arguments apply equally to a government contractor who discloses information which he receives in the course of his contract.

57. For a person who is not a Crown servant or government contractor, the Government considers that the opposite presumption should be made: that, unless proved otherwise, such a person does not know that disclosure of particular information in the categories to which the Government proposes to attach a test of harm would be likely to result in that harm. The Government accordingly proposes that, in such cases, the prosecution should have to prove not only that the disclosure would be likely to result in harm but that the person who made the disclosure knew or could reasonably have been expected to know that harm would be likely to result.

A PUBLIC INTEREST DEFENCE

58. Suggestions have been made that the law should provide a general

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defence that disclosure was in the public interest. The object would be to enable the courts to consider the benefit of the unauthorised disclosure of particular information, and the motives of the person disclosing it, as well as the harm which it is likely to cause. It is suggested, in particular, that such a defence is necessary in order to enable suggestions of misconduct or malpractice to be properly investigated or brought to public attention.

59. The Government recognises that some people who make unauthorised disclosures do so for what they themselves see as altruistic reasons and without desire for personal gain. But that is equally true of some people who commit other criminal offences. The general principle which the law follows is that the criminality of what people do ought not to depend on their ultimate motives - though these may be a factor to be taken into account in sentencing - but on the nature and degree of the harm which their acts may cause.

60. In the Government's view, there are good grounds for not departing from the general model in this context; and two features of the present proposals particularly reinforce this conclusion. First, a central objective of reform is to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the proposals in this White Paper are designed to concentrate the protection of the criminal law on information which demonstrably requires its protection in the public interest. It cannot be acceptable that a person can lawfully disclose information which he knows may, for example, lead to loss of life simply because he conceives that he has a general reason of a public character for doing so.

61. So far as the criminal law relating to the protection of official information is concerned, therefore, the Government is of the mind that there should be no general public interest defence and that any argument as to the effect of disclosure on the public interest should take place within the context of the proposed damage tests where applicable.

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A DEFENCE OF PRIOR PUBLICATION

62. Under the Government's 1979 Bill it would not have been an offence to disclose without authority information in certain categories if the defendant could show that the information had been made available to the public before his disclosure. The rationale for this defence was that, if the information in these categories was publicly available, a second disclosure could not be harmful. It seems to the Government that this rationale is flawed. There are circumstances in which the disclosure of information in any of the categories which the Government proposes to cover in new legislation may be harmful even though it has previously been disclosed. Indeed, in certain circumstances a second or subsequent disclosure may be more harmful. For example, a newspaper story about a certain matter may carry little weight in the absence of firm evidence of its validity. But confirmation of that story by, say, a senior official of the relevant Government Department would be very much more damaging. In such circumstances, the Government considers that the official should still be subject to criminal sanctions. Similarly, the publication of a list of addresses of persons in public life may capture the interest of terrorist groups much more readily than the same information scattered in disparate previous publications.

63. The Government does not, therefore, propose that there should be an absolute defence of prior publication for any category of information. But in cases in which the prosecution would under the Government's proposals have to show that disclosure was likely to result in harm, the offence would not be made out if no further harm is likely to arise from a second disclosure. The prior publication of the information would be relevant evidence for the court to consider in determining whether harm was likely to result from a second disclosure, but it would not be - and, in the Government's view, should not be - conclusive.

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64. There are two categories of information the disclosure of which would not under the Government's proposals be subject to a test of harm in each case: information relating to or obtained by interception, and information obtained in confidence from other governments or international organisations. As explained in paragraphs [51] and [53], however, the Government considers that any disclosure of information in these categories is harmful, and that applies irrespective of whether the information has previously been made public in some form. If information about, for example, the practice of interception is published unlawfully, it would clearly be undesirable if the effect were that it became lawful at any time thereafter to publish the information as widely as and in whatever form the publisher chose.

OTHER OFFENCES, ENFORCEMENT AND EXTENT

Other offences

65. The central mischief at which the Government's proposals are aimed is the unauthorised disclosure of information the publication of which is harmful to the public interest. However, there are actions which conduce to this central mischief and which the Government considers should be criminal. At the lower end of the scale of seriousness, there is the Crown servant who culpably fails to take sufficient care of documents containing information the unauthorised disclosure of which would be an offence. At the upper end is the person who reveals to a person, who he knows is going to use the knowledge, how to gain access to information the unauthorised disclosure of which would be an offence. The Government proposes that both should be an offence. The Government also proposes that it should be an offence for any person who is wrongfully in possession of a document containing information whose unauthorised disclosure would be an offence to fail to return the document when given a formal

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notice requiring him to do so. It is not, however, proposed that mere receipt of such information (as in the present law) should be an offence.

Penalties

66. For the central offence of deliberate disclosure, the Government proposes that the new legislation should provide the same maximum penalty on indictment as for the present offences under section 2: two years' imprisonment or a fine or both. On summary conviction it proposes, as in its 1979 Bill, that the maximum penalty should be six months' imprisonment or a fine not exceeding £2000 or both.

67. The Government considers that the same maximum penalties should be applicable to the offence of revealing how to gain access to information the unauthorised disclosure of which would be an offence. Knowingly to facilitate the disclosure of such information is as culpable as to disclose it oneself. The other offences mentioned in paragraph [65] are less serious, and the Government proposes only summary penalties, although it considers that the power of imprisonment should be available given that, for example, the disclosure of a document which a person refuses to return might lead to loss of life.

Powers of investigation and arrest

68. It will be necessary to ensure that the police have adequate powers to investigate the new offences. It will, for example, be necessary for England and Wales to designate the central offence as an "arrestable offence" for the purposes of the Police and Criminal Evidence Act 1984.

Authority for prosecution

69. At present, under sections 8 and 12 of the Official Secrets Act

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1911, no prosecution may be brought under section 2 in England and Wales or Northern Ireland except by or with the consent of the Attorney General. The Government proposes that, under the new legislation, no prosecution should be brought in respect of information relating to security, intelligence, defence, international relations or interception or information provided by other governments or intergovernmental organisations on conditions requiring it to be held in confidence except by or with the consent of the Attorney General. Prosecutions in respect of information useful in the commission of offences or in escape from lawful custody would rest with the Crown Prosecution Service in England and Wales; in Northern Ireland they would require the consent of the Director of Public Prosecutions for Northern Ireland. In Scotland the Lord Advocate is responsible for all prosecutions.

Territorial extent

70. The Government proposes that the new legislation should apply throughout the UK and that it should be possible to extend it by Order in Council to the Channel Islands and the Isle of Man. By virtue of section 10(1) of the Official Secrets Act 1911, section 2 offences may be committed abroad by "British officers or subjects". The Government proposes to retain the spirit of this provision by giving the United Kingdom courts jurisdiction over offences under the new legislation if committed abroad by a British citizen, Crown servant or government contractor.

THE FUTURE ROLE OF THE CIVIL SERVICE DISCIPLINE CODE

71. The result of implementing the Government's proposals would be that only a very small proportion of the information in the hands of Crown servants would be protected by the criminal law. That does not mean, however, that there will be no inhibition on the disclosure of any of the information which the criminal law will no longer protect.

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The Government still has the duty to keep the private confidences of citizens and others. More generally, Ministers will continue to determine what information should be disclosed and to account to Parliament for those decisions. In practice Ministers already make a great deal of information public or authorise Crown servants to do so on their behalf.

72. The Civil Service Discipline Code already provides penalties for unauthorised disclosures which can be invoked where it is not thought right to bring a prosecution under section 2. The Discipline Code will continue to be applied against unauthorised disclosure of information.

73. Once new legislation is in place it will be necessary to amend the conduct rules for Crown servants, in particular the rules covering the disclosure of official information, in consultation with the Civil Service trade unions, to reflect the fact that the criminal law no longer protects all official information. Departmental rules and guidance will also need to be revised to ensure that it is clear to Crown servants what types of information they cannot disclose without authority without rendering themselves liable to criminal or, as the case may be, disciplinary action.

THE SECURITY CLASSIFICATION OF INFORMATION

74. As explained in paragraph [21], the Government does not intend to rely on the security classification of information as a test of harm likely to be caused by the disclosure of that information. Although the Government's 1979 Bill departed to some extent from the Franks Committee approach in this respect, it did contain provision for regulating the classification of information and documents relating to defence or international relations. Under that Bill, however, the harm arising from the disclosure of such information would have been certified by a Minister. The Government sees no need for legislative

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provisions relating to classification under the scheme it is now proposing, in which neither the classification of information nor the opinion of a Minister plays a crucial part.

75. Under the Government's proposals the question of the harm arising from disclosure will be a matter on which the prosecution have to satisfy the court. The fact that a document was classified at a certain grade is not evidence of likely harm; it is only evidence of the view of the person who awarded the classification. Moreover, it is evidence only of the view taken at the time of classification; circumstances may have changed by the date of the disclosure. The grade of classification may be relevant in a prosecution as evidence tending to show that the defendant had reason to believe that the disclosure of the information was likely to harm the public interest, but the prosecution will have to adduce separate evidence to prove that the disclosure was indeed likely to cause such harm.

76. But within the Crown service the classification of documents will, of course, continue to play an essential administrative role in the handling of information and will be relevant in disciplinary proceedings for the unauthorised disclosure of information not covered by the new legislation. The fact that classification plays no part in the Government's proposals in no way diminishes the duty on Crown servants to ensure that documents are given an accurate grading.

CONCLUSION

77. This White Paper presents a set of proposals the central objective of which is to apply the criminal law to those, and only those, who disclose a limited range of information without authority knowing or having good reason to know that to do so is likely to harm the public interest. The proposals would not apply criminal sanctions to disclosures which are not likely to harm the public interest, nor to anyone who could not reasonably have been expected to foresee the effect of his disclosure.

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78. Responsible media reporting would not be affected by the Government's proposals. They represent a restriction on freedom to publish, but any legislation in this area must limit that freedom. The law already constrains in various ways what may be published in order to avoid damage to private interests. It is right that constraints should also be imposed to prevent unacceptable damage to the public interest.

79. Under the Government's proposals it will be for the courts, and the courts alone, to decide whether the disclosure of particular information is criminal. The Government is entrusting the safeguarding of the public interest to the jury.

80. The Government believes that the proposals set out in this White Paper would result in clear and intelligible legislation which juries could apply readily and equitably. The legislation would apply to culpable acts without drawing in harmless or innocent actions. It would merit and receive the confidence of the public and of juries.

81. The Government intends to initiate debates in both Houses of Parliament on its proposals in July. It will then consider the opinions expressed in those debates, and the comments which it receives from other sources on the proposals, with a view to early legislation.



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- 12 -

17. Responsible media reporting would not be allowed by the Government's proposals. They represent a restriction on freedom of speech, not any legislation at all which would limit that freedom. The law already contains in various ways what may be considered in order to avoid damage to public interests. It is right that constraints should also be imposed to prevent unacceptable damage to the public interest.

18. Under the Government's proposals it will be for the courts, and the courts alone, to decide whether the disclosure of political information is criminal. The Government is restricting the independence of the public interest to the law.

19. The Government believes that the proposals set out in this White Paper would result in clear and intelligible legislation which would apply to all equally and equitably. The legislation would apply to all without favouring in business or financial interests. It would make and receive the confidence of the public and of business.

20. The Government intends to initiate debates in both Houses of Parliament on the proposals in July. It will then consider the opinions expressed in those debates, and the comments which it receives from other sources on the proposals, with a view to early legislation.

From: THE PRIVATE SECRETARY
CONFIDENTIAL



HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

2 June 1988

NBAH

Dear Tony,

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

Gap
The Home Secretary has asked me to thank you for your letter of 25 May conveying the Foreign and Commonwealth Secretary's comments on the draft White Paper which the Home Secretary sent to the Prime Minister on 13 May.

The Foreign and Commonwealth Secretary will see from the revised draft which we are circulating to the offices of Cabinet members today that we have adopted his suggestion that the additional protection to be given to certain information provided in confidence to other governments or intergovernmental organisations should cover information relating to international relations. The Home Secretary has asked me to write to explain why, subject of course to any further views which Sir Geoffrey may express, no amendment has been made to the draft on the other points which the Foreign Secretary raised.

The first point raised by Sir Geoffrey related to the additional test of harm for the disclosure of information relating to defence. The Home Secretary sees some difficulty in proposing a test which is obviously different from that proposed (in accordance with previous discussions) for the disclosure of information relating to international relations. While he is happy for this point to be considered further in the context of the preparation of the Bill, he would prefer in the White Paper to keep to "dealings with", which seems to him to be a wider term than "relations with" and thus to leave more room for manoeuvre. This is not a point on which a slight change of wording as between the White Paper and the Bill is likely to lead to difficulty.

The Home Secretary entirely agrees with the Foreign Secretary that there should be no defence of prior publication in relation to the "special offence". The paragraphs of the draft to which Sir Geoffrey referred are intended to explain why the Government

/considers such

A C Galsworthy, Esq

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considers such a defence unjustified for any category of information. The Home Secretary is a little reluctant to highlight the "special offence" at this point. It is not a category of information so much as a category of persons who may disclose information within a particular category, and the omission of reference to it at this point does not seem to him misleading. On the other hand a reference to the special offence at this point could divert attention from the fact that a damage test is proposed for the security and intelligence category at large.

The Home Secretary also shares the Foreign Secretary's view that the White Paper should propose that the disclosure of information received in confidence from other governments or international organisations should be an offence in all circumstances, and it is certainly not the intention of the paragraphs to which the Foreign Secretary refers (now paragraphs 54-57) to suggest the contrary. Paragraph 56, which refers to the need for the prosecution to prove that an outsider knew the likely effect of his disclosure, is intended to refer only to those categories of information to which a test of harm is to be attached. It will not be necessary for the prosecution to show any such knowledge in respect of the disclosure of information received in confidence from other governments or international organisations. It is difficult to bring this out more explicitly at this point in the White Paper without making the omission of a damage test an obvious target for attack.

Finally, there is the question of extraterritorial jurisdiction, which has also been raised by the Secretary of State for Trade and Industry. We consider that the proposed coverage of disclosure by certain foreign nationals abroad is necessary and justified. The proposals must, as a minimum, cover a government contractor of non-British nationality who obtains information in this country while carrying out a contract here and subsequently discloses it abroad, just as if he made his disclosure in the UK. But it also seems reasonable for the proposals to cover, for example, locally employed Crown servants in our embassies or government contractors who are foreign nationals and who are based and carry out their work abroad. The Home Secretary sees no rationale for making a Crown servant or government contractor specially liable for disclosing in the UK information harmful to the UK public interest but not liable at all for disclosing identical information abroad. The purpose of the Government's proposals is to protect essential UK interests and it is generally recognised that the protection of a state's interests are a proper ground for taking extraterritorial jurisdiction. The problem with some countries, in particular the United States, has been a tendency to define the interests of the state very widely and to use them as the basis for criminalising acts which have only the most tenuous connection with the country

/taking the

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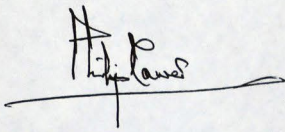
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taking the jurisdiction. The Home Secretary considers that the narrowly targeted extraterritorial jurisdiction which he proposes, and which the Government proposed also in its 1979 Bill, properly reflects the particular respect which Crown servants and government contractors, whatever their nationality, owe to the interests of the state which employs them.

Copies of this letter go to the recipients of yours.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'P J C MAWER', written over a horizontal line.

P J C MAWER

CONFIDENTIAL

Security, OSAPr2



taking the jurisdiction. The New York City considers that the
nationally targeted extrajudicial action which is
proposed, and which the Government has also in the 1970
bill, properly reflects the part which which Crown
activities and government movements. However their nationality
one to the interests of the state.

Copies of this letter go to the recipients of yours.

James Earl Ray

Alfred

P. J. C. HENRY

CONFIDENTIAL



MINISTRY OF DEFENCE

MAIN BUILDING WHITEHALL LONDON SW1A 2HB

Telephone 01-218 2111/3

MO 23/2V

21st May 1988

Dear Philip,

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

The Defence Secretary was grateful to your Secretary of State for sending him copies of his minutes of 13th and 20th May to the Prime Minister. He has no comments upon the draft White Paper but he agrees that the subsequent legislation should be extended, if possible, to encompass publication in the UK of information provided to other Governments in confidence and subsequently disclosed by them. Although in the defence field, we try to avoid situations of this kind by ensuring that the recipients of sensitive information give it the same protection as we do ourselves, there is no absolute protection against such leaks and it is a loophole we should try to close.

I am sending copies of this letter to the Private Secretaries to other members of OD(DIS) and to the Attorney General, and to Trevor Woolley.

[Signature]
(L C F. ANDRUS)
Private Secretary

Philip Mawer Esq
Home Office

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SECURITY = Official Secret A-J pt 2

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MINISTRY OF DEFENCE
101, WHITEHALL, LONDON SW1A 2JH



1/4-1/2 1984

[Handwritten signature]

SECRET

The following information is being provided to you for your information only. It is not to be used for any other purpose. It is not to be disclosed to any other person without your authority. It is not to be used for any other purpose. It is not to be disclosed to any other person without your authority. It is not to be used for any other purpose. It is not to be disclosed to any other person without your authority.

The following information is being provided to you for your information only. It is not to be used for any other purpose. It is not to be disclosed to any other person without your authority. It is not to be used for any other purpose. It is not to be disclosed to any other person without your authority.

[Handwritten signature]

[Handwritten signature]

101, WHITEHALL, LONDON SW1A 2JH



the department for Enterprise

NB

The Rt. Hon. Lord Young of Graffham
Secretary of State for Trade and Industry

The Rt Hon Douglas Hurd CBE MP
Home Secretary
Home Office
50 Queen Anne's Gate
LONDON
SW1H 9AT

Department of
Trade and Industry

1-19 Victoria Street
London SW1H 0ET

Switchboard
01-215 7877

Telex 8811074/5 DTHQ G
Fax 01-222 2629

Direct line 215 5422
Our ref PS3AUC
Your ref
Date 26 May 1988

Res Doyle, as for

Thank you for sending me a copy of your minute to the Prime Minister of 13 May and of the draft White Paper on the reform of Section 2 of the Official Secrets Act 1911.

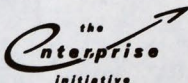
I am in general content with the proposals and their presentation, particularly in relation to information received from individuals and firms. I have just one point of detail: an ambiguity at the end of paragraph 68. We appear to be proposing to extend the jurisdiction of UK courts to non-British Crown servants and Government contractors overseas, which is presumably not the intention.

I am copying this letter to the members of OD(DIS), to the Lord Chancellor, the Lord President, the Lord Advocate, the Chief Whip, the Minister of State (Privy Council Office), the Attorney General and Sir Robin Butler.

Handwritten signature

PS/Chancellor of
Duchy
PS/Ministers
PS/Sir Brian Hayes
Mr Knighton
Mr Hosker
Mr Hilton
Mr Spivey

Mr Bailes - on file
Enclosures:
+ recipients of
Home Secretary's
minute



25. V.

10429

N BAO



CONFIDENTIAL

Foreign and Commonwealth Office

London SW1A 2AH

25 May 1988

Dear Philip,

Reform of Section 2 of the Official Secrets Act 1911

The Foreign Secretary has seen the Home Secretary's minute of 13 May to the Prime Minister, with which he enclosed a copy of a draft White Paper on the reform of Section 2 of the Official Secrets Act 1911. He believes that the draft is a good one, which sets out the difficult issues involved fairly and comprehensively. Overall he considers the package balanced and defensible.

There are one or two points of detail which he thinks may need some further thought.

On disclosure of information relating to defence matters to other governments in circumstances which would lead to difficulty in international relations, the Foreign Secretary wonders whether it would be wise to rest protection of such information solely on the same damage test as that applying to international relations. Might the matter be better dealt with by reflecting the wording in the Home Secretary's minute of 13 May in the draft White Paper? It would be more realistic for the prosecution to prove damage to our relations with another country than to have to meet the stiff challenge of proving damage to our dealings with it.

The Foreign Secretary wonders whether it would be worth amending paragraph 63 of the draft White Paper to include three, rather than two, categories of information not subject to a test of harm. There is a case for adding, as the third category, reference to the Special Offence in relation to members (and former members) of the Security and Intelligence Services. This would ensure that future Wrights would have no recourse to the defence of prior publication.

A further point relates to the paragraphs of the draft (53-56) which consider whether criminal liability should be confined to Crown Servants or extend to other recipients of protected information. If information received in confidence from other governments were leaked to, and subsequently published by, a British newspaper the resultant damage would fall directly on the country of origin rather than the United Kingdom: the damage to British interests would be equally real, only indirect. Even the Americans, with all their freedom of information policies, treat information received from other governments in confidence as a separate, and better protected, category. The Foreign Secretary therefore wonders whether it might not be better to retain the absolute nature

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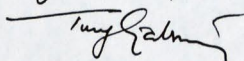
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of the offence for this category of information, even for outsiders.

The Foreign Secretary has noted that the draft (in paragraph 68) proposes the extension of the jurisdiction of United Kingdom courts to cover offences committed abroad, and potentially extends this jurisdiction to non-British nationals. This goes beyond Section 10 of the Official Secrets Act 1911 and could create practical difficulties in our relations with other countries. We have resisted comparable extension by foreign countries, in particular the United States, of their criminal jurisdiction over British subjects. The Foreign Secretary thinks it would be advisable to make it clear that we do not intend jurisdiction to extend to foreign nationals abroad.

The Foreign Secretary has also seen the Home Secretary's minute of 20 May to the Prime Minister. He sees a strong case for extending the proposed offence to include information about international relations. This would provide protection for, say, a British working paper circulated in strict confidence to other permanent members of the Security Council about joint sanctions against Iran.

I am sending copies of this letter to the Private Secretaries to the members of OD(DIS), to the Private Secretaries to the Lord Chancellor, the Lord President, the Lord Advocate, the Secretary of State for Trade and Industry, the Chief Whip, the Minister of State (Privy Council Office), the Attorney General, and to Sir Robin Butler.

Yours ever,


(A C Galsworthy)
Private Secretary

P Mawer Esq
PS/Home Secretary

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SECURITY: Official

Secrets P. 2

25.V.

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PM 88

of the officers for this category of information, even for
consideration.

The Foreign Secretary has noted that the British (in
paragraph 25) propose the extension of the jurisdiction of
United Kingdom courts to cover offences committed abroad, and
potentially extends this jurisdiction to non-British
nationals. This does not seem to be the official
policy. It is not clear whether it is at the official
level that this and could create practical difficulties in
any relations with other countries. We have received
considerable extension by foreign countries, in particular the
United States, of their criminal jurisdiction over British
subjects. The Foreign Secretary has noted that it is not
to make it clear that we do not intend jurisdiction to extend
to foreign nationals abroad.

The Foreign Secretary has also seen the Home Secretary's
minute of 10 May to the Prime Minister. He took a strong case
for extending the proposed attempt to include information
about international relations. This would provide protection
for, say, a British working paper circulated in other
countries to other permanent members of the Security Council
about joint operations against Iraq.

I am sending copies of this letter to the relevant
departments to the members of the (CIC), to the Prime
Secretary to the Lord Chancellor, the Lord President, the
Lord Advocate, the Secretary of State for Trade and Industry,
the Chief Whip, the Minister of State (Privy Council Office),
the Attorney General, and to the Home Secretary.

(A. C. [illegible])
Foreign Secretary

9 March 1984
Foreign Secretary

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Cite

PM

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

23 May 1988

Dear Philip,

REFORM OF SECTION 2 OF THE THE OFFICIAL SECRETS ACT 1911

I have sent you today the Prime Minister's comments on the draft White Paper on the reform of the Official Secrets Act which the Home Secretary circulated on 13 May. You should also be aware of the comments of the Prime Minister's Chief Press Secretary, which she has endorsed, on the substance and presentation of the draft White Paper. Mr. Ingham suggests that the media will concentrate on the following points:

- "(i) journalists will themselves be liable to criminal prosecution if their disclosure causes harm and they could reasonably be expected to know that would be the result;
- (ii) editors can be liable if they do not return documents they should not have in their possession - in other words, I assume they won't be able to get away with re-typing or destroying documents. Is that a correct assumption?
- (iii) paragraph 69 will be seen as inadequate; there will be great pressure for central definition of those areas of information where Ministers will not permit disclosure - no doubt in an effort to establish a sort of "freedom of information tariff". No doubt the Government will wish to resist clearer definition; it will need to be aware of this;
- (iv) I very much hope that the Government does not admit a defence of prior publication. Such a defence is an open invitation to the conspiracy that is so-called investigative journalism to secure publication of "offside" information in a variety of obscure ways;
- (v) overall, we should be very clear that, while the document is fair and reasonable, it will be rejected as woefully inadequate and indeed,

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[Signature]

repressive by the media and their allies. The legislation will mark out a major 1989 battleground in Parliament.

For all these reasons it will be vital, in presenting the White Paper, to prepare:

- (a) a clear and concise argument in favour of the proposed solutions - a paragraph which we would like to see reproduced in all journals;
- (b) a Q&A brief which particularly deals with media questions about the consequences for eg Peter Wrights, editors and journalists under the projected new legislation."

I am sending a copy of this letter to Sir Robin Butler.

Yours truly
Nigel Wicks

N. L. WICKS

Philip Mawer, Esq.,
Home Office.

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file PN

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

23 May 1988

Dear Philip,

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

The Prime Minister has seen the Home Secretary's minute of 13 May attaching a draft White Paper on the reform of Section 2 of the Official Secrets Act 1911.

The Prime Minister is content with the draft subject to the following particular points referred to below. She sees no need for an early meeting of OD(DIS). She suggests that before circulating the draft to Cabinet the Home Secretary may wish at the meeting on 26 May to warn his colleagues that he will be doing so and to outline how OD(DIS) has approached the matter. She understands that the draft will need to be agreed not later than 10 June if the White Paper is to be published in June as promised. Any discussion of the draft in Cabinet would therefore need to take place on 9 June. But, subject to the views of other members of the Cabinet after the draft is circulated, that too should probably not be necessary.

Since the House of Lords' judgment on "Spycatcher" will not have been received when the White Paper is published and we cannot rule out the possibility that the Government may wish to include in the Official Secrets Bill legislation to amend the civil law following that judgment, it would be a wise precaution to add a sentence at the end of paragraph 5 of the White Paper as follows:

"Nor does it deal with matters affecting the Civil law which may have to be considered in the light of the outcome of current litigation about the "Spycatcher" book."

The Prime Minister's particular points on the draft White Paper are:

Paragraph 2: the sentence at the bottom of page 1 "But the information may be the same and the actual damage likely to result may be the same...." needs clarifying. What follows does not really explain that assertion.

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Paragraphs 14 and 20: those paragraphs, and particularly paragraph 20, seem to advise "potential offenders" ways in which they can avoid committing an offence. Those paragraphs need re-wording to avoid the notion, which the media could well pick up and exploit, that the Government is explaining how to make disclosures in a way which can avoid conviction.

Finally, the Prime Minister has considered the Home Secretary's minute of 20 May recommending that the Government's proposals on the Official Secrets Act should be amended so as to restrain the publication in the United Kingdom of certain information provided in confidence by HMG to other Governments or inter-governmental organisations abroad. Subject to the views of colleagues she is content to proceed as proposed.

I am sending copies of this letter to the Private Secretaries to the members of OD(DIS), to the Private Secretaries to the Lord Chancellor, the Lord President, the Lord Advocate, the Secretary of State for Trade and Industry, the Chief Whip, the Minister of State (Privy Council Office) the Attorney General, and to Sir Robin Butler.

N. L. Wicks

N. L. WICKS

Philip Mawer, Esq.,
Home Office.

PRIME MINISTER

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

There is one additional issue which has recently arisen which is not mentioned in my minute to you of 13 May or in the draft White Paper which it covered. This is the question of information provided in confidence to other Governments or inter-Governmental organisations.

2. As you know, there is reason to believe that the "Independent" has obtained a Trevi document containing sensitive United Kingdom security and intelligence information which we had provided. Section 2 is concerned with the leaking of Government information. Disclosure of such information, other than by a Crown servant or Government contractor, is an offence under section 2 only if the information has reached the discloser through some contravention of the Official Secrets Acts. If, as we suspect, the Trevi document was leaked abroad by an official of another Government, no offence was committed and consequently it would not be an offence for the "Independent" to publish the document. In the absence of evidence of an offence, police powers of entry, search and seizure could not come into play.

3. Our proposals would retain the present essential connection with Government information. Our 1979 Bill would have gone further in relation to security and intelligence information but this was a highly controversial proposal which we have not considered it desirable or feasible to revive. Any proposals which did not in some way preserve

Rice Minute
Agree to proposal in
para 6, subject to
the views of colleagues?

Yes

CD
in Ambrose
1975. 20/5

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the link with information originally held by a Crown servant or Government contractor would be similarly controversial and could prove difficult to secure.

4. On the other hand I do not think it would be satisfactory to rely simply on the civil law. Although the courts might be prepared to grant an injunction against publication of Government information originally provided to another Government or inter-Governmental organisation, they would be unlikely to order the return of any document involved.

5. It could be argued that, if we cannot trust other Governments or inter-Governmental organisations to keep our secrets, we should not entrust such information to them. Certainly we must ensure that adequate protection is offered to our information but, of course, there is no absolute protection against leaks. International co-operation has become an essential means of ensuring our national defence as well as tackling matters such as terrorism which respect no frontiers. Such co-operation can be effective only if information, and this inevitably includes sensitive information, is shared.

6. My preference, therefore, is to amend our proposals so as to restrain the publication in the United Kingdom (or by a British citizen abroad) of certain information provided in confidence by the United Kingdom Government to other Governments or inter-Governmental organisations abroad. What I propose is that it should be an offence to disclose, subject to the relevant damage test, information relating to security or intelligence or to defence which the defendant knew or had reasonable cause to believe had been provided by the Government of the United Kingdom to another Government or inter-Governmental organisation on terms requiring it to be held in confidence. It would be a defence to show that the information had officially been made public or the disclosure had been authorised by the Government or the organisation concerned.

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7. This seems to me to represent the minimum departure from the basis of the present law and of our proposals. I have restricted the proposal to information relating to security, intelligence or defence because I do not think that the same problems arise in respect of the other categories of information.

8. I am copying this minute to the members of OD(DIS), the Attorney General and to Sir Robin Butler, and would be glad to receive the views of colleagues. My proposal would require some amendment to the White Paper, although if the matter has not been resolved before it goes to the printers, I think it would be sufficient for the White Paper simply to mention that it is under consideration.

Dy 1, Hurd.

20 May 1988

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Covering SECRET

PRIME MINISTER

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT

Papers below on the draft of the White Paper on the reform of
Section 2 of the Official Secrets Act, comprise:

Flag A: Cabinet Office comments
Flag B: Bernard Ingham's comments
Flag C: The Home Office draft of the White Paper
Flag D: The Home Secretary's covering minute

If you agree that it is not necessary to hold a meeting of
OD(DIS) to discuss the White Paper, I will, if you are
content, write to the Home Office in the terms of the draft
letter attached to Robin Butler's minute. I will also pass on
Bernard's comments.

Content to proceed in this way?

Yes - provided - Bernard's comments

Will need to be met and we

shall need to see the proposed

amendments. [N.B. I thought

we had decided

(see Home Sec's minute)

that there should

not be a defence

of prior publication]

N.L.W.

N. L. WICKS

19 May 1988

SLHAWL

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MT

SECRET

Ref. A088/1536

MR WICKS

c Mr Weston

Reform of Section 2 of the Official Secrets Act 1911

I agree with Mr Weston's advice below that, provided the Prime Minister and others are content with the draft White Paper attached to the Home Secretary's minute of 13 May, it should not be necessary to hold a meeting of OD(DIS).

2. On the two points raised by Mr Weston, it is important to ensure that the protection given in the Official Secrets Bill relating to interception is broad enough to cover information relating to warrants in the Security Service Bill. It should be possible to ensure this since, following the Prime Minister's meeting on Monday, it is envisaged that the Security Service Bill will precede the Official Secrets Bill; and we do not recommend any amendment to the White Paper to cover the point at this stage.

3. On the coverage of the White Paper, I agree with Mr Weston that it is important to keep open the possibility that the Official Secrets Bill should also include legislation to amend the law of confidentiality covering the Spycatcher case. To guard against the possibility that the omission of any reference to this in the White Paper could subsequently lead people to accuse the Government of issuing a false prospectus, it might be worth adding a sentence at the end of paragraph 5 of the draft White Paper as follows:

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"Nor does it deal with matters affecting the civil law which may have to be considered in the light of the outcome of current litigation about the "Spycatcher" book."

4. I have amended the draft letter to Mr Mawer to include this point.

R.R.B.

ROBIN BUTLER

18 May 1988

CONFIDENTIAL

Draft letter from Mr Wicks to Mr Mawer

Reform of Section 2 of the Official Secrets Act 1911

The Prime Minister has seen the Home Secretary's minute of 13 May attaching a draft White Paper on the reform of Section 2 of the Official Secrets Act 1911.

2. The Prime Minister is content with the draft. She sees no need for an early meeting of OD(DIS). She suggests that before circulating the draft to the Cabinet the Home Secretary may wish at the meeting on 26 May to warn his colleagues that he will be doing so and to outline how OD(DIS) has approached the matter. She understands that the draft will need to be agreed not later than 10 June if the White Paper is to be published in June as promised. Any discussion of the draft in Cabinet would therefore need to take place on 9 June. But, subject to the views of other members of the Cabinet after the draft is circulated, that too should probably not be necessary.

3. I am sending copies of this letter to the Private Secretaries to the members of OD(DIS), to the Private Secretaries to the Lord Chancellor, the Lord President, the Lord Advocate, the Secretary of State for Trade and Industry, the Chief Whip, the Minister of State (Privy Council Office) and the Attorney General, and to Sir Robin Butler.

3. Since the House of Lords' judgement on Spycatcher will not have been received when the White Paper is published and we cannot rule out the possibility that the Government may wish to include in the official secrets Bill legislation to amend the civil law following the judgement, it CONFIDENTIAL would be a wise precaution to add a sentence at the end of para. 5 of the White Paper as follows: "Nor does it deal with matters affecting the civil law which may have to be considered in the light of the outcome of current litigation about the 'Spycatcher' book."

4. *Private*

SECURITY: relevant & critical
Secret act pt 2.

B.0122

MR WOOLLEY
MR WICKS

SECRET

CABINET OFFICE	
A	5137
17 MAY 1988	
FILING INSTRUCTIONS	
FILE No.	

Reform of Section 2 of the Official Secrets Act 1911

The Home Secretary minuted to the Prime Minister on 13 May attaching the draft of a White Paper on reform of Section 2 of the Official Secrets Act 1911. He invited colleagues to send him any suggestions for amendment, but added that subject to the Prime Minister's views it might also be helpful to discuss the draft at an early meeting of OD(DIS).

2. The Home Office have confirmed that the Home Secretary does not himself see any particular reason for OD(DIS) to meet. He raised the point on the basis that it might be easier to avoid discussion of the draft in Cabinet if it had already been discussed at a meeting of OD(DIS) and other Ministers closely concerned. He accepts that he would need in any event to circulate the draft to Cabinet; and, shortly before doing so, he would wish to raise the matter under Home Affairs and outline the approach taken by OD(DIS).

3. If the White Paper is to be published in June as promised, it will need to be approved by 10 June (preferably earlier). This argues for a brief statement by the Home Secretary at Cabinet on 26 May, and circulation of the draft as soon as possible thereafter. There would then still be time for Cabinet discussion, if necessary, on 9 June.

4. An early meeting of OD(DIS) cannot ensure that no member of the Cabinet will ask to have the draft White Paper put on the Cabinet Agenda. The immediate question is whether OD(DIS) can for their part agree the draft without a meeting. Quite apart from the likely difficulty of arranging a meeting at such short notice (it would need to take place by early next week), I believe that clearance out of Committee should be possible.

SECRET

5. As the Home Secretary explains, the draft is closely in line with the proposals agreed in OD(DIS) last year, and has been thoroughly examined by officials. On minor points it largely follows the line taken in 1979. There are two new points on which the Home Secretary now seeks his colleagues' agreement:

i. Disclosure of information relating to defence matters to other governments in circumstances which would lead to difficulty in international relations. The damage test for disclosure of defence information (paragraph 48 of the draft) has been broadened to cover e.g. the hypothetical case of a leak of information on how to make a nuclear weapon to a friendly government (e.g. Pakistan) where there was no direct threat against the United Kingdom.

ii. No explicit prior publication defence. This is potentially more controversial, particularly since the 1979 Bill would have afforded such a defence in respect of information likely to be useful in the commission of crime and in respect of information received in confidence from other governments etc. Paragraph 61 of the draft reflects the arguments of officials in the NIO and the FCO that there should be no such provision in the new Bill.

6. We have discussed with Home Office officials whether the separate legislation envisaged for the Security Service has any bearing on the proposals in the White Paper, and in particular whether the absolute protection proposed for information relating to interception is broad enough to cover all information relating to warrants. It is not. But this point cannot yet be addressed even in (widely copied) Ministerial correspondence, let alone in the White Paper itself. If Security Service legislation goes ahead, it would certainly be desirable in principle for all information relating to warrants to be treated on the lines proposed for information relating to interception in paragraphs 28 and 52 of the draft. If necessary, a suitable amendment could be tabled during the passage of the Bill.

Not likely
to be
necessary,
since it is

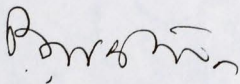
now envisaged that

the Security Service Bill
would precede the Official
Security Bill.

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7. There is one further point which Ministers may decide to include in the Bill, but on which the Government would not wish to announce its intentions until after the judgment of the House of Lords on Wright (unlikely before mid-July). Following the OD(DIS) meeting on 14 March, officials have been examining possible changes to the civil law to make it easier for the Crown to restrain the disclosure of security and intelligence information from "insiders". Their preliminary conclusion, to be incorporated in a paper to be discussed by OD(DIS) after Cabinet on 16 June, is that any legislation should make statutory the duty of confidence of members and former members of the security and intelligence services, and of other public servants to be covered under the proposed "special offence", and should also impose a duty on outsiders, such as the media, not to disclose information obtained in breach of the primary duty. Officials are likely to recommend that, subject to obvious political and Parliamentary handling considerations, such legislation should preferably be included in the Bill to reform Section 2. This will not be welcome to the Home Secretary. But his officials are aware of the possibility, and recognise that the absence of any mention of it in the White Paper would not preclude its addition to the Bill, particularly if a decision on the matter was announced before the Bill was introduced.

8. I do not think that any of the above points warrants a meeting of OD(DIS). I recommend a Private Secretary letter to the Home office on the lines of the attached draft.



P J Weston

17 May 1988

MR WICKS

REFORM OF OFFICIAL SECRETS ACT

The measures proposed in the projected White Paper seem to me to be a neat, justifiable solution to an intractable problem and to be generally well argued.

I am equally under no illusion that it will satisfy the critics of the Official Secrets Act who are generally less concerned to reform the Act than to establish a "Freedom of Information" regime.

The Government will need to be firm and resolute in (a) introducing the White Paper and legislation; and (b) enacting the Bill.

On points of presentation I have the following comments:

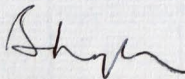
- Para 2: I think we need to clarify the sentence at the bottom of page 1 "But the information may be the same and the actual damage likely to result may be the same ...". What follows does not really explain that assertion to me, even taking account of the "purpose" of disclosure.
- Paras 14 & 20: The idea that "potential offenders" should know "how to avoid committing an offence" is deeply offensive to me; this needs rewording to avoid the notion, which the media will pick up and run with, that the Government wants it to be clear to potential traitors how they can avoid conviction as such.
- Para 34: I think it is unsatisfactory, after all the consideration already, that the Government is still considering whether to create offences of disclosure. This I think unnecessarily weakens the Government's approach.

On points of substance the media will be particularly interested in the facts;

- i) journalists will themselves be liable to criminal prosecution if their disclosure causes harm and they could reasonably be expected to know that would be the result
- ii) editors can be liable if they do not return documents they should not have in their possession - in other words, I assume they won't be able to get-away with re-typing or destroying documents. Is that a correct assumption?
- iii) para 69 will be seen as inadequate; there will be great pressure for central definition of those areas of information where Ministers will not permit disclosure - no doubt in an effort to establish a sort of "freedom of information tariff". No doubt the Government will wish to resist clearer definition; it will need to be aware of this.
- iv) I very much hope that the Government does not admit a defence of prior publication. Such a defence is an open invitation to the conspiracy that is so-called investigative journalism to secure publication of "offside" information in a variety of obscure ways.
- v) overall, we should be very clear that, while the document is fair and reasonable, it will be rejected as woefully inadequate and indeed, repressive by the media and their allies. The legislation will mark out a major 1989 battleground in Parliament.

For all these reasons it will be vital, in presenting the White Paper, to prepare:

- a) a clear and concise argument in favour of the proposed solutions - a paragraph which we would like to see reproduced in all journals;
- b) A Q&A brief which particularly deals with media questions about the consequences for eg Peter Wright's editors and journalists under the projected new legislation.



BERNARD INGHAM

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cc B/E
P/C.

2



Prime Minister

PRIME MINISTER

REFORM OF SECTION 2 OF THE
OFFICIAL SECRETS ACT 1911

Advice is being prepared on this; and an OD(PIS) discussion will be necessary. But you may want to have a preliminary read this week.

I attach the draft of a White Paper on the reform of section 2 of the Official Secrets Act 1911. You will recall that we are committed to publish this in June.

N.L.U.
13.5

Minister attached

2. The draft embodies the proposals which we agreed in OD(DIS) on 5 November last year as to the shape of future legislation. We did not consider some of the lesser issues, such as the need for other offences related to the central disclosure offence, but on all these points, subject to what follows, the White Paper follows our proposals in 1979.

3. An earlier draft of the White Paper was circulated at official level to interested Departments and the present version reflects views then expressed as well as incorporating my own revisions.

4. The consultations at official level have turned up two matters which have not previously been considered by Ministers but on which decisions are needed for the White Paper and for

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the Bill. The first point, which was raised by Sir Robin Butler, concerns the disclosure of information relating to defence matters to other governments in circumstances which would lead to difficulty in international relations. The proposals as we have so far agreed them would not cover disclosure to a friendly government which would itself use the information on a confidential basis because the weapons, for example, would not be likely to be used against the United Kingdom. Nevertheless, I agree with Sir Robin that an unauthorised disclosure of this kind should, where the circumstances warrant it, constitute an offence. I therefore propose that an offence should be committed if information is disclosed relating to defence, as for information relating to international relations, and disclosure is likely to prejudice relations between the United Kingdom and another state or states (for example, because it breaches a treaty obligation). This proposal is now contained in the draft White Paper. I have considered the alternative possibility of prohibiting absolutely the unauthorised disclosure of any information relating to defence to another state, but this would take us back to dealing with trivia and I do not think it is justifiable to put all defence information in such a special position.

5. The second new question which has arisen is whether we should offer, or should reject, any defences on the ground that the information has already been published. The 1979

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Bill would have afforded such a defence in respect of information likely to be useful in the commission of crime and in respect of information received in confidence from other governments etc., and our general aim has been not to come forward with proposals which are manifestly stiffer than in 1979. Richard Shepherd and his friends have already made clear the significance which they attach to a defence of prior publication in respect of all categories of information. Officials, however, have questioned the wisdom even of the concessions offered in 1979, and on examining the matter I have sympathy with their reservations. The draft White Paper is therefore on the basis that there is no scope for a prior publication defence, although we should have no doubt about the battles ahead in Parliament, and the attacks from the media, on this point.

6. I am copying this minute and the draft White Paper to the members of OD(DIS), to the Lord Chancellor, the Lord President, the Lord Advocate, the Secretary of State for Trade and Industry, the Chief Whip, the Minister of State (Privy Council Office), the Attorney General and Sir Robin Butler. I should be glad to receive any suggestions for amendment which colleagues might care to sent me. Subject to your views, however, it may also be helpful to discuss the White Paper at an early meeting of OD(DIS).

Douglas Hurd

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13 May 1988

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DRAFT (10 MAY 1988)

REFORM OF SECTION 2 OF THE
OFFICIAL SECRETS ACT

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INTRODUCTION

1. Section 2 of the Official Secrets Act 1911 has long been regarded as unsatisfactory and in need of reform. Early last year the Government decided to set in hand work which would allow it to determine whether it should make a further attempt to narrow and clarify the law on the protection of official information. The work began in April 1987, and by the end of the year had reached ~~the~~ the stage where the Government concluded that it would in due course be right to put proposals for reform to Parliament. The Home Secretary accordingly announced in reply to a Parliamentary Question on 15 December 1987 that, when the work was brought to a conclusion later in the same Session, he would lay before Parliament a White Paper setting out the Government's proposals for the reform of section 2, with a view to early legislation. In the course of the debate on 15 January this year on the Second Reading of the Protection of Official Information Bill introduced by Mr Richard Shepherd MP, the Home Secretary said that he hoped to publish the White Paper in June. This is the promised White Paper.

2. The following chapters set out the Government's proposals for the reform of section 2 of the 1911 Act. The Government proposes no amendment to section 1, which deals with various espionage activities carried out "for any purpose prejudicial to the safety or interests of the State". There is no widespread dissatisfaction with section 1. On the contrary, it is sometimes suggested that the protection which section 1 provides for official information is fully adequate and that section 2 is simply unnecessary. This, however, is a misconception. Section 1 deals with disclosure which has the specific purpose of prejudicing the safety or interests of the state. The relative gravity of such conduct is reflected in the higher maximum penalty for an offence under section 1 than for an offence under section 2, which deals with disclosure for other purposes. But the information may be the same, and the actual damage likely to result may be the same, whether the disclosure is caught by section 1 or by section 2. Without section 2 there would be insufficient protection for

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information the disclosure of which, for example, would undermine national security, help terrorists, impair the ability of the armed forces to defend the country or damage relations with other states, leading to commercial loss or even endangering the lives of British citizens abroad. The Franks Committee (see paragraph [0] considered carefully whether section 2 could simply be repealed. It concluded that:

"whether one takes a broad or narrow view of the kinds of official information requiring the protection of the criminal law, section 1 does not provide full protection. Effective protection requires that the law should cover leakage of information, as well as espionage."

The Committee accordingly recommended that section 2 should be replaced, not repealed.

3. The Government accepts the view that protection must continue to be given to certain information which section 1 does not fully protect. It believes that it is right to use the criminal law to prohibit disclosure of such information, even though the discloser has no purpose prejudicial to the safety or interests of the state, because of the degree of harm to the public interest which may result.

4. However, section 2 in its present form undoubtedly goes too wide. The object of the Government's proposals is to attain a better definition of when, assuming that section 1 of the 1911 Act does not apply, the disclosure of official information should be a criminal offence.

5. This White Paper is principally concerned with information which would, under the Government's proposals, be protected by the criminal law. It does not, therefore, address such matters as the question of public access to official information not covered by the Government's proposals. That is a separate issue which does not arise directly out of the reform of section 2.

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THE NEED FOR REFORM

Scope of section 2

6. Section 2 is a complex provision which creates a number of closely linked offences. It applies to information originally obtained by a person holding office under the Crown by virtue of that office or by a government contractor or his staff by virtue of his contract. It applies not only to information which is held by Ministers, Crown servants and government contractors but also to information originally obtained by them which is then entrusted to another person in confidence; or, of course, to information which is simply obtained by another person in contravention of the Official Secrets Acts. It is an offence for any person to communicate such information except to someone to whom he is authorised to communicate it or to whom it is his duty in the interest of the state to communicate it. Thus, if a Crown servant hands a document to an unauthorised person, it is an offence and, if that person, knowing that the Crown servant had contravened section 2 in giving it to him, passes it on to another unauthorised person, that is also an offence.

7. In addition, section 2 provides that it is an offence to use the information for the benefit of any foreign power or in any other manner prejudicial to the safety or interests of the state; to retain documents which the holder has no right to retain or to fail to comply with a direction from a lawful authority to return them; to fail to take reasonable care of or to endanger the safety of documents; to communicate information relating to "munitions of war" directly or indirectly to a foreign power or in any other manner prejudicial to the safety or interests of the state; or to receive any information knowing or having reasonable cause to believe that it is communicated in contravention of the Official Secrets Acts.

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Defects

8. The drafting of section 2 is archaic and, in places, obscure. But the central objection is to its scope. It penalises the disclosure of any information obtained by a person holding office under the Crown or a Government contractor in the course of his duties, however trivial the information and irrespective of the harm likely to arise from its disclosure. The "catch-all" nature of section 2 has long been criticised. Although in practice prosecutions are not brought for the harmless disclosure of minor information, it is objectionable in principle that the criminal law should extend to such disclosure. The excessive scope of section 2 has also led to its public reputation as an oppressive instrument for the suppression of harmless and legitimate discussion. Because section 2 goes so much wider than what is necessary to safeguard the public interest, its necessary role in inhibiting harmful disclosures is obscured.

Previous attempts at reform

9. Along with the disadvantages of section 2, the need for an effective and enforceable alternative which would command general support has also long been recognised. The first major initiative to devise such an alternative was the Departmental Committee, under Lord Franks of Headington, established in 1971 by the previous Conservative Government to review the operation of section 2 and make recommendations. The Committee reported in 1972. It recommended the replacement of section 2 by a new statute which would cover only official information in specified categories. It would have been an offence to disclose without authority any information in certain categories; but for information in other categories, unauthorised disclosure would have been an offence only if it was likely to cause serious injury to the interests of the nation. The Committee's recommendations depended heavily on the security classification of information. In particular, arrangements were proposed whereby a

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Minister would have certified before any prosecution that the information concerned was correctly classified at a level which meant that it was considered that the disclosure would cause at least serious injury to the interests of the nation. His certificate would have been conclusive evidence in any legal proceedings.

10. A White Paper published in July 1978 by the Labour Government, "Reform of Section 2 of the Official Secrets Act 1911" (Cmnd 7285), set out proposals for legislation which closely followed the Franks Committee recommendations, although not all of the categories of information recommended by the Franks report would have been covered. Among the recommendations of the Franks Committee which these proposals retained were the dependence on the classification of information and the role of the Minister in certifying conclusively that the information was properly classified at a level which meant that its disclosure was considered likely to cause serious injury to the interests of the nation.

11. When the new Government took office in 1979, it prepared a Bill to amend section 2. This closely followed the Labour Government's proposals. But it would have further reduced the number of categories of information protected by the criminal law, and it abandoned the dependence on the classification of information. The role of the Minister before prosecution was retained, but he would have been certifying directly that the disclosure of certain information would be likely to cause serious injury to the interests of the nation (or endanger the safety of a United Kingdom citizen). Despite following so closely the Franks Report and the Labour Government's White Paper, the Bill was widely criticised when it was introduced in the House of Lords in October 1979. The major specific areas of criticism were, first, the provision for conclusive Ministerial certificates and, second, the fact that the Bill would have made it an offence for anyone to disclose any information held by the Government relating to security or intelligence. Although the Bill received a Second Reading, it was clear to the Government that there was little chance of its commanding general acceptance, and it was withdrawn.

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12. Besides these Government initiatives to reform section 2 there have been a number of Private Members' Bills over the last 20 years which have proposed various reforms of the provision.

The way forward

13. As this history indicates, section 2 as it stands has few, if any, defenders, and successive Governments have agreed that it should be reformed. But it has been difficult to find agreement on the precise nature of the reform. The recommendations of the Franks Committee have naturally dominated discussion of this issue since they were published in 1972, and have remained a necessary and valuable reference point for the Government's present consideration of the reform of section 2. But the Government has tried to look afresh at the issues, taking into account the criticisms of its 1979 Bill and the development of Parliamentary and public thinking in recent years. It believes that the proposals which follow would allow the creation of new legislation to replace section 2 which would be easily comprehensible, readily applicable by the courts and widely accepted as useful and necessary.

OBJECTIVES AND PRINCIPLES OF THE GOVERNMENT'S PROPOSALS

14. The central concern of any reform of section 2 is to determine in what circumstances the unauthorised disclosure of official information should be criminal. For this purpose it is not sufficient that the disclosure is undesirable, a betrayal of trust or an embarrassment to the Government. So far as Crown servants are concerned there is a range of circumstances in which the disclosure of information properly constitutes a disciplinary offence, but the intervention of the criminal law is not justified (paragraphs [69-71] discuss this further). There may also be circumstances in which it is right for the Government to seek to enforce its rights on behalf of the public

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under the civil law of confidence, notwithstanding that no prosecution for a criminal offence is possible. As explained in paragraph 3, what justifies the application of the criminal law, where disclosure is not caught by section 1 of the 1911 Act, is the degree of harm to the public interest which may result. The objective of the Government's proposals is to narrow the scope of the present law so that the limited range of circumstances in which the unauthorised disclosure of official information needs to be criminal are clearly defined. This will enable potential offenders to know how to avoid committing an offence, and the courts to enforce the law without any undue burden of proof being placed either on the defence or on the prosecution.

Ministerial certificates

15. In the Government's 1979 Bill it was an offence to disclose information relating to defence or international relations the unauthorised disclosure of which would be likely to cause serious injury to the interests of the nation or endanger the safety of a United Kingdom citizen. As explained in paragraph [10], the question whether the disclosure of particular information was likely to have these effects was, under the Bill, to be determined by a certificate from the relevant Minister which could not have been challenged by the defendant in the subsequent legal proceedings for the offence of disclosure. As also explained in paragraph [10], this procedure descended directly from a recommendation in the report of the Franks Committee which was intended simply to constitute a check on the correctness of classification. The rationale for leaving to a Minister the judgement of the potential effect of the disclosure of certain information on the interests of the nation is obvious. Because of his responsibilities within the Government for the area to which the information concerned relates, the Minister is uniquely qualified to make a judgement on the damage to the public interest likely to arise from its disclosure.

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16. This proposed arrangement was, however, criticised as placing too much power in the hands of Ministers. It was argued that, since the defendant would not be able to challenge the Minister's certificate, an essential element of the offence would not be considered by the courts but would be decided by the Minister alone. There would be no restraint on a Minister issuing a certificate, even if circumstances did not objectively justify it. The Minister would not be seen as disinterested and there would always be the suspicion of political bias.

17. The Government recognises the force of these arguments. Various arrangements have been proposed since 1979 whereby the power to certify would be shared between the Minister and some other person or body or would pass to another person or body. But no other body or individual shares the Minister's responsibility for safeguarding the interests of the nation and none is therefore as well or better placed to make or review the necessary judgement.

18. The Government accepts the arguments against the procedure previously proposed for conclusive Ministerial certificates as to the likelihood of serious damage to the interests of the nation. It believes that if the issue is not to be decided by a Minister it must, like all other issues relating to the reformed offence, be left to the courts. The Government accordingly proposes that, where it is necessary for the courts to consider the harm likely to arise from the disclosure of particular information, the prosecution should be required to adduce evidence as to that harm and the defence should be free to produce its own evidence in rebuttal. The burden of proof would be on the prosecution, in the normal way. There would be no Ministerial certificates.

19. The Government is proposing (see paragraph [64]) that the central offence of disclosure should in England and Wales be triable either in the magistrates' courts or in the Crown Court. The effect would be to

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give the opportunity to any person accused of disclosing information in contravention of the new legislation to put his case before a jury. (In Scotland, in accordance with normal procedure, it is for the Crown to decide whether the offence is serious enough to be prosecuted on indictment and therefore before a jury).

Tests of harm to the public interest

20. As mentioned in paragraph [15], the test proposed in the 1979 Bill, following Franks, was

"likely to cause serious injury to the interests of the nation or endanger the safety of a citizen of the United Kingdom and Colonies."

The first part of this formulation embodies a very general concept. While this was practicable in conjunction with the procedure for Ministerial certificates, it would be unreasonable to expect the courts to apply such a broad test. Moreover, the potential offender himself would derive little guidance from this general test of harm in his attempts to avoid committing an offence. While it is acceptable to speak in general terms of the need to protect information where disclosure would harm the public interest, a more specific definition is required in any new legislation if the prosecution and defence are to be able to make judgements as to the harm likely to arise from disclosure of particular information.

21. The Government has considered whether to return to the system proposed by the Franks Committee whereby the classification of information is the essential determinant of the offence. But this approach was abandoned in 1979 and the Government has concluded that it should not be readopted. The arguments are set out in paragraphs [72-74].

22. The Government considers that so far as possible any test of harm

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should be concrete and specific if it is to be applied by the courts. At this practical level, the harm likely to arise from the disclosure of different kinds of information is not the same in all respects in each case. The Government therefore proposes separate tests of likely harm for the different categories of information to be covered by future legislation.

23. The following paragraphs discuss, first, which categories of information should be covered by a new Bill, and second, what, if any, tests of likely harm to the public interest should be applied to each.

CATEGORIES OF INFORMATION TO BE COVERED BY NEW LEGISLATION

24. In any new legislation to replace section 2, it is necessary to identify those areas in which the disclosure of at least some information may be sufficiently harmful to the public interest to justify the application of criminal sanctions. The number of such areas is in fact small. For the most part, even if disclosure may obstruct sensible and equitable administration, cause local damage to individuals or groups or result in political embarrassment, it does not impinge on any wider public interest to a degree which would justify applying criminal sanctions.

Defence, security and intelligence

25. The most obvious areas in which the public interest needs to be protected are those where the protection of the nation from attack from outside or from within is involved. Clearly new legislation must protect information relating to defence (including civil preparedness) and information relating to security and intelligence.

International relations

26. Another area where the disclosure of certain information may lead

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to serious consequences for the nation is that of international relations. A disclosure which disrupts relations between this country and another state may result in measures by that state against British interests and resident British citizens or anti-British public reaction within that state, putting at risk the property or even the lives of British citizens.

Information obtained in confidence from other Governments or international organisations

27. Somewhat similar considerations apply to information provided by other Governments or international organisations on conditions requiring it to be kept in confidence. But besides the direct consequences which the disclosure of such information may have on relations between this country and the state which provided the information, such disclosure has a wider disruptive effect on international diplomacy. If it appears that this country is unwilling or unable to protect information given in confidence, it will not be entrusted with such information. The Government's ability to function effectively in international diplomacy and in relation to international organisations, and consequently its ability to protect and promote this country's interests, will thereby be impaired.

Information useful to criminals

28. It is clearly sensible that there should be an inhibition on the disclosure of information which is likely to be useful in the commission of crime, in helping a prisoner to escape from lawful custody or to terrorists. Similarly information which, if disclosed, would obstruct the prevention or detection of an offence or the offender's arrest or prosecution also needs to be protected.

Interception

29. There is a particular sensitivity about the interception of

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telephone calls, mail and other forms of communication. It is an exceptional but vital instrument which is used, for the protection of society, only when other means are not available. Successive Governments have recognised that properly controlled interception for limited purposes, such as national security or the prevention and detection of crime, is not only justified but essential in the public interest. The effectiveness of interception would be much reduced if details of the practice were readily available. But it is not only the means by which interception is practised which need to be protected. The information gathered by its use, even where it is not covered by one of the other categories already mentioned, ought not to be publicly available. Interception inevitably involves interference, without their knowledge, with the privacy of those whose communications are intercepted. Such interference is acceptable in the public interest only if those responsible for interception maintain the privacy of the information obtained.

Categories not covered by present proposals

30. All the categories of information mentioned above were covered by the Government's 1979 Bill, and the Government proposes that they should be covered by new legislation.

31. The Government remains of the view, which was also taken in 1979, that it is not necessary or right for criminal sanctions to apply to Cabinet documents as a class or to advice to Ministers as a class. Documents of this kind will be protected by the proposals if their subject matter merits it, but their coverage en bloc would fuel suspicions that information was being protected by the criminal law merely for fear of political embarrassment.

32. Nor is it considered necessary to protect economic information as a class.

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33. The 1979 Bill would have protected information provided in confidence to Crown servants or government contractors by firms, other bodies and individuals. This reflected a recommendation of the Franks Committee. It is clearly right that when sensitive commercial or personal information is provided to the Government it should not be lightly disclosed. But the Government has concluded that it would not be right to give blanket protection to all information offered in confidence in legislation designed to protect only that information the disclosure of which would seriously harm the public interest.

34. For the most part the Government takes the view that the civil remedies available to those providing information, and the disciplinary procedures which would penalise disclosure by a Crown servant, provide sufficient protection for private information. However, there are circumstances, particularly where information is provided under a statutory requirement, where, as the Franks Committee argued, it is in the public interest that private information is given the protection of the criminal law. There are already a number of specific offences relating to the disclosure by Crown servants of particular information provided under statutory requirements. The Government is considering whether the reform of section 2 and the consequent narrowing of the range of information protected by the criminal law would leave without a criminal safeguard any private information provided to the Government in confidence which merits such protection. A particular area for consideration, for example, is information to be provided to the tax authorities. Consideration will, if necessary, be given to the creation of separate specific offences of disclosure.

CIRCUMSTANCES IN WHICH DISCLOSURE WOULD BE AN OFFENCE

35. Crown servants will in the normal course of their duties properly disclose information in the categories which the Government proposes

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should be covered in new legislation. The same is true of Government contractors. It is obviously not intended that such disclosures should be caught by the new legislation, and references to disclosure in the following paragraphs should accordingly be read as excluding disclosures of that kind.

36. As explained in paragraphs [20-22], the Government considers that disclosure of information in the categories to be covered by new legislation should be an offence only where a certain degree of harm to the public interest is likely to result, and that the definition of the harm which is to be a condition of the offence need not and should not be the same in all respects for each category of information. The following paragraphs accordingly consider what test of harm, if any, should be attached to each category of information.

Security and intelligence matters

37. In the Government's 1979 Bill the disclosure by any person of any information relating to security and intelligence was an offence. As explained in paragraph [11], this was a source of criticism. The Government does not now propose that new legislation should make all such disclosures an offence. It proposes instead that legislation should make a distinction between disclosures by members and former members of the security and intelligence services and disclosures by other persons; and that, in the latter case, the prosecution should have to show that the disclosure was likely to damage the operation of the security and intelligence services.

38. Because of the exceptional sensitivity of this area of information, however, there is a particular difficulty in bringing prosecutions in some cases which would be exacerbated by the need to show that the proposed test of harm had been met. In order to prove the truth of the information at present, and in order to satisfy the test of harm if the Government's proposal is adopted, evidence may

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need to be adduced which involves a disclosure which is as harmful as or more harmful than the disclosure which is the subject of the prosecution. Because of this danger it is not always possible to bring a prosecution at all. The Government considers that it is not in the public interest that those who wish to disclose information which damages the operation of the security or intelligence services (for example by revealing details of their operations or identifying personnel) should be able to do so with impunity, simply by reason of the sensitivity of the subject-matter.

39. The Government proposes to meet this difficulty by providing that the prosecution should have to prove either that the disclosure was likely to damage the operation of the security or intelligence services or that the information concerned was of a class or description the disclosure of which would be likely to damage the operation of the services. This would allow the arguments before the court to be less specific. The prosecution would have to satisfy the court that a particular disclosure was of a certain class or description, and that disclosure of information of that class or description was likely to damage the operation of the services.

40. While the Government believes that this proposed test of harm is in general adequate to safeguard the interests both of the defendant and of the security and intelligence services, it considers that different arguments apply to the unauthorised disclosure of information by members or former members of those services. It takes the view that all such disclosures are harmful to the public interest and ought to be criminal. They are harmful because they carry a credibility which the disclosure of the same information by any other person does not, and because they reduce public confidence in the services' ability and willingness to carry out their essentially secret duties effectively and loyally. They ought to be criminal because those who become members of the services know that membership carries with it a special and inescapable duty of secrecy about their

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work. Unauthorised disclosures betray that duty and the trust placed in the members concerned, both by the State and by people who give information to the services.

41. The Government accordingly proposes that it should not be necessary for the prosecution to adduce evidence of the likely damage to the operation of the security or intelligence services when information relating to security or intelligence has been disclosed by a member or former member of one of those services.

42. The difficulties described in paragraph [38], arising from the fact that a trial may lead to the disclosure of information more sensitive than has already been disclosed, need particularly to be overcome where the defendant is a member or former member of the security or intelligence services. It is clearly not in the public interest that a person who is entrusted with the protection of the security of the country, and who betrays that trust, should be able to escape prosecution because of the very sensitivity of the information with which he has been entrusted. Furthermore, as a general policy, Governments do not comment on assertions about security or intelligence: true statements will generally go unconfirmed, and false statements will normally go undenied. As a result, and because of the particular credibility attaching to statements about security or intelligence by members of the services concerned, the circulation of misinformation by a member of the services may, in a different way, be as harmful as his disclosure of genuine information.

43. The Government proposes to meet these problems by making it an offence for a member or former member of the security or intelligence services to make any disclosure which is either of information relating to security or intelligence or which purports to be of such information or which is intended to be taken as such.

44. These issues have been discussed in terms of the "security and

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intelligence services". But the arguments apply not only to actual members and former members of the services but also to those who work closely in support of or who are in frequent contact with the services, such as certain members of the armed forces who provide technical support for the services, or officials in specified posts in certain Departments who deal with the services on a regular basis as part of their normal duties. These non-members have the same sort of access to sensitive information relating to security or intelligence, and to the operation of the services, as members themselves. It seems right that it should similarly be an offence for any of these non-members to disclose any information relating to security or intelligence or to make any statement which purports to be a disclosure of such information.

45. However, some of these non-members occupy such sensitive posts only temporarily. The special offence should only apply in respect of information acquired in such posts. For any disclosure of information relating to security or intelligence acquired in a previous or subsequent post it should be necessary for the prosecution, as normal, to satisfy the courts that the operation of the security or intelligence services was likely to be damaged.

46. In order to give effect to these proposals, the Government proposes that there should be a power for the responsible Minister to designate individuals or groups whose duties necessarily involve extensive familiarity with the work of the security and intelligence services as having the same criminal liability as members of these services in respect of the disclosure of information relating to security or intelligence.

47. The list of persons designated would not, for obvious reasons, be made public. But the persons concerned would be notified individually; and criminal liability would attach only after the individual officer concerned had received notification of his liability.

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Defence

48. As regards the disclosure of information relating to defence, the Government proposes that the prosecution should have to prove that the disclosure was likely either to prejudice the capability of the armed forces to carry out any of their defence tasks or to lead to a risk of loss of life, injury to personnel or damage to equipment or installations or to prejudice dealings between the Government and the government of another state or an international organisation.

International relations

49. It is proposed that disclosure of information relating to international relations should be an offence if it can be shown that the disclosure would be likely to jeopardise or seriously obstruct the promotion or protection of United Kingdom interests abroad, or to prejudice dealings between the Government and the government of another state or an international organisation, or to endanger the safety of a British citizen.

Information obtained in confidence from other governments or international organisations

50. As explained in paragraph [27], the harm arising from the disclosure of information provided by other governments or international organisations on conditions requiring it to be held in confidence is not simply the disruption of relations between the Government and the other government or the organisation concerned. There is a wider damage to the standing of the United Kingdom in relation to all governments and international organisations. For that reason any unauthorised disclosure is harmful, and the Government sees no purpose in setting a test of harm which is bound to be satisfied in every instance.

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Information useful to criminals

51. The category of information whose disclosure would be likely to be useful in the commission of offences or to terrorists, or in helping a prisoner to escape from custody, already carries its own test of harm within it. The prosecution need to prove that the information would be likely to be useful for one of these obviously harmful purposes. There is no need or scope for any additional test of harm in respect of this category.

Interception

52. Finally, paragraph [29] sets out the reasons why the disclosure of information relating to the process of interception or obtained by those means is harmful. It seems to the Government that none of the information which Crown servants must possess in relation to this process can be disclosed without the possibility of damaging this essential weapon against terrorism and crime and vital safeguard of national security. Similarly no information obtained by means of interception can be disclosed without assisting terrorism or crime, damaging national security or seriously breaching the privacy of private citizens. The Government does not therefore consider that a specific test of harm can be formulated or, indeed, is necessary or appropriate for this category of information.

THE LIABILITY OF THE DISCLOSER

53. The previous paragraphs have considered in what circumstances the unauthorised disclosure of certain information should be an offence. The next question is whether it should be an offence whoever makes the disclosure. As has been made clear earlier in the White Paper, the Government considers that what justifies making the unauthorised disclosure of certain information a criminal offence is the degree of

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harm to the public interest in which it is likely to result. Since the unauthorised disclosure of such information by, say, a newspaper may be as harmful as disclosure of the same information by a Crown servant, the Government believes that it would not be sufficient for the new legislation to apply only to disclosure by Crown servants. The objective of official secrets legislation is not to enforce Crown service discipline - that is not a matter for the criminal law - but to protect information which in the public interest should not be disclosed. Such protection would not be complete if it applied to disclosure only by certain categories of person. The Government accordingly proposes that the unauthorised disclosure by any person of information in the specified categories in circumstances where harm is likely to be caused should be an offence.

54. However, although the justification for applying the criminal law in this area is the harm that disclosure may cause, it would not be right to make disclosure criminal except where the discloser knows or can reasonably be expected to know that the disclosure would be likely to cause harm. In applying this principle a distinction can be drawn between the liability of Crown servants and government contractors and of other people, including the media.

55. In general it is reasonable to assume that a Crown servant knows the value of the information that comes to him in the course of his duties, and that, if he discloses information likely to cause harm, he knows what he is doing. There will be circumstances, however, in which a Crown servant intends to act properly and indeed acts reasonably, but unwittingly makes a harmful disclosure. In such circumstances the Government proposes that it should be open to him to claim the defence that he could not reasonably have been expected to recognise the harm likely to be caused by his disclosure. The same arguments apply equally to a government contractor who discloses information which he receives in the course of his contract.

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56. For a person who is not a Crown servant or government contractor, the Government considers that the opposite assumption should be made: that such a person does not know that disclosure of particular information in the categories to which the Government proposes to attach a test of harm would be likely to result in that harm. The Government accordingly proposes that, in such cases, the prosecution should have to prove not only that the disclosure would be likely to result in harm but that the person who made the disclosure knew or could reasonably have been expected to know that harm would be likely to result.

A PUBLIC INTEREST DEFENCE

57. Suggestions have been made that the law should provide a general defence that disclosure was in the public interest. The object would be to enable the courts to consider the benefit of the unauthorised disclosure of particular information, and the motives of the person disclosing it, as well as the harm which it is likely to cause. It is suggested, in particular, that such a defence is necessary in order to enable suggestions of misconduct or malpractice to be properly investigated or brought to public attention.

58. The Government recognises that some people who make unauthorised disclosures do so for what they themselves see as altruistic reasons and without desire for personal gain. But that is equally true of some people who commit other criminal offences. The general principle which the law follows is that the criminality of what people do ought not to depend on their ultimate motives - though these may be a factor to be taken into account in sentencing - but on the nature and degree of the harm which their acts may cause.

59. In the Government's view, there are good grounds for not departing from the general model in this context; and two features of

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the present proposals particularly reinforce this conclusion. First, a central objective of reform is to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. The defendant himself, for example, would not know with confidence whether his defence would succeed. Secondly, the proposals in this White Paper are designed to concentrate the protection of the criminal law on information which demonstrably requires its protection in the public interest. It cannot be acceptable that a person can lawfully disclose information which he knows may, for example, lead to loss of life simply because he conceives that he has a general reason of a public character for doing so.

60. So far as the criminal law relating to the protection of official information is concerned, therefore, the Government is of the mind that there should be no general public interest defence and that any argument as to the effect of disclosure on the public interest should take place within the context of the proposed damage tests where applicable.

A DEFENCE OF PRIOR PUBLICATION

61. Under the Government's 1979 Bill it would not have been an offence to disclose without authority information in certain categories if the defendant could show that the information had been made available to the public before his disclosure. The rationale for this defence was that, if the information in these categories was publicly available, a second disclosure could not be harmful. It seems to the Government that this rationale is flawed. There are circumstances in which the disclosure of information in any of the categories which the Government proposes to cover in new legislation may be harmful even though it has previously been disclosed. Indeed, in certain circumstances a second or subsequent disclosure may be more harmful. For example, a newspaper story about a certain matter may

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carry little weight in the absence of firm evidence of its validity. But confirmation of that story by, say, a senior official of the relevant Government Department would be very much more damaging. In such circumstances, the Government considers that the official should still be subject to criminal sanctions. Similarly, the publication of a list of addresses of persons in public life may capture the interest of terrorist groups much more readily than the same information scattered in disparate previous publications.

62. The Government does not, therefore, propose that there should be an absolute defence of prior publication for any category of information. But in cases in which the prosecution would under the Government's proposals have to show that disclosure was likely to result in harm, the offence would not be made out if no further harm is likely to arise from a second disclosure. The prior publication of the information would be relevant evidence for the court to consider in determining whether harm was likely to result from a second disclosure, but it would not be - and, in the Government's view, should not be - conclusive.

63. There are two categories of information the disclosure of which would not under the Government's proposals be subject to a test of harm in each case: information relating to or obtained by interception, and information obtained in confidence from other governments or international organisations. As explained in paragraphs [50] and [52], however, the Government considers that any disclosure of information in these categories is harmful, and that applies irrespective of whether the information has previously been made public in some form. If information about, for example, the practice of interception is published unlawfully, it would clearly be undesirable if the effect were that it became lawful at any time thereafter to publish the information as widely as and in whatever form the publisher chose.

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OTHER OFFENCES, ENFORCEMENT AND EXTENT

Other offences

63. The central mischief at which the Government's proposals are aimed is the unauthorised disclosure of information the publication of which is harmful to the public interest. However, there are actions which conduce to this central mischief and which the Government considers should be criminal. At the lower end of the scale of seriousness, there is the Crown servant who culpably fails to take sufficient care of documents containing information the unauthorised disclosure of which would be an offence. At the upper end is the person who reveals to a person, who he knows is going to use the knowledge, how to gain access to information the unauthorised disclosure of which would be an offence. The Government proposes that both should be an offence. The Government also proposes that it should be an offence for any person who is wrongfully in possession of a document containing information whose unauthorised disclosure would be an offence to fail to return the document when given a formal notice requiring him to do so. It is not, however, proposed that mere receipt of such information (as in the present law) should be an offence.

Penalties

64. For the central offence of deliberate disclosure, the Government proposes that the new legislation should provide the same maximum penalty on indictment as for the present offences under section 2: two years' imprisonment or a fine or both. On summary conviction it proposes, as in its 1979 Bill, that the maximum penalty should be six months' imprisonment or a fine not exceeding £2000 or both.

65. The Government considers that the same maximum penalties should be applicable to the offence of revealing how to gain access to

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information the unauthorised disclosure of which would be an offence. Knowingly to facilitate the disclosure of such information is as culpable as to disclose it oneself. The other offences mentioned in paragraph [62] are less serious, and the Government proposes only summary penalties, although it considers that the power of imprisonment should be available given that, for example, the disclosure of a document which a person refuses to return might lead to loss of life.

Powers of investigation and arrest

66. It will be necessary to ensure that the police have adequate powers to investigate the new offences. It will, for example, be necessary for England and Wales to designate the central offence as an "arrestable offence" for the purposes of the Police and Criminal Evidence Act 1984.

Authority for prosecution

67. At present, under sections 8 and 12 of the Official Secrets Act 1911, no prosecution may be brought under section 2 in England and Wales or Northern Ireland except by or with the consent of the Attorney General, or in Scotland of the Lord Advocate. The Government proposes that, under the new legislation, no prosecution should be brought in respect of information relating to security, intelligence, defence, international relations or interception or information provided by other governments or intergovernmental organisations on conditions requiring it to be held in confidence except by or with the consent of the Attorney General or, in Scotland, the Lord Advocate. Prosecutions in respect of information useful in the commission of offences or in escape from lawful custody would rest with the Crown Prosecution Service in England and Wales and the Procurator Fiscal Service in Scotland; in Northern Ireland they would require the consent of the Director of Public Prosecutions for Northern Ireland.

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Territorial extent

68. The Government proposes that the new legislation should apply throughout the UK and that it should be possible to extend it by Order in Council to the Channel Islands and the Isle of Man. By virtue of section 10(1) of the Official Secrets Act 1911, section 2 offences may be committed abroad by "British officers or subjects". The Government proposes to retain the spirit of this provision by giving the United Kingdom courts jurisdiction over offences under the new legislation if committed abroad by a British citizen, Crown servant or government contractor.

THE FUTURE ROLE OF THE CIVIL SERVICE DISCIPLINE CODE

69. The result of implementing the Government's proposals would be that only a very small proportion of the information in the hands of Crown servants would be protected by the criminal law. That does not mean, however, that there will be no inhibition on the disclosure of any of the information which the criminal law will no longer protect. The Government still has the duty to keep the private confidences of citizens and others. More generally, Ministers will continue to determine what information should be disclosed and to account to Parliament for those decisions. In practice Ministers already make a great deal of information public or authorise Crown servants to do so on their behalf.

70. The Civil Service Discipline Code already provides penalties for unauthorised disclosures in circumstance where it is not thought right to bring a prosecution under section 2, for example where disclosure would harm the interests of the Government or of a Department. The Discipline Code will continue to be applied against unauthorised disclosure of information in these areas.

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71. Once new legislation is in place it will be necessary to amend the conduct rules for Crown servants, in particular the rules covering the disclosure of official information, in consultation with the Civil Service trade unions, to reflect the fact that the criminal law no longer protects all official information. Departmental rules and guidance will also need to be revised to ensure that it is clear to Crown servants what types of information they cannot disclose without authority without rendering themselves liable to criminal or, as the case may be, disciplinary action.

THE SECURITY CLASSIFICATION OF INFORMATION

72. As explained in paragraph [21], the Government does not intend to rely on the security classification of information as a test of harm likely to be caused by the disclosure of that information. Although the Government's 1979 Bill departed to some extent from the Franks Committee approach in this respect, it did contain provision for regulating the classification of information and documents relating to defence or international relations. Under that Bill, however, the harm arising from the disclosure of such information would have been certified by a Minister. The Government sees no need for legislative provisions relating to classification under the scheme it is now proposing, in which neither the classification of information nor the opinion of a Minister plays a crucial part.

73. Under the Government's proposals the question of the harm arising from disclosure will be a matter on which the prosecution have to satisfy the court. The fact that a document was classified at a certain grade is not evidence of likely harm; it is only evidence the view of the person who awarded the classification. The grade of classification may be relevant in a prosecution as evidence tending to show that the defendant had reason to believe that the disclosure of the information was likely to harm the public interest, but the prosecution will have to adduce separate evidence to prove that the disclosure was indeed likely to cause such harm.

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74. But within the Crown service the classification of documents will, of course, continue to play an essential administrative role in the handling of information and will be relevant in disciplinary proceedings for the unauthorised disclosure of information not covered by the new legislation. The fact that classification plays no part in the Government's proposals in no way diminishes the duty on Crown servants to ensure that documents are given an accurate grading.

CONCLUSION

75. This White Paper presents a set of proposals the central objective of which is to apply the criminal law to those, and only those, who disclose a limited range of information without authority knowing or having good reason to know that to do so is likely to harm the public interest. The proposals would not apply criminal sanctions to disclosures which are not likely to harm the public interest, nor to anyone who could not reasonably have been expected to foresee the effect of his disclosure.

76. Responsible media reporting would not be affected by the Government's proposals. They represent a restriction on freedom to publish, but any legislation in this area must limit that freedom. The law already constrains in various ways what may be published in order to avoid damage to private interests. It is right that constraints should also be imposed to prevent unacceptable damage to the public interest.

77. Under the Government's proposals it will be for the courts, and the courts alone, to decide whether the disclosure of particular information is criminal. The Government is entrusting the safeguarding of the public interest to the jury.

78. The Government believes that the proposals set out in this White

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Paper would result in clear and intelligible legislation which juries could apply readily and equitably. The legislation would apply to culpable acts without drawing in harmless or innocent actions. It would merit and receive the confidence of the public and of juries.

79. The Government intends to initiate debates in both Houses of Parliament on its proposals in July. It will then consider the opinions expressed in those debates, and the comments which it receives from other sources on the proposals, with a view to early legislation.

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PRIME MINISTER

You should know that Lord Bethell did something to redeem himself during the Lords' debate on his Official Secrets Bill. He kept his side of the bargain and did not press for the Bill to go beyond Second Reading. He has also used his speech to take some swipes at the Alliance and Labour Party attitudes to official secrets matters.

N. L. W.

N. L. Wicks

25 April 1988



the department for Enterprise

G. A. Hosker CB
The Solicitor

CONFIDENTIAL

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P. J. Weston,

MISC 132: ENFORCING THE DUTY OF CONFIDENTIALITY

Further to my letter of the 30th of March, I am enclosing an analysis of the legal advice that has since been received from Mexico and the Republic of Ireland. These should be included with Annex B in the earlier papers and the attached chart entries should be added to Annex C.

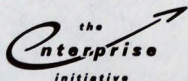
The overall picture may be regarded as encouraging but if further work is to be undertaken, I think that it should take account of possible ways in which the effect of an assignment of future copyright can be avoided. For example, where a "ghost" writer is asked to prepare a work based on conversations with a civil servant and on material to which he has drawn attention, the copyright would be created by the writer and it need never be vested in the civil servant. It could in fact be assigned to a company formed jointly by the parties for the purpose of an exploitation. In order to prevent such a situation, there would need to be a prohibition on the servant procuring the creation of copyright by others but that would involve difficult legal questions outside copyright law which have not been addressed so far.

As before, I am sending copies of this letter and its enclosures to members of the Official Group.

Yours sincerely

G. A. Hosker

G A HOSKER



MEXICO

- (1) An assignment of future copyright made under English law by a Crown servant would be recognised under Mexican law.
- (2) It would be desirable for the assignment to be in a document specifically prepared and signed by the servant for the purpose.
- (3) Registration may be needed for the purpose of enforcement.
- (4) The assignee can in ordinary circumstances restrict publication wholly or in part.
- (5) The assignment of future copyright can be enforced under local law. Although the remedy of an injunction is not available in Mexico, similar relief can be obtained, through the Federal General Attorney's Office, by "precautionary measures", involving the seizure of property "for purposes of the payment of damages".
- (6) The assignee can claim the profits of any exploitation of the copyright in Mexico which has not been authorised by him, and a UK action for an account of profits could be validly pursued in Mexico by way of enforcement of a foreign judgment.

REPUBLIC OF IRELAND

(1) Under section 49 of the Copyright Act 1963, future copyright may be assigned by a prospective owner of copyright to another person by an agreement in writing signed by or on behalf of the prospective owner. The advice is that the provision can apply even in the case of copyright coming into existence after the death of the author.

(2) Assignments executed in accordance with English law and relating to future copyright wheresoever it may subsist will be enforceable in the Republic of Ireland in respect of any work in which Irish copyright subsists.

(3) No particular form of assignment is required but it should be in writing and signed by the author. In order to secure the fullest possible protection within the jurisdiction of the Irish courts the assignment should clearly come within the terms of section 49 of the Copyright Act 1963: it should not be an assignment imposed by English law.

(4) The assignment can be enforced against the author by injunction and, provided that it complies with section 49 of Copyright Act 1963, against third parties too.

(5) The assignee can, as the copyright owner, restrict publication wholly or in part as he thinks fit and an action for an account of profits can be brought for unauthorised

exploitation of the copyright.

(6) The Irish solicitors believe that a claim can be made for profits arising from a breach of copyright in other jurisdictions and accruing to someone within the jurisdiction.

	1	2	3	4	5	6	7	8
MEXICO	Yes	Yes, preferably in a separate written document	50 years after author's death	Registration may be needed	No, but "precautionary measures" may be available	-	Yes, including enforcement of UK action for an account of profits	-
REPUBLIC OF IRELAND	Yes	Yes. A separate written document should be used	-	-	Yes	Yes	Yes, for profits accruing inside or outside the jurisdiction to someone in the Republic of Ireland	-

cc BUp



SECRET

B.070

MR WICKS

cc Sir Robin Butler
Sir Percy Cradock

Unauthorised Disclosure: Enforcing the
Duty of Confidentiality

I have looked into the points raised by the Prime Minister at the meeting this morning prior to OD(DIS) on Monday 14 March.

Terms of service

2. Ministers decided last year, following an informal meeting chaired by the then Lord President on 27 July, that an explicit reference should be introduced into the terms of service of public servants (paragraph 7 of Lord Whitelaw's minute of 30 July). The square bracketed passage on page 6 of the Prime Minister's brief for the OD(DIS) meeting on 14 March explains that difficulties have since been encountered as regards the Civil Service. I confirm that these are primarily the difficulty of negotiating successfully with the Unions where there is a risk of ending up in a worse position than at present. But officials will re-submit on the matter, in the light of further advice from Counsel, as soon as possible.

3. GCHQ staff - as civil servants - are covered by the Civil Service Code; but GCHQ have included an explicit reference to the duty of confidentiality in GCHQ's local regulations. There is also now an explicit reference in the indoctrination forms signed by all new and retiring staff.

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4. As regards the Security Service and SIS, all staff are now bound by specific conditions relating to the security of information and documents. Each new member of staff also signs an undertaking not to publish without authority, either during or after their service, any information concerning the security and intelligence services. Similar undertakings have not yet been signed by all serving staff. First, the Services are examining whether the undertaking can be upgraded into a contractual relationship, which would be easier to enforce in English courts and might also facilitate enforcement abroad. The Security Service's Legal Adviser is about to refer the draft of such an agreement to the Home Office Legal Adviser, prior to discussion within the Official Committee on Defence, Intelligence and Security Information Policy (OD(DIS)(0)).

Pensions

5. At their discussion on 5 November of OD(DIS)(88(77) (paragraphs 2.18-2.24 and 3.20), Ministers agreed that no changes should be introduced regarding pensions.

P J Weston

P J Weston

11 March 1988

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30 JUL 1987FILING INSTRUCTIONS
FILE No.PRIME MINISTEREnforcing the Duty of Confidentiality

The meeting of OD(DIS) which you chaired on 16 July had a first discussion about reform of Section 2 of the Official Secrets Act (OSA), by far the most difficult subject covered in the paper by officials on various means of enforcing the duty of confidentiality (OD(DIS)(87)47 of 9 July). OD(DIS) did not have time to consider the other matters in that paper - the civil law concerning injunctions; contracts, discipline and pensions in the public services; and measures in the field of freedom of information.

2. I held an informal meeting on 27 July with Geoffrey Howe, Douglas Hurd, George Younger and Patrick Mayhew for an initial discussion of these other matters. The views we reached are set out below. I hope that you and other colleagues will feel that they, together with OD(DIS)'s views about the OSA, provide a satisfactory basis for further work by officials, with a view to consideration by ministers in the autumn of a possible package of measures of various kinds for protecting Government information.

Injunctions

3. The Court of Appeal's judgement two weeks ago in the case for criminal contempt against the Independent means that a newspaper which publishes material, which another newspaper is restrained by injunction from publishing, may now be in criminal contempt of court. There may be an appeal to the House of Lords. Subject to that, the judgement should represent a major improvement in the law on injunctions from the Government's point of view. We nevertheless felt at my meeting that two aspects of the law concerning injunctions should be examined in detail by officials. The first concerns the test that must be



satisfied before an injunction is granted. At present it is necessary to establish the probability that an unauthorised disclosure will take place. If the test could be lowered, so that only a risk of disclosure would need to be demonstrated, it would be possible to obtain injunctions in more cases and it would be easier sometimes for us to make our case without revealing sensitive information.

4. The second aspect which we thought officials should study is the scope of an injunction as regards the people who must comply with it. Ideally, one would like to introduce blanket court orders restraining anyone from disclosing a particular piece of information. But this would be a major innovation; indeed, since it would not be addressed to particular people but to particular information, it would not be an injunction as such but a new kind of order. We therefore thought that officials should also look at the less ambitious idea of an injunction which would bind not only the named defendants, as at present, but also any other person having notice of it. This might provide a way of restraining unauthorised disclosures more effectively, acting before they happen rather than afterwards through the medium of criminal contempt on the basis of the judgement by the Court of Appeal in the Independent case.

5. We also thought that officials should work up in detail the more straightforward suggestion of making injunctions apply throughout the United Kingdom, rather than requiring, as at present, a separate order in each jurisdiction.

6. Ministers should consider the results of the further work by officials in the light of any appeal to the House of Lords in the Independent case, with a view to a possible Bill concerning the civil law on breach of confidence (not to be drafted yet) which might in due course put forward as part of a package of measures for the protection of Government information.

Discipline, Contracts and Pensions in the Public Service

7. We agreed that mention of the duty of confidentiality should be introduced into the Civil Service Pay and Conditions of Service Code and into letters of appointment of new staff. These two documents set out the main terms on which public servants are employed. We also agreed that, when the Code has been clarified, departments should be invited to issue a notice to all serving staff to remind them of their obligations and that all staff on retirement or resignation should be reminded of their continuing obligation of confidentiality. These are straightforward measures to correct what can now be seen to be omissions in present practice, and in our view should be implemented now.

8. At present, public service pensions can be forfeited only after a person has been convicted of a criminal offence; and, where offences under the OSA are concerned, the sentence must be at least ten years' imprisonment. But the maximum sentence for an offence under Section 2 of the OSA is only two years. A person living abroad can of course escape prosecution under the OSA and thus forfeiture of pension for unauthorised disclosure. It was recognised that a move to broaden the circumstances where pensions can be forfeited so as to remove the major condition that a criminal conviction is needed would be very difficult; amendment of the existing scheme, without legislation, would achieve nothing of value; and new legislation would be controversial, not least for the reasons given by the Chancellor of the Exchequer (in his Private Secretary's letter of 16 July). On the other hand, it is hard to see any effective means of deterring or punishing breaches of confidence by former public servants, at least those living abroad. We were mindful that the Principal Civil Service Pension Scheme is generally seen in Parliament and by the public as very fair, even generous, to pensioners; and that no-one would risk losing all or part of

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their pension under any new forfeiture arrangements without having courted that penalty by making major unauthorised disclosures. We concluded that, despite the difficulties, work on the possibility of new legislation about forfeiture of pensions should be refined by officials to the point where ministers could take a definite decision either way.

9. We also thought that another way of extending the scope for forfeiture of pensions, but less radically, should be investigated. The requirement of a criminal conviction would stand, but it would become possible for convictions under Section 2 of the OSA to trigger the forfeiture arrangements. This could be done by increasing the maximum sentence under Section 2 (probably reformed) of the OSA, so that the threshold of ten years' imprisonment in the present forfeiture arrangements could be crossed in serious cases and pensions thus become liable to forfeit; or, alternatively, by reducing the length of sentence required under the forfeiture arrangements so as to produce the same effect.

10. The paper by officials suggested in Annex B a procedure involving a judicial tribunal for blocking the anomaly under the present forfeiture arrangements whereby a former public servant living abroad, by escaping conviction in the courts of this country, also escapes forfeiture of pension. We agreed that this too should now be worked out in detail, so that Ministers can consider an initiative on these lines if the idea of dropping the requirement for a conviction as part of new legislation on forfeiture arrangements (paragraph 8 above) is in due course discarded.

Freedom of Information

11. None of us favoured the introduction of a Freedom of Information Act providing a statutory right of access to a stated range of Government information. We saw fewer objections to a Code of Practice, whereby the Government would commit

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itself to publishing the relevant facts and considerations when major policy decisions are announced. However there would inevitably be strong objections in the House of Lords (though not necessarily convincing ones) to the idea of such a Code having statutory backing; and, more importantly, it would be unlikely to be enough to win additional support for a package of new measures to protect Government information. We were thus inclined to think that such a package should stand on its own merits and we concluded that, for the time being at least, officials should not do further work on a Code of Practice.

12. I am sending a copy of this minute to the members of OD(DIS), the Lord Chancellor, the Chancellor of the Exchequer, the Lord Advocate, the Minister of State, Privy Council Office, Sir Robert Armstrong and Mr Mallaby.

hslw

Privy Council Office
30 July 1987

SECRET

2 cc Bup

Copy no 1. of 2.

MR WICKS

9 March 1988

UNAUTHORISED DISCLOSURE: THE WAY AHEAD

OD(DIS)(88) 22

1. The OD(DIS) paper is valuable. We have been engaged in hand-to-hand fighting on this front for a year or more. It is time to stand back and look at strategy.
2. Even so, the paper suffers from detail; it is not easy to see the wood for the trees. There is also a major uncertainty: the House of Lords judgement this summer on the Wright case; until then we cannot be sure of the size of the problem we face on the civil law side.
3. That said, however, the following points seem clear:
 - a. The reform of the Official Secrets Act is highly desirable; but a reformed OSA will not be available until next year at the earliest. Until then, if we are to preserve the secrecy on which our intelligence operations depend, we shall have to rely on the civil law only.
 - b. Even a reformed OSA will depend on the reaction of juries; we cannot be sure that they will always be ready to convict. In any event, the civil law and injunctions will still be needed, eg when we want to stop something being published as distinct from punishing somebody for publishing.
 - c. The House of Lords may produce a miracle in July; but, given the trend, it looks more likely that the civil restraints on disclosure will be weakened.

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The duty of confidentiality is being diluted by the courts by the introduction of such considerations as public interest in disclosure in cases of alleged wrong-doing; lesser duties owed by third parties; and, above all, the argument that, once a piece of information is in the public domain, further dissemination by outsiders is not unlawful. This last means that all checks on disclosure can be sidestepped by publication abroad followed by reporting, or serialisation, at home.

- d. Legislation to meet the deficiencies in civil law will therefore be our most urgent task. The precise shape of the task will be uncertain until we have the House of Lords judgement but we should be doing as much work as possible now on the reasonable assumption that we are unlikely to get all we are asking for.
- e. This work should include the possible introduction of a reference to confidentiality in the terms of service of public servants; the possibility of employment contracts for public servants; the possibility of making pensions vulnerable in cases of breach of confidence. Legislation should seek to restore the full strength of the duty of confidence, removing the qualifications recently imposed by the courts, eg on grounds of triviality or alleged iniquity. But, above all, we need to plug the gap in our defences arising from foreign publication and republication here. Legislation might make it a breach of confidence for a third party to republish here material from former members of the intelligence services published abroad. The paper is despondent about the efficacy of such legislation: despite our efforts the

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material will find its way into this country and courts might refuse enforcement on grounds of futility. This problem certainly exists, but we have little choice if we are not to be overwhelmed. Moreover, as I see it, there is still a valid distinction to be drawn between publication within this jurisdiction and outside it. Lord Ackner's judgement in the House of Lords last summer recognised this.

4. In general, we face a continuing battle on the disclosure issue. Conditions may become even more adverse, as courts weaken the state's defences, as the poachers become more experienced, and as greater inducements are offered by the media to officials and ex-officials to break ranks and talk. But, as pointed out above, we have no room for manoeuvre as regards publication by insiders. If we are to run intelligence services we need secrecy. If we are to have secrecy the duty of confidentiality must be strictly upheld. If we are to uphold the duty of confidentiality we cannot condone any breaches by insiders and, whatever we do about publication abroad, we must continue to strive to ban publication within our own jurisdiction.

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PERCY CRADOCK

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cc BCP

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CONFIDENTIAL

PRIME MINISTER

c Sir Robin Butler

OD(DIS) on 14 March

Chairman's Brief

UNAUTHORISED DISCLOSURE: THE WAY AHEAD IN AND AFTER
THE PETER WRIGHT CASE

CONCLUSIONS

The meeting may be able to conclude that:

- pending the House of Lords judgment on Wright, the Government should maintain its present objectives in the Wright and other cases, bearing in mind that in any new cases it can exercise its discretion not to take legal action;
- after the House of Lords judgment, officials should submit advice on whether to legislate to change the resulting state of the civil law on breach of confidence, though such legislation would be controversial and might not be effective;
- after the House of Lords judgment, Ministers will also wish to review policy in future cases. This might reflect the graduated approach postulated in points viii-x of the OD(DIS)(88)22 cover note, subject in each case to whatever particular circumstances may apply. For planned publications by insiders, a manuscript vetting system may need to be considered.

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ATTENDANCE

2. All members of the Sub-Committee will attend, namely the Foreign and Commonwealth Secretary, the Home Secretary, the Defence Secretary, the Lord President and the Attorney General. The Lord Chancellor, the Lord Privy Seal and the Lord Advocate will also be present.

BACKGROUND

3. The Home Secretary and the Foreign and Commonwealth Secretary have been concerned since late last year that Ministers should meet to take stock of the various Wright cases, and the prospects for them, and look ahead to the period when those cases will be over. They agreed that it would be best to do this after the Court of Appeal's judgment in the Guardian/Observer/Sunday Times case, when we would be one step away from a final judgment by the House of Lords and could better foresee what impact this might have on the civil law of breach of confidence.

4. The paper for discussion - OD(DIS)(88)22 - largely steers clear of the specific aspects of policy on enforcing the duty of confidentiality (including reform of Section 2 of the Official Secrets Act) discussed at the Sub-Committee's meetings of 16 July and 5 November 1987. But Section V looks generally at the gaps likely to exist in the civil law after the Wright case, and indicates possible options for plugging them. Any legislation in this area would not be easy, and decisions by the courts would continue to be discretionary.



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HANDLING

5. As will be clear from the nature of the paper, the meeting provides an opportunity for discussion to take a general overview of where matters now stand. Subject to any general comments (Home Secretary, Foreign and Commonwealth Secretary, Attorney General), you may wish to focus discussion on the points listed in paragraph 2 of the cover note. These are repeated below for ease of reference, with brief additional comments.

i. Our objectives for the remaining phases of the various Wright cases - notably restraint of disclosures in the United Kingdom by Wright himself, and in Australia a ruling on the principle of confidentiality and an account of profits - do not at present require alteration. (Paragraphs 2.3-2.6 of the main paper)

Paragraph 2.3 outlines what we can now hope to achieve in the Wright case in this country. We may get some useful results but by no means all that we set out for. Does the Committee agree that our present objectives in the various cases should be maintained? (Home Secretary, Attorney General)

ii. While the Wright case continues, the Government must have regard in any new cases to the need for consistency with current cases but can exercise its discretion not to take legal action against a particular publication, or can decide to authorise it. (Paragraphs 3.6-3.7)



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This implies that we would carry on the present policy: e.g. in the Cavendish case, we decided to take legal action; with the Cave-Brown book on Sir Stewart Menzies, it was decided to authorise publication. Do the Home Secretary, Foreign Secretary and Attorney General agree?

iii. The net result of the Court of Appeal's judgment (if it were confirmed), taken together with the "Independent" judgment, would be that the application of the duty of confidence would be severely narrowed with regard to the material covered - notably by excluding non-sensitive material, matters already published and allegations of iniquity in government; but that where an injunction can be obtained it would apply to more people than before. (Paragraphs 3.8-3.16)

This part of the paper bears on the discussion of the future application of the principle of confidence which comes in Section V. Does the Attorney General endorse the assessment in paragraphs 3.6-3.13 of the implications for current and future cases if the Court of Appeal's judgment is upheld?

iv. If the Court of Appeal's conclusions about the limitations on the duty of confidentiality are upheld, the Government is likely to be pressed in each case in which it objects to a proposed publication to state which passages it believes are objectionable. The institution of a manuscript vetting system will have to be considered. There are severe disadvantages in such a system, as is



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shown by the experience of the CIA.

(Paragraph 3.11)

Subject to anything that the Home Secretary and the Foreign Secretary may wish to add, further discussion of this aspect may best be deferred until after the House of Lords judgment.

v. The suggestion of the Master of the Rolls in his appeal judgment that the Home Secretary might be empowered to issue an instruction having the force of an ex parte injunction is not worth pursuing: it would not affect the substantive law and would therefore be of limited practical advantage as well as very controversial. (Paragraph 3.22)

The Master of the Rolls is known for suggestions which are superficially attractive but on examination risky. Do the Home Secretary and the Lord Chancellor agree that this one should not be taken further?

vi. Once the House of Lords has pronounced on the Wright case, Ministers will wish to consider whether to legislate to change the resulting state of the civil law on breach of confidence (as well as the procedural aspects concerning injunctions). To seek by legislation to reverse all or part of a narrowing by the House of Lords of the duty of confidence would be controversial and might not obtain more favourable decisions from judges. (Paragraphs 5.2-5.4)



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As paragraph 5.1 recalls, Ministers have already agreed to review, when the Wright case is over, various procedural aspects of possible legislation to alter the civil law on injunctions in the field of breach of confidence. The further question is whether this review might also cover substantive aspects of the duty of confidence itself. Officials doubt the advisability and efficacy of such legislation. Do Ministers agree? Should the matter nevertheless be reconsidered after the House of Lords judgment? (Lord Chancellor, Attorney General, Lord Advocate)

[Paragraph 5.6 refers to other work in hand, following decisions by OD(DIS) in July and November 1987. The introduction of an explicit reference to the duty of confidentiality into the terms of service of public servants is proving more difficult than expected. The relevant paragraphs in the Civil Service Code, while not in an ideal form, have not caused serious problems in disciplinary proceedings, still less in civil litigation, but (in view of the controversy on the subject of confidentiality engendered by the Wright case) any attempt to "clarify" the duty would probably now be opposed by the Unions and might also be challenged in the courts. Some tidying of the Code will in any event be necessary if Section 2 is reformed as planned, and it may be tactically better not to attempt revision of the Code in two stages (duty of confidentiality first, OSA references later). Officials will be



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re-submitting separately on this question, in the light of further advice from Counsel.]

vii. After the Wright cases, policy on whether to initiate action in the civil courts should aim in each case for the result which protects national security to the maximum and is consistent with a general policy which can be justified in the courts and publicly. (Paragraph 5.8)

Is this accepted as the underlying guiding principle for future cases? (Home Secretary, Foreign Secretary, Attorney General)

viii. Subject to any qualification by the House of Lords judgment on Wright of the application of the duty of confidence of present and former members of the security and intelligence services, Ministers may wish to continue to seek strictly to enforce the duty of such people. (Paragraph 5.11)

Should strict enforcement remain the objective? Are the courts likely to be willing to restrain comment? Might the Government be prepared to permit comment by past members of the security and intelligence services, subject to specific authorisation being sought in advance? (Home Secretary, Foreign Secretary, Attorney General)

ix. As regards other categories of public servants, the Government might seek to enforce the duty of confidence more selectively. National security will always be the first consideration. If details of the information to be disclosed are avail-



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able, a critical factor will be whether it is assessed that the Courts would grant a permanent injunction. Other considerations will include the sensitivity and significance of the material; the period from which it dates; whether it consists of fact or purported fact or merely comment; and whether it has been published before.

(Paragraph 5.11)

While the Wright case continues, it is not realistic to seek to define a formal policy in respect of other categories of public servant. Even after the Wright case, policy will need to evolve, and cases will need to be considered on their merits. Pending the House of Lords judgment, can the suggested criteria be improved? (Home Secretary, Foreign Secretary, Attorney General)

But
x. With outsiders, there can be greater latitude. Even where a permanent injunction is believed to be obtainable, Ministers may prefer to allow publication in circumstances which give no particular appearance of authenticity rather than to seek to prevent publication by asserting that the information could only have come from an insider.

(Paragraph 5.12)

As paragraph 5.12 points out, the most difficult cases will be those where an outsider discloses significant information but does not attribute it to an insider and there is no evidence to establish its provenance. In some circumstances, even where a permanent injunction is believed to be obtainable, may the balance of advantage



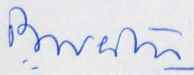
lie in allowing publication rather than in attempting to prevent it by acknowledging the truth of the information? (Home Secretary, Foreign Secretary)

xi. If the courts should become less willing to grant injunctions, claims for exemplary damages may need to be considered. (Paragraph 5.14)

In any particular case, such a remedy is in its nature no more than a fallback, though a successful claim in one case might deter similar unauthorised disclosures in the future. If the judgment of the New Zealand Court of Appeal in the case against the Dominion newspaper (expected later this month) is in our favour, is the Court likely to award us such damages? Is there any prospect that the courts in this country will become more willing to grant this type of remedy? (Attorney General)

xii. Another option worth considering in some cases, despite its shortcomings, is a claim for an account of profits. (Paragraph 5.15)

Should the Government continue (as now in the Wright case) to include a claim for an account of profits in any proceedings following unauthorised disclosure for commercial gain? If the High Court of Australia rules in our favour on Wright, what are the prospects of a successful action in the United States (see also paragraph 2.7)? (Attorney General)


P J Weston

9 March 1988

PRIME MINISTER

The Lord Privy Seal's office told me this morning that Lord Bethell had now told the Lord Privy Seal that he does not intend to pursue his Bill beyond Second Reading. Lord Bethell asked that knowledge of his intention should not go beyond a tight circle. (I suspect that he fears that if his supporters knew of his intention, they would bring great pressure on him to put the Bill into Committee.) This seems to be quite a coup for the Lord Privy Seal. ✓ *ment m*

The Bill will go down for Second Reading on 20 April.

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N.L.W.

N.L. Wicks

26 February 1988

SUBJECT CC MASTER



FILE
MAY

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

22 February 1988

MEETING RECORD

For Mike,

LORD BETHELL'S OFFICIAL SECRETS BILL

The Lord Privy Seal reported to the Prime Minister this morning the latest position on Lord Bethell's proposed Bill on Official Secrets. The Lord President, Paymaster General and Chief Whip were also present.

The Lord Privy Seal said that Lord Bethell had now told him that he wished to proceed with his Bill, and it seemed that he was looking for progress beyond Second Reading. He appeared to want the Government to comment, at Second Reading, on the merits of the Bill. His position was entirely unnegotiable. The Lord Privy Seal had concluded that the Bill would have to have its Second Reading, probably in April, but not in prime time.

The Prime Minister said that the Government spokesman in the Lords should not say anything on the merits of the Bill at Second Reading. Business managers in the Lords should give Lord Bethell's Bill the minimum of what the conventions and procedures of the Lords required. Members of the Lords would need to be reminded that the Government's reform of the Official Secrets Act legislation in 1979 had failed to pass through their Lordships' House.

I am sending a copy of this letter to Alison Smith (Lord President's Office), Simon Judge (Paymaster General's Office), Murdo Maclean (Chief Whip's Office) and Trevor Woolley (Cabinet Office).

Nigel Wicks

N.L. Wicks

Mike Eland, Esq.,
Lord Privy Seal's Office.

JS

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Prime Minister

to note.

N. L. O

16.2

PRIVY COUNCIL OFFICE

WHITEHALL, LONDON SW1A 2AT

15 February 1988

Dear Nigel

The Lord Privy Seal saw Lord Bethell this afternoon to discuss his intention to take up the Richard Shepherd Bill on official information.

Lord Bethell made it clear at the outset that he was committed to proceeding with the Bill. He thought it struck the right balance in this difficult area; he also thought it right that both Houses should have an opportunity to discuss the issues raised by it. In his view it was preferable that he sponsored the Bill rather than an Opposition peer such as Lord Bonham-Carter.

In reply the Lord Privy Seal said that while he recognised the strength of Lord Bethell's commitment to the reform of the Official Secrets Act, he thought the situation had changed significantly since Richard Shepherd had first mooted his Bill. The Government had made absolutely clear that they would be bringing forward their own proposals in this area which would be published and debated in both Houses before the Summer Recess. In the light of these promises it was a matter of some concern that a senior Conservative peer intended to introduce a Bill which could only cause embarrassment to the Government. As in the Commons, the Government would be inhibited from serious comment on the Bill's proposals; to attempt to do so while still formulating their own proposals was not a course any Government would follow. It was therefore hard to see what advantage could be gained from introducing the Bill.

In addition Lord Bethell should be under no illusion as to the personal distress he would cause his colleagues in the Party particularly the Prime Minister who had of course worked with Lord Bethell closely in the past over Russian emigres, and simply could not understand his motives in this instance.

Lord Bethell said he was sorry if his action would embarrass his colleagues; that certainly was not his intention. He did consider, however, that the whole point of launching the Bill now was to have a debate on its provisions before the Government's thoughts had crystallised. The House of Lords in his view had a great deal to contribute to the argument - for example, the opinions of the Law Lords.

N Wicks Esq

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At this point, the Lord Privy Seal interjected that if Lord Bethell's intention was simply to air the issue in the Lords a better course would have been to table a motion for debate. But as Lord Bethell was determined to table the Bill, would he be prepared not to press the Bill beyond a Second Reading since that would seemingly secure all his objectives? It would also be of great benefit to the Lords business managers not to have to find time for later stages of the Bill in a very heavy legislative programme. Lord Bethell said he would consider this. He would need to discuss the matter with the Bill's sponsors. The Lord Privy Seal authorised him to do so on the strict understanding that it was made clear that Lord Belstead had been speaking personally and in his capacity as Leader of the Lords, and that no other Minister be mentioned.

In further discussion, Lord Bethell made it clear that two factors that would influence his decision would be the attitude of the Government at Second Reading - ie could it be more forthcoming about its proposals - and the timing of the debate. The Lord Privy Seal made it clear that it was highly unlikely that the Government would go beyond the position it had taken up in the Commons. On timing he was totally non-committal.

Lord Bethell has promised to return to the Lord Privy Seal very shortly. He introduces his Bill tomorrow.

I am copying this letter to Philip Mawer, Alison Smith, Murdo Maclean, Rhodri Walters and Trevor Woolley.

yours sincerely,
Mike Eland.

M J ELAND

pa
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PRIME MINISTER

The Lord Privy Seal's office tell me that Lord Belstead has seen Lord Bethell about his proposed Protection of Information Bill. Lord Bethell insists on proceedings with the Bill, but there is a possibility (which I heavily discount) that Lord Bethell may agree not to pursue the Bill beyond Second Reading. Lord Belstead will report further.

ms

N.L.W.

(N. L. WICKS)

15 February 1988

Subject as Marked

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10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

15 February 1988

Dear Mike,

PROTECTION OF INFORMATION BILL

The Prime Minister discussed this morning with the Lord Privy Seal, the Lord President, the Chief Whip and the Paymaster General, the Lord Privy Seal's minute of 12 February about Lord Bethell's intention to introduce Richard Shepherd's Bill on Official Secrets Reform in to the House of Lords.

The Prime Minister said that the Lord Privy Seal should let Lord Bethell know that she was astonished to learn of his intention. This would be taken as a personal attack upon her, after all she had done to help him in his various endeavours. Indeed, his action was in many ways worse than Richard Shepherd's since the Commons had debated the matter, the Government had made its position very clear and a White Paper would be published before too long. The Lord Privy Seal should not make any threats to Lord Bethell. But he should understand that if he proceeded, his standing and influence with the Prime Minister would be destroyed. The Lord Privy Seal said that he would see Lord Bethell this afternoon when he would use the arguments the Prime Minister had advanced in order to try to dissuade him from proceeding with his Bill.

If he failed, he would not advise either an official or unofficial whip on Government supporters to block the second reading. He realised that this would be inconsistent with the line the Government had taken with its supporters in the Commons. But the procedures and conventions in the Lords were different and it was clear that the Bill could never pass on to the Statute book. There was a very real risk that a whip on second reading would have adverse consequences for the Government's programme in the Lords generally and would make peers less willing to support the Government in times of difficulty.

The Prime Minister agreed that if Lord Bethell insisted on taking his Bill beyond a second reading, business managers in the Lords should ensure that the bill died a natural death with the minimum of publicity. The Commons Chief Whip should, as necessary, apprise Government Members in the Commons of the reasons for the different tactics the Government had adopted

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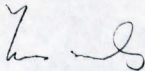
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for blocking the Bill's progress in the Lords.

I am copying this letter to the Private Secretaries to the Home Secretary, the Lord President, the Paymaster General, the Chief Whip in the Commons and the Chief Whip in the Lords and to Sir Robin Butler (Cabinet Office).



Nigel Wicks

N.L. WICKS

Mike Eland, Esq.,
Lord Privy Seal's Office.

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Prime Minister

For discussion at
the Business Managers'
Meeting on Monday.

PRIME MINISTER

PROTECTION OF INFORMATION BILL

N. L. W.

1. Nicholas Bethell has given Bertie Denham notice that he has ^{12.2} been asked by Richard Shepherd to introduce his Bill on Official Secrets Act reform in the House of Lords and that he has decided to do so, although he may first make some modifications to it. This will not only be of general embarrassment to the Government but also gives rise to some difficult questions of Lords handling. I consider that before he is able to go any further I should see Nicholas Bethell and I have arranged to do so on Monday evening. Before I do so, however, I thought I should consult you on the options for handling. These are set out below. They reflect a brief discussion I have had with Douglas Hurd.

2. The normal Lords convention with a Private Peer's Bill which the Government opposes is for a Government spokesman to make the Government's position clear at Second Reading but not to seek to divide the House. If the peer proceeds with the Bill he is given an allocation of time (at this time of the session usually late at night or on a Friday afternoon) and takes the Bill through its remaining stages with the normal intervals between them. The Bill can then be blocked when it reaches the Commons by a single objection. An alternative, is for someone to table an amending motion at Second Reading that the Second Reading be postponed for six months which effectively kills the Bill. This procedure is rarely used. There is no precedent for a whip of any kind on a Private Peer's Bill; there have been some cases of attempted unofficial whipping but these have not always been successful. Against this background I think we have the options set out below.

3. The first and most obvious option is for me to attempt to dissuade Nicholas Bethell from taking up the bill. The drawback to such a course is that we understand that in that event it will be taken up by Lord Bonham-Carter of the Liberal party. This will

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remove the possibility of exercising any control over the Bill but on the other hand if we did resolve to prevent the Bill from making progress in the Lords, it would obviously be more possible to take such action against an Opposition peer than against one of our own supporters.

4. The second option would be to try to persuade Nicholas Bethell not to take the Bill beyond Second Reading. The advantage of this course is that it is not permitted under the rules of the House to introduce a second Bill on the same subject in the same session. It is possible, however, that with some re-casting of the Bill this rule could be circumvented. Also Nicholas Bethell, having been persuaded to take up the bill, presumably will be intent on carrying it through all its stages in the Lords.

5. The third option would be to allow the Bill to take its course in the sure knowledge that it has no chance whatsoever of reaching the statute book. The difficulties with this course, as Douglas Hurd has pointed out to me, are twofold. First, we would be allowing the Lords an opportunity we have denied to the Commons - namely the chance to discuss the Bill in detail in a Committee Stage. Secondly, that Committee Stage will be used to attempt to force us to disclose details of our plans on specific points of the Bill. The first of these difficulties would be undeniable, but I think we can overcome the second problem by making clear at the outset that the Government's objection to the Bill - as in the Commons - rests primarily on the fact that it is not a suitable subject for a Private Member and that it is premature, given that we are bringing forward our own plans in the summer with an opportunity to debate them. The Government spokesman could then reiterate this line without going beyond it at Committee Stage; he could say that his role was simply to listen and take note of the points raised. This will not be a particularly easy role to sustain but there are precedents for it during Committee Stages on Lords' Private Members' Bills.

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6. The final option is to seek to prevent the Bill getting beyond a Second Reading. However we could not keep our intentions secret. The current media obsession with security matters would ensure a maximum turnout of supporters of the Bill. To put an official whip on our supporters is without precedent and would cause deep resentment. An unofficial whip on such a high profile issue would become known and provoke similar reactions. To mount it we would be drawing heavily on capital which I would much rather reserve for tight divisions on important Government Bills later in the Session. We could sour relations with crossbenchers and some of our own supporters which could also be reflected in later divisions.

7. My preferred course is therefore to see Nicholas Bethell and to try to persuade him not to take the Bill beyond a Second Reading. If I fail, I think I should then seek to persuade him, as a government supporter to drop the Bill altogether. If this too is unsuccessful then I really do think that our best course would be to follow the well-tried and well-understood route of letting the Bill die a natural death with the minimum of publicity though we will have to ensure this is properly presented.

8. I am sorry to minute you at such length but I thought it right to set out the issues in full. I am ready to discuss either at our regular meeting with colleagues on Monday or on a later occasion.

I am copying this minute to Douglas Hurd, John Wakeham, Peter Brooke, David Waddington, Bertie Denham, and Sir Robin Butler.

JD Belstead

BELSTEAD

12 February 1988



5. The first action is to make to prevent the Bill getting passed a second reading. However we could not keep out intention. The current media obsession with security matters would enable a maximum turnout of supporters of the Bill. In fact an official visit to the committee is without precedent and would cause great resentment. An unofficial visit on such a high profile issue would be more known and provide similar reactions. To meet it we would be drawing heavily on capital which I would expect rather reserve for tight divisions on important Government Bills later in the session. We could have relations with crossbenchers and some of our own supporters which could also be reflected in later divisions.

1. My preferred course is therefore to see Nicholas Bethell and to try to persuade him not to take the Bill beyond a second reading. If I fail, I think I should then seek to persuade him as a Government supporter to drop the Bill altogether. It does look as uncharacteristic than I really do think that our best course would be to follow the well-trodden and well-understood route of testing the Bill as a natural death with the aim of publicising enough we will have to ensure this is properly presented.

6. I am sorry to write you at such length but I thought it right to set out the things I think we need to discuss. I have asked our request meeting with colleagues on Monday or on a later occasion.

I am copying this minute to Douglas Hurd, John Wetherley, Peter Brown, David Wedderburn, Basil Gurnham, and Sir Robin Butler.

John Butler

BELSTEAD

12 February 1988



10 DOWNING STREET
LONDON SW1A 2AA

THE PRIME MINISTER

3 February 1988

cc HO
AH
Press

JA

Dear Richard,

Thank you for your letter of 22 January about the Government's proposals for reform of section 2 of the Official Secrets Act.

Like you I hope that there will be a broad spectrum of support for our proposals in the House of Commons. Indeed, Douglas Hurd and I have made clear that we aim to draw up proposals which are effective, enforceable and reasonable; that there will be ample opportunities for discussion; that we fully recognise the role of Parliament in considering our proposals and the ensuing legislation; and that we believe there will be general public support for our objectives. But I should point out once again - as of course the Home Secretary did in the debate on your Bill - that the issues go to the heart of Government and that our proposals must reflect the view we take, as the government of the day, on what is necessary in the national interest.

It is of course open for you and the co-sponsors of your Bill to let Douglas Hurd know at any time of any views or suggestions which add to what you have already put on the record, and these will be properly considered and taken into account. The right time for full and detailed discussion would, I think, be when we have published our own analysis

JA

and proposals in a White Paper. There will then be a debate in the House before the recess. I know that in the usual way Douglas Hurd will want to keep in touch at that stage with those who take a constructive interest in the subject.

Yours

Hayes

Richard Shepherd, Esq., M.P.

From: THE PRIVATE SECRETARY



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MEAT 1/2

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

1 February 1988

Mr. Wicks.

Content with the draft

reply? MEAT 1/2

Dear Mark,

REFORM OF SECTION 2 OF OFFICIAL SECRETS ACT

Thank you for your letter of 26 January.

I enclose a draft reply to Mr Shepherd's letter of 22 January.

In essence Mr Shepherd's request is for a distinctive change in the plan which the Home Secretary announced to Parliament on 15 January, whereby the Government proposes and discussion follows. On Mr Shepherd's plan, as under his original plan for a Bill, a consensus would be established to which there would be strong pressure on the Government to adhere. The consensus thus established would be very likely to extend, for example, to a public interest defence, which has no place in the Government's proposals. We cannot accept Mr Shepherd's new request in full without undermining the Government's case against allowing the Shepherd Bill to proceed.

The draft reply is therefore designed implicitly to reject the overall plan proposed, while sounding conciliatory, though non-committal about discussions after the White Paper is published.

Yours sincerely,

P J C MAWER

Mark Addison, Esq

0A2AKJ

Draft letter for signature by THE PRIME MINISTER to:

Richard Shepherd, Esq, MP
House of Commons
LONDON SW1A 0AA

Copies to be sent to:
PS/Home Secretary
PS/Lord President
PS/Lord Privy Seal

Thank you for your letter of 22 January about the Government's proposals for reform of Section 2 of the Official Secrets Act.

Included,
Douglas Hurd and I have made clear that we aim to draw up proposals which are effective, enforceable and reasonable; that there will be ample opportunities for discussion; that we fully recognise the role of Parliament in considering our proposals and the ensuing legislation; and that we believe there will be general public support for our objectives.

like you I

~~It is therefore very much my hope, as it is yours, that~~
there will be a broad spectrum of support for our proposals in ~~all parties, including the Official Opposition.~~ *the House of Commons.* ~~I must, But I~~
~~however, make it clear once again - as of course the Home~~
Secretary did in the debate on your Bill - that the issues go to the heart of Government and that our proposals must reflect the view we take, as the government of the day, on what is necessary in the national interest.

/It is of course

It is of course open for you and the co-sponsors of the ^{you} Bill to let Douglas Hurd know at any time of any views or suggestions which add to what you have already put on the record, and these will be properly considered and taken into account. ^{I think} ~~I think~~ ^{the right time} ~~the right time~~ ^{for any more structured} ~~for any more structured~~ ^{discussion would be} ~~discussion would be~~ ^{after we have put together and published} ~~after we have put together and published~~ our own analysis and proposals in a White Paper. ^{After that} ~~After that~~ there will ^{then} ~~be~~ a debate in the House before the recess and I know that in the usual way Douglas Hurd will want to keep in touch at that stage with those who take a constructive interest in the subject.

000
Pmc Minutes ²

A useful interview

From: THE PRIVATE SECRETARY

W C W

27.1



HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

27 January 1988

Dear Trevor,

REFORM OF SECTION 2 OF THE
OFFICIAL SECRETS ACT

..... You may recall that I spoke to you last week about the Home Secretary's recorded interview with Peter Hennessy for the "Analysis" programme on Radio 4 tomorrow night. Sir Robin Butler may be interested to see the attached transcript of the interview.

I am copying this letter and enclosure to Nigel Wicks.

Yours sincerely,

P J C MAWER

Trevor Woolley, Esq.,

INTERVIEW WITH HOME SECRETARY

Interviewer

Mr Hurd, who should decide where the line is drawn between the necessary secrets of the state and the citizen's access to information - Ministers, Parliament or the courts?

Home Secretary

If you are talking about criminal offence, then obviously only Parliament could do that, and the trouble at present is that the Act which Parliament passed in 1911 is too wide and too weak and that is why we ought to change it.

Interviewer

Who though is in a position to judge what should remain secret and what shouldn't in disputed cases?

Home Secretary

Well, it should be for Parliament to lay down the definition and then obviously it will be for the courts in a particular case to decide whether the Act is er... whether the crime defined in the Act has been committed or not.

Interviewer

Many would argue, I mean, Ministers in the position to really know what should be retained and what should be released.

Home Secretary

Well, when we come to discuss proposals for the Official Secrets Act, that will be one of the ball points. I think it is certainly right that Ministers should propose to Parliament where they think the definition should be, and that was the argument we had over Mr Shepherd's Bill. But when it comes to individual cases, at the end of the day it is going to be the court, isn't it, which decides?

Interviewer

But in this Constitutional constellation then, it is Parliament that really is the sovereign body because it has to decide the guidelines initially.

Home Secretary

Yes, of course that's right. Whenever you are talking about creating offences or defining offences, it has to be Parliament which does it, and Parliament will, quite rightly, want to look at this very carefully. They looked at our last attempt and they didn't like it, the House of Lords, and so we had to withdraw it and now we will try again.

Interviewer

But you are not terribly keen, are you, on backbenchers making the propositions that their colleagues will decide upon, you think Ministers have to propose in this area and Parliament to dispose?

Home Secretary

I think that is right. I think it is sensible when Government is seriously reviewing this, I mean if we were sitting back and saying everything was perfect, and we are going to rest on section 2 for the rest of time, I could quite understand Parliament getting a bit restive under that. But when we say, that we are engaged in a serious effort and will come forward with proposals in June, it is reasonable, as the majority have decided, the Friday before the House, to wait for that and then for Parliament to judge whether to take our proposals, reject them, or change them.

Interviewer

Are you worried by, what appears to many, to be an extension of the law of confidence, into the area of Government secrecy?

Home Secretary

Now we are dealing here with the duty of confidentiality, aren't we, that's what you're talking about, and there are people, and we're thinking obviously particularly of members of the security service, who, I think, have a particular, particularly strong duty of confidentiality; most

employees have it in one degree or another but what we are concerned about at the moment is the particular duty which those servants of the Crown engaged in particularly secret activity have and which continues after their retirement and how that is to be protected.

Interviewer

So you would want the law of confidentiality as it is being currently applied then to be kept at the secret servants of the state and not to spill over to Crown servants generally.

Home Secretary

Well, as I say, it does apply, everywhere it applies, to ... to you, it applies to most employees. There is under the Civil law an obligation of confidentiality which the courts assess and the problems which are, shall we say, under most acute debate at the moment relate to the absolutely the top end of that market; the particularly, I would say complete duty, owed by someone who has been a member of the security service or is still.

Interviewer

Do you think it is not desirable, therefore, to extend that notion of complete duty, as you describe it, to normal civil servants not engaged in these hyper-sensitive areas?

Home Secretary

^{? grades}
I think there are gravels and I think that when we come to discuss the Official Secrets Act in detail, and we will have to do, the courts are doing all the time, we will have to assess how that actually works out in practice. In practice you know, ~~you know~~, we are discussing all this time exceptional situations, I mean I've been a Crown servant for 14 years and a member of Parliament for 14 years, I've seen it from both angles and I must say the number of times where there is this tension or this contradiction between the duties of the civil

servant and what the Minister requires of him, they are really very small and therefore to suppose that this whole situation is one of, you know, collapse or crisis or high drama is not so.

Interviewer

So you will hope that with your White Paper on Official Secrets, and once it is a law, you will obviate the need for the courts to get into this exceedingly complicated business of deciding where the line should be drawn, but your statute will take care of that.

Home Secretary

Well we will certainly try again to define clearly the three kinds of information which civil servants have; the one over which there need be no protection, although it is protected at the moment, by the Official Secrets Act, unnecessarily. Secondly there is the category where there needs to be protection but where, quite reasonably, that can be done by ordinary discipline. You don't need the criminal law. And thirdly, there is the area, the section, which is a small minority of the whole, where there is, we believe, and we hope Parliament will agree, a section which does need the protection of the criminal law.

Interviewer

Can you give me three very quick examples from each of those categories?

Home Secretary

Yes. I don't think we've offered you a cup of tea, but if you saw the ~~gave~~ details of the teabag and the tea served in the Home Office, technically, because you might well be in breach of the Official Secrets Act, that is nonsense, no reason why that should be protected at all. When officials brief me for this interview or give me advice as to what it should contain, that I would be displeased if they immediately said that I hadn't taken their advice, but I wouldn't think that was a matter

where they should be prosecuted, but there might be a disciplinary point there, there might be. But supposing ^{that} someone was to run after you as you caught the lift down from this interview, and said oh, by the way, the actual truth about this or that security ^{service} ^{is} operation/so and so, then I would think that that disclosure to you might require criminal action. So those are three things that might happen to you in the course of your present visit to this building which would fall into those categories.

Interviewer

Can you make a distinction for me between the particular obligations that secret servants of the state have to confidentiality and the more general obligations on normal civil servants.

Home Secretary

Well I think when we come to our Bill, those frontiers will be strongly discussed because they are controversial and we are working on exactly how we believe they should be defined. I think I'd simply say this; that the security service has this particular responsibility for protecting us from terrorism, subversion, espionage and therefore there is a particularity about what they get, what they know which does mark them off, a bit, from say, the ordinary soldier, sailor, airman or civil servant.

Interviewer

Do you think, bearing in mind, the very real distinction between secret servants of the state and the others that there is a case to be made for some kind of confidential Parliamentary oversight of the secret agencies?

Home Secretary

It's difficult, isn't it. I mean, at the moment, I am responsible to Parliament as regards the security service and the Prime Minister also, and that is fairly clearly defined. You could of

course set up a committee, distinguished committee of Privy Councillors. Either you would tell them everything, in which case they wouldn't be able to pass on everything they knew and people like you would quickly begin to say, "oh, old so and so, he's the other side of the fence, he's not much use to me, how do I know that he hasn't been nobbled". On the other hand, if you don't tell them everything, if they stay as it were the public side of the fence, which fences off these particular secrets, then they would get discontented and they would feel that they weren't getting the whole story, nor would they be. So that is the difficulty of devising any system outside. What we have done, as you have noticed, in the last few weeks is set up a system of staff councillor, so that a member of the security service who feels something is going amiss, or there is something particular that he wants to tell to someone who isn't his immediate superior, has somebody now to go to.

Interviewer

But you haven't given up the attempt to find a half-way house between this dilemma of some kind of oversight system that would reconcile the two problems you've described?

Home Secretary

Well, I believe that if we can get through the present mish mash of controversy, and make it appear perhaps more clearly than we have, where the lines of responsibility are, that they are through the Home Secretary, through the Prime Minister, so far as the security services are concerned and we have on the side this new institution of the staff councillor, I think that that is a reasonable outcome.

Interviewer

You've spoken of the obligation of confidentiality, and particular reference to the secret servants of

the state, do you think it has to be absolute in the sense of being life-long in every case?

Home Secretary

Well I think so. It is not really satisfactory if a member of the security service, the moment he leaves the service, can leap up and down and say I can say what I like because my obligation of confidentiality no longer applies. I mean, he has an obligation, he has an obligation to his country, he has an obligation to his former colleagues. I mean it is actually their lives and the effectiveness of their work which are at risk if he is released immediately from that obligation. Again, we have got a rash of instances at the moment, but this has been accepted through the ages, I would almost say, that there are certain things which you do which you don't even say perhaps to members of your family. I believe that most people accept that there is this duty of confidentiality and that it does extend beyond the actual period of service.

Interviewer

Unto the grave?

Home Secretary

Unto the grave.

Interviewer

Are you attracted by the idea of contracts for Crown servants that would make all this very specific?

Home Secretary

Well I don't rule that out. I'm not sure that it would add very greatly to the strength of the present situation, there is the duty of confidentiality already under civil law, it doesn't work particularly well obviously, when somebody is outside the jurisdiction of one of our courts, but nor would a contract.

Interviewer

Where does an official's duty in the end lie? Are

civil servants public servants or Government servants?

Home Secretary

They are public servants and they serve the Government of the day and it is the Ministers who are responsible to Parliament, to the electorate and whose decisions may be questioned in judicial review and the civil servant is to that extent protected and because of that, it is not he who is accountable, but the Minister.

~~Interviewer~~

~~One more, for the indulgence?~~

~~Home Secretary~~

~~One more, a quick one.~~

Interviewer

Lord Franks, after he had done his report on Official Secret Reform went further and said that to get some kind of access to information built into the system he wanted a code of practice to be presented to Parliament by Ministers, Parliament would agree and a Select Committee would monitor it. It would go with the Parliamentary grain. Do you think we may see that idea?

Home Secretary

Well, I would rather get the reform of the Official Secrets Act through. I would be surprised if during the debates and discussions on that Bill we didn't, we couldn't make the kind of progress and the kind of detail which would be satisfactory, turn out satisfactorily, and then it would be for the courts to interpret in particular cases. I don't myself see why you need in the middle, in between as it were, the Act which Parliament passed and its interpretation by the courts, why you need a separate code monitored by Parliament.

Interviewer

Don't you need a compulsion to be open, as we are a fairly secretive society.

Home Secretary

Oh no, we are becoming steadily less secretive. I asked the other day in the Home Office, and I have been provided with a whole list of things which I won't weary you with now, where we used to keep our mouths shut and we now provide information and I think that most of my colleagues could produce such a list and certainly the Prime Minister could in what she has said about the security service. I don't think there has ever been a Prime Minister who has said more about the security service. The trouble about the media is that naturally they are more interested in the information which is not available than in the greatly increased amount of information which is available.

Interviewer

Douglas Hurd, thank you very much.



10 DOWNING STREET
LONDON SW1A 2AA

From the Private Secretary

Ack | 26 January 1988

I attach a copy of the letter from Richard Shepherd, asking the Home Secretary to engage in all party discussions before coming forward with proposals to replace Section 2 of the Official Secrets Act, which has attracted some publicity.

I should be grateful for a draft reply by Tuesday 2 February please.

(Mark Addison)

Philip Mawer, Esq.,
Home Office

Via

From: Richard Shepherd, M.P.



HOUSE OF COMMONS
LONDON SW1A 0AA

22nd January 1988

754
News R22/1
McKivley - 15 Dec.
I will send to the House
in the usual way for a
reply, and put into
the file.

Dear Anne Minister,

We write as sponsors of the Protection of Official Information Bill which failed to secure a second reading in the Commons last Friday by 37 votes.

What united us as sponsors was the belief that it would be very much in the national interest if the Bill which will replace Section 2 were to have the general support of all the principal parties in Parliament; and we also considered that our own Bill was a possible basis for such a measure which would ensure continuity of policy and remove controversy from an important area of government.

Our fear is that a measure promoted by a government but opposed by opposition parties might emerge to replace Section 2. Such a situation would prevent the stability and continuity which should be maintained in policies relating to the protection and security of official documents.

We therefore request that before publishing proposals in the form of a White Paper, the Home Secretary should engage in discussions with representatives of other parties in an endeavour to arrive at agreed structures to replace Section 2; and so that these discussions might proceed with the declared support and goodwill of H.M. Government and the Official Opposition.

In a nutshell, we believe that the security of our nation would be stronger and more effective if the legislation which dealt with it was such as to command a broad spectrum of support among all parties.

With kind regards,
Richard

The Rt.Hon. Margaret Thatcher, M.P.
The Prime Minister,
10 Downing Street,
London SW1A 2AA.

Signed on behalf of:

Jonathan Aitken
Nicholas Fairbairn
Sir Ian Gilmour
Robin Squire
Teddy Taylor

Michael Foot
Merlyn Rees
Chris Smith
David Owen
Archy Kirkwood



10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

MR. WOOLLEY,
CABINET OFFICE

ENFORCING THE DUTY OF CONFIDENTIALITY
(OD(DIS)(88)2)

The Prime Minister has now studied this paper which sets out recommendations of officials regarding a number of questions concerning the form of Section 2 of the Official Secrets Act, international enforcement of injunctions and copyright.

The Prime Minister is content with the recommendations of the paper set out in paragraph 3.1 subject to the views of the other members of the Committee.

I am sending a copy of this minute to the Private Secretaries to the members of OD(DIS), the Lord Chancellor, Lord Privy Seal, the Lord Advocate and to Sir Christopher Mallaby.

N. L. W

N. L. WICKS

18 January 1988

80

XXXXXX 01-936-6494

Communications on this subject should
be addressed to

THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

19 January 1987

T Woolley Esq
Cabinet Office
Whitehall
LONDON S W 1

Mr.

Dear Trevor,

ENFORCING THE DUTY OF CONFIDENTIALITY (OD(DIS)(88)2)

The Attorney General has seen the above paper and Nigel Wicks's minute to you of 18 January. He is content with the recommendations set out in paragraph 3.1 of the paper.

I am copying this to Nigel Wicks, to the Private Secretaries to the other members of OD(DIS), the Lord Chancellor, the Lord Privy Seal and the Lord Advocate and to Sir Christopher Mallaby.

Yours sincerely,
Anthony Inglese

A M C INGLESE

SECURITY: Official Secret Act PTZ



ATTORNEY GENERAL'S CHAMBERS
THE HOME SECRETARY
STATION CHIEF'S CHAMBERS

1. Reply to

2. Reply to

3. Reply to

4. Reply to

Dear Sir,

ENFORCING THE DUTY OF CONFIDENTIALITY

The Attorney General has been the above paper and legal which is the
of the... the to confirm with the recommendations set out in paragraph
2.1 of the paper.

I am copying this to the Home Secretary to the effect
members of the... the Lord Chancellor, the Lord Privy Seal and the Lord
Advocate and to the... the... the...

Yours sincerely,
[Signature]

A. W. H. H. H.



CONFIDENTIAL



N015

SIR CHRISTOPHER MALLABY (has seen)

MR WOOLLEY 15/1

MR WICKS

Yes not

Prime Minister

A complex paper which comes to sensible judgments. Are you content with the recommendations in § 3.1?

ENFORCING THE DUTY OF CONFIDENTIALITY (OD(DIS)(88)2)

Private Offices were requested to inform the Secretaries of OD(DIS) by the end of 14 January if any Minister favoured a meeting to discuss the recommendations in the above paper.

N.L.W.
15.1

2. No Minister has requested a meeting. The Foreign and Commonwealth Secretary and the Attorney General have no comments on the paper. Home Office officials think it unlikely that the Home Secretary will comment. The Lord Chancellor's Department have told us that, while he is generally content with the paper, he will be writing to suggest that more work should be done by officials to refine the use of the expression "purported information".

His Pte office confirms that

B. H. Dinwiddy

B H DINWIDDY

15 January 1988

CONFIDENTIAL

From: THE PRIVATE SECRETARY



ma
HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

14 January 1988

Dear Nigel,

PROTECTION OF OFFICIAL INFORMATION

I understand that the Prime Minister is to see Richard Shepherd MP at 4 p.m. today. She may find it
..... helpful to see the attached note, prepared by the
Home Secretary's Special Adviser, of last night's
meeting of the backbench Home Affairs Committee. Mr
..... Bickham's covering note to me (also attached) gives a
useful summary account.

I am sending copies of this letter and its enclosures to the Private Secretaries to members of OD(DIS), Paul Stockton (Lord Chancellor's Office), Alison Smith (Lord Privy Seal's Office), Alan Maxwell (Lord Advocate's Department), Murdo Maclean (Chief Whip's Office) and Trevor Woolley (Cabinet Office).

Yours sincerely,
P J C MAWER

Nigel Wickes, Esq., CBE.

PERSONAL - IN CONFIDENCE

cc: Mr Patten
Mr Renton
Lord Ferrers
Mr Hogg
Mr Heathcoat-Amory
Mr Wrench
Mr Faulkner
Mr Varney
Mr Walters
Mr Mower
Mr Fanthorpe - CRD

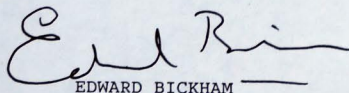
Mr Mawer

BACKBENCH HOME AFFAIRS COMMITTEE

I attach a record of the Backbench Committee meeting with the Home Secretary on the Shepherd Bill on Official Secrets. This note provides a summary.

The meeting was attended by 72 Members. Although a number of Members were clearly feeling aggrieved the mood was reasonable and not over-charged. The meeting was cut short by a division but the Chairman told me that only seven Members had indicated a desire to ask a question - of whom six had been called by the close. There was clearly resentment about the three line whip and, in some quarters, about the suggestion that a Private Member's Bill is an unsuitable vehicle for reforming the OSA. The Shepherd camp can be expected to emphasize the 'backbenchers' rights' theme.

The Home Secretary was well received and supported by Mr Mates, Mr Heseltine and, on balance, Mr Biffen. Mr Budgen spoke on the issue of backbenchers' rights. Mr Nelson argued that the Government should reveal its thinking and set out reasons of substance for rejecting the Shepherd Bill. Mr Aitken claimed that a Private Member's Bill was the best vehicle for creating a consensus behind a reformed OSA and argued that the three line whip was unacceptable. Mr Biffen said that on balance he preferred using the route of Government legislation but was warmly applauded when he criticised front bench 'arrogance' in imposing a three line whip. Mr Allason complained about the fact that the Government had not mentioned reforming the OSA in the Manifesto. Mr Heseltine said that Mr Shepherd was ultimately responsible for pushing the Government into action for which he deserved credit, but with a number of different law cases outstanding the Government should not be let down by its supporters. He backed the Government's promise of a White Paper and early legislation.



EDWARD BICKHAM

14 January 1988

HOME SECRETARY'S MEETING WITH THE
CONSERVATIVE BACKBENCH HOME AFFAIRS COMMITTEE
WEDNESDAY 13 JANUARY 1988

Official Secrets Act : Mr Richard Shepherd's Bill

Present : Mr Michael Mates, (in the Chair) and 71 other Members

The Home Secretary said that reform of the Official Secrets Act was of importance to the Government, Parliament and the media but raised little interest amongst the electorate. In 1979 the Government had made a major effort to reform the Act; the Labour Government having prevaricated for five years. The Government's effort had been derailed by the Blunt revelations. This had led to a number of senior colleagues, understandably, believing that the issue was best left alone. The alternative view within Government over the last couple of years was that Section 2 of the OSA was too wide and too weak and that it was important that a new effort should be made to reform it. Indeed, the Home Secretary said that he believed in the need to tackle reform once again in the interests of good Government. Work on proposals for reform had begun last April and he hoped that Members would give no credence to the notion pedalled in the Press that his undertaking to bring forward a White Paper was cooked up to put a smoke screen round the Shepherd Bill. This was not true and he gave the Committee an undertaking to that effect. Work had progressed well and by December about two thirds of it had been completed. He had then been authorised by the Prime Minister to announce the publication of a White Paper with a view to early legislation.

The Home Secretary said that although he disagreed with some of Mr Shepherd's recent comments, he would not criticise the way in which Mr Shepherd had set about his business or his choice of subject for a Bill. However, devising a satisfactory reform of the Act was a different exercise from any in which the Home Secretary had been previously involved. It went to the heart of

the way in which Government works and involved the passionate interest of a host of Departments and agencies. It was a formidable task to construct a properly balanced package but that objective was now within grasp. The Government had thought about jumping aboard the "Shepherd bus" but two difficulties were raised by such a course : the Government's work was not complete and could not be rushed; and the nature of a Private Member's Bill meant that neither the sponsor nor Ministers were in control. On the latter point, the Government could probably cut the throat of an unacceptable Bill at Report Stage, this would inevitably be a messy business which could complicate the prospects for producing acceptance of a new Government Bill.

He assured the Committee that the White Paper would not be a "pig in a poke" and nor would it be a tyrannical new measure aimed at buttoning the lips of civil servants or trussing the Press. Indeed, such suggestions were out of touch with reality given the Government's experience in 1979, the support shown for the Shepherd Bill and the need to devise legislation which commands sufficient acceptance as to secure convictions.

The Home Secretary outlined the main questions which had to be addressed in constructing a package for reform; which categories of information need protection? What is the correct balance between safeguarding information through criminal sanction and through disciplinary procedures? Should the disclosure of all information in certain categories be covered by the criminal law? Should there be a damage test and should that test vary as between different categories of information? and, finally, who should decide whether a particular disclosure would have been likely to cause damage?

When Richard Shepherd had come forward with his proposed Bill the Government was outwardly inert. His choice had therefore not been surprising and the choice for the House in October seemed to be between action through a Private Member's Bill and inaction. The situation had, however, been transferred because the Government was now clearly committed to making a solid effort to bring about reform.

Michael Mates, in thanking the Home Secretary, reminded Members that the issue of the three line Whip was not a matter on which the Home Secretary could personally be pressed.

Nick Budgen congratulated the Home Secretary on his persuasive presentation of the Government's case. He said that he had doubts about the Shepherd proposal of allowing the Judicial Committee of the Privy Council to second guess Ministerial certificates - which he saw as involving judges in politics. However, what had swayed him into hostility to the Government's position was the Prime Minister's argument that the subject of Official Secrets was not "suitable" for a Private Member's Bill. He strongly disapproved of the argument of principle that backbenchers have no role in regard to issues of national security. The Prime Minister had not deployed the argument which the Home Secretary had now put forward that the time was unripe and that the Government was itself determined to act.

The Home Secretary replied that when the Prime Minister had written to Mr Shepherd it had not been clear that the Government could proceed with proposals for reform. That was not the position now and the choice was now clear before Parliament - they could either go for a Private Member's Bill or they could wait for a White Paper, a period of discussion and early legislation proposed by the Government.

Anthony Nelson said that Richard Shepherd had proceeded honourably. He had had doubts about whether the Bill went far enough in protecting official information but the Home Secretary would have to do better in producing arguments of substance as to why the Shepherd Bill should be prevented from making progress. He hoped the Home Secretary would come forward with more substantive reasons on Friday and that he would say more about what he regarded as the stumbling blocks to using the Shepherd Bill as a vehicle for reform. The Home Secretary replied that he would do his best to show that he was not engaged in a throttling exercise. It was foolish to pretend the Government was seeking to override Parliament. In the end Parliament would decide whether it found the Government's proposals acceptable - as, in effect, it had in 1979. He would

certainly not be surprised if the Leader of the House made time available for a debate on the White Paper before the Summer Recess.

John Biffen welcomed the persuasive case put forward by the Home Secretary and said that on balance he believed it was better to take reform of the Official Secrets Act forward through Government legislation. He regarded the Shepherd initiative as laudable. There had been one jarring note in the affair: the imposition of a three line Whip. This soured the substance of the Government's case and showed a breakdown in the relationship of trust between the Treasury bench and Backbenchers which was suggestive of a dangerous arrogance on the part of the Front Bench. He said that he deeply admired what the Home Secretary was trying to do, but his task was not helped by a three line Whip. There was sustained applause.

Rupert Allason asked why, if work had been going on since last April, there had been no reference to reforming the Official Secrets Act in either the Manifesto or the Queen's Speech. The Home Secretary said that the latter would not have been sensible since there had never been any intention to include a Bill in the present Session. With regard to the Manifesto, it was an arguable point but it had to be remembered that the Manifesto was drafted at a very early stage of the work, before it was clear whether the Government would be able to produce a package which stood a good chance of acceptance. He did, however, regret that the Government had not been able to reveal its hand a little earlier.

Michael Heseltine said that in political terms, Richard Shepherd had won. Without his initiative it was more than probable that the "do nothing" school of thought within the Government would have prevailed and there

would have been no attempt to reform the OSA. That then left open the question of whether it was better to proceed by way of the Shepherd Bill or through Government legislation. It seemed apparent to him that there was no pressing need to legislate this year and as there were wider issues which needed to be addressed about relations between Ministers and officials he favoured proceeding on a slower timescale by way of Government proposals. He felt, in particular, that the Government should be given the benefit of the doubt at a time when it is fighting a number of difficult legal cases. He would not, on an issue of national security, be prepared to reject the advice of the Home Secretary.

A Division having been called in the House, the meeting was brought to a close.

EDWARD BICKHAM

14 January 1988

1603A



4 J2 BVC
SUBJECT

CC MASTER

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

14 January 1988

Dear Philip,

MR SHEPHERD'S BILL

The Prime Minister had a 35 minute discussion this afternoon with Mr Shepherd about his Bill. The discussion was animated in parts, but was conducted in a wholly amicable fashion. The Prime Minister's Parliamentary Private Secretary, Mr Hamilton, was also present.

Mr Shepherd said that the three line whip placed loyal colleagues in a difficult position. He was sure that the Government could have defeated his Bill even without such a drastic step. He was most disappointed that no Government Minister had made any substantive comment on either the substance or the detail of his Bill.

The Prime Minister said that she was sorry that loyal colleagues were being placed in a difficult position. But the decision to have a three line whip had been taken only after the most careful consideration. She knew from her own personal experience the problems likely to arise for a Private Member taking a Bill through the House. There could, of course, be no objection to any Government backbencher taking up a broad issue like that in Mr Shepherd's Bill. But the normal approach adopted by the Member in those circumstances was to use the debate on Second Reading as a means of ventilating the issue without pressing the Bill into Committee. If a Member wanted to take a Bill right through Committee, the normal practice was to focus on a narrow issue on reform, as she had done herself. But the real difficulty for the Government with his Bill was that Committee would inevitably contain Members who did not support the principle of an effective Security Service. They would use Committee Stage as a pretext for raising many difficult issues, some of which would damage the Services. The Bill's long title gave ample scope for such tactics. She could see no way in which a Private Member could negotiate with the Government on these matters. The Government would make its position clear: a White Paper in June with legislation next session. Mr Shepherd knew that she was always ready to see Government

backbenchers. Maybe she should have spoken sooner; but it would have been quite wrong for her to have met a delegation which had included leading members of the Opposition, such as Mr Foot, Mr Rees and Dr. Owen.

Mr Shepherd then rehearsed his version of the history of the discussions with Ministers about the Bill. He had been willing from the beginning for the Home Office to take over the Bill. The Prime Minister interjected that a Government Department could not take over a Private Member's Bill in a way which would give the Government the control over the Bill which it would have had with a Government Bill. It would be impossible for a Private Member to negotiate with the Opposition on the important matters which would arise.

Mr Shepherd then said that an earlier Government had been willing for a Private Member to introduce legislation on the matters covered in his Bill. The previous Labour Government had not blocked Mr Clement Freud's Bill. Mr Hamilton, who had been a member of the Committee examining that Bill, said that the then Government's tactics on the Bill had been much dictated by the current state of politics and their need to obtain Liberal Party support.

Mr Shepherd then asked whether the Prime Minister would be willing to permit the matter to go to a Select Committee, replace the three line whip with a two line whip and to identify the main principles which the Government thought should underlie such legislation. The Prime Minister said that she was not willing to see the matter go to a Select Committee or to remove the three line whip. The Government would outline the principles it thought should be followed in the forthcoming White Paper.

I am sending a copy of this letter to Alison Smith (Lord President's Office) and Murdo Maclean (Chief Whip's Office).

Yours sincerely
Nigel Wicks

N.L. Wicks

Philip Mawer, Esq.,
Home Office.

CONFIDENTIAL



10 DOWNING STREET

From the Principal Private Secretary

13 January 1988

Dear Philip,

PROTECTION OF OFFICIAL INFORMATION BILL

The Prime Minister has seen the Home Secretary's minute of 12 January about what the Home Secretary should say in the Second Reading debate on Richard Shepherd's Bill.

The Prime Minister is content with the line suggested by the Home Secretary in his minute; and in particular that he should say that the Government hopes to lay the White Paper before Parliament in June. Subject to the views of the Lord President, she would be ready for him also to say that he hopes that it will be possible for Parliament to debate the White Paper before the Summer Recess.

I am sending copies of this letter to the Private Secretaries to members of OD(DIS), Paul Stockton (Lord Chancellor's Office), Alison Smith (Lord Privy Seal's Office), Alan Maxwell (Lord Advocate's Department), Murdo Maclean (Chief Whip's Office) and Trevor Woolley (Cabinet Office).

Yours truly
Nigel Wicks

(N.L. Wicks)

Philip Mawer, Esq.,
Home Office.

CONFIDENTIAL

PRIME MINISTER

I attach as background for this meeting:-

Your correspondence with Mr. Shepherd
Briefing for Questions
The Bill

A note by the Home Office on the
differences between Mr. Shepherd's
Bill and the Government's proposals.

N.L.W.

N. L. WICKS

13 January 1988

HIV.11

*Richard
Shepherd*

NOTE FOR QUESTIONS TO THE PRIME MINISTER

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911/RICHARD
SHEPHERD'S BILLLine to take

1. As the Home Secretary announced on 15 December, the Government will be setting out its proposals for the reform of section 2 in a White Paper later this Session with a view to early legislation.

2. We have been working on the proposals since last Easter but have not yet reached conclusions. The time taken reflects the importance and complexity of the issues.

3. Until we have completed our studies, it would not be sensible to comment on details.

4. The object of our proposals will be to narrow the scope of the criminal law so as to penalise only disclosures which genuinely threaten the interests of the nation.

5. Official secrets legislation is complex and controversial and the issues go to the heart of government and the security of the state. The way to secure effective, reasonable and permanent reform is a Government Bill, following a White Paper.

Background

6. The Home Secretary announced on 15 December that the Government would be laying a White Paper before Parliament later this Session setting out the Government's proposals for reform of section 2, with a view to early legislation.

7. The Second Reading debate on Mr Shepherd's Bill is on 15 January. Ministers have declined to discuss the details of the Bill with Mr Shepherd on the grounds that the Government has not decided its own proposals. In the debate the Home Secretary will say that the debate is useful to the Government in preparing its proposals but that the House should wait for those proposals and not give the Bill a Second Reading.

mt

PRIME MINISTER

JONATHAN AITKEN

You may like to know that I have checked the Hansard for 3 May 1977, when the Adjournment Debate on Agee and Rosenball took place. Jonathan Aitken spoke in the debate and sat on the fence. His speech ended:

'in the absence of benefits and reasons given and full legal process being entered into, the best we can say is that the Home Secretary's arguments tonight must remain unproven'.

He abstained in the vote.

MEAT

Hardyson very much not

MARK ADDISON

1 December 1987

Sue
Can you 'store' this?

JP 3/12
AITKEN

Official
Answer me

Protection of Official Information Bill

EXPLANATORY MEMORANDUM

The Bill replaces section 2 of the Official Secrets Act 1911 with new provisions to protect certain official information and articles from unauthorised disclosure. It also requires government departments and certain other authorities to publish specified information.

PART I

Part I deals with the protection of official information.

Clause 1 defines the "protected information" to which the Bill applies as information which is or has been held by a Crown servant or government contractor by virtue of his position as such, and which:

- (a) relates to defence, international relations, security or intelligence if its unauthorised disclosure would be likely to cause serious injury to the interests of the nation, or endanger the safety of a British citizen;
- (b) would be likely to be useful in the commission of offences, the escape of a person from legal custody or be likely to impede law enforcement;
- (c) has been supplied by an individual in confidence under a statutory requirement or in connection with an application under a statutory provision.

There are analogous definitions for protected articles.

Clauses 2 to 5 create offences relating to the disclosure and retention of protected information. Equivalent offences relating to disclosure of protected articles are also provided.

Clause 2 makes it an offence for a Crown servant intentionally or recklessly to disclose protected information knowing it to be such and knowing the disclosure to be contrary to his official duty.

Clause 3 makes it an offence for a government contractor intentionally or recklessly to disclose protected information knowing it to be such unless the disclosure is in connection with his functions or is officially authorised.

Clause 4 makes it an offence for a person other than a Crown servant or government contractor intentionally or recklessly to disclose protected information knowing it to be such unless the disclosure is officially authorised or to a Crown servant.

Clause 5 deals with the unauthorised retention of documents containing protected information. It makes it an offence for a Crown servant intentionally or recklessly to retain a document containing protected information knowing it to be contrary to his official duty to do so.

A Crown servant or government contractor who intentionally or recklessly fails to comply with an official direction for the return or disposal of a document containing protected information commits an offence.

Other persons commit an offence if they intentionally or recklessly retain a document containing protected information, knowing it to be such, after receiving an official direction for its return or disposal.

Clause 6 provides a defence that, before the time of the alleged offence, the information or article had become publicly available whether in the United Kingdom or elsewhere.

Clause 7 provides a defence that the disclosure or retention of information or an article was in the public interest insofar as the accused person had reasonable grounds to believe that it indicated the existence of crime, fraud, abuse of authority, neglect in the performance of official duty or other misconduct. In the case of a Crown servant or government contractor the defence is available only if he had previously taken reasonable steps to comply with any established procedures for drawing such matters to the attention of the appropriate authorities, without effect.

Clause 8 provides that no prosecution can be brought for the disclosure of protected information or articles concerning defence, international relations security or intelligence unless a Minister has certified that at the time of the alleged offence the information or article was properly classified in accordance with clause 12 of the Bill. The consent of the Attorney General is required before prosecutions for certain offences can be brought.

Clause 9 provides that where a defendant challenges a certificate issued under clause 8 the Judicial Committee of the Privy Council shall determine whether the information or article involved was properly classified at the time of the alleged offence.

Clause 10 deals with powers of arrest and the bringing of proceedings.

Clause 11 provides for penalties for offences under the Bill.

Clause 12 requires the responsible Minister to classify information or articles relating to defence, international relations, security or intelligence whose unauthorised disclosure would cause serious injury to the interests of the nation or endanger the safety of a British citizen, and ensure that documents or articles are marked accordingly.

Clause 13 requires the Minister for the Civil Service to make regulations, subject to affirmative resolution by Parliament, governing the classification of documents and articles under clause 12, and provides for an annual report to Parliament on the application of the regulations.

PART II

Part II deals with the publication of certain documents.

Clause 14 defines the government departments and other authorities to whom this Part of the Bill applies.

Clause 15 requires departments and authorities to make available for inspection, copying and purchase any manuals or other documents containing rules used by them in making decisions affecting the benefits

or penalties to which individuals may be entitled or subject. An index to such manuals and other documents must also be provided. Departments and authorities may charge a fee to cover the administrative costs of making such documents available for inspection or for providing copies.

Clause 16 requires departments and authorities to make an annual report to Parliament on any measures they have introduced to facilitate and increase public access to information within their control. (The introduction of such measures is not itself required under the Bill.)

PART III

Part III deals with miscellaneous matters.

Clause 17 deals with interpretation.

Clause 18 prescribes the circumstances in which acts committed outside the United Kingdom can constitute offences under this Bill; extends the Bill to Northern Ireland; and provides for its extension by Order in Council to the Channel Islands, the Isle of Man or any colony.

Clause 19 deals with the short title, amendments, repeals and commencement of the Bill.

SCHEDULE

The Schedule lists the repeals, which include section 2 of the Official Secrets Act 1911.

Protection of Official Information Bill

ARRANGEMENT OF CLAUSES

PART I

PROTECTION OF OFFICIAL INFORMATION

Clause

1. Protected information and articles.
2. Wrongful disclosure by Crown servants.
3. Wrongful disclosure by government contractors.
4. Wrongful disclosure by other persons.
5. Retention of documents.
6. Information previously available to the public.
7. Disclosure in the public interest.
8. Restrictions on prosecutions.
9. Evidence of serious injury etc.
10. Arrest, search and trial.
11. Penalties.
12. Classification.
13. Regulations governing classification.

PART II

PUBLICATION OF CERTAIN DOCUMENTS

14. Application.
15. Manuals, etc.
16. Annual reports.

PART III

MISCELLANEOUS

17. Interpretation.
18. Acts done abroad and extent.
19. Short title, amendments, repeals, and commencement.

SCHEDULE: Repeals.

A
B I L L

TO

Repeal section 2 of the Official Secrets Act 1911 and to make new provision for the protection of official information and articles, for the publication of certain documents; and for connected purposes. A.D. 1987.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

PROTECTION OF OFFICIAL INFORMATION

1.—(1) This Act applies to information of any of the following descriptions which is or has been held by a Crown servant or government contractor by virtue of his position as such, namely— Protected information and articles.

(a) information relating to defence, international relations, security or intelligence the unauthorised disclosure of which would be likely to cause serious injury to the interests of the nation or endanger the safety of a British citizen;

(b) information which is likely to be useful in the commission of offences, or in facilitating an escape from legal custody, or likely to impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders;

(c) information supplied by an individual in accordance with any requirement to do so imposed by or by virtue of any statutory provision or so supplied in connection with an application under a statutory provision for the grant of any benefit, approval or other permission, and which is held on terms requiring, or in circumstances in which it would be reasonable to expect, it to be held in confidence.

(2) This Act applies to any article which is or has been held by a Crown servant or government contractor by virtue of his position as such, being an article —

[Bill 20]

PART I

(a) the unauthorised disclosure of which would for reasons of defence, international relations, security or intelligence be likely to cause serious injury to the interests of the nation or endanger the safety of a British citizen; or

(b) which is likely to be useful in the commission of offences, or in facilitating an escape from legal custody, or likely to impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders; or

(c) supplied by an individual in accordance with any requirement to do so imposed by or by virtue of any statutory provision or so supplied in connection with an application under a statutory provision for the grant of any benefit, approval or other permission and which is held on terms requiring, or in circumstances in which it would be reasonable to expect, it to be held in confidence.

(3) In this Act—

“protected article” means an article to which this Act applies;

“protected information” means information to which this Act applies.

Wrongful disclosure by Crown servants.

2. A Crown servant shall be guilty of an offence if he intentionally or recklessly discloses, contrary to his official duty, any protected information or any protected article which in either case he holds by virtue of his position as a Crown servant, knowing it to be protected information or a protected article, and knowing such disclosure to be contrary to his official duty.

Wrongful disclosure by government contractors.

3. A government contractor who intentionally or recklessly discloses any protected information or any protected article which in either case he holds by virtue of his position as a government contractor, knowing it to be protected information or a protected article, shall be guilty of an offence if the disclosure is not made either—

(a) in accordance with an official authorisation, or

(b) for the purposes of the functions by virtue of which he is a government contractor and without contravening an official restriction

and he knows at the time of the disclosure that the disclosure is not so made.

Wrongful disclosure by other persons.

4.—(1) A person who intentionally or recklessly discloses any protected information or protected article and knowing it to be protected information or a protected article shall be guilty of an offence if the disclosure is not made either—

(a) to a Crown servant for the purpose of his functions as such; or

(b) in accordance with an official authorisation;

and he knows at the time of the disclosure that the disclosure is not so made.

PART I

(2) Subsection (1) above does not apply to the disclosure by a Crown servant or government contractor of any information or article which he holds by virtue of his position as such.

Retention of documents.

5.—(1) A Crown servant who, by virtue of his position as such, has in his possession or under his control any document containing protected information or any protected article, shall be guilty of an offence if, knowing it to be such a document or article he intentionally or recklessly retains it contrary to his official duty, knowing such retention to be contrary to his official duty.

(2) A Crown servant or government contractor who, by virtue of his position as such, has in his possession or under his control any document containing protected information or any protected article, shall be guilty of an offence if, knowing it to be such a document or article he intentionally or recklessly fails to comply with an official direction for its return or disposal.

(3) A person other than a Crown servant or government contractor who has in his possession or under his control any document containing protected information or any protected article shall be guilty of an offence if, knowing it to be such a document or article he intentionally or recklessly retains it after receiving an official direction for its return or disposal.

6. It shall be a defence for a person charged with an offence under this Act to prove that before the time of the alleged offence the information or article had become publicly available, whether in the United Kingdom or elsewhere.

Information previously available to the public.

7.—(1) It shall be a defence for a person charged with an offence under this Act to prove that the disclosure or retention of the information or article was in the public interest insofar as he had reasonable cause to believe that it indicated the existence of crime, fraud, abuse of authority, neglect in the performance of official duty or other misconduct.

Disclosure in the public interest.

(2) In the case of a person charged with an offence under section 2,3,5(1) or 5(2) above, subsection (1) above shall only apply if he has taken reasonable steps to comply with any established procedures for drawing such misconduct to the attention of the appropriate authorities without effect.

8.—(1) A prosecution for an offence under this Act in respect of information falling within section 1(1)(a) above or an article falling within section 1(2)(a) above shall not be instituted unless it is certified by a Minister of the Crown that the information was at the time of the alleged offence properly classified in accordance with the provisions of section 12 below.

Restrictions on prosecutions.

(2) Subsection (1) above shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any such offence, or the remand in custody or on bail of a person charged with any such offence.

(3) A prosecution for an offence under this Act in respect of information falling within section 1(1)(b) or (c) above or an article falling within section 1(2)(b) or (c) above shall not be instituted in England and

PART I
Wales except by or with the consent of the Director of Public Prosecutions or, in Northern Ireland, the Director of Public Prosecutions for Northern Ireland; and a prosecution for any other offence under this Act shall not be instituted in England and Wales except by or with the consent of the Attorney General or, in Northern Ireland, the Attorney General for Northern Ireland.

Evidence of serious injury. 9.—(1) Where on a prosecution under this Act a defendant challenges a certificate under section 8(1) above he shall give notice in writing including any grounds for that challenge to the Attorney General not less than 28 days before the date set for trial.

(2) Where notice under subsection (1) above has been duly given the Attorney General shall refer the notice and the certificate to which it applies to the Judicial Committee of the Privy Council which shall determine whether the information or article to which the certificate applies was at the time of the alleged offence properly classified in accordance with the provisions of section 12 below, which determination shall be conclusive.

Arrest and trial. 10.—(1) Offences under any provision of this Act other than section 5 above and attempts to commit them shall be deemed for all purposes of the law of England and Wales or Northern Ireland to be arrestable offences within the meaning of section 24 of the Police and Criminal Evidence Act 1984 and the Criminal Law Act (Northern Ireland) 1967.

1984 c. 60.
1967 c. 18.
(N.I.). (2) Proceedings for any offence under this Act may be taken in any place in the United Kingdom.

Penalties. 11.—(1) A person guilty of an offence under any provision of this Act other than section 5 above shall be liable—

- (a) on conviction on indictment to imprisonment for a term not exceeding two years, or a fine, or both; or
- (b) on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

(2) A person guilty of an offence under section 5 above shall be liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 4 on the standard scale, or both.

Classification. 12.—(1) Where in the opinion of the responsible Minister the unauthorised disclosure of any information relating to defence, international relations, security or intelligence would be likely to cause serious injury to the interests of the nation or endanger the safety of a British citizen, the Minister shall classify the information accordingly and, in the case of information contained in a document, cause the document to be marked in accordance with regulations made under section 13 below.

(2) Where in the opinion of the responsible Minister the unauthorised disclosure of any article would for reasons of defence, international relations, security or intelligence be likely to cause serious injury to the interests of the nation or endanger the safety of a British citizen, the Minister shall classify the article accordingly and cause it to be marked in accordance with regulations made under section 13 below.

PART I
Regulations governing classifications.

13.—(1) The Minister for the Civil Service shall make regulations prescribing the principles, practice and procedure to be followed by responsible Ministers in classifying documents and articles under section 12 above.

(2) Without prejudice to the generality of subsection (1) above, regulations under this section may make provision—

(a) for securing that only information or articles the unauthorised disclosure of which is likely to cause serious injury to the interests of the nation or endanger the safety of a British citizen is or are classified under section 12 above and accordingly that classification denotes that disclosure of the information or articles would be likely to have that effect;

(b) for the marking of any document containing information so classified, or any article so classified, with an identification or classification of that information or article; and

(c) providing for the review by the responsible Ministers of their decisions relating to the classification of information or articles under section 12 above.

(3) No regulations shall be made under this section unless a draft of the regulations has been laid before, and approved by a resolution of, each House of Parliament.

(4) The Minister for the Civil Service shall lay annually before each House of Parliament a report on the application of the regulations made under this section.

PART II

PUBLICATION OF CERTAIN DOCUMENTS

14. This Part applies to government departments and other authorities listed in Schedule 2 to the Parliamentary Commissioner Act 1967 as for the time being in force.

15.—(1) This section applies to documents that are used by departments or authorities in making decisions or recommendations under or for the purposes of any enactment or scheme administered by the department or authority with respect to the rights, privileges and benefits, or to the obligations, penalties or other detriments to or for which persons are or may be entitled or subject, being—

(a) manuals or other documents containing interpretations, rules, guidelines, practices or precedents; or

(b) documents containing particulars of such a scheme, but not including documents that are otherwise available to the public,

(2) A department or authority shall—

(a) cause copies of all documents to which this section applies in respect of the department or authority that are in use to be made

PART II

available for inspection, copying and purchase by members of the public; and

- (b) not later than twelve months after the coming into force of this Act, and thereafter annually, cause to be published a statement (which may take the form of an index) specifying the documents of which copies are, at the time of preparation of this statement, so available and the places where copies may be inspected and may be copied or purchased.

(3) A department or authority may charge a fee to cover the administrative costs of making documents available for inspection by members of the public, or for providing copies of documents, in accordance with subsection (2) above.

Annual reports.

16. A department or authority shall lay annually before each House of Parliament a report of the measures it has taken to facilitate and increase access by the public to information within its control.

PART III

MISCELLANEOUS

Interpretation.

1973 c. 36.

17.—(1) In this Act, except where the context otherwise requires—

“Crown servant” means—

- (a) a Minister of the Crown;
(b) a person appointed under section 8 of the Northern Ireland Constitution Act 1973 (the Northern Ireland Executive, etc.);

(c) any person employed in the civil service of the Crown, including Her Majesty's Diplomatic Service, Her Majesty's Overseas Civil Service, the civil service of Northern Ireland, and the Northern Ireland Court Service;

(d) any member of the naval, military or air forces of the Crown or any women's service administered by the Defence Council, including any person employed by an association established for the purposes of the Reserve Forces Act 1980;

1980 c. 9.

(e) any constable or any other person employed or appointed in or for purposes of any police force (including a police force within the meaning of the Police Act (Northern Ireland) 1970);

1970 c. 9
(N.I.).

“defence” includes the following matters, namely—

- (a) the armed forces of the Crown;
(b) military weapons, stores and other equipment, the invention, development, production and operation of such equipment and research relating thereto;

(c) defence policy and strategy and military planning and intelligence;

(d) plans and measures for the maintenance of essential supplies and services, whether in time of war, or state of emergency, or for the maintenance or restoration of public order;

(e) the defence of a foreign State and such other matters relating to such a State as correspond to the matters mentioned in paragraphs (a) to (d) of this definition;

PART III

“document” includes any written or printed matter, any map, plan or photograph, and any article or thing that has been so treated in relation to any sounds or visual images that those sounds or visual images are capable, with or without the aid of some other device, of being produced from the article or thing;

“foreign State” means any State other than the United Kingdom:

“government contractor” means, subject to subsection (3) below, any person who is not a Crown servant but who provides, or is employed in the provision of goods or services—

(a) for the purposes of any of the services, forces or bodies referred to in the definition of Crown servant or of the holder of an office prescribed under that definition: or

(b) under an agreement of arrangement certified by the Secretary of State as being one to which the government of a foreign State or an international organisation (whether or not one of which only governments are members and including a commercial organisation), or an organ of such a government or organisation, is a party or which is subordinate to: or made for the purposes of implementing, any such agreement or arrangement:

“international relations” means—

(a) the relations between any two or more of the following, that is to say—

(i) Governments of States

(ii) organisations of which States or the governments of States are members.

(b) but not the relations between the United Kingdom and the European Communities or any acts or proceedings taking place within the organs of the European Communities or relating to Community affairs, except where such activities relate to the international relations of the European Communities themselves.

“legal custody” includes detention in pursuance of any enactment or any instrument made under an enactment:

“state” includes any territory outside the United Kingdom.

(2) Any reference in this Act to an official authorisation, restriction or direction is a reference to an authorisation, restriction or direction duly given or imposed by a Crown servant or government contractor.

18.—(1) Any Act—

(a) done by a British citizen, a Crown servant or a government contractor anywhere outside the United Kingdom; or

(b) done by any person in any of the Channel Islands or the Isle of Man or any colony;

Acts done abroad
and extend.

Protection of Official Information

A BILL

To repeal section 2 of the Official Secrets Act 1911 and to make new provision for the protection of official information and articles, for the publication of certain documents; and for connected purposes.

*Presented by Mr. Richard Shepherd
supported by
Mr. Jonathan Aitken, Sir Nicholas Bonsor,
Mr. Nicholas Fairbairn, Mr. Ian Gilmour,
Mr. Robin Squire, Mr. Teddy Taylor,
Mr. Michael Foot, Mr. Merlyn Rees,
Mr. Chris Smith, Dr. David Owen
and Mr. Archy Kirkwood*

*Ordered, by The House of Commons,
to be Printed, 28th October 1987*

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PRIME MINISTER

Yes

*Prime Minister
Agree the
line suggested,
especially X in
paragraph 4?*

PROTECTION OF OFFICIAL INFORMATION BILL

N.C.U

12-1

I am considering what I should say in the Second Reading debate on Richard Shepherd's Bill.

2. I think there will be advantage in my speaking early in the debate. This will help our backbenchers and will ensure that I do not speak after the debate has accumulated a weight of details and questions to which I cannot respond. Since I shall be opposing the Bill on principle and on general practical arguments, and not by reference to its detailed content, I do not intend to speak for long.

3. I shall explain the important part played by section 2 in defending security and other vital interests of the state; indicate our sympathy for a reform which concentrates the criminal law on these matters; rehearse the history of our previous attempt; and, most importantly, set out (on lines already agreed) the path we now propose to follow. I shall then explain that we consider the subject unsuitable for

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2.

Private Member's legislation and that, whilst we have reform in hand, we have not reached full and final conclusions and are not therefore in a position to discuss detailed issues.

X | 4. In the absence of anything to say on the substance of our own proposals, I shall need to be all the more reassuring on the firmness of our own commitment to reform and on the timetable for it. In particular, I think I must be as specific as possible about the timing of our White Paper. I propose therefore to say that we hope to lay it before Parliament in June. This should allow adequate time for drafting and discussion within Government, while also offering sufficient opportunity for the discussion to broaden before and during the Summer Recess. I should be glad to know if you are content with this.

5. It is a necessary part of my case against sending Richard Shepherd's Bill into Committee that the Government's plans offer more opportunity for discussion and reflection. To this end, I would also like to be able to say that I hope it will be possible for Parliament to debate the White Paper before the Summer Recess. I should be glad to know if the Lord President or Leader of the House of Lords sees any difficulty about this.

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CONFIDENTIAL

3.

I am sending copies of this minute to members of OD(DIS), the Lord Chancellor, the Lord Privy Seal, the Lord Advocate and the Chief Whip, and to Sir Robin Butler.

Douglas Auld.

12 January 1988

CONFIDENTIAL

From: THE PRIVATE SECRETARY

COVERING CONFIDENTIAL



HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

12 January 1988

Dear Nigel,

When the Home Secretary discussed Mr Richard Shepherd's Protection of Official Information Bill with the Prime Minister on 14 December, she asked for a short note setting out the differences between Mr Shepherd's Bill and the Government's proposals.

I attach a note setting out the main points on which the Bill departs from what Ministers have agreed. There are a number of other less central provisions in the Bill, some on details which Ministers have not directly considered, from which the Government's proposals differ or are likely to differ.

Yours sincerely,
P J C Mawer

P J C MAWER

Nigel Wicks, Esq, CBE

COVERING CONFIDENTIAL

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MAIN POINTS ON WHICH MR SHEPHERD'S BILL DIFFERS FROM GOVERNMENT PROPOSALS ("THE PROPOSALS")

Categories of information

The Bill would cover information provided in confidence by individuals. It would not cover separately information obtained by or relating to interception or information obtained in confidence from a foreign government or intergovernmental organisation. The Bill includes information relating to international relations, as do the proposals, but specifically excludes information relating to the European Community.

Damage tests and ministerial certificates

For information relating to defence, international relations, security or intelligence, the Bill provides a single damage test as envisaged in the 1977 "Protection of Official Information Bill: "likely to cause serious injury to the interests of the nation or endanger the safety of a British citizen". There is no absolute offence in relation to security or intelligence information for members of the security and intelligence services.

The Bill returns to the Franks model, rejected for the 1979 Bill, in that it relies directly on the classification of information: it would require a Minister to certify before each prosecution that the information was properly classified. The Bill would enable the defendant to challenge that certificate, in which event the Judicial Committee of the Privy Council would determine whether the information was properly classified. The proposals dispense with Ministerial certificates.

Defences

The Bill provides a specific defence that an unauthorised disclosure of information was in the public interest if the accused "had reasonable cause to believe that it indicated the existence of

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- 2 -

crime, fraud, abuse of authority, neglect in the performance of official duty or other misconduct", provided that he has "taken reasonable steps to comply with any established procedures for drawing such misconduct to the attention of the appropriate authorities without effect".

Freedom of information

In addition to amending section 2 of the Official Secrets Act 1911, the Bill would also require the publication of certain documents by Government departments and some other public bodies. These documents include internal guidelines and manuals of instruction on the administration of schemes affecting individuals and annual reports to Parliament on measures to increase public access to official information.

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CABINET OFFICE

70 Whitehall London SW1A 2AS

01-270 0101

From the Secretary of the Cabinet and Head of the Home Civil Service

Sir Robert Armstrong GCB CVO

Ref. A087/3653

HOME SECRETARY

BBC Radio 4 Series: 'My Country Right or Wrong'

In the light of Ministers' agreement to OD(DIS)(87)101, I spoke to Mr Marmaduke Hussey this afternoon about the BBC Radio 4 series 'My Country Right or Wrong'. *attached*

2. I reminded Mr Hussey of the Attorney-General's letter of 4 December to Mr Birt, and explained that the offer at the end of that letter remained open. If a procedure could be established which enabled the Government to consider the contents of the series and satisfy itself that (perhaps after amendment) it contained no breaches of the duty of confidentiality by former members of the security or intelligence services, it might be possible for the Government to agree to the series being broadcast. Mr Hussey referred to the difficulty of principle for the BBC in letting the Government see the transcripts of the series. I reminded him that, if the injunction became the subject of a trial, the transcripts would in any case be discovered. He said that, as at present advised, the BBC

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SECADK

would prefer to be obliged to discover the transcripts for the purposes of court proceedings than to offer to show them voluntarily to a representative of the Government, which would smack of censorship. I said that it might not be necessary to insist on seeing the actual transcripts: it might be sufficient for the interviews to be read across to officials (not lawyers or Admiral Higgins) able to assess whether confidentiality had been breached.

3. Mr Hussey repeated that there was a principle at stake for the BBC - the potential for censorship which would be raised by the precedent of the BBC conceding to pressure from the Government to examine the transcripts. The objection did not arise in the same way if a court ordered the transcripts to be discovered, nor to showing the transcripts to a third party, such as the Chairman of the Security Commission, to assess their implications for national security.

4. I explained that the Government was not prepared to hand over its responsibility for judging matters of national security to an outside body, even to a judge. If that was what the BBC wanted, the case might as well go to trial. The purpose of my approach was to see whether there was any possibility of an agreed approach that would avoid that. In response to a point from Mr Hussey to the effect that the BBC had already read over relevant parts of the transcript to Admiral Higgins, I explained that his was a different responsibility, and he was not qualified to reach judgments about breaches of the duty of confidentiality.

5. Mr Hussey agreed to consult further about what I had said, and to come back to me.

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6. I am copying this minute to the Prime Minister, the Foreign and Commonwealth Secretary, the Secretary of State for Defence and the Attorney General.

RA

21 December 1987



CONFIDENTIAL

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

15 December 1987

1. NEA ~~to~~ 22. *one minute*

*A predictable reaction for
Mr Shepherd. The bill will
need to be voted down.*

Dear Steven,

REFORM OF SECTION 2 OF OFFICIAL SECRETS ACT 1911

W. C. U

I thought it might be helpful to confirm the account I gave you this afternoon of the Home Secretary's meeting with Mr Richard Shepherd MP. The meeting coincided with publication of the Arranged Written Answer, the text of which was approved by the Prime Minister in Nigel Wicks' letter of 9 December. (* *copy studied*)

The meeting began with the Home Secretary handing Mr Shepherd a copy of the Answer. Mr Shepherd's reaction was that it contained nothing new. There had been talk in the tea rooms for some weeks that the Government intended to produce a White Paper and to move towards legislation. The Home Secretary said that on the contrary, the Answer was indeed news in that it gave a clear Government commitment to introduce proposals for the reform of section 2.

The Home Secretary went on to say that he was sure that the orderly way forward was through the procedural steps set out in his Answer. The Government was making a genuine attempt to cope with the issues. It had considered whether to proceed by adopting Mr Shepherd's Bill. But the issues involved went to the heart of the concerns of Government. Moreover, there could be no guarantee that a Bill brought forward by a Private Member would end up in a shape which was satisfactory either to the Government or to the Member concerned. It could simply mean a messy outcome.

Mr Shepherd insisted that there would be value in sending his Bill to a Committee of the House. The Parliamentary debate on the issues would be of considerable value to the Government in enabling it to frame its proposals in a way which would prove acceptable to the majority of opinion in the House. Moreover, the Bill did not simply touch on the central interests of the executive: it also embraced fundamental issues about the relationship of the state and the individual. There was considerable Parliamentary suspicion of the Government's intentions, inspired by the way in which it had been pursuing injunctions against individuals and the press recently in the "Spycatcher" affair. There would be those who would be arguing that Parliament should assert its position in relation to these matters.

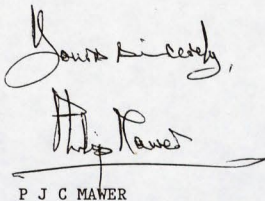
Mr Shepherd made it clear that whether he himself pressed his Bill to a vote or not, one of his supporters was bound to. It would be argued that the House had to see the shape of the Government's proposals before his own Bill could safely be consigned to oblivion. As far as Mr Shepherd's own contribution in the debate was concerned, he would be urging that the

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2.

Bill should be sent to a Committee so that the issues could be properly aired in a Parliamentary setting.

The Home Secretary will of course be discussing the further handling of the matter with the business managers before the L Committee meeting tomorrow morning. For the moment I am sending copies of this letter to Nigel Wicks (No 10), to the Private Secretaries to other members of OD(DIS), to Paul Stockton (Lord Chancellor's Office), Alan Maxwell (Lord Advocate's Department), Murdo Maclean (Chief Whip's Office) and Trevor Woolley and Sean Mundy (Cabinet Office).

Yours sincerely,

P J C MAWER

Steven Wood, Esq.,

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Tuesday, 15th December, 1987

Written No. 120

Mr Michael Mates (East Hampshire): To ask the Secretary of State for the Home Department, what plans he has to seek to reform section 2 of the Official Secrets Act 1911.

MR DOUGLAS HURD

As my rt hon Friends, the Attorney General and the Prime Minister have told the House, the Government has had work in hand for some time to find effective, enforceable and reasonable provisions to replace section 2 of the Official Secrets Act 1911. This work is continuing and we intend to bring it to a conclusion later this Session. When the work is complete, we shall lay before Parliament a White Paper setting out the Government's proposals for reform of the present law, with a view to early legislation.

Tuesday, 17th December, 1937



Written No. 150

Mr. Michael Hayes (East Hamshire). To ask the Secretary of State for the Home Department, what plans he has to seek to reform section 2 of the Official Secrets Act 1911.

MR DOUGLAS HURD

As my right hon. friends, the Attorney General and the Prime Minister have told the House, the Government has had work in hand for some time to find effective, enforceable and reasonable provisions to replace section 2 of the Official Secrets Act 1911. This work is continuing and we intend to bring it to a conclusion later this Session. When the work is complete, we shall lay before Parliament a White Paper setting out the Government's proposals for reform of the present law, with a view to early legislation.

From: Richard Shepherd, M.P.

CP type
Z



HOUSE OF COMMONS
LONDON SW1A 0AA

14th December 1987

FOR INFORMATION ONLY

Mr. Williams.
To see.
No reply required,
I think.
M.P.
I agree.
M.W.

Dear Anne Minister,

THE PROTECTION OF OFFICIAL INFORMATION BILL
(a Bill to replace Section 2 of the Official
Secrets Act 1911)

2ND READING NOTES FOR FRIDAY JANUARY 15 1988

I enclose a detailed briefing note on the Protection of Official Information Bill which has its 2nd Reading on Friday 15 January.

I am sorry if the notes seem somewhat lengthy but the sponsors wanted to ensure that every colleague was provided with an intelligible if somewhat detailed guide to the Bill. The foundations we have built on are those of the Franks Committee Report 1972 (cmd 5104) and the Government's Bill of 1979. This present bill defines the six classes of information and articles that would be protected by criminal sanctions: defence, international relations, security and intelligence, information likely to be useful in the commission of offences, and information provided by an individual in accordance with statutory requirement. This bill in no way impinges upon Section 1 of the Official Secrets Act which is the section which deals with espionage and treachery.

The All-Party sponsors believe there are positive advantages in supporting a 2nd Reading: a law which touches on national security and the relationship of the citizen to the State and the Commons to the Executive should ideally be one that commands the widest possible consensus in Parliament.

I very much hope that after reading the notes you will feel that this bill provides a basis for a House of Commons consensus.

With kind regards,

Yours sincerely,

Richard

& best wishes to you and
your family for
Christmas & the New Year.

Parliamentary Briefing Note

on

THE PROTECTION OF OFFICIAL INFORMATION BILL

**A Bill to replace section 2 of
the Official Secrets Act 1911**

Presented by Mr. Richard Shepherd

supported by

**Mr. Jonathan Aitken, Sir Nicholas Bonsor,
Mr. Nicholas Fairbairn, Sir Ian Gilmour,
Mr. Robin Squire, Mr. Teddy Taylor,
Mr. Michael Foot, Mr. Merlyn Rees,
Mr. Chris Smith, Dr. David Owen
and Mr. Archy Kirkwood**

PROTECTION OF OFFICIAL INFORMATION BILL

The Bill would repeal section 2 of the Official Secrets Act 1911 and replace it with new measures to protect official information.

The main offence under section 2 is of unauthorised disclosure of official information by a Crown servant. There has been widespread agreement on the need to replace it since the publication in September 1972 of the report of a departmental committee chaired by Lord Franks (Cmnd 5104), which concluded that section 2 was "a mess".

Franks referred to the section's "catch-all quality" noting that "It catches all official documents and information. It makes no distinctions of kind, and no distinctions of degree. All information which a Crown servant learns in the course of his duty is 'official' for the purposes of section 2, whatever its nature, whatever its importance, whatever its original source. A blanket is thrown over everything; nothing escapes".

The Franks Committee concluded that section two suffered from so many defects that the only satisfactory approach was to repeal it and replace it by entirely new measures.

The government attempted such a reform in 1979, but the bill was withdrawn shortly after its second reading.

In outline, the present Bill follows the structure of the 1979 bill, though the actual proposals differ from it in a number of respects. These notes describe the present Bill and identify those points at which it departs from the 1979 proposals.

NOTES ON CLAUSES

PART I

Information and Articles Protected by Act

Clause 1 defines the six classes of information and articles that would be protected by criminal sanctions. Disclosing information which does not fall within one of these classes would not be a criminal offence. It will of course still remain necessary to protect much of this information, but such protection would not include the threat of prosecution for an improper disclosure.

Clause 1 (1) (a) lists the first four classes. These involve information relating to defence, international relations, security or intelligence whose unauthorised disclosure would be likely to cause serious injury to the interests of the nation or endanger the safety of a British citizen.

In the 1979 bill, only the first two of these classes (defence and international relations) were subject to the "serious injury" test. It was not applied in relation to unauthorised disclosures of security or intelligence information; any such disclosure would have been an offence, whether or not injury was likely to result. The present Bill follows the Franks Report in proposing that disclosures of security and intelligence information should lead to criminal proceedings only where serious injury to the interests of the nation was involved.

Clause 1 (1) (b) specifies the fifth protected category: information which is likely to be useful in the commission of offences, or in facilitating an escape from legal custody, or is likely to impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders.

It follows the 1979 bill, with one omission. Information likely to be useful in "the doing of other acts prejudicial to the safe keeping of persons in legal custody" has not been included. This appears to be redundant in that such information is already likely to be covered either as information "likely to be useful in the commission of offences" or "likely to be useful in ... facilitating an escape from legal custody".

Clause 1 (1) (c) specifies the sixth protected class: information provided by an individual in accordance with a statutory requirement (eg the requirement to declare income to the Inland Revenue) or which is required in connection with an application for some statutory benefit, approval or other permission (eg an application for social security benefit or for legal aid).

Such information is covered by the Bill only where it is held on terms requiring confidentiality or in circumstances where it would be reasonable to expect it to be held in confidence. This proviso is to avoid creating a new obstacle to the disclosure of information obtained from individuals which at present is made public (eg the names and addresses of computer users registered under the Data Protection Act, which are available on a public register).

Clause 1 (2) repeats these provisions in relation to "articles".

In restricting protection to these six categories, the scope of the Bill is narrower than the 1979 bill. The following classes of information protected in the 1979 Bill are not included in the Bill:

(a) information relating to or obtained by means of the interception of telephone or postal communications. Such information is not here protected in itself. However, it would be caught by clause 1 (1) (a) if disclosure of the information in question would be likely to cause serious injury to the interests of the nation.

(b) information obtained from a foreign government or an international body in confidence. Again, such information is not itself protected, but would be covered by clause 1 (1) (a) if its disclosure would be likely to cause serious injury to the interests of the nation.

In both the above cases, it is not the source of the information but the consequences of its unauthorised disclosure which determines whether or not it would attract criminal penalties.

The 1979 bill also protected information relating to a variety of other 'third parties'. Information supplied by or relating to companies, nationalised industries, foreign companies or nationalised industries and individuals would have been protected if it was provided in confidence or in circumstances in which confidentiality might be expected. Such information (apart from information about individuals falling within clause 1 (1) (c) is not protected in the Bill.

To include all such information would be to protect much information in which there is a genuine public interest. Information about the government's regulatory functions on matters such as environmental pollution, consumer product safety, the control of medicines, food additives and similar matters would remain subject to criminal penalties as the relevant information invariably is obtained from or relates to a particular 'third party'. That such matters are presently covered by section two of the Official Secrets Act is often cited as one of the undesirable manifestations of the present situation.

The effect of including all third party information, as was proposed in 1979, would be to retain the "catch all" approach of section 2 in which an offence would be committed by a disclosure, regardless of the sensitivity of the information disclosed. It would have led to a puzzling inconsistency in which innocuous third party information would have been more strictly protected than defence information. Any disclosure of the former could constitute an offence, whereas only if "serious injury" to the national interest was demonstrated could proceedings be brought in the latter case.

The alternative to bringing third party information into the scope of the Bill is to rely on internal disciplinary sanctions backed by the possibility of action for breach of confidence by an aggrieved party under common law. In part, the law of confidence has been developed specifically to deal with improper disclosures of commercial secrets, and may be a more appropriate sanction than criminal prosecution in that it allows for the recovery of damages. The individual civil servant who improperly disclosed trade secrets to a competitor could leave him or herself open to enormous potential liability.

Offences of Wrongful Disclosure

Clauses 2, 3 and 4 prescribe the offences that would result from the wrongful disclosure by Crown servants, government contractors and other persons, respectively, of protected information.

Under clause 2 a Crown servant who, contrary to his official duty, discloses protected information commits an offence. The offence is committed only if he knows that the disclosure is contrary to his official duty and has acted "intentionally or recklessly". A disclosure resulting from an act of carelessness would not be an offence.

WHAT HAVE Right-of-centre Conservatives like Mr Richard Shepherd, Mr Teddy Taylor and Mr Jonathan Aitken in common, not just with Mr Edward Heath but with opposition politicians like Dr David Owen, Mr Merlyn Rees and Mr Michael Foot? The answer is that all are supporters of Mr Shepherd's proposal to reform the notorious Section Two of the Official Secrets Act with a draft "freedom of information" Bill.

As Mr Shepherd came top in this year's Private Members' ballot, his Bill — other things being equal — could have been expected to have a sporting chance of getting through. Other things are not equal, however: the Government seems determined to stop the Bill, whose excessive length anyway makes it easy to filibuster.

That is a pity, because Mr Shepherd's proposals have already done one useful thing: they have concentrated ministerial minds on the reform of Section Two, long promised by successive governments, never accomplished. Mrs Thatcher herself is said to be concerned by the frequent media impositions that accompany attempts to enforce official secrecy, from the Tisdall and Ponting affairs and the Spycatcher row to the injected Radio Four series on the accountability of the security services. So concerned, indeed, that civil servants are now said to be busily drafting their own revision of Section Two to follow the expected demise of Mr Shepherd's Bill.

Almost no one disagrees that Section Two is in need of revision. The problem with reform, as any responsible journalist will acknowledge, is that secrecy is vital to many areas of defence, national and fiscal security. Yet these are the very areas of most interest to a large part of the press. For example, the Government's attempt to ban Spycatcher would almost certainly have taken place even under a reformed Official Secrets Act; indeed, as an attempt to prevent members of the Security Services breaching their earlier trust, it seems eminently justifiable, even if it may have been carried to inordinate lengths.

The last attempt to amend the Act, under Mrs Thatcher's first Government, was withdrawn in 1978 because there was disagreement with the proposal that the decision on what should be classified as

secret — something which could do "serious injury" to national security — would be left to a Minister.

This Bill followed the 1972 Franks Report, which concluded that Section Two was "a mess" which "catches all official documents and information. It makes no distinctions of kind, and no distinctions of degree. All information which a crown servant learns in the course of his duty is 'official' for the purposes of Section Two, whatever its nature, whatever its importance, whatever its original source."

On learning of the Prime Minister's decision to make another attempt at reforming the Act, one's first reaction is to commend her characteristic courage in seeking to modify the very culture of Britain's in many ways admirably efficient machinery of government. Journalists will welcome the news initially. But their joy may be shortlived once detailed proposals are published: while including restrictions on the catch-all element of the Act (protections on minor, non-security related disclosures are rarely under taken anyway) there is likely to be a tightening-up in the sanctions attaching to the much smaller category of information that relates to national security.

This is exactly the right approach: but the Prime Minister should be in no doubt that far from attracting the

plaudits of the open government lobby, her reform may attract as much opprobrium as Section Two already does. It will also be seen to be using up valuable parliamentary time and delaying Bills that are of more immediate concern to ordinary people who do not share Fleet Street's obsession with cloak-and-dagger conspiracies.

Mrs Thatcher has told Mr Shepherd that she finds it difficult to see how a Private Member's Bill could be "the appropriate vehicle for amending the law dealing with the security of the State". One could argue the precise opposite. A law on national security should ideally be one that commands the widest possible consensus in Parliament, and so be unreplicable by a future Government of a different hue; the Government's own proposals are unlikely to find such a consensus.

Mr Shepherd's Bill, which has this kind of broad support, is in practice sensible and reasonably restrictive, and is much more likely to command a parliamentary majority and media support than a measure drafted in Whitehall.

It rather shakily sidesteps the hurdles of 1979. On the issue which brought down that Bill, Mr Shepherd suggests that the judicial committee of the Privy Council — in effect a five-man panel of the Law Lords — could have a right of

A chance to come clean on secrets

A Private Member's Bill proposing reforms to the Official Secrets Act is published today. The Government should support it now, argues ROBERT HARVEY, instead of seeking to draw up reforms of its own later

review, on appeal. This seems a reasonable way of short-circuiting the long procedure by which a Minister might deem that a disclosure would cause serious injury, take an offender to court, and then risk seeing the decision reversed later.

The Shepherd Bill, also unlike the 1979 Bill, proposes that a defence in court might be based on the claim that an alleged crime was acting in the public interest in bringing out certain information, or on the fact that the information had previously been made public.

The Bill restricts official secrecy to matters of defence, foreign affairs, security and intelligence or "information whose disclosure would be likely to assist in the commission of a crime or otherwise prejudice law enforcement". It does not cover information provided by foreign Governments, companies, nationalised industries and individuals, which the 1979 Bill did. These would be dealt with — as they should be — standard civil service disciplinary procedures.

Finally, the Shepherd Bill insists, as the 1979 Bill did not, that on matters of security and intelligence, the Government should be required to show what "serious injury" is likely to occur as a result of a particular disclosure. Under the 1979 Bill, it would have been enough for the Government to say that a matter touched on defence or security matters for an offence to have been committed. In this respect, the Shepherd Bill may go too far where the 1979 Bill did not go far enough. The penalties in the Bill may not satisfy the Government either.

All this, while in no sense an irresponsible opening up of legitimate state secrets to the scrutiny of the press, seems likely to avoid the pitfalls that tripped up the previous Bill, while marshalling a formidable measure of all-party support. The measure itself is highly desirable, because it will restrict the blunt arm of the law to its proper sphere — the protection of national security, as opposed to official blunders.

The introduction of a more restrictive Government Bill is likely instead to bring Mrs Thatcher under much unnecessary fire and, even if bulldozed through by a Government majority, would be a target for immediate replacement by any future non-Conservative government with a measure that really could endanger national security.

DAILY TELEGRAPH

TUESDAY 8th DEC '87

An equivalent provision was contained in the 1979 bill, however the burden of proof would have been different. Under the 1979 bill an offence would have been committed unless the defendant could prove that "he did not believe, and had no reasonable cause to believe" that the information was protected. In the present Bill the burden of proof is reversed. It would be for the prosecution to show that the accused person knew that the information was protected and disclosed it intentionally or recklessly (that is, with wilful disregard for the consequences of his actions).

One of the ways in which the government will ensure that those handling protected information know of its status is by classifying and marking documents accordingly. Clauses 12 and 13 of the Bill contain provisions relating to the classification and marking of documents.

Clause 3 contains similar provisions in relation to disclosures by government contractors.

Clause 4 applies to disclosures by other persons, including members of the public, the press (or Crown servants and government contractors who disclose information which they have acquired other than as a result of their official position). A person who intentionally or recklessly discloses protected information, knowing it to be such, commits an offence.

However, information is only protected if it "is or has been held by a Crown servant or government contractor by virtue of his position as such" (clause 1), and if it falls within one of the six protected categories. Disclosure of information which has not originated with a Crown servant or government contractor, or whose origin is not apparent, is not an offence. Nor would it be an offence if the information did so originate, but was also available from public sources (clause 6).

Retention of Documents

Clause 5 provides that offences are committed:

- (i) by a Crown servant who intentionally or recklessly retains a document containing information to which the Bill applies knowing this to be contrary to his official duty.
- (ii) by a Crown servant or government contractor who intentionally or recklessly fails to comply with an official direction for the return or disposal of a document containing information to which the Bill applies.
- (iii) by a person other than a Crown servant or government contractor who intentionally or recklessly retains a document containing information to which the Bill applies after receiving an official direction for its return or disposal.

These provisions differ from those of the 1979 bill in that no offence of failing to take reasonable care of a document is proposed. Only intentional or reckless acts, but not carelessness, would attract criminal penalties.

In addition "other persons" would not commit an offence by failing to return a document when instructed to do so. The offence would occur only if they intentionally or recklessly *retained* the document (or, under clause 4, disclosed it). They would not however be liable if they destroyed the document.

A provision of the 1979 Bill which has not been repeated here would have made it an offence to disclose information or articles which, while not themselves covered by the Bill, could be used in order to obtain unauthorised access to information or articles which were protected. If such unauthorised access involved a criminal offence, then information which might help in its assistance would be covered under clause 1 (1) (b) of the Bill.

Information Previously Available to the Public

Clause 6 provides that it is a defence against any prosecution to show that the information or article involved had become publicly available before the time of the alleged offence, whether in the UK or elsewhere.

The 1979 bill contained a defence of prior publication which was limited to charges involving third party information or information about law enforcement. Under the present Bill, the defence would be available in relation to charges involving any category of protected information.

Disclosure in the Public Interest

Clause 7 provides a defence that a disclosure was in the public interest insofar as the defendant had reasonable cause to believe that the information indicated the existence of crime, fraud, abuse of authority, neglect of official duty or other misconduct.

In the case of a civil servant or government contractor, the defence would only be available if the defendant had previously taken reasonable steps to draw the misconduct to the attention of the appropriate authorities and these had been unsuccessful. This would not be a requirement for defendants who did not hold such position, for example in the case of a journalist.

The defence is available only where there is evidence of specific misconduct. It would not be open to a defendant to claim that a disclosure was justified because he or she maintained that the policy of the government itself was against the public interest.

The types of misconduct that might arise are not exhaustively defined. It would be open to a defendant to claim that such matters as, for example, a minister lying to parliament, constituted misconduct.

However, it would not be sufficient for a defendant to show that some misconduct, however minor had arisen. The misconduct must be sufficient to justify, in the public interest, the disclosure of information which ought normally to remain confidential.

Conclusive proof of the misconduct would not be required: in some cases it will be impossible to obtain such proof without an official inquiry or, in the case of an alleged crime or fraud, a trial. However, a person would not be justified in acting simply on suspicion. He or she must have "reasonable cause to believe" that the information indicates the existence of misconduct; this implies that any reasonable person faced with similar information would reach a similar conclusion.

No such defence was proposed in the 1979 bill. However, an analogous defence does exist in relation to actions for breach of confidence under common law. The concept of a "public interest defence" has evolved from rulings in the last century in which the courts have refused to enforce the obligation of confidentiality that would otherwise exist in order to help someone prevent the exposure of his own criminal activity. In a ruling in 1856, the judge said: "The true doctrine is, that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist". [Gartside v. Outram (1856) 26 LJ Ch 113, 114]

In subsequent rulings the courts have looked closely at whether the defence should be restricted to circumstances in which crime or fraud arise. In a 1968 ruling, Lord Denning concluded that the defence: "extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others ... [It] should extend to crimes, frauds and misdeeds (emphasis added), both those actually committed as well as those in contemplation, provided always — and this is essential — that the disclosure is justified in the public interest". [Initial Services Ltd v Putterill (1968) 1 QB, 396, 405]

In 1980 Lord Wilberforce held that the circumstances in which disclosure in the public interest might be justified: "extends in fact beyond 'iniquity' to misconduct generally" [British Steel Corporation v Granada (1980), 3 WLRD, 774, 821-822].

This principle was endorsed by the Law Commission in its 1981 report on the law of confidence. Its proposals for a new statutory law of confidence incorporated a statutory public interest defence, which it defined in its draft 'Breach of Confidence Bill' as follows: "A public interest may be involved in the disclosure or use of information notwithstanding that the information does not relate to any crime, fraud or other misconduct" ['Breach of Confidence', 1981, Cmnd 8388].

Restrictions on Prosecutions

Clause 8 requires the issue of a ministerial certificate before any prosecution can be brought under clauses 1 (1) (a) or 1 (2) (a). These relate to information or articles concerning defence, international relations, security or intelligence whose unauthorised disclosure is likely to cause serious injury to the interests of the nation or endanger the safety of a British citizen.

The certificate can only be issued if the minister is satisfied that at the time of the alleged offence the information or article was properly classified in accordance with the provisions of the Bill and of regulations to be made under clause 13 on the classification and marking of documents and articles.

A certificate is required only in connection with a prosecution, and not for any preliminary actions such as the issue of a search warrant or the arrest of a suspected offender.

A similar certification procedure existed under the 1979 bill. However, the certificate proposed in that bill would not have indicated that the information was properly classified — only that its disclosure would have been likely to cause serious injury or danger to the safety of a citizen.

A more important difference is that the certificates proposed under the 1979 bill could not have been challenged. They would have been taken as "conclusive evidence" that serious injury was likely. It would not have been possible for a defendant to argue that in issuing the certificate the minister may have been misinformed, acting on the basis of outdated information or in an arbitrary manner. A procedure for questioning certificates under the present Bill is laid down in clause 9.

Clause 8 also provides that the consent of the Attorney General is required before any prosecution under clauses 1 (1) (a) or 1 (2) (a) [serious injury to the interests of the nation etc.] can be brought. Prosecutions involving other classes of information can be brought with the consent of the Director of Public Prosecutions. The procedures in the 1979 bill were identical.

Evidence of Serious Injury

Clause 9 provides a procedure for the review of a ministerial certificate issued under clause 8 (certifying that the information was properly classified at the time of the alleged offence as likely to cause serious injury, etc.)

Where a defendant intends to challenge a certificate he is required to give notice of this, stating any grounds, to the Attorney General at least 28 days before the commencement of the trial. The notice and the certificate will be referred to the Judicial Committee of the Privy Council, who will be responsible for determining whether at the time of the alleged offence the information had been properly classified in accordance with the provisions on classification under clause 12. The determination of the Judicial Committee would be conclusive, and could not be challenged in court.

The use of the Judicial Committee of the Privy Council for this purpose would avoid some of the objections that might be raised in relation to possible alternatives. The suggestion that classification should be subject to challenge in court may be objected to on the grounds that this would involve *in camera* hearings, possibly by vetted juries, who would be asked to reach decisions on what is or is not in the national interest. An alternative which has been suggested is for ministerial certificates to be reviewed by a committee of privy councillors selected for the purpose. However, the independence of such a committee might not be accepted in all quarters.

Scope for such concerns would be greatly reduced if any review of a ministerial certificate were in the hands of the Judicial Committee of the Privy Council — which in effect consists of the Law Lords, normally sitting in panels of five.

The Judicial Committee's normal functions include: advising the Sovereign on appeals from the supreme courts of certain Commonwealth countries; hearing appeals on certain ecclesiastical matters affecting members of the clergy and church buildings; hearing appeals concerning decisions of the General Medical Council and other professional bodies that a practitioner be struck off; and the ruling on claims that an MP is disqualified from sitting in the House of Commons under the terms

of the House of Commons Disqualification Act 1957. In addition, under proposals for devolution contained in the Scotland and Wales Bill 1976-77 and the Scotland Act 1978 the Judicial Committee was to have been responsible for adjudicating on any dispute concerning the legislative competence of the devolved assemblies.

Arrest and Trial

Clause 10 provides that offences other than those under clause 5 (retention of documents) are arrestable offences, and that proceedings can take place anywhere in the UK. It is identical to the corresponding provisions of the 1979 bill, except that the definition of an arrestable offence referred to is that in the Police and Criminal Evidence Act of 1984.

Penalties

Clause 11 lays down penalties for offences under the Bill, and these are identical to those in the 1979 bill (except where standard fines have since been increased). The penalties for offences, other than under clause 5, on summary conviction, are a maximum of six months imprisonment and/or a fine of up to the statutory maximum (presently £2,000). On indictment the maximum penalty is up to two years imprisonment and/or a fine.

The penalties for the lesser offences under clause 5 (retaining, but not disclosing, documents) are, on summary conviction, a maximum of three months imprisonment and/or a fine not exceeding level 4 on the standard scale (presently £1,000).

Classification

Clause 12 requires the responsible minister to classify and mark accordingly any article or any document containing information whose unauthorised disclosure would cause serious injury to the interests of the nation etc. under clause 1 (1) (a) or clause 1 (2) (a) of the Bill. This is to be done in accordance with the provisions of regulations under clause 13. This is, with one difference, identical to the procedure in the 1979 bill. However, the 1979 bill placed responsibility for classification in the hands of "responsible authorities", and persons who were to be regarded as such authorities were to be specified in subsequent regulations. The present Bill places responsibility on ministers, so as to retain parliamentary accountability.

Regulations Governing Classification

Clause 13 requires the Minister for the Civil Service (presently the Prime Minister) to make regulations prescribing the principles and procedures to be followed by ministers in classifying documents. The regulations may, amongst other things, provide that a distinctive classification be given to documents whose unauthorised disclosure would involve an offence under clause 1 (1) (a).

This is based on the provisions of the 1979 bill, except that it refers to responsible ministers rather than responsible authorities. A further change is that the Minister for the Civil Service would be under a duty to make the regulations and not, as in 1979, merely empowered to. The regulations play a greater part under this Bill than under the 1979 proposal, in that the ministerial certificate under clause 8 would have to certify not only that the information would cause serious injury, but also that the document containing it was properly classified in accordance with the regulations.

Although it is more usual for legislation to confer powers rather than duties on ministers to make regulations, a duty to make regulations is sometimes imposed. Examples are given in the Appendix to this paper.

The Minister for the Civil Service would be required to make an annual report to Parliament on the application of these regulations. The report would not be expected to deal with the classification of individual documents but with general matters such as the steps taken to avoid over-classification, which is generally acknowledged to be a widespread problem, leading to the excessive use of costly security measures.

Such reporting was not required under the 1979 bill.

PART II

Publication of Certain Documents

Clauses 14 to 16 contain some limited duties on departments and authorities to publish information.

Clause 14 defines the departments and authorities concerned as those listed in Schedule 2 to the Parliamentary Commissioner Act 1967, as amended. This provides a statutory definition of those central government departments and other authorities whose actions directly affect the public and for whom ministers are directly accountable in Parliament.

Clause 15 requires the departments and authorities to make available for inspection, copying and purchase the administrative manuals containing rules or guidelines used in administering schemes affecting the benefits or penalties to which individuals may be entitled or subject.

They would be required to publish an index to the manuals made available under this clause, indicating where they may be inspected, copied or purchased; the list would be updated annually. There would be no obligation to make available documents which are already publicly available from other sources (eg Statutory Instruments).

This clause is based on a provision of the Australian Freedom of Information Act 1982. The aim is to provide individuals with information about the rules under which they may be dealt with and allow them to satisfy themselves that they have been fairly treated.

The clause does not require departments to prepare any special documents not already in existence (other than a list of the manuals) and is not expected to have any significant cost implications. A fee may be charged to cover the administrative costs of making documents available for inspection or providing photocopies.

It is not intended that information that would assist those seeking to make fraudulent applications (for benefits etc) be published; if it seems likely that such information may inadvertently be covered by the scope of the clause, a specific exclusion will be added.

Clause 16 requires departments and authorities to make an annual report to Parliament on steps they have taken to improve and increase public access to information within their control. There is however no specific duty on them to give access to information. The reports may have a positive effect in themselves by providing a modest incentive for departments to think about steps they might take and by highlighting examples of positive initiatives.

PART III

Interpretation

Clause 17 defines terms used in the Bill. It largely reproduces the definitions employed in the 1979 bill, though the following changes have been made:

- (i) a definition of "document" (not previously defined) has been added.
- (ii) the definition of "international relations" has been narrowed by excluding the possibility that injury to the relations between a department of one government and the department of another which did not in themselves harm relations between the governments, could be regarded as "injury to international relations". The 1979 Bill included in its definition of international relations the relations between a government and a "person carrying on political activities with respect to any foreign State". This has not been repeated here.
- (iii) relations between the UK and the EEC which relate to community affairs have been excluded from the definition of international relations, except where they relate to the international relations of the EEC itself.

(iv) in the 1979 bill "security or intelligence" were defined as "the work and activities of, and in support of, the security and intelligence services ... etc". In the present draft the word "lawful" has been inserted before "work".

(v) the 1979 bill contained powers to extend the definition of "Crown servant" by prescribing that additional classes of persons should be regarded as such. The power to prescribe such additional classes has been omitted. If because of, for example, future privatisations it is thought desirable to treat employees of a privatised body as Crown servants for the purposes of the protection of official information, this can be done in the privatisation legislation itself.

Acts Done Abroad Etc

Clause 18 repeats the corresponding provision of the 1979 bill.

Clause 19 deals with short title, amendments, repeals and commencement. The repeals themselves are listed in the Schedule and include the whole of section two of the Official Secrets Act 1911. The Schedule is taken from the 1979 bill.

Richard Shepherd MP
Maurice Frankel

December 1987

APPENDIX Examples of statutes imposing a duty on ministers to make regulations

Section 20 of the Education (No 2) Act 1986 states that "the Secretary of State shall make regulations" requiring the governing bodies of county, voluntary and maintained special schools to make available to parents information on the syllabus and educational provision of schools.

Section 5 (9) of the Weights & Measures Act 1985 states that "the Secretary of State shall by regulations make provision" for the checking of working standards used by weights and measures authorities and for the testing, adjustment and limits of error of their equipment.

Section 56 (1) of the Local Government Act 1985 states "The Secretary of State shall make regulations requiring" local authorities to furnish him with statistics on manpower.

Section 49 (1) of the Public Health (Control of Disease) Act 1984 states: "It shall be the duty of the Secretary of State to make regulations" fixing the number, age and sex of persons permitted to dwell in canal boats and for promoting cleanliness in and preventing the spread of disease by such boats.

Section 14 (6) of the Industrial Training Act 1982 states that "It shall be the duty of the Secretary of State to make regulations" establishing a body to hear appeals by employers against decisions of industrial training boards concerning applications for exemption from a levy.

Section 67 (5) of the Civil Aviation Act 1982 states that "The Secretary of State shall make regulations" permitting and laying down procedures for appeals to be made to him concerning decisions of the Civil Aviation Authority in relation to applications for air transport licenses.

Paragraph 1 (1) in Schedule 1 of the Education Act 1981 states "The Secretary of State shall by regulations make provision" concerning the advice which local education authorities are to seek in assessing the special educational needs of children.

FROM THE PRIVATE SECRETARY



HOUSE OF LORDS.
LONDON SW1A 0PW

14 December 1987

Nick Sanderson Esq
Home Office
Queen Anne's Gate
LONDON
SW1

CONFIDENTIAL

Dear Nick,

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

The Lord Chancellor has seen the Home Secretary's minute of 8 December to the Prime Minister, Nigel Wicks's reply of 9 December and Mike Eland's letter of 10 December.

He agrees that the Home Secretary should proceed as proposed, and that the draft answer should be amended as proposed by the Prime Minister.

I am copying this letter to Nigel Wicks, the Private Secretaries to the members of OD(DIS), Alan Maxwell (Lord Advocate's Department), Steven Wood (Lord Privy Seal's Office,) Murdoch Maclean (Chief Whip's Office) and Trevor Woolley (Cabinet Office).

*Yours,
Paul*

Paul Stockton

16. XII

AM 07

SECURITY

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CONFIDENTIAL



Foreign and Commonwealth Office

London SW1A 2AH

14 December 1987

Dear N:dc

Reform of Section 2 of the Official Secrets Act 1911

The Secretary of State has seen the Home Secretary's minute of 8 December and the Prime Minister's response of 9 December, and is content with the line of action proposed.

I am copying this letter to the Private Secretaries of members of OD(DIS), Paul Stockton (Lord Chancellor's Office), Alan Maxwell (Lord Advocate's Department), Steven Wood (Lord Privy Seal's Office), Murdo Maclean (Chief Whip's Office) and Trevor Woolley (Cabinet Office).

Yours truly

R N Culshaw
(R N Culshaw)
Private Secretary

N Sanderson Esq
Home Office

CONFIDENTIAL

CONFIDENTIAL



pa

PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

10 December 1987

Dear Nick,

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

^{Har}
The Lord President has seen the Home Secretary's minute of 8 December to the Prime Minister and Mr Wicks' reply of 9 December.

He agrees that the Home Secretary should proceed as proposed. He also agrees with the Prime Minister that the last sentence of the draft reply raises more questions than it answers and should be omitted.

I am sending a copy of this letter to Nigel Wicks, the Private Secretaries to the members of OD(DIS), Paul Stockton (Lord Chancellor's Office), Alan Maxwell (Lord Advocate's Department), Stephen Wood (Lord Privy Seal's Office), Murdo Maclean (Chief Whip's Office) and Trevor Woolley (Cabinet Office).

Yours sincerely,

J Mike Eland

M J ELAND
Private Secretary

Nick Sanderson Esq
Private Secretary to the Secretary of State
Home Office

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10 DOWNING STREET

From the Principal Private Secretary

9 December 1987

Dear Nick,

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

The Prime Minister has seen the Home Secretary's minute of 8 December in which he seeks approval to announce, through an inspired written Answer, the Government's plans for reforming Section 2 of the Official Secrets Act 1911.

Subject to the views of Ministers, the Prime Minister is content with the draft reply attached to the Home Secretary's minute. But she would like the last sentence of the draft omitted. She believes that this sentence raises more questions than it answers. The Prime Minister is also content for the Home Secretary to talk to Mr. Shepherd in the terms of paragraph 6 of his minute.

I am copying this letter to the Private Secretaries to members of OD(DIS), Paul Stockton (Lord Chancellor's Office), Alan Maxwell (Lord Advocate's Department), Steven Wood (Lord Privy Seal's Office), Murdo Maclean (Chief Whip's Office) and Trevor Woolley (Cabinet Office).

Yours sincerely

Nigel Wicks

(N.L. Wicks)

Nick Sanderson, Esq.,
Home Office.

CONFIDENTIAL

SW

CONFIDENTIAL

Place B I
B G.



Prime Minister

Content will be

Written ~~corrected~~ attached
as I have ~~approved~~
and will be ~~approved~~
to Richard Shepherd as

Prime Minister

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

in 36. (B I is content.)

You will recall that, following the meeting of OD(DIS) on N.C.U.
5 November, I minuted you on 11 November about the timing of the 8.12
announcement of the Government's intention to issue a White
Paper on reform of section 2 of the Official Secrets Act 1911
with a view to early legislation.

2. The conclusion at that stage was that we should wait a little longer. I have now reviewed the matter in consultation with the Lord President, Lord Privy Seal and Chief Whip, and ask for your agreement to action before the Recess.

3. Following our earlier exchange I met Richard Shepherd again. As I explained in my minute to you of 17 November, it was clear that without a more tangible indication of the Government's intentions than I could then give he would still continue to seek support for his Bill. It appears from reports that he has done so with vigour and with some success on our backbenches. Since then he has again asked you (in a Question) and me (in a letter) for substantive comments on the provisions of his Bill; we have both declined.

4. His Bill is down for Second Reading on Friday 15 January. Parliament is due to return on the previous Monday, 11 January. I continue to believe that the Bill needs to be defeated on Second Reading since there is no certainty of controlling it if it reaches Committee. This would involve whipping the Party against it, which would in turn mean the Whip on duty making this known to the 1922 Committee on 17 December. Before then I would need to have seen Richard Shepherd and announced our intentions as regards timing and procedure on the lines already agreed. I would propose to make this announcement as a written Answer.

CONFIDENTIAL

CONFIDENTIAL

2.

I have suggested an amendment.

N.C.U.

5. I attach a draft question and written Answer. As you will see, it builds on the answers which you and the Attorney General have given disclosing that work is in hand. It also makes it clear, as we have already done to Richard Shepherd, that the work is not yet concluded.

6 5. If you agree that the written Answer should be made, I will arrange to see Richard Shepherd on the same day. I do not think that I have any chance at this stage of persuading him to withdraw his Bill, particularly since I cannot be forthcoming on the contents of the White Paper; but it may be possible to secure his agreement not to divide the House on Second Reading. To that end I would propose to make it clear to him privately that we envisage introducing legislation in the next Session. I would propose to see him and make the written Answer on 14 or 15 December.

7 9. Copies of this minute go to members of OD(DIS), the Lord Chancellor, the Lord Advocate, the Lord Privy Seal, and the Chief Whip and to Sir Robert Armstrong.

N.L. Sanderson.

Approved by the Home Secretary
and signed in his absence.

8 December 1987

CONFIDENTIAL

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

To ask the Secretary of State for the Home Department, what plans he has to reform section 2 of the Official Secrets Act 1911.

DRAFT REPLY

As my Rt Hon Friends, the Attorney General and the Prime Minister have told the House, the Government has had work in hand for some time to find effective, enforceable and reasonable provisions to replace section 2 of the Official Secrets Act 1911. This work is continuing and we intend to bring it to a conclusion later this Session. When the work is complete, we shall lay before Parliament a White Paper setting out the Government's proposals for reform of the present law, with a view to early legislation.

[Our proposals will build on the Protection of Official Information Bill which the Government introduced in 1979, but will take fully into account the criticisms made of that Bill.]

Best to omit this sentence? It
raises more ~~points~~ questions than it answers.
Agree to omit the sentence?

✓
agree *mt*



SECURITY

OFFICIAL SECRETS

RT

RT



NEA/see

QUEEN ANNE'S GATE LONDON SW1H 9AT

3 December 1987

Dear Richard,

ATTACHED

Thank you for your letter of 18 November.

As you know, our view is that official secrets is not a suitable subject for a Private Member's Bill. Your suggestion of regular meetings to discuss amendments is, I know, intended to be helpful, and in other circumstances would be so. But as it is, the idea doesn't really fit.

It follows that it would not make much sense for me to offer comments on the substance of your Bill as it stands. I am grateful to you for sending me your drafts, and have read them with interest.

I will be in touch with you again as soon as our thinking about possible timing and procedures is further advanced. I should be grateful if you would treat this letter as being also a reply to your earlier letters of 24 September and 13 and 21 October to me, of 1 October to Douglas Hogg and 22 October to John Patten.

Yours,
Douglas

Richard Shepherd, Esq, MP

From: Richard Shepherd, M.P.



HOUSE OF COMMONS

LONDON SW1A 0AA

18th November 1987

Dear Douglas,

I much enjoyed our chat about my Private Member's bill and although I was sorry that you were unable as yet to express an opinion on the contents of my Bill, I welcome the indications which you gave and which the Prime Minister confirmed in Question Time that consideration is being given to legislation to replace Section 2 which would be less restrictive and therefore more likely to be effective.

I believe that my Bill strikes the right balance in replacing Section 2 while at the same time preserving national security. However, if there are any specific points in the Bill which cause you and your Department concern I would be only too glad to meet you, or your officials, to discuss them.

The major problem I gathered from our chat was that of a measure relating to security being promoted by a private member. While I do believe that private members' legislation is an appropriate vehicle, I wonder if it would help to resolve your very genuine concern if I were to suggest regular discussions and meetings in the course of the progress of the Bill in Committee to discuss the implications of any amendments which might be tabled. I would certainly be glad to come to such an arrangement in the spirit of co-operation which I hope I have shown in my promotion of this limited but important proposed legislation.

Would this be helpful?

With kind regards,

Richard

The Rt.Hon. Douglas Hurd, CBE. MP.
The Secretary of State,
Home Office,
50 Queen Anne's Gate,
London SW1H 9AT.

HOUSE OF COMMONS
LONDON W1A 0AA

18th November 1987

Dear Sir,

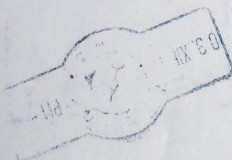
I much enjoyed our first meeting on 11th November and although I was sorry that you were unable to attend as expressed an opinion on the contents of my Bill. I welcome the indications which you gave and which the Prime Minister confirmed in Question Time that consideration is being given to legislation to regulate Section 2 which would be less restrictive and therefore more likely to be effective.

I believe that my Bill strikes the right balance to regulating Section 2 while at the same time preserving national security. However, if there are any specific points in the Bill which cause you and your Government concern I would be only too glad to meet you, or your officials, to discuss them.

The major problem I gathered from our chat was that of a measure relating to security being proposed by a private member. While I do believe that private members' legislation is an appropriate vehicle, I wonder if it would help to remove your very genuine concern if I were to suggest regular discussions and meetings in the course of the passage of the Bill to Committee to discuss the implications of any amendments which might be tabled. I would certainly be glad to come to such an arrangement in the spirit of co-operation which I hope I have shown in my promotion of this limited but important proposed legislation.

Would this be helpful?

Yours faithfully,
David



The Rt Hon. Douglas Hurd, CBE, MP,
The Secretary of State,
Home Office,
25 Queen Anne's Gate,
London SW1A 2AT.



10 DOWNING STREET

LONDON SW1A 2AA

THE PRIME MINISTER

18 November 1987

Dear Richard.

Thank you for your letter of 16 November about your proposed Bill on the protection of official information.

I have reflected very carefully on what you say in your letter, but I still do not believe that a Private Member's Bill is the right vehicle for amending the law in this difficult and sensitive area. The issues involved go to the heart of the functions of Government and the security of the state. For that reason, I do not believe it would be fruitful for us to enter into a dialogue about the substance of your Bill.

As the Attorney General and I said in the House last week, the Government has for some time been at work on devising an effective, enforceable and reasonable alternative to section 2. The Home Secretary explained when you met him on Monday, and you will know from your own researches, that the issues involved are difficult. We have not yet reached conclusions. Nevertheless the Home Secretary will certainly look out for you again before the Second Reading of your Bill to let you know how procedurally we propose to move forward. I know that he will be in touch with you about this as soon as the way forward is clear.

Yours ever

Raymond

Richard Shepherd, Esq., M.P.



10 DOWNING STREET

PRIME MINISTER

I have re-drafted the letter to Richard Shepherd to exclude the sentence which you did not like and to include a reference to the "security of the state" in the second paragraph of the draft.

N.L.W.

(N. L. WICKS)

18 November 1987



10 DOWNING STREET

LONDON SW1A 2AA

17 November 1987

THE PRIME MINISTER

very carefully
I have replied on what you say in your letter, but I still

Thank you for your letter of 16 November about your proposed Bill on the protection of official information. I certainly agree that we shall need to establish so far as is possible a Parliamentary and Government consensus about any proposals to reform section 2 of the Official Secrets Act. As I have made clear already, however, I do not believe that a Private Member's Bill is the right vehicle for amending the law in this difficult and sensitive area. The issues involved go to the heart of the functions of Government *and the security of the state*. For that reason, I do not believe it would be fruitful for us to enter into a dialogue about the substance of your Bill.

As the Attorney General and I said in the House last week, the Government has for some time been at work on devising an effective, enforceable and reasonable alternative to section 2. The Home Secretary explained when you met him *on Monday* last night, and you will know from your own researches, that the issues involved are difficult. We have not yet reached conclusions. Nevertheless the Home Secretary will certainly look out for you again before the Second Reading of your Bill to let you know how procedurally we propose to move forward. I know that he will be in touch with you about this as soon as the way forward is clear.

Richard Shepherd, Esq., M.P.



10 DOWNING STREET

PRIME MINISTER

The Home Secretary suggests, in his minute at Flag A, that you should reply to Mr. Shepherd in terms of the draft below. His minute describes also the outcome of his meeting with Mr. Shepherd yesterday.

N.L.W.

(N.L. WICKS)

17 November 1987



A

PRIME MINISTER

REFORM OF SECTION 2 OF OFFICIAL SECRETS ACT 1911

Your Private Secretary wrote to mine yesterday confirming your agreement that I should see Richard Shepherd as proposed in my minute of 23 November. I saw him last evening.

2. I took the line which I had sketched in my minute. The Government had been working on devising an effective, enforceable and reasonable replacement for section 2 since the spring of this year. His Bill had accelerated and sharpened that process. I could not yet tell him the result of that work but I accepted that before the Second Reading of his Bill we would have to make clear how in procedural terms we intended to go forward. I would see him again for that purpose. Meanwhile we remained firmly of the view that the subject was not suitable for Private Members' legislation. This was no reflection on him: it was simply that the issues went to the heart of Government.

3. Richard Shepherd said that he felt himself in a difficulty because he had not realised how far ahead the Government had got when I first saw him about his proposed Bill. He volunteered that had I been able to give him a clearer signal at the time he would not have introduced his Bill. Now, however, he was committed to pursuing it to a Second Reading and if possible into Committee: he could not withdraw without knowing the geography of the Government's intentions. Parliament should in any event have the opportunity to debate the issue. This would help the

Government itself in framing its proposals. He hoped that at the least the Government would take over his Bill: he could not believe that its shape would differ very greatly from any proposals we might bring forward.

4. I replied that I could not discuss substance with him. Work was not that far advanced. There were many difficult issues still to be addressed. The Government could not, however, simply take over his Bill: we would want to maintain control of legislation on such a difficult and sensitive issue. I intended to see him again before 15 January, by which time I should be able to tell him more about our intentions. In the meantime I could neither confirm nor deny rumours - which he claimed had emerged from a lobby briefing - about publication later this session of a Government White Paper leading to a Government Bill.

5. The discussion was courteous, but I was left with the clear impression that without a more tangible indication of the Government's intentions than I was authorised to give, Richard Shepherd will continue to work assiduously to cultivate support for his Bill. Indeed, he referred as he left to him having no alternative but to fight his corner. I will have to see him again, probably before Christmas, and will then have to give him a clear and firm statement both of our approach towards his Bill and of how we intend to proceed with developing our own proposals. I will keep in close touch with the Chief Whip about this.

6. More immediately there is the question of the response to Richard Shepherd's letter to you of yesterday in which he invites you to meet him and some of the leading sponsors and supporters of his Bill. I do not suppose, however, that you would think it sensible to see him: we do not want to encourage the notion that we are prepared to treat with him about the contents of his Bill. I suggest that you can best respond to his letter by referring to his meetings with me. A draft reply which you may care to send him building on that approach is attached.

3.

7. I am copying this minute to the other members of OD(DIS), the Lord Chancellor, the Lord Advocate, the Chief Whips in the Commons and the Lords, and to Sir Robert Armstrong.

Douglas Hurd

17 November 1987

CP
Per file

PRIME MINISTER

Richard Shepherd, M.P., has written seeking a meeting with you, to which he would bring some of the leading sponsors of his Bill. In fact, the Home Secretary saw him today and there seems no point whatever in your agreeing to a similar meeting at this stage. The Home Secretary will, however, be letting you have a report of his meeting, and providing advice on the letter. Meanwhile, I have acknowledged it.

mb

MEK

MARK ADDISON

16 November 1987



file 16
LOFADM

10 DOWNING STREET
LONDON SW1A 2AA

From the Private Secretary

16 November 1987

I am writing on behalf of the Prime Minister to thank you for your letter of 16 November.

This is receiving attention and a reply will be sent to you as soon as possible.

MARK ADDISON

Richard Shepherd, Esq., M.P.

From: Richard Shepherd, M.P.



HOUSE OF COMMONS
LONDON SW1A 0AA

16th November 1987

BY HAND

Dear Prime Minister,

Thank you for your letter of 21st October acknowledging safe receipt of the draft copy of the Protection of Official Information Bill. Naturally I have carefully considered your official comments which concentrated on the suitability of such legislation being introduced by a Private Member.

After taking extensive soundings among colleagues I would ask you to consider what I believe is a widely held view on this aspect of the Bill, namely that the question of who introduces it is a secondary question of relatively minor importance. After all there are many precedents for legislative proposals which started out as Private Members' Bills becoming important statute law as a result of subsequently receiving the imprimatur or even formal adoption by the government of the day. What is surely of greater and primary importance is the actual substance of the Bill.

I hope I am not mistaken in taking some encouragement from the fact that neither you nor any member of the Government has so far expressed major disagreement with most of the content of my Bill. Indeed it would be surprising if my Bill did run counter to our Government's philosophy. The co-sponsors of the Bill who, as you know, include a former deputy Prime Minister, former Home Secretary, former Foreign Secretary and former Lord Privy Seal had always hoped that this would be an issue that would secure the Government's support.

The issues are those identified by Lord Franks in 1972, addressed in the White Paper of 1978 and incorporated in the Government's own bill of 1979. As you know, the Government's bill was withdrawn from the Lords because of widespread opposition to certain aspects and in particular the illiberality of an unreviewable ministerial certificate of serious injury. We have looked closely at the reasons

/for failure

for failure and have produced a bill which reflects both the need for the protection of that official information the release of which could cause serious injury and the generality of information which needs less than the sanction of criminal law. Nothing in the Bill encroaches on Section 1 of the present Official Secrets Act.

Because of the complexity of the issues involved in replacing Section 2 of the 1911 Act I wonder whether the most efficient way of proceeding would be to establish a consensus between parliamentary and government opinion. My Bill has sought to achieve such a consensus but I would still appreciate further substantive comment from Government sources before the Second Reading debate takes place on 15th January.

Because of your own interest in this issue I wonder if you would consider seeing me and some of the leading sponsors and supporters of the Bill for a discussion to see if we can establish a kind of consensus which would be most effective?

With kind regards,

Richard

The Rt.Hon. Margaret Thatcher, M.P.
The Prime Minister,
10 Downing Street,
London SW1.

COMMENTARY

W F Deedes

The Wrights and wrongs of secrecy

IN THE 15 years which have elapsed since Lord Franks, a brilliant mountain guide, led some of us to recommend changes in the Official Secrets Act, I have perversely lapsed into thinking that the subject is best left alone. That is heresy to journalists and now, it seems, heresy to Ministers. They have set their hearts on removing this curse of secrecy from our lives and reforming the Act.

The sudden resolve is attributed by some to the *opéra bouffe* staged over Peter Wright and his memoirs. That can hardly be so. The Punic War against Wright was rightly waged to assert that no member of the Secret Service will ever be allowed to publish memoirs with impunity. No reformed Act will change that. Nor would reform alter the heavy punishment inflicted on the News of the World recently by a court for defying an order not to publish the names of doctors suffering from Aids.

It might be nearer the mark to say that the gleeful and sometimes tendentious reporting of the drawn-out Wright affair has induced the Government to tackle an unpopular Act. I doubt if the public gives a hoot about Government secrets, being far more interested in protecting what is left of its privacy. But secrets are King Charles's head to my profession, and it is there the Government aims to cool the brow.

It will not find it easy. Newspapers and broadcasting are in the business of disclosure. During the Falklands war, when editors had to be briefed collectively, it came home to me how widely newspapers differed — and would again — on what is fit to print in a national emergency. In Washington, widely seen as a model of open government, there is nothing left unfit to print.

Our present Act, passed in 1911 and so derided by my kind, says in effect that almost everything in the Government's possession is theoretically secret, but it will only biff you if you overstep the mark where it really matters. And, of course, any new Act will have to define what really matters and, logically, increase the penalties for overstepping the mark.

What the Government will find is that, since Franks, a body of political and media opinion has come to regard not simply the 1911 Act but all secrecy itself as obnoxious. That is where battle will be joined in Parliament. Those who are drafting this brave proposal need our prayers.

The Wicks

Wine words
from Bill
Deedes on
Official Secrets
Act.

John
16/4

CONFIDENTIAL

file spw



10 DOWNING STREET

From the Principal Private Secretary

16 November 1987

Dear Philip

REFORM OF SECTION 2
OF THE OFFICIAL SECRETS ACT 1911

The Prime Minister has seen the Home Secretary's minute of 13 November about the next steps in the handling of Mr. Richard Shepherd's Bill on the Official Secrets Act.

The Prime Minister agrees with the course proposed by the Home Secretary and that he should see Richard Shepherd on Monday and take the line with him described in paragraph 3 of the Home Secretary's minute.

I am copying this letter to the Private Secretaries to the members of OD(DIS), the Lord Chancellor, the Lord Advocate, the Chief Whips in the Commons and the Lords, and to Sir Robert Armstrong.

Yours truly
Nigel Wicks

(N. L. WICKS)

Philip Mawer, Esq.,
Home Office.

CONFIDENTIAL

PA

CONFIDENTIAL



Prime Minister

Agree that the
Home Secretary should see
Mr Shepherd and speak to
him on the lines below?

Prime Minister

Yes

N.L.W.

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

DGP

13.11

Your Private Secretary wrote to mine on 12 November about your response to my suggestions for the next steps in our handling of the Richard Shepherd Bill and our proposals for reform of section 2 of the Official Secrets Act. In the light of your response, I have discussed handling with the Lord Privy Seal, the Solicitor General and the Chief Whip.

2. In view of what you say I accept that we should not at present go further than the formula used by the Attorney General in the House on Monday, words which you substantially repeated during Questions yesterday. The Chief Whip has confirmed, however, that he is under mounting pressure to reveal the Government's intentions about Richard Shepherd's Bill and that Shepherd himself is working hard to build up support in its favour. As you know, I cannot postpone much longer, without damage to our prospects, a response to Shepherd's own urgent request to see me, and we need in any event to move quickly to head off his lobbying.

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CONFIDENTIAL

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3. I therefore propose to see Richard Shepherd on Monday. I would refer him to the words of the Attorney General and your own remarks, and say that as he will have gathered from these, work on devising an effective, enforceable and reasonable alternative to section 2 has been proceeding for some time. I cannot yet tell him the result of that work but before the Second Reading of his Bill, the Government will say how procedurally it intends to move forward. I will see him again as soon as the Government has reached a conclusion on this. For the present, as he knows from his correspondence with you and my previous meeting with him, it is the Government's firm view that the protection of official information is an unsuitable subject for a Private Member's Bill. The Government will not therefore support his Bill, nor will we engage in a detailed dialogue with him about its provisions.

4. I am copying this letter to the other members of OD(DIS), the Lord Chancellor, the Lord Advocate, the Chief Whips in the Commons and the Lords, and to Sir Robert Armstrong. If my Private Secretary has not heard to the contrary by 10 am on Monday, 16 November, he will make arrangements for me to see Richard Shepherd later the same day. I will let you know the outcome of the discussion.

Douglas Hurd.

13 November 1987

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Prime Minister ⁽²⁾
A helpful piece from Mr. Brittan.
MEB 12/11

Not to be published before 8.00 pm on Thursday, 12 November 1987

REFORMING THE OFFICIAL SECRETS ACT

EXTRACT OF A SPEECH BY THE RT HON LEON BRITTON QC MP TO THE ANNUAL DINNER OF THE STOCKPORT CONSERVATIVE ASSOCIATION AT THE BELGRADE HOTEL, STOCKPORT ON THURSDAY, 12 NOVEMBER 1987

"The Official Secrets Act in its present form lost all its friends many years ago. So it is good news that the Government is once again giving serious consideration to its reform. The ground has already been well tilled, first in the Franks Committee's Report, and then in the Government's own Bill of 1979. There have certainly been some important developments since then, but the issues and problems remain fundamentally the same. If the present review is pursued urgently there is, therefore, no reason why Government legislation should not be put before Parliament in the next Session. The time has now come for this issue to be given that degree of priority.

"The main reason why such legislation is now needed is that in practice the 1911 Act does not give the effective protection that is needed against unauthorized disclosures which would genuinely damage our national security. The reason for this of course is not that the Act is too lax, but that it is so absurdly all-embracing that it has become discredited. This means that those who wish to do damage to our security may be tempted to do so, thinking that they will not be prosecuted, because of the unpopularity of the Official Secrets Act. If they, nonetheless, are prosecuted, all the inadequacies of the Act can be thrown in the face of the prosecution, however irrelevant they may be to the particular case. By allowing this legislation to stay on the statute book we are providing a dangerous smokescreen for those whose aim is to damage our national interests, for they may be tempted to think that they can get away with it by masquerading as champions of open government.

.../...

"The example of what happened in 1979 is an instructive one. The Government had the courage to tackle this thorny problem and put before Parliament legislation which was largely based on the Franks Report. That legislation had its flaws, but it would have provided effective protection for genuine state secrets, while massively reducing the application of the criminal law for lesser matters. Some people opposed the legislation because they thought that the flaws were fundamental to it. But there were quite a number of people who opposed it because they did not really want effective legislation at all. They preferred a murky and discredited Act which they hoped would not be used.

"In reconsidering this issue now the Government should, therefore, seek to remedy the genuine defects in the 1979 Bill. They must accept that whatever they do, there will be those who will oppose even the most nicely judged reform for motives of their own. I am sure the Government will not be deterred by that prospect and will proceed with the constructive task of producing a workable and effective Bill.

"The main problem is to find a way of ensuring that material has properly been classified as secret, without simply relying on the original say-so of the Minister or official concerned, but also without exposing to public scrutiny the very material which needs to be protected. In addition, it will be necessary to consider once again what categories of information require the protection of the criminal law. There is certainly room for argument as to whether the 1979 Bill got this completely right. But I very much doubt whether substantial changes will be necessary here. For the 1979 Bill met much of the criticisms of liberal critics of the 1911 Act by removing from the scope of the criminal law the vast bulk of official information whose disclosure might be embarrassing to the Government of the day, but could not possibly harm our national security.

.../...

"When these difficult, but not intractable, issues have been resolved, the Government should proceed promptly with the task of reform. For to defer it until later in the Parliament will only make a necessary task more difficult to accomplish."

ENDS



"When these difficulties, not yet insurmountable, should have been
resolved, the Government should have proceeded with the work of
reform. For no other reason is what is at the moment only
a necessary task more difficult to accomplish."

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DABADP



10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

12 November 1987

Dear Philip,

REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT, 1911

The Prime Minister has seen the Home Secretary's minute of 11 November in which he seeks approval for an announcement, in the terms of the Written Answer attached to his minute, of the Government's intentions to publish a White Paper, with a view to early legislation, on the reform of Section 2 of the Official Secrets Act.

The Prime Minister recognises the need to run Richard Shepherd's Bill into the sand and the importance of shaping our tactics accordingly. But she is not convinced that an early announcement is either necessary or right. Mr Shepherd's supporters already know that the Government does not regard the Official Secrets legislation as suitable for a private member's measure; the Government is looking at the issue with a view to devising an "effective, enforceable and reasonable alternative"; the Government is not going to bring forward an alternative Bill in this heavily committed Session; and that the work has been in hand for some time on devising alternative provisions. But the most important point, in the Prime Minister's view, is that the terms of the announcement suggested by the Home Secretary are hardly consistent with the very limited reply by the Attorney General, which Ministers agreed following the last meeting of OD(DIS). She believes that the Home Secretary's announcement would undermine the position taken by the Attorney General by giving the impression that the difficulties of devising new provisions, to which the Attorney referred, have suddenly dissolved. She therefore believes that the Home Secretary's announcement should wait a little longer.

I am sending a copy of this letter to the Private Secretaries to members of OD(DIS), the Lord Chancellor, the Lord Advocate, the Chief Whips in the Commons and the Lords, and to Sir Robert Armstrong.

Yours truly
Nigel Wicks

N L WICKS

Philip Mawer, Esq.
Home Office

CONFIDENTIAL

SPH

PRIME MINISTER

REFORM OF SECTION II OF THE OFFICIAL SECRETS ACT 1911

The Home Secretary's minute at Flag A seeks approval for an early statement on the Government's intentions on the Official Secrets Act. Bernard is much against an early statement, as his minute at Flag B explains. I am less against an early statement than Bernard. The Home Secretary's main argument is that he has the task of running the Shepherd Bill into the sand; and it is difficult to gainsay ^{him} if he feels an early statement on the lines he suggests is useful.

I therefore recommend that I express your doubts about an early statement, drawing, as appropriate, on Bernard's note, but leave the final decision to the Home Secretary to make in consultation with the Leader of the House and the Chief Whip.

Agree?

N.L.W.

NLW

11 November, 1987.

JD3BEJ

Yes - the
most important thing
is that having agreed the very
limited reply by the A-G - we are
now letting him down by giving
the impression that the difficulties
have suddenly dissolved. I think
we should wait a little longer. _{not}

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Placed B I A



PRIME MINISTER

REFORM OF SECTION 2 OF THE
OFFICIAL SECRETS ACT 1911

attached
At the OD(DIS) meeting on 5 November we discussed in a preliminary way how and when we would announce our intention to issue a White Paper on the reform of section 2 of the Official Secrets Act, with a view to early legislation. We had already concluded that it was necessary to oppose Richard Shepherd's Private Member's Bill.

2. I have been giving some further thought to this question, in consultation with the Whips' Office. My conclusion is that the balance of advantage lies in an early announcement.

3. As you will have seen, the media have picked up what the Attorney General said, as agreed at the meeting, in answering a Question on Monday - that we are looking at the 1911 Act. It will not be obvious, if we delay a statement, why we did not carry this statement of our position further. I see advantage in making our position clear now by means of an arranged Question, with a repeat of it in the Lords, before a supporter of Richard Shepherd's Bill puts down a more hostile Question.

4. Some concern was expressed at the OD(DIS) meeting that too early an announcement would give Richard Shepherd time to organise his support. My feeling now is that the longer we leave it the more people will have given him a commitment of support which they may feel unable to break. The sooner we set his Bill in a wider context, the more likely it is that

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backbenchers with sympathies for reform will be discouraged from looking to the Shepherd Bill as the right vehicle. The interest in the subject at Westminster is building up fast.

5. By announcing our intention to issue a White Paper and to legislate, I will in effect be making it clear that we do not expect Richard Shepherd's Bill to succeed. I would propose, therefore, to meet him earlier on the day the announcement is to be made to tell him what I will be saying. I will explain further why we cannot support his Bill, and try to persuade him either to withdraw the Bill or not to press it to a vote at Second Reading. I suspect that he will resist the former but may conceivably be more ready to accept the latter. It will help in achieving this if I can put it to Richard Shepherd that we view the debate as a useful step in the discussion of the issues with which our White Paper will deal and which the House will consider at greater length when we introduce our own legislation. If Richard Shepherd agrees not to divide the House, it will not prevent someone else doing so but it would greatly reduce the likelihood of any substantial number of our supporters voting for the Bill.

6. I shall of course be pressed on the likely contents of our White Paper, particularly no doubt by sponsors of the Shepherd Bill. I cannot be drawn on substance at this stage; but I would propose to make it clear in my announcement that our proposals will build on the 1979 Bill, taking account of the strong criticisms made of certain aspects of that Bill.

7. I attach a draft of the announcement in the form of a Written Answer which I would like to make in the next few days. Richard Shepherd has already requested an urgent meeting with me: I have put him off for the moment but cannot do so for long. I would be glad to know whether you agree that we should go ahead on these lines.

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I am copying this minute to members of OD(DIS), to the Lord Chancellor, the Lord Advocate, the Chief Whips in the Commons and the Lords, and to Sir Robert Armstrong.

Doyle - Hunt

11 November 1987

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REFORM OF SECTION 2 OF THE OFFICIAL SECRETS ACT 1911

To ask the Secretary of State for the Home Department: what plans he has to reform section 2 of the Official Secrets Act 1911.

DRAFT REPLY

Section 2 of the 1911 Act has been widely criticised for its wide scope in practice and its ineffectiveness, and we have always made it clear that we sympathised with that criticism. We introduced in 1979 the Protection of Official Information Bill, which would have considerably narrowed the scope of section 2. But certain aspects of that Bill were themselves the subject of strong criticism, inside and outside Parliament, and it was not possible to make progress with it.

We have continued to seek a reasonable, effective and enforceable alternative to section 2, and have for some time been studying the possibilities. We propose, later this Session, to lay before Parliament a White Paper setting out the Government's proposals for reform of the present law, with a view to early legislation. Our proposals will build on the 1979 Bill but will take into account the criticisms made of that measure.

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MR WICKS

OFFICIAL SECRETS ACT

You asked for my comments on the Home Secretary's minute.

My first reaction is to query where the Home Secretary's proposed course leaves the Attorney General who stuck by the agreed line and said reform "is not without difficulties". An early Written Answer on the lines proposed by the Home Secretary will lead journalists to assume that somewhat miraculously these difficulties have been resolved. This will increase the pressure for the Government to explain how it has resolved these difficulties and to make public its proposals.

In short, I see disadvantage in the Home Secretary's making a statement within the next few days.

I do not understand the Home Secretary's point about Richard Shepherd being given time to organise his support. These would-be supporters know already:

1. The Government does not regard Official Secrets legislation as suitable for Private Members.
2. The Government is looking at the issue with a view to devising an "effective, enforceable and reasonable alternative".
3. The Government is not going to bring forward an alternative Bill in this heavily committed session.
4. The Government has nonetheless embarked on a reform of the Act (Telegraph today); and that senior Ministers hope by the time the Shepherd Bill comes up for Second Reading to have outline proposals available (again Telegraph today).

In other words there is no doubt that the Government does not regard the Shepherd Bill as a suitable vehicle and that it does not intend it - let alone expect, as the Home Secretary puts it - to succeed.

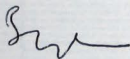
The only way in which the Home Secretary is proposing to take the matter forward is by promising a White Paper preparatory to legislation. I know that the media already assume this.

I am profoundly underwhelmed by the argument that interest in the subject is building up fast at Westminster. This build-up will last until the next crisis. There is no reason why we should encourage the build up, especially when any legislative action is

at least 12 months away.

I am also chronically against the idea of allowing the media to dictate Government business, especially when there is no need to rush. To do so merely encourages Departments' use of the media for their own purposes.

In short, what's the rush?



BERNARD INGHAM
11 November 1987

PA on file

now
cf.



for previous
paper see
GR file on
Richard SHEPHERD

10 DOWNING STREET

Note for the record.

Home Office - in clearing the
draft - failed to pick up that
it was the herds which
rejected the 1977 Bill, and
that Shepherd's is a Bill not a
motion.

ATT x1 discussed. He had
already had a word with
Shepherd, and there seemed to be
little point in taking any
further action.

MEAT 5/11



10 DOWNING STREET
LONDON SW1A 2AA

From the Private Secretary

4 November 1987

Dear Philip

I attach a copy of the Prime Minister's final reply to Richard Shepherd on his Protection of Official Information Bill, which we discussed on the telephone.

I am copying this letter to Mike Eland (Lord President's Office), Steven Wood (Lord Privy Seal's Office), Michael Saunders (Law Officers' Department), Murdo Maclean (Chief Whip's Office) and to Trevor Woolley (Cabinet Office).

Yr
Mark Addison

(Mark Addison)

Philip Mawer, Esq.,
Home Office.



sgu AA.

10 DOWNING STREET

LONDON SW1A 2AA

THE PRIME MINISTER

28 October 1987

Dear Richard,

sgu AA.

Thank you for your letters of 2 and 21 October.

(162) I am grateful to you for keeping me informed about the drafting of your Bill, and the discussions you have had with the Home Secretary. As you know we introduced a Bill in 1979 to reform Section 2 of the Official Secrets Act, which did not, in the event, find favour with the House. The matter is highly complex, and I do not believe there are any easy solutions. But I have to say that I find it difficult to see how a Private Members' ~~motion~~ ^{Bill} could be the appropriate vehicle for amending the law dealing with the security of the state.

Lamont

Ranger

Richard Shepherd, Esq. M.P.



DEPARTMENT OF TRADE AND INDUSTRY
ALLINGTON TOWERS
19 ALLINGTON STREET
LONDON SW1E 5EB

Telephone (Direct dialling) 01-215 0177
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(Switchboard) 01-215 7877

4 November 1987

C L G Mallaby Esq
Cabinet Office
70 Whitehall
London SW1



Dear Mallaby,

OD(DIS)(87)77: SECOND REPORT TO MINISTERS

You circulated on 20 October the second report of the Official Group on Enforcing the Duty of Confidentiality, in preparation for discussion in OD(DIS) tomorrow.

I am writing to let you know that the Secretary of State for Trade and Industry is content with the line taken in the report, particularly the proposal that information received from companies should not be protected by official secrets legislation, but by other means.

Yours sincerely

J F BAILES

1 am writing to let you know that the Secretary of State for Trade and Industry is contact with the relevant departments, and that information received from those departments is being processed as quickly as possible.

CONFIDENTIAL



cc B/JP

MINISTER OF STATE, PRIVY COUNCIL OFFICE

PRIME MINISTER

ENFORCING THE DUTY OF CONFIDENTIALITY

As I shall not be attending Thursday's meeting of OD(DIS) it may be useful if I set down here my views on those aspects of direct concern to me - the management of the Civil Service and our stance on Freedom of Information.

I very much support the conclusions reached at the Lord President's preliminary meeting, as recorded in his minute of 28 October to you, that we should press forward with a package of measures to reform Section 2 of the Official Secrets Act and to strengthen the duty of confidentiality, as an important aid to the good management of the Civil Service and a clearer understanding by civil servants of their rights and responsibilities.

I also agree that we should stand firm against any move to include provisions on Freedom of Information in such a package and that our position should be made clear in the proposed White Paper. We must however recognise that this is an area where we can expect considerable pressure from the FOI lobby when our proposals are published. We shall need to be ready with a robust defence of our policy and to make as much as possible of our actual track record on open government, which is more substantial than the lobbies have been prepared to recognise. I am asking my officials to set in hand some preparatory work on this.

I am sending copies of this minute to members of OD(DIS), and other recipients of the Lord President's minute.

RICHARD LUCE

3 November 1987

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PART 1 ends:-

C. MACLEAY TO PM 30.10.67

PART 2 begins:-

Mos/PCO TO PM 3.11.67