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PREM 19/3530

PART 3

MT.

SECRET,

CONFIDENTIAL FILING

Reform of the Official Secrets Act.

Proposed Protection of Official Information Bill

Enforcing the Duty of Confidentiality

SECURITY

PT1: May 1979

PT3: November 1988

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
28.11.88							
~~7.12.88~~							
~~19.12.88~~							
~~21.12.88~~							
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END OF CONSERVATIVE ADMINISTRATION

1 MAY 1997

Privy Council Office,
Whitehall,
London, SW1A 2AT

With the Compliments

of the

Private Secretary

to the

Lord President of the Council

PRIME MINISTER'S QUESTIONS: 21 NOVEMBER 1991

INDEPENDENT ARTICLE: "OFFICIAL SECRECY IS WIDELY CONDEMNED"

Official Secrets Act 1989

Line to take: by repealing the all-embracing Section 2 of the 1911 Official Secrets Act this Government has narrowed substantially the scope of the application of the criminal law to the protection of official information.

Freedom of information

Line to take; since 1979 the Government's policy has been to make as much official information available as possible while preserving the confidentiality essential to the effective working of the Government. There are an increased number of statutes in force giving specific rights in certain areas. The Government repealed Section 2 of the 1911 Official Secrets Act. The Citizen's Charter initiative is all about improving choice, quality, value and accountability within the public sector.

Background note

Mr Richard Shepherd MP has said that he will sponsor a Private Members Freedom of Information Bill. He has sixth place in the Ballot. In the past the Government has consistently opposed a general statutory right of access to official records, such as we understand the Shepherd Bill, which has not yet been introduced, will provide.

WP2/AFPMQ

Survey finds consensus in social attitudes despite yea

British keep faith with welfare state

THE MOST striking feature of public opinion in Britain is an apparently unshakable belief that the Government has a duty to fund the NHS, welfare payments, pensions and council housing, the eighth British Social Attitudes Survey released today reports.

An "astonishingly high" level of support for state provision of welfare services has not changed during the 1980s, it found. British attitudes are no different from those in most other west European social democracies.

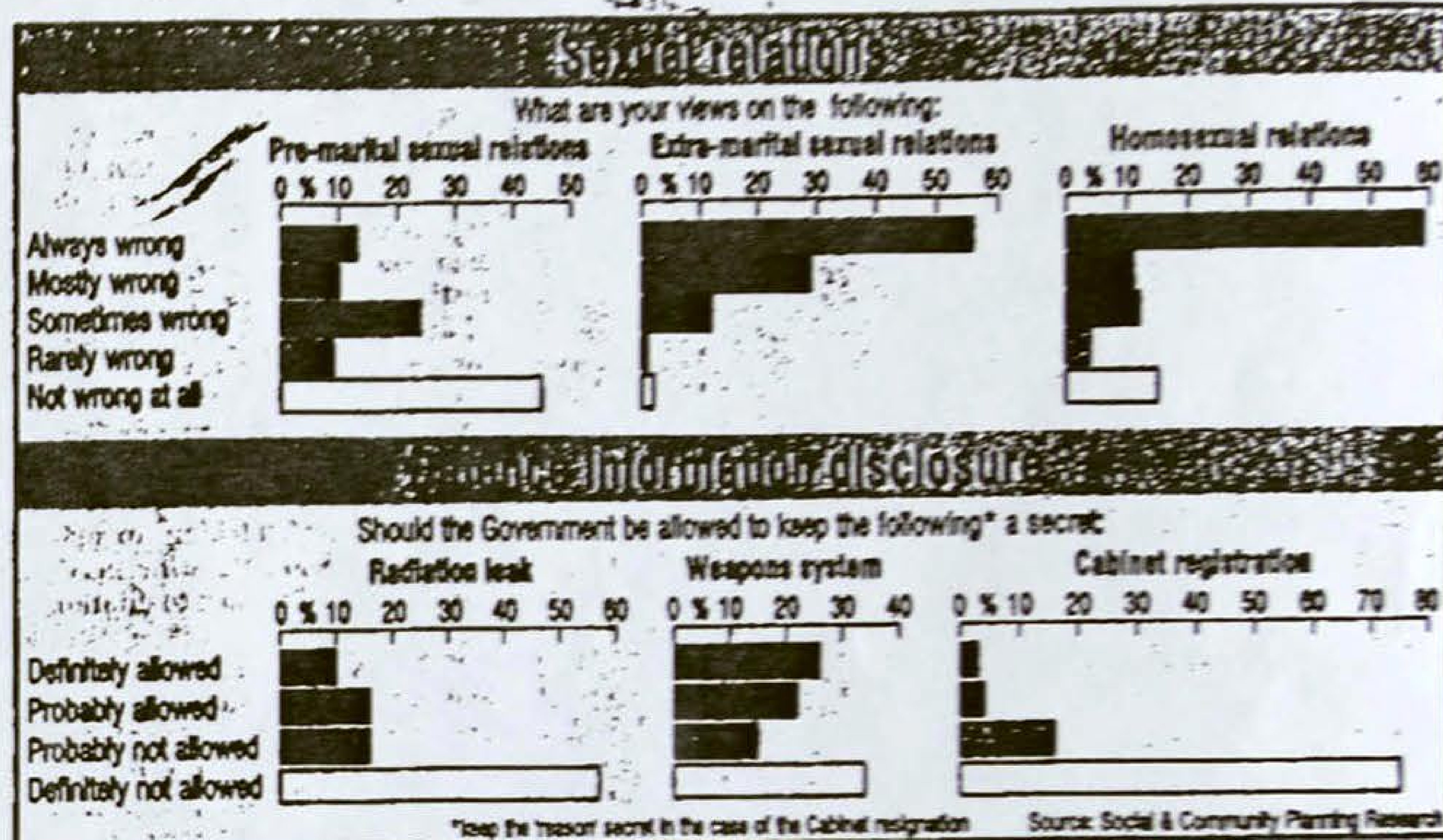
The annual survey, widely regarded as the most authoritative examination of public responses to social, political and moral questions, has for five years been emphasising that political polarisation has not been mirrored by a sea change in public beliefs.

All the opinion poll evidence suggests that the post-war consensus has survived Thatcherism, it says. The 1980s saw a challenge to the 40-year tradition that the state should be the dominant supplier of social services. "Yet far from a reduction in support for health and welfare expenditure, the 1980s have seen a strengthening of public endorsement of centralised, tax-financed state welfare."

Raising taxes to fund services won the support of 32 per cent of those questioned in 1983 and 54 per cent in 1990. In spite of 12 years of free market policies, eight out of ten of those questioned believed the Government should intervene in the economy by setting up construction projects to create jobs for the unemployed and by imposing controls on credit.

Eighty-five per cent of those questioned said that the Government definitely had a responsibility to provide health care. Almost half said they were dissatisfied with the way the NHS was run and there was a widespread belief that the health service's problems could be alleviated with more expenditure. Even those with private medical insurance expressed strong support for the NHS.

The past decade has seen a rise



in support for more spending on education from 50 per cent in 1983 to 60 per cent in 1990. It is now just behind health as the service the public wants most spent on.

The improvement in primary schools most people want to see is smaller classes (28 per cent of adults questioned) followed by more resources for books and equipment. "By contrast," the survey authors note, "none of the the items which are the Government's priorities — better teaching of English and maths, more parental involvement in governing bodies — was chosen as the most important priority by more than 5 per cent of our sample."

Approval for student loans has fallen from 38 per cent in 1983 to 24 per cent now. But the Government's establishment of a national curriculum has found public favour. About half the respondents favoured central control of what was taught in schools, compared with 39 per cent in 1983.

Respect for teachers was said to have declined by a majority of both parents and pupils questioned. A sizeable minority (41 per cent) thought that teachers are not doing their jobs well and failing to teach the "three Rs".

Consensus broke down when respondents were asked whether the Government had a duty to provide a job for everyone who wants one. Between a quarter and a fifth also said there was no duty on the Government to act to reduce the income gap between rich and poor or provide a decent standard of living for the unemployed.

There are also significant social divisions on what type of benefits the state should provide. The salaried middle classes are more willing to increase taxes to pay for improvements in education. But they are unenthusiastic about "working-class benefits" such as providing housing for people who cannot afford to buy a home, a proposition which won majority support when it was put to manual workers. The middle class agenda is likely to triumph, the report notes, because support for spending on health and education is found in all sections of society.

The split in attitudes towards the redistribution of wealth and the unemployed should not be exaggerated, the researchers argue. The evidence is that British society is "divided not polarised." Although class provided the basis for different economic priorities, the divisions on spending priorities were almost as great within each class as they were between classes.

■ *British Social Attitudes*, Dartmouth Publishing, £19.95.

Official secrecy is

DIX
WE GUARA

Official secrecy is widely condemned

GOVERNMENT secrecy, imposed by the all embracing Official Secrets Act, is widely condemned in the survey.

The researchers took five possible newspaper articles, all of which would be illegal under the terms of the Act, and asked whether the Government should be able to stop them appearing.

Only in one case — the publication of confidential defence plans — did a majority of respondents believe that minsisters should use the threat of legal sanctions to impose secrecy. On all the others — details of weapons systems, economic plans, minor radiation leaks and the reasons for a Cabinet minister's resignation — majorities ranging from 52 to 93 per cent thought that the Government had no right to prevent publication.

Meanwhile, 83 per cent said that a civil servant should be allowed to expose a minister who had lied to Parliament.

But the report says that most of the other issues highlighted by civil liberties groups did not cause great public concern. The issue of compulsory identity cards was treated with some indifference. About a quarter of those surveyed had no view on the matter and the remainder were evenly split. Huge majorities favoured the use of video cameras to detect criminals at football matches or speeding drivers on the roads. And two thirds of those sampled favoured banning television stations and newspapers from interviewing terrorists.

Meanwhile, there was widespread support for a clampdown on smokers with majorities saying that smoking should be banned in hospitals, cinemas and restaurants.

A third said it should be banned completely in workplaces, while a quarter said that smokers should be banned from pubs and should be given lower priority for heart and lung operations in the NHS.

A majority thought that "people look down on smokers these days". And even 33 per cent of smokers agreed with the proposition that taxes on cigarettes should be raised.

Barristers' leaders call for fresh legal aid fund

A CONTINGENCY legal aid fund should be set up to ensure more people can afford justice, barristers' leaders said yesterday.

The fund would be self-financing mainly from a small fixed proportion of damages awarded in successful civil court cases, the Bar Council said.

The Bar rejected the Government's proposed civil legal aid "safety net" scheme as unworkable and wrong in principle.

Under the proposed scheme, clients would have to pay legal fees to a limit and only apply for legal aid if costs passed that level.

It was unfair to expect clients to commit their own resources first without a reasonable certainty that they would receive legal aid to continue their case, the Bar said.

Bar Council chairman Anthony Scrivener QC said: "Action is needed to ensure that more people can afford to get justice in our courts and in our tribunals."

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The General Secretary

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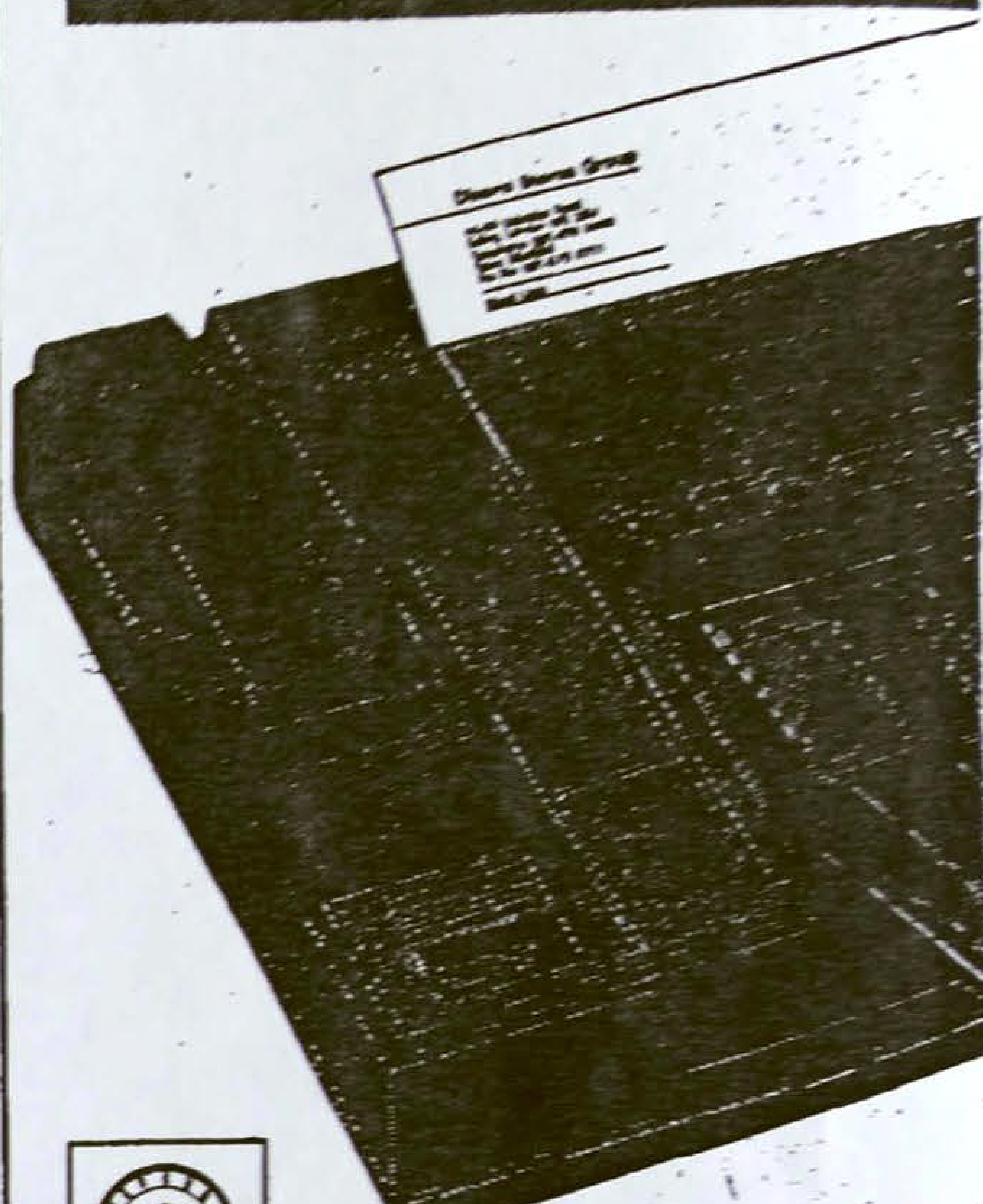

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FROM CABINET OFF 071 2706142

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10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

17 December 1990

Dear Colin

OFFICIAL SECRETS ACT 1989: NOTIFICATION NOTICE

The Prime Minister has seen the note attached to the Home Secretary's minute of 14 December and has signed the form acknowledging his notification under the Official Secrets Act 1989. I am sending the signed copy to Sir Robin Butler's office and attach a copy for the Home Office.

I am copying this letter to Sonia Phippard (Cabinet Office).

Yours sincerely

Andrew Turnbull

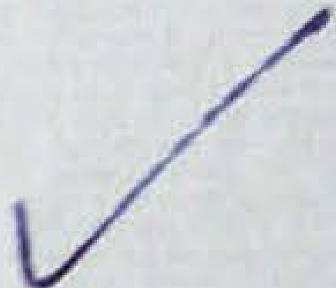
ANDREW TURNBULL

Colin Walters, Esq.,
Home Office

CONFIDENTIAL

CONFIDENTIAL

Prime Minister
Please can you sign
the form at the back
AT
14/12



Prime Minister

OFFICIAL SECRETS ACT 1989: NOTIFICATION NOTICE

The purpose of this letter is to notify you that you are subject to the provisions of section 1(1) of the Official Secrets Act 1989. A short note describing the notification procedure and its implications is attached at Annex A.

I would be grateful if you would sign the acknowledgement at Annex B and arrange for it to be passed to Sir Robin Butler's office and for a copy to be sent to me.

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

Kenneth Baker

14 December 1990

CONFIDENTIAL

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ANNEX A

OFFICIAL SECRETS ACT 1989: NOTIFICATION

1. Under Section 1(1) of the Act any disclosure about security or intelligence by a member of, or a former member of, the security and intelligence services without lawful authority constitutes a criminal offence. This also applies to any person who is not a member of the security and intelligence services but who is notified by a Minister that he or she is subject to Section 1(1) of the 1989 Act.

2. The individuals subject to notification are those whose work, in the opinion of a Minister, is or includes work connected with the security and intelligence services, and is of such a nature that the interests of national security require that they should be subject to Section 1(1) of the Act. The Prime Minister has agreed that those Ministers whose responsibilities involve them closely with the services should be similarly notified.

3. A person who is notified is guilty of a criminal offence under Section 1(1) of the Official Secrets Act 1989 if, without lawful authority, they disclose any information, document or other article relating to security and intelligence which has been in their possession in the course of their work. This includes making any statement which purports to be a disclosure of information relating to security or intelligence, or is intended to be taken by those to whom it is addressed as being such a disclosure. The penalty on conviction for such an offence could be imprisonment for up to two years, or a fine, or both.

4. In accordance with Section 1(8) of the Act, a notification must be revoked by a further notice served in

writing if the work of the individual concerned ceases to be such as described in paragraph 2 above. Otherwise a notification remains in force for 5 years. It may be renewed by further notices under Section 1(6) of the Act for periods of 5 years at a time.

5. Once a notification has expired or been revoked it remains an offence under Section 1(1) of the Act for the person who was the subject of that notification to disclose or purport to disclose any information, document, or other article relating to security or intelligence which was in their possession in the course of their work while the notification was in force.

CONFIDENTIAL

ANNEX B

ACKNOWLEDGEMENT OF NOTIFICATION NOTICE

I acknowledge that I have been notified under Section 1(6) of the Official Secrets Act 1989 that I am subject to Section 1(1) of the Official Secrets Act 1989.

Signed ....John Major........

Date ....16 December 1990........

Name ....JOHN MAJOR........

CONFIDENTIAL

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c/pps/osa

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBIN BUTLER

OFFICIAL SECRETS ACT 1989:
NOTIFICATION OF MINISTERS

The Prime Minister has seen your minute of 7 December and was content with the proposals for notifying Ministers, including himself.

ANDREW TURNBULL

10 December 1990

CONFIDENTIAL

CONFIDENTIAL

Prime Minister
Content with these proposals for putting selected Ministers under the same obligations of secrecy as the security services?
AT 7/12

Ref. A090/2989

PRIME MINISTER

Content [handwritten]

Official Secrets Act 1989: Notification of Ministers

This minute seeks your agreement to continuing the arrangements for the notification of Ministers under the Official Secrets Act 1989.

2. Under the Act Ministers have a power to notify individuals or groups who work closely with the security and intelligence services and impose on them the same obligations of secrecy as on members of those services. During the passage of the legislation through Parliament Home Office Ministers, with the authority of your predecessor, announced that those Ministers whose responsibilities involved them closely with the services should be similarly notified, although they did not specify which Ministers would be included.

3. The general policy on notification is to keep it as limited as possible and departments have notified only:-

(i) those individuals in Government Departments, in the Armed Forces, the police and certain Government contractors, whose work involves such close and regular contact with one or more of the security and intelligence agencies that they have an intimate knowledge of its structure and/or operations, verging on that of some of its members; and

(ii) those members of the Armed Forces who undertake technical communications and work alongside the agencies in various parts of the world.

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4. The same principles have been followed in the notification of Ministers and the following appointments are currently subject to the procedure:

The Prime Minister
The Foreign Secretary
The Home Secretary
The Secretary of State for Defence
The Secretary of State for Northern Ireland
The Attorney General
The Minister of State, Foreign and Commonwealth Office (Mr Hogg)
The Minister of State for the Armed Forces (Mr Hamilton)

5. Although the notification procedure has been publicly announced and Ministers may give a broad indication of the total number of posts which will be subject to notification, the fact that it is being applied within departments to particular posts and to particular Ministers has not been disclosed.

6. Each time a new Minister is appointed to one of the relevant posts he or she has to be notified; notification notices then have to be renewed at intervals of 5 years if the individual remains in the same post; and when a Minister leaves such a post the notification notice has to be revoked.

7. Following legal advice to the effect that it is sufficient for an official to sign the notice on a Minister's behalf, your predecessor decided that she should authorise the notification of individual Ministers except herself (because Ministers cannot notify themselves) and delegated the task of issuing the notices to me. It was decided that she should be notified by the Home Secretary.

8. Against this background, are you content:

(i) that the posts at paragraph 3, including your own and those presently occupied by Mr Hogg and Mr Hamilton, should remain subject to notification under the provisions of the Official Secrets Act 1989, and that the list of Ministers notified should remain confidential?

(ii) that the process of notifying Ministers should continue to be carried out from my office and that as part of that responsibility I should

> (a) issue a notification notice to the new Home Secretary on your behalf and issue a revocation notice to his predecessor,
>
> (b) issue a revocation notice on your behalf to your predecessor,
>
> (c) request the Home Secretary to undertake your own notification?

FER.B.

ROBIN BUTLER

7 December 1990

Pl AT.

.B/aw

PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

24 July 1990

Dear Mr Higgins,

GOVERNMENT OBSERVATIONS ON THE FIFTH REPORT FROM THE TREASURY AND CIVIL SERVICE COMMITTEE, SESSION 1989-90, ON THE CIVIL SERVICE PAY AND CONDITIONS OF SERVICE CODE

I am responding on the Government's behalf to the Fifth Report of the Treasury and Civil Service Committee which considered a revision issued in March 1990 to that part of the Civil Service Pay and Conditions of Service Code (the Code) which concerns the use of official information and related activities.

2 The revision to this part of the Code was made to reflect the changed legal position following the passing of the Official Secrets Act 1989. This Act substantially narrowed the application of criminal law to the unauthorised disclosure of official information and repealed the 'catch-all' provision in section 2 of the Official Secrets Act 1911. The Government welcomes the Committee's conclusion that the changes to the Code relating to the Official Secrets Acts are in effect technical and neutral, merely bringing the Code into line with new legislation.

Duties and Loyalties

3 The Committee took evidence from the First Division Association on their concerns about the introductory passage in the Code revision which states:

"They [civil servants] owe duties of confidentiality and loyal service to the Crown. Since constitutionally the Crown acts on the advice of Ministers who are answerable for their Departments in Parliament, these duties are for all practical purposes owed to the Government of the day."

Contd 2/ . . .

4 The Committee noted that this formulation is in effect the same as that employed in the note issued to all civil servants in December 1987 by the then Head of the Home Civil Service on the subject of duties and responsibilities of civil servants in relation to Ministers (the Armstrong memorandum). They were also satisfied that the wording does not indicate any change in Government policy on this subject. The Government welcomes and confirms the Committee's conclusions.

5 However, the Committee noted that the passage in the Code was more concise than the equivalent passage in the Armstrong memorandum and considered that this could lead to ambiguity over its meaning. They recommended that the Code should be clarified by cross-reference to the relevant section of the Armstrong memorandum on this point.

6 The difference in wording is solely due to the different contexts of the two documents. The Armstrong memorandum related to the general duties of civil servants and therefore needed to set out fully the nature of the duty of loyalty, while the revised Code paragraphs address the narrower issue of the duties owed by civil servants to their employer in relation to the use of official information. However, the Government has no objection to the cross-reference recommended by the Committee and will amend the Code accordingly at the first appropriate opportunity.

Civil Servants and Select Committees

7 The Committee welcomed the assurance given by the Head of the Home Civil Service that the revisions to the Code would have no effect on the conduct of civil servants appearing before Select Committees, and no bearing on the undertaking in the Memorandum of Guidance for officials appearing before select committees (the Osmotherly rules) that civil servants should be as helpful as possible to Committees. The Government welcomes the Committee's acceptance that the Memorandum of Guidance is consistent with the Code.

8 The Committee also welcomed the statement by the Head of the Home Civil Service that Ministers recognise the right of Committees to summon those civil servants whom they wish to examine. In agreeing that an official would have a duty to appear if summoned by Parliament, Sir Robin Butler said that this duty appears in the Memorandum of Guidance and is accepted by Ministers. The reference is to paragraph 10 which says:

Contd 3/ . . .

> "Officials appearing before Select Committees do so on behalf of their Ministers. It is customary, therefore, for Ministers to decide which officials (including members of the Armed Services) should appear to give evidence. Select Committees have in the past generally accepted this position. Should a Committee invite a named official to appear the Minister concerned, if he did not want that official to represent him, might suggest that another official could more appropriately do so, or that he himself should give evidence to the Committee. If a Committee insisted on a particular official appearing before them - whether serving in the UK or overseas - they could issue a formal order for his attendance. In such an event the official would have to appear before the Committee. In all circumstances the official would remain subject to Ministerial instructions as to how to answer questions."

There is no change in the Government's position, as set out in this paragraph of the Memorandum, which records the custom that it is for Ministers to decide which officials should appear to give evidence. As the paragraph states, officials who appear before Select Committees do so on behalf of Ministers. This principle applies to the Chief Executives of Next Step Agencies as it applies to other civil servants. In practice, Committees have been content to proceed on the basis of "requests" for departmental witnesses and evidence, rather than through the exercise of formal powers. In the Government's view it is in the interest of continuing good relationships between Ministers, officials and Committees that this practice should continue.

<u>Political Neutrality</u>

9 The Government welcomes the opportunity to restate its belief in the importance of maintaining the political impartiality of the civil service. An example of the application of this principle in a sensitive area is contained in the guidelines issued to departments on the cost of the policies of Opposition Parties, and published on page 30 of the Select Committee's report. The Government also welcomes the Committee's recognition that these guidelines provide for Ministers and civil servants a clear statement of the boundary between party political and governmental activity.

10 The Government notes the Committee's conclusion that in deciding on the manner of presentation of Government policies to the public, Ministers should consider whether a civil servant or a political appointee would be the most suitable candidate for the task. It is important to record that the

Contd 4/ . . .

function of members of the Government Information Service is to present Government policies according to long established rules. It is therefore generally appropriate to appoint a civil servant to press or information officer posts. If, however, a Minister wished an information officer to go beyond the constraints imposed upon a civil servant and argue politically for Government policies, it is open to them to appoint a special adviser.

Public Activities

11 Paragraph 9913 of the revised Code reminds civil servants that as well as a duty of confidentiality, they have a complementary general duty to give loyal service to the Crown. It lists a number of general principles which civil servants "must observe in relation to the use of official information or experience" which bear on that general duty. One such principle, set out in sub-paragraph (iv) is that:

> "They must not make public statements or remarks in terms which their Department could find objectionable, about
>
> - individuals, whether officials, Ministers or private persons; or
>
> - organisations, whether public or private."

12 The Committee endorsed the view of the FDA that there is now "an element of imprecision" in this paragraph of the Code as to the meaning of "public remarks". The Committee noted that the previous Code paragraphs dealing with activities involving the use of official information or experience had defined such activities as being "in the main . . . publication of books or articles, contacts with the Press, broadcasts, speeches or lectures and participation in outside conferences". They recommended that the revised Code paragraph should include a fuller definition of "public remarks" on these lines.

13 The use of an illustrative list of outside activities in the previous Code paragraphs was set in the context of a blanket requirement on civil servants to obtain prior authority before taking in any activity involving the disclosure of official information or use of official experience. The revised Code follows a deliberately less prescriptive approach on this point, requiring civil servants simply to comply with any departmental instructions to seek authority before taking part in any such activity or to clear in advance texts for publication which draw on official information or experience.

Contd 5/ . . .

14 It is a long established principle that civil servants should exercise care in drawing on official information or experience when commenting on individuals or organisation in circumstances where their comments may attract wider attention, and possibly, criticism, of a kind which would reflect adversely on their Department. Any such breach of their duty in this respect has always been treatable as a disciplinary offence.

15 The Government is certainly willing to keep an open mind on any further suggestions for clarifying this Code provision. But it is not at present persuaded that a more detailed description of the circumstances to which the principle set out in sub-paragraph (iv) applies would be helpful. Indeed it might be misleading in a document which applied to all civil servants. There is a wide range of circumstances which may lead to comments being reported and attributed in a way which is damaging to the Department or those with whom it deals. Civil servants always need to take care about this. The question whether the degree of culpability was such that it warranted disciplinary action cannot be decided in advance: it would depend on the circumstances of each case.

The Appeals Procedure

16 A predecessor Committee recommended that civil servants should have a right of appeal in the last resort to the Head of the Civil Service, and not just to the head of their department, if they were asked to do or not do something which raised for them a fundamental issue of conscience. This recommendation was accepted by the Government and the procedure is not set out in the Code. The present Committee investigated two aspects of this right of appeal in the course of their current inquiry.

17 Concern was expressed to the Committee that an official's career prospects might be affected if they appealed, but the Head of the Civil Service gave an assurance that such an appeal would not be held against the official or entered on his or her personnel record unless it were frivolous or vexatious. The same assurance can be given in respect of an appeal which goes no further than the head of a department.

18 The Committee also considered that there was possible room for doubt as to whether a "fundamental issue of conscience" as described in paragraph 14 of the Armstrong memorandum included issues of illegality, impropriety and maladministration as set out in paragraphs 11-13 of the

Contd 6/ . . .

memorandum. It therefore recommended that the memorandum be revised to state clearly that the right of appeal in paragraph 14 applied to such issues.

19 It has always been the Government's intention to allow such issues to come within the appeal procedure to the Head of the Civil Service, and the Armstrong memorandum is consistent with that intention. However, in view of the concern expressed by the Committee, the Government is willing to make clear in the Code paragraphs dealing with this procedure that the right of appeal applies to complaints on the grounds of illegality, impropriety and maladministration as set out in paragraphs 11-13 of the Memorandum.

Timing of revisions to the Code to meet recommendations in the Committee's Fifth Report

20 The whole of the present Code is currently under review in order to incorporate within it guidance which is set out in other documents and to distinguish clearly between guidance and mandatory rules. Once the review of each broad category of the Code is completed, the relevant part of the Code will be issued in a new format. That part which contains the subjects covered in the Committee's report is likely to be issued around the end of the year. As the two matters (in paragraphs 6 and 19) on which the Government will consider further action represent no change in present practice or policy, any relevant modifications will be made at that time.

Yours sincerely,

Alison Saxendine

GEOFFREY HOWE

(Approved by the Lord President and signed on his behalf)

The Rt Hon Terence Higgins MP
Chairman
Treasury and Civil Service Select Committee
House of Commons
LONDON
SW1A OAA

CONFIDENTIAL

MINISTRY OF DEFENCE
MAIN BUILDING WHITEHALL LONDON SW1A 2HB
Telephone 01-218 2111/3

MO 23/2D

26th March 1990

Dear Sonia,

DUTY OF CONFIDENCE: INTERNATIONAL AGREEMENTS

The Defence Secretary has seen OD(DIS)(90)1. He endorses both the general conclusion that the more promising approach is to seek to negotiate Agreements for the general Recognition and Enforcement of Judgements and the specific recommendations at paragraph 5 of the paper.

I am sending a copy of this letter to Andrew Turnbull and to the Private Secretaries to the other members of OD(DIS).

Yours sincerely,

John Colston.

(J P COLSTON)
Private Secretary

Miss Sonia Phippard
Cabinet Office

CONFIDENTIAL

FROM THE RIGHT HONOURABLE THE LORD MACKAY OF CLASHFERN

HOUSE OF LORDS,
SW1A 0PW

CONFIDENTIAL

Prime Minister
To note
File

Prime Minister

THE DUTY OF CONFIDENCE: INTERNATIONAL AGREEMENTS

1. The attached note by the secretaries of OD(DIS), dated 1st March 1990, draws attention to the fact that the report of the UK team on exploratory discussions concludes that it may prove politically more acceptable to potential partners to negotiate up-to-date judgments agreements rather than to seek specific protection for security and intelligence information. I consider that the report fully supports this conclusion in relation to the three Commonwealth countries.

2. With the emphasis moving largely, but not entirely, towards negotiating up-to-date general agreements on judgments I shall be looking for opportunities to take this matter forward. As a first step I am glad to say that colleagues have already agreed that I should have a place for a bill next session to enable us to ratify the Lugano Convention.

3. I shall be in Auckland next month for the Commonwealth Law Conference and I understand from the organisers that Law Ministers from Australia, Canada and New Zealand will be present for at least part of the conference. I intend to use this opportunity to have separate discussions on -

(a) the reaction by each government to the visit by the UK team;
(b) the scope for fresh general agreements linked to or in parallel with Lugano.

4. The Commonwealth Law Conference is to be followed by a separate meeting in Christchurch of Commonwealth Law Ministers. I have to return home before that meeting but Patrick Mayhew and Peter Fraser are coming out for it and will be in a position to continue the line of discussion.

5. I am copying this minute to all members of OD (DIS), Peter Fraser and Sir Robin Butler.

MAC

14 March 1990

From: THE PRIVATE SECRETARY

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

CONFIDENTIAL

7 March 1990

Dear Sonia

DUTY OF CONFIDENCE: INTERNATIONAL AGREEMENTS

The Home Secretary has seen OD(DIS)(90)1 and Andrew Turnbull's minute of 5 March.

He agrees that the more promising approach is to seek to conclude agreements for the more general recognition and enforcement of judgments and that, to this end, efforts should be made to persuade Australia, Canada and New Zealand to accede to the Lugano Convention. In this connection, it would clearly be advantageous for the United Kingdom to be in a position to ratify the Convention as soon as possible. He also endorses the recommendation that officials should maintain and build upon the contacts which they have already established, and Ministers should take advantage of any suitable opportunities to take soundings of the Ministers of those Governments.

I am copying this letter to Andrew Turnbull and to the Private Secretaries to the other members of OD(DIS).

Yours sincerely
Colin Walters

C J WALTERS

Ms Sonia Phippard
Cabinet Office
WHITEHALL, S.W.1.

CONFIDENTIAL

Security: Official Secrets Act Pt 3

ECL

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10 DOWNING STREET
LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBIN BUTLER

THE DUTY OF CONFIDENCE: INTERNATIONAL AGREEMENTS

The Prime Minister has seen OD(DIS)(90)1. She has noted the report by officials on their talks with the close allies. She agrees that the more promising approach is to seek to negotiate Agreements for the general Recognition and Enforcement of Judgements which would safeguard confidential information as part of wider arrangements. She agrees that Ministers should take further soundings with the four close allies at the political level as opportunity offers; that officials should maintain and build upon the informal contacts they have now established; that the United Kingdom should ratify the Lugano Convention as soon as possible; and that early consideration should be given to encouraging Australia, Canada and New Zealand to accede to the Convention.

I am copying this minute to Private Secretaries to members of OD(DIS).

AT

ANDREW TURNBULL

5 March 1990

MRM

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

2 March 1990

Dear Colin,

OFFICIAL SECRETS ACT 1989: NOTIFICATION NOTICE

The Prime Minister has now signed the notice acknowledging her notification under Section 1(1) of the Official Secrets Act 1989. I am sending the original to Sir Robin Butler's office and attach a copy for your records.

I am copying this letter to Sonia Phippard (Cabinet Office) together with the original form.

Yours sincerely

Andrew

Andrew Turnbull

Colin Walters Esq
Home Office

CONFIDENTIAL

ACKNOWLEDGEMENT OF NOTIFICATION NOTICE

I acknowledge that I have been notified under section 1(6) of the Official Secrets Act 1989 that I am subject to section 1(1) of the Official Secrets Act 1989.

Signed ....Margaret Thatcher....

Date ....1 March 1990....

Name MRS. MARGARET THATCHER

CONFIDENTIAL

PRIME MINISTER

THE DUTY OF CONFIDENCE: INTERNATIONAL AGREEMENTS

As agreed in April last year, officials have undertaken talks with Australia, Canada, New Zealand and the United States to establish whether it might be possible to negotiate international agreements for the mutual protection of confidential information from publication. The attached paper sets out the result.

The covering Note by the Secretaries rather glosses over the extent to which the talks were disappointing. This is made clearer in the full paper, e.g. para 7, which concludes that:

> "Although some of the ideas they put forward captured the interest of the officials in the countries visited, there is little prospect of achieving any new inter-Governmental agreements within the short or medium term.".

This conclusion applies both to confidential information widely defined and to security and intelligence information.

In part this may be because, as para 12 points out, none of the countries visited has yet had to deal with a Spycatcher problem.

Officials conclude that a more promising approach would be to seek Agreement for the general Recognition and Enforcement of Judgements (REJ's) which would include security and intelligence information but only as part of a wider system of arrangements. It is also suggested that Commonwealth countries might be encouraged to sign the Lugano Convention on the enforcement of civil judgements. This has now been opened to non-European countries. Finally, it is recommended that the Lord Chancellor, Attorney General and Treasury Solicitor should pursue the matter with their opposite numbers as opportunities arise.

Content to proceed in this way?

ANDREW TURNBULL

1 March 1990

c:\pps\duty (kk)

CONFIDENTIAL

CONFIDENTIAL

QUEEN ANNE'S GATE LONDON SW1H 9AT

27 February 1990

Dear Prime Minister

OFFICIAL SECRETS ACT 1989:
NOTIFICATION NOTICE

The purpose of this letter is to notify you that you are subject to the provisions of section 1(1) of the Official Secrets Act 1989, which comes into force on 1 March 1990. A short note describing the notification procedure and its implications is attached at Annex A.

I would be grateful if you would sign the acknowledgement at Annex B and arrange for it to be passed to Sir Robin Butler's office and for a copy to be sent to me.

Yours ever

The Rt Hon Margaret Thatcher MP
No 10 Downing Street
LONDON, S.W.1.

CONFIDENTIAL

ANNEX A

OFFICIAL SECRETS ACT 1989: NOTIFICATION

1. Under section 1(1) of the new Act any disclosure about security or intelligence by a member of, or a former member of, the security and intelligence services without lawful authority constitutes a criminal offence. This also applies to any person who is not a member of the security and intelligence services but who is notified by a Minister that he or she is subject to section 1(1) of the 1989 Act.

2. The individuals subject to notification are those whose work, in the opinion of a Minister, is or includes work connected with the security and intelligence services, and is of such a nature that the interests of national security require that they should be subject to section 1(1) of the Act.

3. A person who is notified is guilty of a criminal offence under section 1(1) of the Official Secrets Act 1989 if, without lawful authority, they disclose any information, document or other article relating to security and intelligence which has been in their possession in the course of their work. This includes making any statement which purports to be a disclosure of information relating to security or intelligence, or is intended to be taken by those to whom it is addressed as being such a disclosure. The penalty on conviction for such an offence could be imprisonment for up to two years, or a fine, or both.

4. A notification must be revoked by a further notice served in writing if the work of the individual concerned ceases to be such as described in paragraph 2 above. Otherwise a notification remains in force for 5 years. It may be renewed by further notices under section 1(6) of the Act for periods of 5 years at a time.

5. Once a notification has expired or been revoked it remains an offence under section 1(1) of the Act for the person who was the subject of that notification to disclose or purport to disclose any information, document, or other article relating to security or intelligence which was in their possession in the course of their work while the notification was in force.

file DAS.

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBIN BUTLER

OFFICIAL SECRETS ACT 1989: NOTIFICATION OF MINISTERS AND OFFICE HOLDERS

The Prime Minister has seen your minute of 22 February. She has agreed the list of Ministers to be notified, and the suggested process for notifying Ministers and Cabinet Office holders. She has noted the arrangement for notifying herself. She also agreed that the Staff Counsellor and members of the Security Commission should also be notified.

I am copying this minute to Stephen Wall (Foreign and Commonwealth Office), Colin Walters (Home Office), Simon Webb (Ministry of Defence), Stephen Leach (Northern Ireland Office), Juliet Wheldon (Law Officers' Department) and to the Director General of the Security Service.

AT

ANDREW TURNBULL
24 February 1990

file
c:\pps\ Secrets.
das

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

24 February 1990

SIR ROBIN BUTLER

OFFICIAL SECRETS ACT 1989: NOTIFICATION

The Prime Minister has seen your minute of 22 February. She has approved your proposals for notifying staff in the Cabinet Office. She has also agreed that the notices should be signed on her behalf by the Principal Establishment Officer in the Cabinet Office. Mr Powell and I have also noted that we are to be notified.

ANDREW TURNBULL
24 February 1990

Prime Minister
Content?
AT 23/2

Ref. AO90/509

PRIME MINISTER

Yes

Official Secrets Act 1989: Notification of Ministers and Office Holders

I consulted you during the early stages of the passage of the Official Secrets Act 1989 about the notification of individuals or groups who work closely with the security and intelligence services and on whom the same obligations of secrecy will be imposed as on members of those services (my minute of 6 December 1988 to Mr Wicks). You agreed that those Ministers whose responsibilities involved them closely with the services should be notified. This was confirmed by Home Office Ministers during the passage of the legislation through Parliament, although they did not specify which Ministers would be notified.

2. The process of notification will need to be completed before the Official Secrets Act 1989 is brought into force on 1 March. This minute seeks your agreement on which Ministers should be notified and the agreements for notifying them. It also seeks your agreement to the notification of certain office holders.

The Ministers to be Notified

3. The general policy on notification is to keep it as restrictive as possible. Accordingly, departments have been advised that the aim should be to notify only:

(i) those individuals in Government Departments, in the Armed Forces, the police and certain Government contractors, whose work involves such close and regular contact with one

or more of the security and intelligence agencies that they have an intimate knowledge of its structure and/or operations, verging on that of some of its members; and

(ii) to those members of the Armed Forces who undertake technical communications and work alongside the agencies in various parts of the world.

4. It is clearly desirable that the same principles should be followed in deciding which Ministers should be notified. Having consulted Permanent Secretary colleagues I recommend that the holders of the following Ministerial posts should be notified:

The Prime Minister
The Foreign Secretary
The Home Secretary
The Secretary of State for Defence
The Secretary of State for Northern ireland
The Attorney General
The Minister of State, Foreign and Commonwealth Office (Mr Waldegrave)
The Minister of State for the Armed Forces (Mr Hamilton)

Arrangements for Notification

5. Ministers cannot notify themselves. So each of the Ministers to be notified, yourself included, will have to be notified by another Minister. Lawyers have advised that it will be sufficient for an official to sign the notice on a Minister's behalf, provided that they have the necessary authorisation. I recommend, therefore, that you delegate to me the task of notifying the Ministers concerned, other than yourself, on your behalf. I would then invite the Home Secretary, as the Minister responsible for the Act and, indeed, with direct responsibilities for one of the agencies, to notify you. One of the advantages of

this approach is that each notification involves a certain amount of mechanics. Each time a new Minister is appointed to one of the relevant posts he or she will have to be notified; notification notices will then have to be renewed at intervals of 5 years if the individual remains in the same post; and when a Minister leaves such a post the notification notice will have to be revoked. That points to using my office to administer the system.

Office Holders

6. Your authorisation is also requested in respect of the Staff Counsellor and the seven members of the Security Commission who also fall within the remit for notification. (They have been consulted and raised no objections to the prospect of being notified.) The Home Secretary is making similar arrangements in respect of the Interception Commissioner and Tribunal and the Security Service Commissioner and Tribunal.

Conclusion

7. Against this background I would welcome your endorsement of the following recommendations:

Agreed MT

(i) the Ministers to be notified under the provisions of the Act should be those listed in paragraph 4 above;

Agreed MT

(ii) the Staff Counsellor and the members of the Security Commission should be similarly notified;

Agreed MT

(iii) the process of notifying Ministers and Cabinet Office office holders should be carried out from my office under your authority, and that as part of that arrangement I should request the Home Secretary to undertake your own notification.

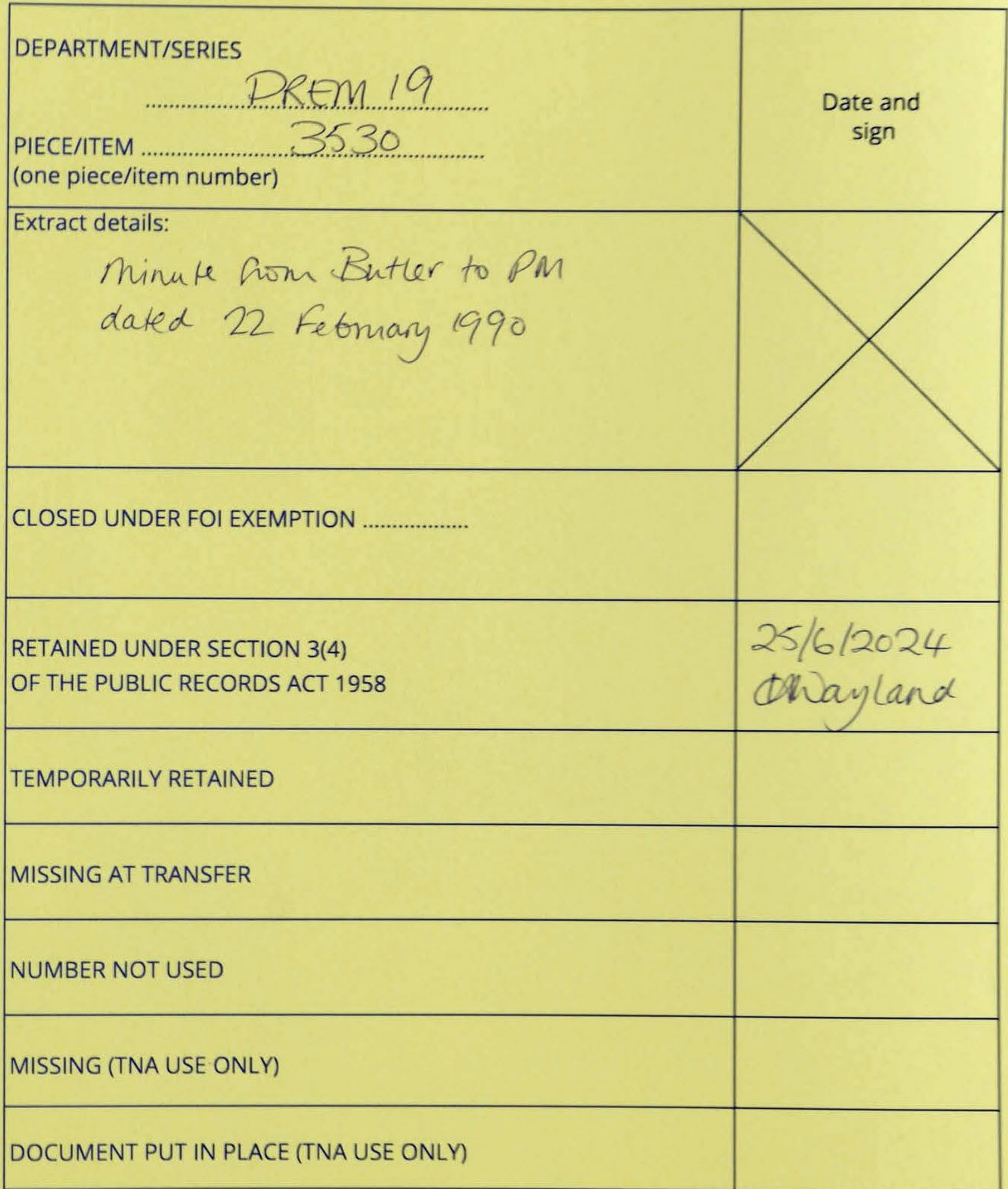
8. I am copying this minute to the Foreign and Commonwealth Secretary, the Home Secretary, the Secretary of State for Defence, the Secretary of State for Northern Ireland, the Attorney General and to the Director General of the Security Service.

F.E.R.B.

ROBIN BUTLER

22 February 1990

THE NATIONAL ARCHIVES



	Date and sign
DEPARTMENT/SERIES PREM 19 PIECE/ITEM 3530 (one piece/item number)	
Extract details: Minute from Butler to PM dated 22 February 1990	X
CLOSED UNDER FOI EXEMPTION	
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Instructions for completion of Dummy Card

Use black or blue pen to complete form.

Use the card for one piece or for each extract removed from a different place within a piece.

Enter the department and series,
eg. HO 405, J 82.

Enter the piece and item references, .
eg. 28, 1079, 84/1, 107/3

Enter extract details if it is an extract rather than a whole piece.
This should be an indication of what the extract is,
eg. Folio 28, Indictment 840079, E107, Letter dated 22/11/1995.
Do not enter details of why the extract is sensitive.

If closed under the FOI Act, enter the FOI exemption numbers applying to the closure, eg. 27(1), 40(2).

Sign and date next to the reason why the record is not available to the public ie. Closed under FOI exemption; Retained under section 3(4) of the Public Records Act 1958; Temporarily retained; Missing at transfer
or Number not used.

CONFIDENTIAL

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBIN BUTLER

CABINET OFFICE

REVISION OF THE CIVIL SERVICE CODE: USE OF OFFICIAL INFORMATION

The Prime Minister has seen your minute of 5 January and has noted the position reached with the Civil Service unions. She was content for the revised Code to be promulgated to departments.

I am copying this minute to Martin Le Jeune (Minister of State, Privy Council Office) and Juliet Wheldon (Law Officers Department).

AT

ANDREW TURNBULL

9 January 1990

CONFIDENTIAL

Prime Minister
This does no more than restate the existing position. Even after ~~it has been~~ promulgating the CS unions will want talks on such matters as appeals in "conscience" questions
Content for this to be promulgated next week?
AT 8/1

Ref. A090/21

PRIME MINISTER

Revision of the Civil Service Code: Use of Official Information

The paragraphs of the Civil Service Code dealing with the use of official information have been revised to take account of:

(i) the note on the duties and responsibilities of civil servants issued by Sir Robert Armstrong; and

(ii) the new Official Secrets Act legislation.

2. The revised Code paragraphs are attached at Annex A. They were the subject of extensive consultations with Departments and have been cleared with Treasury Counsel. They have also been discussed with the trade unions. The unions - and the First Division Association (FDA) in particular despite the fact that they failed to take up their invitation to attend the meeting arranged to discuss the revision - have reservations about it, which the FDA have now voiced publicly (cutting from today's Financial Times attached). Their primary concern is with the description of the constitutional position of civil servants in paragraph 9904 of the revision. The FDA argue that there are circumstances, admittedly exceptional, in which civil servants, as servants of the Crown, may have a wider obligation - for example to Parliament - than is implied by that paragraph.

3. It has been pointed out to the FDA that the Code revision

Para 3
of Memorandum
attached.

does no more than reflect the statement of the constitutional position of civil servants in the Armstrong memorandum, which was of course the subject of extensive discussions with the unions and with the Treasury and Civil Service Select Committee. The unions have indicated a wish to make representations to me on all this. That will have to be considered. But there can be no question of departing from the position in the Armstrong memorandum for the purpose of these Code paragraphs. In any case, the unions' concerns go wider than the Code paragraphs in question and the Code revision needs now to be promulgated to Departments so that they can notify their staff before the new Official Secrets Act comes into force.

4. The implementation date for the new Official Secrets Act has not yet been announced; but I understand that it is now likely to be at the end of February. Subject to your approval, I propose now to go ahead in promulgating the attached Code revision to Departments in the week beginning 15 January, together with guidance on bringing the provisions of the new Act and of the Code revision, and their implications for the protection of official information, to the attention of staff, and on the revised procedures for bringing the provisions of the Act to the attention of civil servants on appointment and of others.

5. I am copying this minute to the Minister of State, Privy Council Office, and the Attorney General.

F.E.R.B.

ROBIN BUTLER

5 January 1990

ANNEX

DRAFT

THE USE OF OFFICIAL INFORMATION AND RELATED ACTIVITIES

Background

9904. Civil servants must exercise care in handling the information that has come into their possession in the course of their official duties and should not forget that they are employed for the purposes of the Department in which they are now serving. They owe duties of confidentiality and loyal service to the Crown. Since constitutionally the Crown acts on the advice of Ministers who are answerable for their Departments in Parliament, these duties are for all practical purposes owed to the Government of the day.

Introductory

9905. Any civil servant or former civil servant who is in doubt about the application of the duties and obligations set out below to particular activities or situations relating to the use of information obtained in the course of official duties should always consult a senior officer.

9906-9909. Unallocated.

Duties and Obligations

9910. Civil Servants and former civil servants are bound by the provisions of the criminal law which protect certain categories of information. Civil servants should be aware of the Official Secrets Act 1989, the main provisions of which are summarised at Annex . There are also many other Acts of Parliament containing provisions which create criminal sanctions for the unlawful disclosure of certain kinds of information. Many of these provisions relate to information received or gathered under a statutory framework for official purposes. Each Department's Establishment Branch will be able to advise what Acts are relevant to the work of the Department.

9911. All civil servants owe the Crown, as their employer, a duty of confidentiality. Whether or not the criminal law applies they must protect official information which is held in confidence: because it has been communicated in confidence within Government (for example by Ministers or civil servants), or because it has been received in confidence from others (for

example, a member of the public or a firm), and no decision has been taken to lift that restriction. This duty of confidentiality continues after a civil servant has left Crown employment.

9912. Civil servants are expected to be prepared to make available official information which does not fall into one of the categories described in paragraph 9910 and 9911, in accordance with Government policy and departmental instructions, provided they observe the principles set out in paragraph 9913 below.

9913. As well as a duty of confidentiality, civil servants have a complementary general duty to give loyal service to the Crown: a duty which also underlies other provisions of the Code. Civil servants - whether acting in an official or private capacity - must observe the following principles in relation to the use of official information or experience:

i. It is their responsibility, before disclosing official information, to satisfy themselves that the information does not fall within the categories described in paragraphs 9910 and 9911 and, where appropriate, to check with a senior officer.

ii. Subject to paragraph 9915 below, they must comply with any departmental instructions about the need to seek authority before taking part in activities which might involve the disclosure of official information or draw upon official experience, or to clear in advance texts for publication which draw on official information or experience.

iii. They must not seek to frustrate the policies or decisions of Ministers by the use or disclosure outside the Government of any information to which they have had access as civil servants.

iv. They must not make public statements or remarks in terms which their Department could find objectionable, about

- individuals, whether officials, Ministers or private persons; or
- organisations, whether public or private.

v. They must not take part in activities, including discussion of matters of current or political controversy, which

- conflict with the interests of the Department;

- bring the name of the Department, or the Civil Service generally, into disrepute; or

- bring into question the impartiality of the Civil Service.

Disciplinary Sanctions

9914. Any breach of these duties, involving

i. the disclosure or publication of information falling in either of the categories described in paragraphs 9910 and 9911, except in confidence to those entitled to receive it, or

ii. a failure to observe the principles described in paragraph 9913,

is a disciplinary offence, which may result in a range of penalties up to and including dismissal.

Trade Union activities

9915. Civil servants do not need permission to take part in activities organised by, or on behalf of, their trade union; but they continue to be governed by the duties and obligations in relation to the use of official information described in paragraphs 9910, 9911 and 9913. In addition a civil servant who, as an elected national, departmental or branch representative or officer of a recognised trade union, is publicising union views on an official matter which, because it directly affects the conditions of service of members of the union as employees, is of legitimate concern to them, needs no specific permission. This exemption will not, however, apply to the case (probably rare) where the official duties of the trade union representative or officer as a civil servant are directly concerned with the matter in question.

B542/B130689

FINANCIAL TIMES

Top civil servants rebel over code of conduct

By John Gapper, Labour Editor

THE GOVERNMENT is facing a public clash with its senior civil servants over a new code of conduct which implies that they may be dismissed for disclosing any information that a minister wants them to keep secret.

The First Division Association, the union representing 11,000 senior civil servants – including permanent secretaries in Whitehall departments – has refused to accept the code. The union says the code wrongly identifies the interests of the country with those of the Government.

The union argues that the code could prevent civil servants who give evidence to Commons select committees from being completely honest.

The Cabinet Office has now told the union that it shortly intends to publish the code, which says that duties of confidentiality and loyal service to the Crown are "for practical purposes owed to the Government of the day."

Ms Elizabeth Symons, FDA general secretary, said yesterday that FDA members accepted a duty of confidentiality in nearly all circumstances. However, they believed it was wrong to identify the public interest completely with that of the Government.

"We know that we have a duty of confidentiality and loyalty, but we owe the absolute duty to the Crown and Parliament, not to ministers, who have been known to be less than perfect occasionally," she said.

The union is now seeking a meeting with Sir Robin Butler, head of the Civil Service, to discuss the code. The Cabinet Office argues that the code will not impose any higher obligations of confidentiality than those already existing.

Among the FDA's members is Sir Peter Gregson, permanent secretary at the Department of Trade and Industry, who in December gave evidence to the Commons public accounts committee on the sale of the Rover Group to British Aerospace.

Other permanent secretaries belonging to the FDA include Sir Terence Heiser, at the Department of the Environment, and Sir Christopher France at the Department of Health.

The code is to form part of the civil servants' pay and conditions of service code, which is the Civil Service equivalent of employment conditions. Those breaking it would be liable to disciplinary action, including dismissal.

Concern over the issue within the FDA has been heightened by complaints from members about having to cost the Labour Party's policy review statement for ministers last summer. This was regarded by some as party political work.

The code has been drawn up by the Cabinet Office following the 1989 Official Secrets Act, which replaced Section 2 of the 1911 Act.

Under the earlier law, it was a criminal offence to disclose any official information without lawful authority.

Instead of this, the 1989 Act confines criminal liability to six categories of information, including security and intelligence. The code is intended to cover official information falling outside these categories.

The union is also worried about provisions that employees must not "make public statements or remarks in terms which their Departments could find objectionable," or take part in activities "that conflict with the Department's interests."

It says civil servants should have access to an ombudsman to complain in confidence about being asked to do things that they consider improper. At the moment, they are asked to make representations to senior managers in their department.

The Cabinet Office said an existing memorandum of guidance drawn up by Lord Armstrong, the former Cabinet Secretary, already imposed similar obligations on civil servants.

Friday, January 5, 1990

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ANNEX O

THE DUTIES AND RESPONSIBILITIES OF CIVIL SERVANTS IN RELATION TO MINISTERS

Note by the Head of the Home Civil Service

In February 1985, with the consent of the Prime Minister, I issued a note of guidance restating the general duties and responsibilities of civil servants in relation to Ministers. That note was reproduced in a Written Answer by the Prime Minister to a Parliamentary Question on 26 February 1985 (OR 26 February 1985, cols 130 to 132). In the light of subsequent discussion, including observations of the Treasury and Civil Service Select Committee and the Defence Committee of the House of Commons and comments from the Council of Civil Service Unions, I have expanded the note of guidance, and a revised version is now issued. As previously, the note is issued after consultation with Permanent Secretaries in charge of Departments and with their agreement. As with the earlier version, this revised version is issued with the consent of the Prime Minister, and will be reported by her to the House of Commons.

2. This note is concerned with the duties and responsibilities of civil servants in relation to Ministers. It should be read in the wider context of Ministers' own responsibilities, which were set out in the Government's reply to the Seventh Report from the Treasury and Civil Service Committee (Cmnd 9841):

> "The Government believes that Ministers are well aware of the principles that should govern their duties and responsibilities in relation to Parliament and in relation to civil servants. It goes without saying that these include the obligations of integrity. They include the duty to give Parliament and the public as full information as possible about the policies, decisions and actions of the Government, and not to deceive or mislead Parliament or the public. In relation to civil servants, they include

the duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching policy decisions; the duty to refrain from asking or instructing civil servants to do things which they should not do; the duty to ensure that influence over appointments is not abused for partisan purposes; and the duty to observe the obligations of a good employer with regard to terms and conditions of service and the treatment of those who serve them."

3. Civil servants are servants of the Crown. For all practical purposes the Crown in this context means and is represented by the Government of the day. There are special cases in which certain functions are conferred by law upon particular members or groups of members of the public service; but in general the executive powers of the Crown are exercised by and on the advice of Her Majesty's Ministers, who are in turn answerable to Parliament. The Civil Service as such has no constitutional personality or responsibility separate from the duly constituted Government of the day. It is there to provide the Government of the day with advice on the formulation of the policies of the Government, to assist in carrying out the decisions of the Government, and to manage and deliver the services for which the Government is responsible. Some civil servants are also involved, as a proper part of their duties, in the processes of presentation of Government policies and decisions.

4. The Civil Service serves the Government of the day as a whole, that is to say Her Majesty's Ministers collectively, and the Prime Minister is the Minister for the Civil Service. The duty of the individual civil servant is first and foremost to the Minister of the Crown who is in charge of the Department in which he or she is serving. The basic principles of accountability of Ministers and civil servants are as set out in

the Government's response (Cmnd 9916) to the Defence Committee's Fourth Report of 1985-86:

- Each Minister is responsible to Parliament for the conduct of his Department, and for the actions carried out by his Department in pursuit of Government policies or in the discharge of responsibilities laid upon him as a Minister.

- A Minister is accountable to Parliament, in the sense that he has a duty to explain in Parliament the exercise of his powers and duties and to give an account to Parliament of what is done by him in his capacity as a Minister or by his Department.

- Civil servants are responsible to their Ministers for their actions and conduct.

5. It is the duty of civil servants to serve their Ministers with integrity and to the best of their ability. In their dealings with the public, civil servants should always bear in mind that people have a right to expect that their affairs will be dealt with sympathetically, efficiently and promptly.

6. The British Civil Service is a non-political and professional career service subject to a code of rules and disciplines. Civil servants are required to serve the duly constituted Government of the day, of whatever political complexion. It is of the first importance that civil servants should conduct themselves in such a way as to deserve and retain the confidence of Ministers, and to be able to establish the same relationship with those whom they may be required to serve in some future Administration. That confidence is the indispensable foundation of a good relationship between Ministers and civil servants. The conduct of civil servants should at all times be such that Ministers and potential future Ministers can be sure that that confidence can be freely given,

and that the Civil Service will at all times conscientiously fulfil its duties and obligations to, and impartially assist, advise and carry out the policies of, the duly constituted Government of the day.

7. The determination of policy is the responsibility of the Minister (within the convention of collective responsiblity of the whole Government for the decisions and actions of every member of it). In the determination of policy the civil servant has no constitutional responsibility or role distinct from that of the Minister. Subject to the conventions limiting the access of Ministers to papers of previous Administrations, it is the duty of the civil servant to make available to the Minister all the information and experience at his or her disposal which may have a bearing on the policy decisions to which the Minister is committed or which he is preparing to make, and to give to the Minister honest and impartial advice, without fear or favour, and whether the advice accords with the Minister's view or not. Civil servants are in breach of their duty, and damage their integrity as servants of the Crown, if they deliberately withhold relevant information from their Minister, or if they give their Minister other advice than the best they believe they can give, or if they seek to obstruct or delay a decision simply because they do not agree with it. When, having been given all the relevant information and advice, the Minister has taken a decision, it is the duty of civil servants loyally to carry out that decision with precisely the same energy and good will, whether they agree with it or not.

8. Civil servants are under an obligation to keep the confidences to which they become privy in the course of their work; not only the maintenance of the trust between Ministers and civil servants but also the efficiency of government depend on their doing so. There is and must be a general duty upon every civil servant, serving or retired, not without authority to make disclosures which breach that obligation. This duty

applies to any document or information or knowledge of the course of business, which has come to a civil servant in confidence in the course of duty. Any such unauthorised disclosures, whether for political or personal motives, or for pecuniary gain, and quite apart from liability to prosecution under the Official Secrets Acts, result in the civil servant concerned forfeiting the trust that is put in him or her as an employee and making him or her liable to disciplinary action including the possibility of dismissal, or to civil law proceedings. He or she also undermines the confidence that ought to subsist between Ministers and civil servants and thus damages colleagues and the Service as well as him or herself.

9. Civil servants often find themselves in situations where they are required or expected to give information to a Parliamentary Select Committee, to the media, or to individuals. In doing so they should be guided by the policy of the Government on evidence to Select Committees, as set out in memoranda of guidance issued from time to time, and on the disclosure of information, by any specifically departmental policies in relation to departmental information, and by the requirements of security and confidentiality. In this respect, however, as in other respects, the civil servant's first duty is to his or her Minister. Thus, when a civil servant gives evidence to a Select Committee on the policies or actions of his or her Department, he or she does so as the representative of the Minister in charge of the Department and subject to the Minister's instructions*, and is accountable to the Minister for

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*A Permanent Head of a Department giving evidence to the Committee of Public Accounts does so by virtue of his duties and responsibilities as an Accounting Officer as defined in the Treasury memorandum on The Responsibilities of an Accounting Officer; but this is without prejudice to the Minister's responsibility and accountability to Parliament in respect of the policies, actions and conduct of his Department.

the evidence which he or she gives. As explained in paragraph 2, the ultimate responsibility lies with Ministers, and not with civil servants, to decide what information should be made available, and how and when it should be released, whether it is to Parliament, to Select Committees, to the media or to individuals. It is not acceptable for a serving or former civil servant to seek to frustrate policies or decisions of Ministers by the disclosure outside the Government of information to which he or she has had access as a civil servant

10. The previous paragraphs have set out the basic principles which govern the relations between Ministers and civil servants. The rest of this note deals with particular aspects of conduct which derive from them, where it may be felt that more detailed guidance would be helpful.

11. A civil servant should not be required to do anything unlawful. In the very unlikely event of a civil servant being asked to do something which he or she believes would put him or her in clear breach of the law, the matter should be reported to a senior officer or to the Principal Establishment Officer, who should if necessary seek the advice of the Legal Adviser to the Department. If legal advice confirms that the action would be likely to be held to be unlawful, the matter should be reported in writing to the Permanent Head of the Department.

12. There may exceptionally be circumstances in which a civil servant considers that he or she is being asked to act in a manner which appears to him or her to be improper, unethical or in breach of constitutional conventions, or to involve possible maladministration, or to be otherwise inconsistent with the standards of conduct prescribed in this memorandum and in the relevant Civil Service codes and guides. In such an event the matter should be reported to a senior officer, and if appropriate to the Permanent Head of the Department.

13. Civil servants should always recall that it is Ministers, and not they, who bear political responsibility. A civil servant should not decline to take, or abstain from taking, an action because to do so would conflict with his or her personal opinions on matters of political choice or judgment between alternative or competing objectives and benefits; he or she should consider the possibility of declining only if taking or abstaining from the action in question is felt to be directly contrary to deeply held personal conviction on a fundamental issue of conscience.

14. A civil servant who feels that to act or to abstain from acting in a particular way, or to acquiesce in a particular decision or course of action, would raise for him or her a fundamental issue of conscience, or is so profoundly opposed to a policy as to feel unable conscientiously to administer it in accordance with the standards described in this note, should consult a senior officer. If necessary, and if the problem cannot be resolved by any other means, the civil servant may take the matter up with the Permanent Head of the Department and also has a right, in the last resort, to have the matter referred to the Head of the Home Civil Service through the Permanent Head of the Department; detailed provisions for such appeals are included in the Civil Service Pay and Conditions of Service Code. If the matter still cannot be resolved on a basis which the civil servant concerned is able to accept, he or she must either carry out his or her instructions or resign from the public service - though even after resignation he or she will still be bound to keep the confidences to which he or she has become privy as a civil servant.

ROBERT ARMSTRONG

Cabinet Office
1 December 1987

chex.dc/ds2/85 **CONFIDENTIAL**

Treasury Chambers, Parliament Street, SW1P 3AG
01-270 3000

5 December 1989

Rt Hon David Waddington CBE MP
Secretary of State for the
Home Department
Home Office
50 Queen Anne's Gate
LONDON
SW1H 9BW

Dear Secretary of State,

I have seen your letter of 20 November to Geoffrey Howe about the prescription of those non-civil servants who are to be treated as civil servants for the purposes of the Official Secrets Act (OSA) 1989. My main interest is the decision not to include officials from the Bank of England in the Order.

We have taken the view that officials from the Bank of England need not be prescribed for the purposes of this legislation, because for the most part they do not create information falling into any of the six protected categories. In the limited number of cases where they might do so, our view is that they would be adequately covered by other legislation. I am therefore content with the draft Order as it stands.

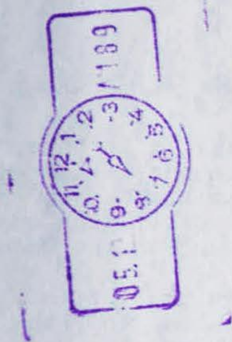
I am copying this letter to recipients of yours.

Yours sincerely,

Duncan Sparkes

p.p. JOHN MAJOR
[Approved by the Chancellor
and signed on his behalf]

SECURITY. OSA Part 3.



THE DEPARTMENT OF TRANSPORT

FROM THE SECRETARY OF STATE

2 MARSHAM STREET LONDON SW1P 3EB
TELEPHONE 01-276 3000

The Rt Hon David Waddington QC MP
Home Secretary
Queen Anne's Gate
LONDON
SW1H 9AT

My Ref: C/PSO/15555/89

Your Ref:

- 1 DEC 1989

Dear David,

OFFICIAL SECRETS ACT 1989: PRESCRIPTION

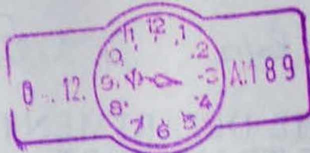
Thank you for sending me a copy of your letter to Geoffrey Howe of 20 November, attaching a draft Prescription Order to be made under the Official Secrets Act 1989. I am content for the Order not to prescribe any members or staff of the Civil Aviation Authority. I agree, however, that the Authority should remain prescribed for the purposes of authorising or restricting disclosures and of directing the return or disposal of documents.

I am sending a copy of this letter to the Prime Minister, the Lord President, all Ministers in charge of Departments and to Sir Robin Butler.

Yours Ever,
Cecil

CECIL PARKINSON

SECURITY: Official Secrets Act [illegible]



NaPM
AT 20/4

QUEEN ANNE'S GATE LONDON SW1H 9AT

20 November 1989

Dear Geoffrey,

OFFICIAL SECRETS ACT 1989: PRESCRIPTION

Before the Official Secrets Act 1989 comes into force I have to make an Order prescribing those non-civil servants who are to be treated as civil servants under the Act. I attach a draft of the Order which, subject to your and other colleagues' agreement, I propose to lay before Parliament in a few weeks' time, with a view to bringing the Act as a whole into force in the New Year.

The 1989 Act removes from the scope of official secrets legislation a large number of organisations whose own legislation at present brings them specifically within the scope of section 2 of the 1911 Act. These organisations include the Bank of England, the Atomic Energy Authority, the Civil Aviation Authority, the Post Office, British Telecom, the National Health Service, the Parliamentary Ombudsman and the National Audit Office. The purpose of the prescription power is to enable me to bring back into the scope of the new Act the comparatively small number of organisations removed from the 1911 Act who still need to be subject to official secrets legislation. The bodies and office holders I propose to prescribe are those who have some responsibility in connection with the functions of the State or the administration of Government policies and who create information, as understood in the Act, in at least one of the six protected categories. It is not sufficient in my view that a person or body should be no more than a recipient of such information: disclosure by non-civil servant of information obtained from Government on confidential terms is an offence under the new Act irrespective of the prescription power.

.... The list of bodies and office holders in the enclosed draft Order is agreed at official level in the Departments immediately concerned: the Department of Transport, the Department of Energy, and the Cabinet Office (OMCS). It is broadly the same list as was agreed by Sir Robin Butler immediately before the then Bill was given a Second Reading. In terms of numbers, most of those prescribed are in either the Atomic Energy Authority or British Nuclear Fuels plc. Other bodies prescribed are the National Audit Office, the Northern Ireland Audit Office, the Parliamentary Commissioner for

The Rt Hon Sir Geoffrey Howe, QC., MP.
Lord President of the Council
WHITEHALL, S.W.1.

/cont....

Administration and the Northern Ireland Commissioner. A minor change from the list as agreed by Sir Robin Butler is that, subject to Cecil Parkinson's views, I do not propose to prescribe any members or staff of the Civil Aviation Authority. This has been extensively discussed by officials and rather than take the potentially controversial step of prescribing a large number of CAA staff it seems best to rely on the provisions of the Act relating to government contractors. However, the CAA remains prescribed for the purposes of authorising or restricting disclosures and of directing the return or disposal of documents.

Colleagues will wish to note that I also propose to enable the Interception of Communications and Security Service Tribunals to authorise the disclosure of official information under the Act, so that complainants will not be at risk of prosecution in respect of any disclosure made to those bodies in support of a complaint.

I am copying this letter and its enclosure to the Prime Minister, to all Ministers in charge of Departments and to Sir Robin Butler. I should be grateful for any comments by Friday, 1 December to enable me, subject to the resolution of any outstanding points, to lay the draft Order before Parliament at the beginning of the following week.

Yours ever
David

Draft Order laid before Parliament under section 14(2) of the Official Secrets Act 1989 for approval by resolution of each House of Parliament

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DRAFT STATUTORY INSTRUMENTS

1989 No.

CRIMINAL LAW, ENGLAND AND WALES

CRIMINAL LAW, NORTHERN IRELAND

CRIMINAL LAW, SCOTLAND

Official Secrets Act 1989 (Prescription) Order 1989

Made *1989*

Coming into force

In exercise of the powers conferred on me by sections 7(5), 8(9), 12 and 13(1) of the Official Secrets Act 1989(a), a draft of this instrument having been laid before Parliament and having been approved by each House of Parliament, I hereby make the following Order:-

1. This Order may be cited as the Official Secrets Act 1989 (Prescription) Order 1989 and shall come into force on the day appointed for the coming into force of the Official Secrets Act 1989 (hereinafter referred to as "the Act").

2. The bodies which are set out in the first column of Schedule 1 to this Order and the classes of members or employees of those bodies which are set out in the second column of that Schedule are hereby prescribed for the purposes of section 12(1)(f) of the Act (definition of "Crown servant").

3. The offices which are set out in the first column of Schedule 2 to this Order and the classes of employees of the

---

(a) 1989 c.6.

holders of those offices which are set out in the second column of that Schedule are hereby prescribed for the purposes of section 12(1)(g) of the Act (definition of "Crown servant").

4. The bodies which are set out in the first column of Schedule 3 to this Order are hereby prescribed for the purposes of one or both of sections 7(5) and 8(9) of the Act as set out in the second column of that Schedule (so as to enable them, in the case of section 7(5), to give official authorisation for, or to impose official restrictions on, disclosures or, in the case of section 8(9), to give official directions for the return or disposal of documents).

Home Office
1989 One of Her Majesty's Principal Secretaries of State

SCHEDULE 1 Article 2

PRESCRIPTIONS: SECTION 12(1)(f)

British Nuclear Fuels plc	The employees of the Company
The Board of the above	The members of the Board
The United Kingdom Atomic Energy Authority	The members, officers and employees of the Authority
Urenco Limited	The employees of the Company
The Board of the above	The members of the Board

SCHEDULE 2 Article 3

PRESCRIPTIONS: SECTION 12(1)(g)

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

SCHEDULE 3 Article 4

PRESCRIPTIONS: SECTIONS 7(5) AND 8(9)

The Civil Aviation Authority	Sections 7(5) and 8(9)
The Tribunal established under section 7 of the Interception of Communications Act 1985(a)	Section 7(5)
The Tribunal established under section 5 of the Security Service Act 1989(b)	Section 7(5)

(a) c.56.
(b) c.5.

EXPLANATORY NOTE

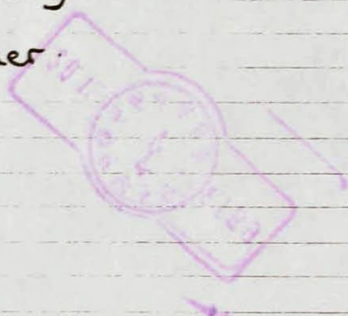
(This note is not part of the Order)

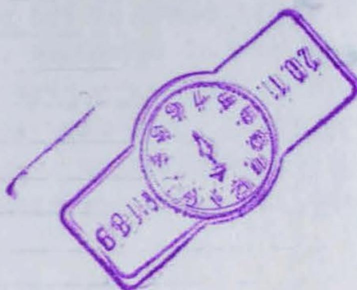
This Order prescribes certain persons and bodies for the purposes of the Official Secrets Act 1989. The effect of the Order is that those persons who are prescribed, under articles 2 and 3, taken with Schedules 1 and 2 respectively, become Crown servants for all purposes of the Act. The relevant persons are those listed in the right-hand column of Schedule 1 and in both columns of Schedule 2. Accordingly, the information which they hold by virtue of their position as persons prescribed by this Order becomes information to which the Act applies if it otherwise falls within the relevant sections (1 to 4 and 8), and such persons will be treated as if they were Crown servants for the purposes of the provisions of the Act relating to the prosecution of offenders and the authorisation of disclosures. Three bodies are prescribed under article 4, taken with Schedule 3. The Order enables them for the purposes of the Act to authorise or restrict disclosures and also, in one case, to direct the return or disposal of documents.

By virtue of article 1 this Order comes into force on the day on which the Act comes into force.

Letter copied to:

Ministry of Agriculture, Fisheries and Food.
Chancellor of the Duchy of Lancaster.
Ministry of Defence.
Dept of Education + Science.
Dept of Employment.
Dept of Energy
Dept of Environment.
Foreign + Commonwealth Office.
Dept of Health.
Northern Ireland Office.
Minister for the Civil Service (Richard Luce)
Scottish Office
Dept of Social Security
Dept of Trade + Industry.
Dept of Transport
Chancellor of the Exchequer.
Welsh Office
Attorney General.





Cile SR

C: PENSIONS

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBIN BUTLER

PENSIONS FORFEITURE

The Prime Minister has seen your minute of 14 September and the paper by officials attached to it. She has also seen comments by Ministerial colleagues.

She shares the view expressed by the Lord Chancellor, the Chancellor of the Exchequer and the Attorney General that the best course for the time being is not to pursue any of the options for legislation identified but to wait and see how the system of reciprocal agreements develops. If this fails to develop satisfactorily, it would be necessary to return to the matter. In such circumstances, she believes the best course would be the establishment of an independent tribunal.

I am copying this minute to the Private Secretaries to the Lord President, the Lord Chancellor, the Chancellor of the Exchequer, the Foreign Secretary, the Home Secretary, the Secretaries of State for Defence, Social Security and Trade and Industry, the Attorney General, the Lord Advocate and the Minister of State, Privy Council Office.

AT

ANDREW TURNBULL
9 October 1989

chex.jp/jmt1/27

CONFIDENTIAL

Treasury Chambers, Parliament Street, SW1P 3AG
01-270 3000

PRIME MINISTER

PENSIONS FORFEITURE

I have seen Sir Robin Butler's minute to you of 14 September, and the subsequent correspondence.

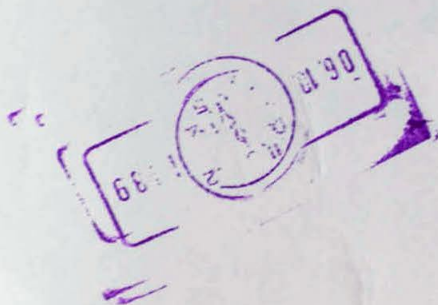
I agree with Patrick Mayhew that the effective choice lies between doing nothing, or option (d), legislating for an independent tribunal. I remain to be convinced that legislating for this change, which would be highly controversial, is sensible. Even after legislation, there would remain a loophole whereby potential offenders could transfer their pension arrangements out of a public service scheme, thus avoiding forfeiture; and furthermore I understand that other measures are being put into place, making even less necessary what would be at best an uncertain deterrent.

Copies of this minute go to Geoffrey Howe, James Mackay, John Major, Douglas Hurd, Tom King, Antony Newton, Patrick Mayhew, Peter Fraser, Richard Luce and to Sir Robin Butler.

[N.L.]
6 October 1989

[Approved by the Chancellor and signed on his behalf]

SECURITY: ONA
Pt 3



PRIME MINISTER

PENSIONS FORFEITURE

Following a meeting last November, officials were asked to do further work on whether the procedures for pensions' forfeiture could be amended to reinforce the duty of confidentiality. A related problem is that the existing arrangements, though they have worked well in the few cases that have arisen, could be challenged in the ECHR on the grounds that there is excessive ministerial discretion and insufficient basis for appeal.

Sir Robin Butler's minute - Flag A - summarises the options to emerge from the officials' paper - Flag B. These are:

a. do nothing while reciprocal agreements are established.
b. establish a tribunal to deal with expatriate cases which would determine on the balance of probabilities whether someone who had fled the jurisdiction had committed an offence.
c. establish an appeal tribunal to supplement the present arrangements, whether or not augmented by an expatriate tribunal. This would be the minimum to satisfy ECHR requirements.
d. establish an independent tribunal to take over from Ministers the decisions on forfeiture.

Comments from Ministers are as follows:

Attorney General: believes the choice lies between doing nothing and the independent tribunal. Prefers to do nothing, relying instead on agreements with selected countries on mutually enforceable judgements for an account of profits arising from unauthorised publications.

Lord Chancellor: also believes nothing should be done unless the system of reciprocal agreements leads nowhere. Thinks that eventually something may need to be done to meet the ECHR problem.

Chancellor: favours doing nothing. Believes that a future Wright could avoid forfeiture by transferring pension rights abroad.

Home Secretary: favours leaving things as they are.

Secretary of State for Trade and Industry: favours the independent tribunal.

Secretary of State for Defence: believes work on the legislative options should be pursued though it would be necessary to examine implications for Ministry of Defence procedures for armed forces.

The balance of opinion appears to be against legislative action, at least until it is clearer whether mutual agreements on enforcing judgements will be effective. If you take the same view I see no need for a meeting.

If you still feel that one of the legislation options should be pursued, I think you would need to convene a meeting of OD(DIS).

What view do you take?

The officials' group - see paragraph 16 of their report - concluded that the special offence under the 1989 Official Secrets Act should not be made an additional ground for forfeiture, ie. it should be judged by the existing criteria. Sir Robin Butler agrees.

Content? Yes

AT

(1) Do nothing for the present unless system of reciprocal agreements [illegible]

(2) If anything is eventually necessary, I believe it must be the Independent Tribunal.

MT

ANDREW TURNBULL
6 October 1989
C:AT (SLH)

MO 6/28S

PRIME MINISTER

PENSIONS FORFEITURE

In his minute to you of 14th September Sir Robin Butler sought guidance on what, if any, action should be taken to amend the present provisions for pensions forfeiture.

2. Although I note that the expatriate tribunal would not eliminate the present unsatisfactory position where perpetrators of serious offences cannot be penalised through forfeiture of pension if they remain outside the UK's jurisdiction, such a tribunal should nevertheless reduce the scope for avoiding forfeiture by such means and, on balance, I consider that despite its limitations, it would provide a useful extension to existing provisions.

3. Subject to the views of other Ministers, I should also be content to see either of the other two tribunal options pursued further. However, on the appeal tribunal option I would wish further work to include an examination of the implications such a procedure might have on the existing statutory right of officers to have their grievances presented to Her Majesty. Similarly, I would wish further work on the independent tribunal option to examine the implications this might have in relation to the powers currently available to the Defence Council to impose penalties, including reduced pension benefits, in cases of misconduct.

4. As regards the special offence, I agree that it should not be singled out as an explicit and separate ground for forfeiture.

5. Copies of this minute go to Geoffrey Howe, Nigel Lawson, James MacKay, John Major, Douglas Hurd, Nicholas Ridley, Antony Newton, Patrick Mayhew, Peter Fraser, Richard Luce and to Sir Robin Butler.

Ministry of Defence (T K)
5th October 1989

dti

the department for Enterprise

CONFIDENTIAL

PRIME MINISTER

PENSIONS FORFEITURE

I have received a copy of Sir Robin Butler's minute to you dated 14 September on the question whether action should be taken to amend the present provisions for pensions forfeiture.

I agree with Patrick Mayhew that the effective choice lies between doing nothing or option (d) (legislating for an independent tribunal).

Politically, the choice is difficult. The gain is to bring due process into decisions in the cases of non-automatic forfeiture. It also increases the prospects of deterring a Peter Wright. I see considerable merit in it when there is time in the legislative programme.

Copies of this minute go to Geoffrey Howe, Nigel Lawson, James Mackay, John Major, Douglas Hurd, Tom King, Antony Newton, Patrick Mayhew, Peter Fraser, Richard Luce and to Sir Robin Butler.

(approved by the Secretary of State and signed in his absence)

N R

4 October 1989

JW2ACJ

Security OSA. PV3

HOUSE OF LORDS,
SW1A 0PW

CONFIDENTIAL

PRIME MINISTER

PENSIONS FORFEITURE

1 I have seen Robin Butler's minute to you of 14 September and Patrick Mayhew's minute of 20 September.

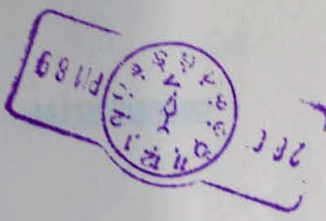
2 I agree that the work being done to secure agreements on the reciprocal enforcement of judgments has the potential for more promising results than would the creation of an expatriate tribunal and that we should suspend work on the latter for the time being. We may, however, wish to return to pensions forfeiture if the reciprocal agreements prove impossible to reach.

3 I would therefore be content that we should not contemplate any more thoroughgoing reform of the existing arrangements at present. Nevertheless, I am troubled by the ECHR problem. However few cases there may be, we must accept that we are vulnerable to challenge under the present system and that any application to the European Court of Human Rights would be highly embarrassing. Our primary concern for now must be to establish a system of effective financial deterrents against a future Peter Wright. Once that has been achieved, we should be prepared to return to the ECHR concern, which applies as much to domestic as to expatriate cases.

4 I am sending copies of this minute to Geoffrey Howe, Nigel Lawson, John Major, Douglas Hurd, Tom King, Nicholas Ridley, Antony Newton, Patrick Mayhew, Peter Fraser, Richard Luce and Sir Robin Butler.

MqC.

28 September 1989



PRIME MINISTER

PENSIONS FORFEITURE

just that

In Robin Butler's minute to you dated 14 September, he sought your views on what, if any, action should be taken to amend the present provisions for pensions forfeiture.

My own preference would be to do nothing. We are building up, slowly, agreement to mutually enforceable judgments, which would allow the Crown to bring proceedings against a future Peter Wright in this country for an account of profits, and to enforce that judgment abroad. This will be a far more effective deterrent than the possible loss of pension rights, in the very few cases of this kind which would be expected to arise in future. I understand that pensions forfeiture occurs only rarely, and the possibility of transferring out of Government pension schemes means that no system can be water-tight.

I do not consider, therefore, that the likelihood of cases arising in the future where the Crown is powerless to act against a wrongdoer is so great as to require action.

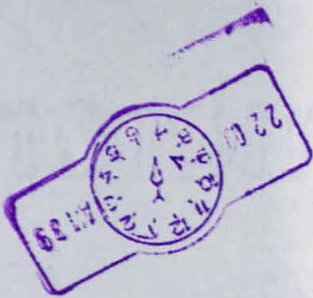
Of the other options identified, I should prefer option (d). I believe that an independent tribunal, taking all the relevant decisions, would meet fully any ECHR concerns arising out of the present arrangements. An independent tribunal would be fully competent to assess whether the offence in question was gravely injurious to the State or liable to lead to serious loss of confidence in the public service, and thus should attract pensions forfeiture, and in my view this would be much more acceptable than establishing an expatriate tribunal.

Copies of this minute go to the Geoffrey Howe, Nigel Lawson, James Mackay, John Major, Douglas Hurd, Tom King, Nicholas Ridley, Antony Newton, Peter Fraser, Richard Luce and to Sir Robin Butler.

P.M.

20 September 1989

Security pt 3 11/88
Reform of sec 2
OSA



Ref. A089/2364

MR TURNBULL

Pensions Forfeiture

I should be grateful if you, and the Private Secretaries to the Lord President of the Council, the Home Secretary, the Foreign and Commonwealth Secretary, the Secretary of State for Defence, and the Attorney General (to whom I am copying this minute) could note that the circulation of Sir Robin Butler's minute of 14 September to the Prime Minister has been widened to include the Chancellor of the Exchequer, the Lord Chancellor, the Secretary of State for Trade and Industry, the Secretary of State for Social Security, the Lord Advocate and the Minister of State, Privy Council Office.

Trevor Woolley

T A WOOLLEY

18 September 1989

Ref. A089/2332

PRIME MINISTER

Pensions Forfeiture

At the meeting of OD(DIS) on 28 November last year you gave instructions that:

> "Further work should be done on pensions forfeiture. It should explore the possibilities for handling the whole question by means of a judicial tribunal, with particular reference to discretion over penalties and the implications for dependents."
> (OD(DIS)(88) 2nd Meeting)

2. A working group, chaired by the Treasury, has now completed a paper setting out the options. I submit a copy. The conclusion of that working group is that the choice lies between:

a. Doing nothing

The present arrangements have worked well in the few cases that have arisen. Doing nothing would spare the Government the controversy that is likely to surround the introduction of a new pensions forfeiture regime. It would have the disadvantage that there would be no power to take action on the pension of someone who has escaped the jurisdiction including a possible future defector. It would also have the disadvantage of not dealing with the present risk that someone convicted inside the jurisdiction could challenge the existing arrangements for removing a pension in the European Court of Human Rights (ECHR).

b. Establishing an expatriate tribunal (consisting of a High Court Judge, or a Judge of the Court of Sessions).

This would be in addition to, but separate from, the present arrangements. It would determine on the balance of probabilities whether someone who had fled the jurisdiction had committed an offence. An adverse finding would act as the primary trigger, whereupon the existing forfeiture procedure would be invoked. Without provision for appeal this would not by itself answer the ECHR point.

c. Establish an appeal tribunal (consisting of a lawyer and two laymen)

An Appeal Tribunal could be introduced to supplement the present arrangements, (and satisfy ECHR requirements) irrespective of whether an expatriate tribunal were also established. This would review a decision on forfeiture whether as a result of a domestic conviction or, in the case of someone outside the jurisdiction, a finding of the expatriate tribunal.

d. Establish an independent tribunal (or use the courts) to decide on forfeiture, not just to take appeals

This would amount to thorough-going reform of the present arrangements, going beyond what is necessary to meet the ECHR point. An independent tribunal would take over certification from Ministers and would decide on the extent of forfeiture.

3. Officials now need guidance from Ministers about which of these options they would like to pursue. On subsidiary points, the Group recommends that, if an expatriate tribunal was set up, it should cover all public service pension schemes and all offences currently carrying liability for forfeiture, not just treason and Official Secrets Acts offences; and also that the special offence under the 1989 Official Secrets Act should not be

made an additional ground for forfeiture. A future Wright would therefore need to be the subject of a Ministerial certificate if he were to be deprived of pension for committing the 'special offence'. I endorse these recommendations.

4. In weighing the options Ministers will wish to bear in mind that the choices set out at 2b., 2c. and 2d. would all require legislation, which would need to be introduced when a suitable vehicle became available; and that, as paragraph 6 of the paper points out, there would still be scope to evade forfeiture whatever new arrangements were adopted, provided that the offender had the foresight to transfer pension before retirement.

5. In the case of dependents, there is discretion under present arrangements for forfeiture to protect a contingent widow's, widower's or child's pension, and this could be preserved under any of the options. It should be noted, however, that such pensions only become payable on the death of the main beneficiary.

6. I should be grateful to know how you would like to proceed, and whether you would wish to have a further discussion in OD(DIS).

7. I am copying this minute to the Lord President of the Council, the Secretary of State for Foreign and Commonwealth Affairs, the Secretary of State for the Home Department, the Secretary of State for Defence and the Attorney General.

FER.B.

ROBIN BUTLER

14 September 1989

CONFIDENTIAL

PENSIONS FORFEITURE

INTRODUCTION

OD(DIS)(88)2nd Meeting asked officials to explore the possibilities for handling the whole question of forfeiture by means of a judicial tribunal, with particular reference to discretion over penalties and the implications for dependants.

2. This paper describes the present forfeiture arrangements (paragraphs 3 to 6), and discusses first how they could be supplemented by a tribunal to deal with persons outside the jurisdiction (paragraphs 7 to 13). It then goes on to consider wider options:-

i. extending forfeiture to deal with official secrets cases where the sentence is less than 10 years, including the special offence (paragraphs 14 to 16);

ii. establishing an appeal tribunal to deal with both domestic and expatriate forfeiture (paragraphs 17, 18); and

iii. arranging for the tribunal, rather than Ministers as now, to take the forfeiture decision (paragraphs 19 to 21).

The position of dependents is described in paragraphs 22 to 24. Finally, the options, and the questions that need resolving are set out in paragraphs 25 and 26.

THE PRESENT ARRANGEMENTS

3. The provisions for forfeiture in public service pension schemes set strict limits to the circumstances in which pension benefits may be forfeited. These reflect the trend of pensions legislation since the early 1970s, towards the view that accrued pension benefits may be taken away only in the gravest circumstances. The present arrangements are summarised at Annex A.

4. Before forfeiture can be considered, there is a requirement for:

a. in all cases, a primary trigger of a conviction in the Courts;

b. in certain cases, a secondary trigger of a ministerial certificate that the offence, for which there has been a conviction, is either gravely injurious to the State or liable to lead to serious loss of confidence in the public services.

5. These arrangements are rarely invoked: the very few cases in the Civil Service since 1972 (only one of which - Prime - concerned the Official Secrets Acts) are summarized at Annex B. When they are invoked, they work well. However:

i. forfeiture cannot be considered in the absence of the primary trigger, a conviction, and so can be avoided altogether if an individual is beyond the jurisdiction;

ii. in relation to confidentiality, the second trigger, the Ministerial certificate, would be required for the circumstances covered by the new Official Secrets Act (and Section 1 of the Official Secrets Act 1911, if the sentence were less than 10 years) even if there had been a conviction.

6. Ministers have recognised, on a number of occasions, that there are severe practical constraints on taking action in two other areas where there is scope to evade forfeiture

i. the relative ease with which pension rights may now be transferred to another pension scheme; and

ii. the opportunity to earn benefits under personal pension arrangements.

These potential loopholes are not considered further in this paper, but it is noted that they would undermine to some extent any new forfeiture regime.

EXPATRIATE FORFEITURE

7. Officials have considered how a primary trigger might be provided when an individual is beyond the jurisdiction. A scheme for an "expatriate tribunal", presided over by a High Court judge or a judge of the Court of Sessions, is outlined at Annex C. This is the minimum change: it could be brought in along with wider arrangements, discussed below in paras 14 to 21. A declaration by an independent judicial tribunal (that, on the balance of probabilities, it was satisfied that the offence, in respect of which a declaration was sought, had been committed) would replace a conviction as the primary trigger.

8. The options for cases which might be referred to the expatriate tribunal are:

a. all situations currently dealt with under domestic forfeiture arrangements (see Annex A);

b. treason and all Official Secrets Acts offences;

c. all Official Secrets Acts offences;

d. only those Official Secrets Act offences where a conviction could lead to a sentence of 10 years or more.

9. These options should be considered in the light of the major constraints on action that are summarised at Annex D (the European Convention on Human Rights; the legislation required; public opinion). The major concern, providing the impetus for present work on forfeiture, has been breaches of confidentiality and the possibilities for evading forfeiture. Restriction to one of the options at (b) to (d) would address the specific concern and, because the number of those potentially affected is smaller, could contain criticism. Furthermore, to the extent that expatriate cases arose, they would be most likely to arise under the OSA head since OSA offences are, in practice, usually not extraditable even where there is an extradition treaty. Even so, option (d) would not meet the specific concern because it would relate only to the graver section 1 offence of the 1911 Act. In this respect, therefore, options (b) and (c) are to be preferred over (d).

10. However, any option would be controversial, and particularly so if the introduction of the necessary legislation followed closely upon the passage of the Official Secrets Act 1989. Options (b) and (c) would be criticised on at least two grounds:

i. the tribunal would apply to relatively less serious cases, for example to disclosures by members of the security and intelligence services and notified persons (the 'special offence'). This is provided for by the Official Secrets Act 1989, which carries a maximum sentence of two years; but the tribunal would not apply to relatively more serious non-OSA offences, which carry much higher maximum sentences. To introduce this novel procedure, but not to apply it to other potential and relatively more serious cases, could be a source of potent criticism;

ii. there may be complaints of discrimination, particularly if coverage is restricted in practice mainly to members of the security and intelligence services.

There is, however, the counter-argument that it would be better to go for a narrower approach (ie options (b) or (c)). Since the coverage would be narrower in terms of offence and those potentially affected, the controversy aroused might be a little less.

11. On balance, officials consider that there is a strong case for option (a) if an expatriate tribunal were introduced. The expatriate loophole cuts across offences and the public services; and concern about evasion is as germane to grave offences which are not Official Secrets Act offences as to those that are.

12. A significant departure from the domestic arrangements is that an expatriate tribunal would apply a civil standard of proof. It would be difficult, whatever the standard required, to avoid the charge that the proceedings were criminal proceedings in all but name. It would be necessary to confront any such charge head on. Officials agree that the tribunal procedure should only be brought into play after every effort had been made to bring the person to Court, including an application for extradition if

possible; and in circumstances where there would have been a criminal prosecution, had the individual been in the country (it would be necessary to be quite clear on this point to avoid the charge that forfeiture arose in expatriate cases on the basis of entirely different conditions from domestic ones). But the tribunal and the forfeiture would not involve a criminal conviction or be a substitute for criminal proceedings; the tribunal would be limited in scope and purpose; and there would be none of the other consequences of criminal proceedings.

13. The domestic arrangements for taking the forfeiture decision could be amended (see paragraphs 16-18 below) to achieve consistency, but it would be difficult to defend the widening of the scope for domestic forfeiture that would result from the introduction of a general requirement for a civil standard of proof. In any event, it may be necessary for the arrangements to provide the expatriate, at the outset, with a choice: he can return and face criminal proceedings, before consideration is given to forfeiture; or remain abroad and be dealt with under the expatriate tribunal procedure. It should be noted that this procedure is distinct from the tribunals discussed below (paras 17 to 21). If Ministers felt that an expatriate tribunal should be introduced, a more radical revision of forfeiture arrangements could become more attractive, despite the increase in the legislation that would be required. Such a revision, to bring them into line with the requirements of the ECHR, by means of an appeals or decision tribunal, is discussed in the next section.

WIDER OPTIONS

The Offence

14. As has been noted above (paragraph 4b) there would be a requirement for a secondary trigger (certification) in cases where a conviction for an OSA offence brought a sentence of less than 10 years. Treasury Counsel has advised that the certification route may be used in such cases; but the matter has not yet been tested in the Courts and, in many OSA cases, doubt could arise as to whether the tests for certification (grave injury to the State or serious loss of confidence in the public services) had been satisfied. The ECHR requirements for reasonableness and proportionality, in any forfeiture, would remain; and the basis for certification could be open to challenge in those cases of breach of confidentiality covered by the Official Secrets Act 1989.

15. It would be possible to address the difficulty by introducing a new ground for forfeiture (to be reflected in the grounds giving rise to action under the expatriate tribunal). This would be a conviction for the special offence. Some of the uncertainty about forfeiture in relation to a Wright-type case, even where there has been a conviction, might be removed by legislation on these lines; and a new ground on this basis would be an explicit signal to the staff concerned of a possible consequence of such an offence, where the warning may now be muted. (The option of making all OSA 1989 offences liable to pensions forfeiture is not easy to justify, as they would be out of kilter with the employment related non-OSA offences, which normally require a conviction of more than two years' imprisonment - see Annex B.)

16. So far as the special offence is concerned, it is no more serious than the other offences in the Official Secrets Act 1989; nor is commission of the special offence likely in all cases to lead to serious loss of confidence in the service or to be gravely injurious to the defence or security interests of the State. It would be difficult, therefore, to justify singling out the offence; or to drop the requirement for a Ministerial certificate, with its attendant uncertainties. The legislation that would be necessary would be controversial and could occasion a reopening of the wider debate on the Official Secrets Act 1989. Even with incorporation of an express test of reasonableness, there could be difficulties under the ECHR. It would be argued that the change was a further discrimination against notified staff. It would in any case be doubtful, even with relatively serious cases and certification, that forfeiture could be applied in any significant degree: and it would remain necessary to act reasonably and proportionately in deciding whether to forfeit and, if so, on the extent of forfeiture. For these reasons, officials on balance recommend that this option be not pursued. It may be better for Ministers to certify serious cases, and allow the mattr to be tested in the Courts, if necessary.

Appeals

17. The ECHR requires that the decision on forfeiture be taken by an independent tribunal established by law, or else that there is a right of appeal to such a tribunal against a decision by the executive. It is unlikely

that, if challenged, the present arrangements for appeals (eg in the case of the Civil Service, the Civil Service Appeals Board) would be held to meet these requirements, except in the case of the police and fire schemes which have specific provision for appeal to the Courts. The general right of recourse to the Courts, on an application for judicial review, available in respect of individuals in all pension schemes, is thought to be unlikely to satisfy ECHR obligations. This problem arises in relation to current arrangements (and, indeed, in areas other than forfeiture) as well as to any new expatriate tribunal procedure. However, while the issue is distinct from and wider than that of expatriate forfeiture, action on expatriate forfeiture could be facilitated if the wider ECHR issue were tackled at the same time.

18. Officials consider that it should be possible to meet ECHR obligations by establishing an appeal tribunal (covering both domestic and expatriate cases) which took the Employment Tribunals as a model. It would consider decisions that had been taken, rather than take the decisions itself; and might be composed of a lawyer and two lay persons. The ECHR requirements would not result in every aspect of the decision being reopened; but they could result in challenges in respect of, for example, the public interest in the forfeiture. (It would be necessary to exempt the police and fire schemes from any such arrangement: it is considered that the substitution of tribunal proceedings for the present access to the Courts would be regarded by scheme members as a retrograde step.) Finally, we conclude that the ECHR considerations are not in themselves decisive in an assessment of the desirability of new legislation. If Ministers decided against legislation on expatriate forfeiture, we consider that it would be defensible to allow present appeals arrangements to remain until such time as they were challenged under the ECHR.

The Decision

19. As an alternative to an appeals mechanism, ECHR obligations in respect of an independent tribunal could be met if the forfeiture decision were taken by such a body. It can certainly be argued that, ideally, pension forfeiture should be a matter of decision by a judicial tribunal, with discretionary powers to decide on penalties and to take account of dependants' interests, rather than by Ministers. As with the other wider options

discussed above, any changes on this front would apply generally to the present forfeiture arrangements rather than focus on the specific problem of expatriate forfeiture.

20. Apart from the ECHR, particular advantages in an independent decision-making tribunal are:

i. it would remove forfeiture into an area wholly independent of Government. Ministers now have to certify, for an employment related offence, that the offence is gravely injurious to the Crown, or involves a serious loss of confidence in the public service. Nevertheless, the decision about the extent of forfeiture may be taken by employers (eg local authorities), or by officials (eg Civil Service), as well as by a Minister (eg teachers). An independent tribunal would be a means of ensuring that Ministers or officials were no longer taking decisions directly related to their own concerns;

ii. the employee would be reassured by the independence of the decision making body;

iii. it could fit in well with developments in pensions policy over recent years, most particularly the idea that, once a pension has been earned, the employer may not normally interfere with it.

21. There are, however, disadvantages:

(i) it would involve the dismantling of present arrangements which, in the few cases that arise, work well;

(ii) Ministers are already involved in certification. It could be argued that an independent tribunal should also decide on the interests of the state or damage to public confidence. On another view, it would be inappropriate to do so, since the relevant Minister, officials or employers will be best placed to assess the nature and impact of the offence; and

(iii) pensions remain an employer provided benefit, and the possibility that they might be forfeited for misconduct, (contingent upon a

conviction for a particular type of offence) is a deterrent against breach by public servants of their fundamental duties to the Crown under their terms of employment.

On balance, we conclude that there might be advantages in moving away from Ministerial involvement, by legislating either for an appeals tribunal or a decision making tribunal. Both of these would assist in meeting ECHR obligations more fully than at present. However, the legislation required would be controversial.

DEPENDANTS

22. OD(DIS) asked officials to consider the implications for dependants. Under the present arrangements, their position is considered carefully. Depending on the circumstances of the case, a decision to forfeit an individual's pension may or may not result in forfeiture of a contingent widow's, widower's or child's pension, in whole or in part.

23. Introduction of an expatriate tribunal would not alter the discretion in respect of dependants. Such a tribunal would relate to the initial trigger for consideration of forfeiture, and not to the decision itself.

24. If an appeal tribunal were introduced, the procedure for deciding forfeiture would again be unaffected. However, it would be right to take account of dependants' interests by giving them a right to challenge before the tribunal any decision that affected them. As for the introduction of a decision-making tribunal, there is in principle no reason why it should not be required to have regard to dependants in the same way as present procedures.

CONCLUSIONS

25. There is a range of options.

I **No change:** cases are few and far between; the present arrangements work well; although there is disquiet about confidentiality, there is no pressure for change arising out of our ECHR obligations; any new arrangements could be evaded by a personal pension or a transfer out of the public service pension scheme, and legislation would be complex and highly controversial;

II Legislation to deal with concerns about the effectiveness of the present arrangements:

a. an expatriate tribunal; and/or

b. the special offence as a separate ground for forfeiture, without Ministerial certification. In the absence of case law, there is no certainty how the new Official Secrets Act would work, in regard to existing arrangements following Treasury Counsel's opinion.

The controversy that would undoubtedly attend either change could be mitigated if any changes were introduced in conjunction with wider changes as at III below. Indeed, either change would increase the likelihood of our ECHR obligations coming under scrutiny, which suggests that changes directed towards the effectiveness of the present arrangements should only be contemplated as part of a wider package;

III Legislation to deal with concern that the present arrangements fall down in relation to the ECHR, and require too great a Ministerial involvement:

a. an appeals tribunal (except for the police and fire schemes, which provide access to the Courts); <u>or</u>

b. a tribunal that decided only the extent of forfeiture; <u>or</u>

c. a tribunal to which a potential case was referred either automatically or at the discretion of the employer following a conviction for a relevant offence, and which took on the whole task including the judgement presently involved in certification, when required. It would deal, too, with a declaration that an offence had been committed from the expatriate tribunal.

If in fact Ministers are ready to contemplate legislation of this order, it may be possible to avoid an elaborate new machinery by extending the jurisdiction of the Courts, perhaps building on the model of the access to the Courts for appeals in the police and fire schemes (which

may then not have to be excepted from a new procedure); but further work would be required to examine this possibility if Ministers wish to pursue the option, not least because it could raise problems of giving evidence in secrets cases. It is easier to establish special procedures to safeguard the confidentiality of sensitive material in a tribunal, than in a Court. Any new arrangements could be dovetailed with an expatriate tribunal: the wider changes, however, merit consideration in their own right. That said, legislation, even if it did not address expatriate forfeiture or the special offence, would provide the occasion for a difficult debate about forfeiture provisions generally.

26. Against the background of the issues discussed in this paper, the views of Ministers are sought as to whether:

(i) (Option 1)

no further action should be taken;

(ii) (Option II)

legislation is needed on:

(a) expatriate forfeiture;

(b) the special offence;

(iii) (Option III)

legislation on a wider basis is required on

(c) an appeals tribunal; or

(d) a decision tribunal; or

(e) a decision tribunal, which also dealt with certification; or

(f) extending the jurisdiction of the Courts, along the lines of the police and fire schemes.

ANNEX A

FORFEITURE IN THE PUBLIC SERVICES

The offences currently leading to forfeiture in public service schemes are as follows:

treason; or

an offence or offences under the Official Secrets Acts resulting in a sentence or consecutive sentences of imprisonment of 10 years or more; or

an offence in connection with the public servant's employment, certified by a Minister as gravely injurious to the State or as liable to lead to serious loss of confidence in the public service.

In 1987; Treasury Counsel advised that the certification procedure could be applied in the case of an offence under the OSA resulting in a sentence of less than 10 years' imprisonment. There is doubt about whether any offence attracting a sentence of this order would attract full forfeiture (the maximum sentence available under the OSA 1989 is 2 years' imprisonment).

The Guaranteed Minimum Pension (the part of the pension from a contracted-out occupational scheme that equates to SERPS benefits) is not forfeitable for an offence under the certification head. However, in the armed forces schemes, GMP may be forfeited where, in the opinion of the Secretary of State, the person concerned has committed an act which is gravely prejudicial to the defence, security, or other interests of the State.

FORFEITURE DECISIONS SINCE 1973 IN THE CIVIL SERVICE

GRADE	OFFENCE	SENTENCE	FORFEITURE DECISION
Deputy Secretary	Corruption and conspiracy to commit corruption	Four years imprisonment	Forfeited whole of lump sum and half of pension
Customs Officer	Importing and possessing heroin	Two terms of 9 years imprisonment to run concurrently	Forfeited lump sum
Inspector of Taxes	Blackmailing a taxpayer and corruptly receiving money.	Nine month suspended prison sentence	Forfeited half of lump sum
Principal P&TO	Conspiring to steal ammunition and theft of ammunition, including a rocket launcher.	Six years imprisonment	Forfeited lump sum and one-fifth of both his pension and contingent widow's benefit
GCHQ Officer	Official Secrets Acts	30 years imprisonment	Forfeited whole of lump sum and whole of pension

NOTE: The first four cases were as a result of offences in connection with employment. As required by the rules, all these four forfeitures, except the first when the rules were different, were made after a certificate signed by a Minister to the effect that the action was gravely injurious to the Crown or liable to lead to a serious loss of confidence in the public service. A certificate was not required for the fifth case as it concerned an OSA offence and a sentence of more than 10 years' imprisonment.

JD4/005

ANNEX C

AN EXPATRIATE TRIBUNAL

Discussions between the Law Officers and the Lord Chancellor have led to the following scheme being proposed in order to meet the problem of triggering consideration of forfeiture in the absence of a conviction, because the individual is beyond the jurisdiction of the UK Courts. It has been worked up to the point where draft legislation was prepared on a contingent basis for inclusion in the OSB (later OSA Act 1989) (and is likely to require further examination if it were decided to proceed with separate legislation). The procedure would involve the following stages:

a. The relevant Minister would be informed that X, on the evidence available, appeared to have committed an offence that could, under domestic forfeiture arrangements, lead to consideration of forfeiture.

b. The Minister would apply to the independent judicial tribunal for a declaration that, on the balance of probabilities, it was satisfied that the offence, in respect of which a declaration was sought, had been committed. X would have the right to present evidence and be represented. The tribunal would then decide whether or not it was satisfied that X had committed the offence.

c. If a declaration were made by the tribunal, that would be treated for the purposes of existing forfeiture provisions as a conviction for the offence. The Minister could then certify that the offence was gravely injurious to the State, or was liable to lead to serious loss of confidence in the public service. He could then consider forfeiture action.

d. In the event of forfeiture, X would have recourse to judicial review in the normal way.

2. The declaration by the tribunal would be without prejudice to future possible criminal proceedings, would not be recorded as a criminal conviction, and would not be used for any other purpose than forfeiture considerations. It would not be admissible in other proceedings. There would be a civil standard of proof. The declaration would not be appealable except on a question of law.

3. It would not be necessary for the alleged offender to return to the United Kingdom in order to be represented or to pursue an appeal against the tribunal's ruling. If required, an application could be made to have the hearing of the tribunal, and the appeal, held in a closed session.

4. The Lord Chancellor or the Lord President of the Court of Session would appoint the tribunal, which would consist of a High Court Judge or a judge of the Court of Sessions

5. This somewhat elaborate procedure has been developed in order to minimise the difficulties surrounding a novel departure.

ANNEX D

CONSTRAINTS ON ACTION

In summary, the major constraints on action are:

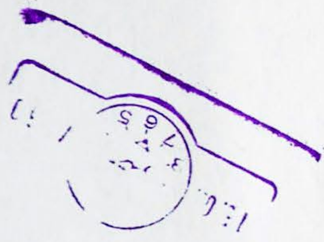
a. The European Convention on Human Rights (ECHR). In particular, any measures that involve depriving someone of his property must be shown to be in the public interest. Moreover, any forfeiture must satisfy ECHR requirements of reasonableness, propriety and proportionality. Finally, in the determination of his civil rights, the individual is entitled to a hearing before an independent and impartial tribunal.

b. Domestic Legislation. Social Security legislation sets out the circumstances in which forfeiture may take place or in which transfers must be made. The Superannuation Act 1972 requires the agreement of staff interests to any changes to the Civil Service Scheme (which applies directly to GCHQ staff and indirectly to members of the other security and intelligence services) that affect benefits accrued by virtue of service before the date of the change. Whilst primary legislation would deal with these hurdles, forfeiture would still be subject, in individual cases, to judicial review on grounds of irrationality, illegality or procedural impropriety.

c. Public Opinion. Any proposed change may, of course be seized upon by freedom of information interests. But controversy will arise more widely because people generally regard pensions as personal possessions or deferred pay. This attitude has been fostered by successive governments and, since it points toward less rather than more forfeiture, anything that increases the prospect of forfeiture is likely to be controversial. Controversy would be particularly severe if measures were demonstrably retrograde, in relation to pension changes in recent years; or were to bear on staff generally for the sake of a few offenders; or were to impact on private sector schemes.

In addition, any system which required a tribunal to form a judgement on whether an offence had been committed would need to have some background of the way

the Courts had interpreted the law. This may be particularly necessary in the operation, for example, of the harm tests in the OSA 1989. The difficulty of justifying the establishment of an expatriate tribunal, that was able to take decisions in relation to OSA offences, would be compounded if it were established in advance of the necessary case law being built up.



10 DOWNING STREET

Prime Minister

The Home Secretary has decided not to raise any objections, though he still personally favours Option B.

Mr Younger has now written to fall into line behind Option C. – see his letter at flag C.

The way is now open to therefore to settle on Option C, subject to the safeguards = para 8 of FERB's minute.

Content?

AT
28/7

Yes – Option C as in para 8 d
MT

10 DOWNING STREET
LONDON SW1A 2AA
From the Principal Private Secretary

SIR ROBIN BUTLER

REVISION OF THE CLASSIFICATION SYSTEM

The Prime Minister has seen your minute of 14 July, the Attorney General's minute of the same date and Mr. Younger's minute of 24 July. She agrees with your recommendation that we should follow the third option in your minute, subject to the safeguards set out in your paragraph 8.

I am copying this minute to Stephen Wall (Foreign and Commonwealth Office), Alex Allan (H.M. Treasury), Colin Walters (Home Office), Brian Hawtin (Ministry of Defence), Neil Thornton (Department of Trade and Industry), Stephen Haddrill (Department of Energy), Michael Saunders (Law Officers' Department) and to the Heads of the Security and Intelligence Agencies.

AT

ANDREW TURNBULL

27 July 1989

GRJ

RESTRICTED

MO 32/2S

PRIME MINISTER

REVISION OF THE CLASSIFICATION SYSTEM

I have seen Sir Robin Butler's minute to you of 14th July, proposing that we should retain the present classification system with minor modification rather than develop a new system which specifically identifies material protected by the Official Secrets Act. Given the strong objections of colleagues to the proposals made by Sir Robin Butler in his minute of 23rd May, I believe the the proposal now made offers the best way forward. My Department would have very serious difficulties with a system involving the addition of the prefix OSA to material protected by the Act. Sir Robin Butler has set out the general objections to this approach, and I described the particular problems my Department would face in my minute to you of 31st May.

2. I am sending a copy of this minute to the Foreign and Commonwealth Secretary, the Chancellor of the Exchequer, the Home Secretary, the Secretaries of State for Trade and Industry and Energy and to Sir Robin Butler.

G.Y.

(GEORGE YOUNGER)

Ministry of Defence
24 July 1989

RESTRICTED

EAMAZP

Prime Minister
The Home Secretary has not minuted. You may nevertheless wish to discuss with FCRB
AT 20/7

PRIME MINISTER

Following the passage of the Official Secrets Act, three possible systems of classification of documents have been identified.

A. Retain Top Secret/Secret/Confidential/Restricted but for those documents covered by the Act add the prefix 'OSA':

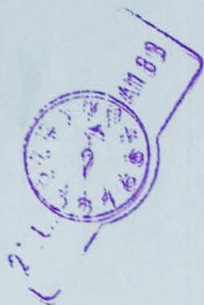
- has the advantage that documents not covered by the Act, eg Budget material, still retains the familiar labels;
- the view of the originator as to whether the document is protected by the Act is stated, and this has some value in a Court, though is not conclusive;
- has disadvantage that a document classified, say, Confidential could be either an old document covered by the Act or a new document not covered by it.

This arrangement is naturally favoured by those departments who have sensitive information which is no longer protected by the Act, eg Treasury and DTI.

B. Retain Top Secret/Secret/Confidential/Restricted for documents covered by the Act, with documents not covered by it adopting new labels such as Private/Strictly Private:

- has the same 'evidential' benefit as Option A;
- avoids danger that documents with same label could have differing status;
- but is thought to give less protection to those documents having to take on the new and less powerful-sounding labels.

Security: Pt 3.
Official Secrets Act.



EAMAZP

Prime Minister
The Home Secretary has still not minuted. You may nevertheless wish to discuss with FERB
AT 20/7

PRIME MINISTER

Following the passage of the Official Secrets Act, three possible systems of classification of documents have been identified.

A. Retain Top Secret/Secret/Confidential/Restricted but for those documents covered by the Act add the prefix 'OSA':

- has the advantage that documents not covered by the Act, eg Budget material, still retains the familiar labels;

- the view of the originator as to whether the document is protected by the Act is stated, and this has some value in a Court, though is not conclusive;

- has disadvantage that a document classified, say, Confidential could be either an old document covered by the Act or a new document not covered by it.

This arrangement is naturally favoured by those departments who have sensitive information which is no longer protected by the Act, eg Treasury and DTI.

B. Retain Top Secret/Secret/Confidential/Restricted for documents covered by the Act, with documents not covered by it adopting new labels such as Private/Strictly Private:

- has the same 'evidential' benefit as Option A;

- avoids danger that documents with same label could have differing status;

- but is thought to give less protection to those documents having to take on the new and less powerful-sounding labels.

This arrangement is naturally favoured by those departments handling a lot of material protected by the Act.

C. You asked Sir Robin Butler to consider a system in which Top Secret/Secret/Confidential/Restricted was retained for all documents:

- retains the familiar labels and hence signals continuing need to avoid unauthorised disclosure of all documents;

- does not seek to single out documents protected by the Official Secrets Act from documents with statutory protection from other Acts (151 in all) and documents with no statutory protection;

- takes view that harm done by disclosure will be for the Courts to decide and that view of originator may be of limited value.

The Attorney General has now commented - Flag B. He believes there is an evidential benefit from having documents marked by the originator as being protected, as this would make it more difficult for defendants to claim that they had no reasonable cause to believe that the material in question came within the Act. He therefore prefers either A or B, though even under B he would use the 'OSA' prefix.

Sir Robin Butler's minute - Flag A - reviews the arguments. He concludes that both A and B are strongly opposed and he therefore concludes that C should be adopted, subject to the safeguards set out in his paragraph 8. But he records that the DGSS still prefers B. I understand the Home Secretary is not happy with Sir Robin's compromise in favour of C and will be minuting. Another argument in favour of making no change, ie Option C, is that the idea of a change came up when it was feared that during passage of the Official Secrets Bill it would be argued that the Bill could not be taken seriously if

it was not backed up by changes in classification. In fact no one argued this. So why not just carry on?

You might like to discuss this with the DGSS at your bilateral on Wednesday but before deciding you want to hear what the Home Secretary has to say.

AT

ANDREW TURNBULL
18 July 1989

cBackup

Ref. A089/1903

PRIME MINISTER

Revision of the Classification System

When we discussed the possible revision of the classification system on 31 May you asked for further consideration to be given to the option of retaining existing classifications for all sensitive information within Government, regardless of whether it is protected by the new Official Secrets Act (OSA), another statute, or disciplinary proceedings, and for the views from the Attorney General on the evidential value of a distinct set of markings for OSA protected material. The Attorney General has now given his advice. You have also received comments from the Foreign and Commonwealth Secretary, the Chancellor of the Exchequer, the Home Secretary, the Secretary of State for Defence and the Chancellor of the Duchy of Lancaster.

2. The existing classification system operates on the basis that documents are classified according to the degree of harm which their unauthorised disclosure would cause to the national interest. Documents are marked:

> RESTRICTED, if unauthorised disclosure would be **undesirable** in the interests of the nation,
>
> CONFIDENTIAL, if unauthorised disclosure would be **prejudicial** to the interests of the nation,
>
> SECRET, if unauthorised disclosure would cause **serious injury** to the interests of the nation, and

TOP SECRET, if unauthorised disclosure would cause **exceptionally grave** damage to the nation.

It was partly unease about the potential juxtaposition of the existing tests for classification with the damage tests in the Act which led officials to explore the scope for revising the classification system. If two documents - one relating to a defence issue, the other to a key economic issue - can both be classified SECRET on the same basis, namely that their unauthorised disclosure would cause serious injury to the interests of the nation, it might be questioned why one is covered by the provisions of the OSA and the other is not.

3. The Attorney General's minute emphasises the potential evidential value of adopting a distinct classification system for material protected by the OSA. The rationale for dividing OSA material from that which is protected by criminal sanctions under other statutes would be:

(i) there are 151 other Acts providing criminal sanctions against disclosure. It would be extremely difficult to align these with the OSA for the purposes of classification;

(ii) the protection of such material is not vital to the national interest in quite the same way as material covered by the OSA. Although there is obviously a strong public interest in preventing disclosure, the reason for protecting such material by criminal sanctions is normally to protect private confidences of one sort or another.

4. My minute of 23 May discussed two possible ways of achieving this objective, either

(A) (i) retaining existing classifications with an OSA prefix for material covered by the Act, or

(ii) retaining the present system for OSA material with a new system of markings for other sensitive material.
ie Private (Strictly Private

(B) 5. The advantage of the second, more radical, option is that in addition to the potential evidential benefit of having a separate system for OSA material, a clean break with the existing classification system for non-OSA material could be presented as a positive response to the spirit of the new Act. It is favoured by the Foreign Secretary, the Home Secretary, the Secretary of State for Defence and the Heads of the Intelligence Agencies. They speak for those Departments who generate and use the vast majority of material protected by the Act. It is supported, too, by the Security Service who see this as an opportunity, which is unlikely to recur for many years, to refine and improve the classification system. On the other hand this course has been opposed by the Chancellor of the Exchequer and the Chancellor of the Duchy of Lancaster and runs counter to your own preferred approach. The case for such a radical change is, arguably, less strong now than it was when we were concerned that the Home Secretary might come under pressure on this point during the passage of the Official Secrets Bill.

6. Simply adding the prefix OSA to material protected by the Act would meet your concern, shared by the Chancellor of the Exchequer and the Chancellor of the Duchy of Lancaster, that we should retain the existing classifications for the protection of other material. In addition to the evidential benefits described by the Attorney General, such a system would also have some of the advantages seen by the Security Service in the more radical option. For example, it would help to identify material which is at greatest risk from hostile intelligence services, a point of particular importance overseas; and it might go some way to discouraging over-classification, since staff would have to address themselves to the more specific tests established by the Act.

7. But this approach also has disadvantages. We have always accepted that it would not be possible to ensure that all material which it would be an offence under the Act to disclose could be identified by means of a distinct classification. The provision which makes it an offence to disclose material which might lead to the commission of an offence does not, for example, lend itself to that approach. Also, material pre-dating the Act could not be covered. There would also be particular difficulties and risks of confusion in relation to classified material originating from our allies. The Foreign Office and the Ministry of Defence are strongly opposed to this approach.

(C)

8. The third alternative is, as you suggested, to retain the present unitary system of classification following implementation of the OSA. It would mean foregoing the evidential benefits of a distinct system. But, as the Attorney General recognises, these must not be over-emphasised. It would then be necessary to emphasise:

(i) that the classification system is seeking to protect a wider range of information than that covered by the provisions of the OSA. The Act does not purport to be a definitive account of all the circumstances in which the disclosure of official information would be damaging to the interests of the nation. Its purpose is to narrow the scope of the application of the criminal law in the protection of such information.

(ii) that the primary aim of the classification system is to ensure the secure handling of sensitive information within government. The level of classification of any document- or indeed the absence of any classification - should not be seen as a guide to the protection offered to the document by the OSA, any other statute or the provisions of the Civil Service Code.

These points would, as you suggested, need to be incorporated in guidance to civil servants. (It will anyway be necessary to issue guidance on the implications of the new Act and to remind civil servants of their continuing obligations in respect of the use of official information and the sanctions available in the event of any breach of those obligations. The relevant section of the Civil Service Code is already in the process of revision.) There might also be advantage in:

(iii) modifying the criteria for classification slightly so that, for example, the test for CONFIDENTIAL becomes **damaging** rather than **prejudicial**. This would not increase the evidential value of the classification in any prosecution under the OSA, but might reduce the scope for the defence that the unauthorised disclosure of any document correctly classified CONFIDENTIAL under the existing criteria could not meet the damage tests in the Act;

(iv) issuing further guidance on the need to avoid over classifying documents. Over classification has always been the bugbear of the system. It devalues the currency and, as the Attorney General has noted, could in future affect adversely the prospects of a successful prosecution under the Official Secrets Act.

Conclusion

9. Although each of the first two options has its supporters among the Departments most directly concerned, each also has its strong opponents. Given these positions, it appears that only the third option - retaining the present system with the modifications set out in para 8 - would be an acceptable compromise. But you will want to take account of the strongly-held view of the Security Service that this would be to miss an opportunity, unlikely to recur at all soon, of refining and improving the classification system.

10. I am copying this minute to the Foreign Secretary, the Chancellor of the Exchequer, the Home Secretary, the Secretary of State for Defence, the Chancellor of the Duchy of Lancaster, the Secretary of State for Energy, the Attorney General and the Heads of the Security and Intelligence Agencies.

NA Woolley
(Private Secretary)

for ROBIN BUTLER

14 July 1989

Approved by Sir Robin Butler and signed in his absence.

3

cc Bactiy

PRIME MINISTER

REVISION OF THE CLASSIFICATION SYSTEM

FLAP.

You asked that I should give my views, in connection with the proposed revision of the classification system, on the value of originators of documents classifying them as being protected by the Official Secrets Act.

I think such a system would have significant value.

In any prosecution brought under the new Act it will be necessary to establish beyond reasonable doubt that the information disclosed without lawful authority was information whose disclosure was prohibited by the Act. The Act provides that it is a defence for the defendant to prove that at the time of the alleged offence he did not know and had no reasonable cause to believe that the material in question was material which came within the provisions of the Act. He will only have to establish this 'on the balance of the probabilities', whereas the prosecution's case must be proved beyond reasonable doubt. A classification system which was unique to material coming, in the originator's view, within the provisions of the Act would significantly assist the prosecution in rebutting the statutory defence, by enabling the prosecution to demonstrate that the defendant was put on notice of the originator's view. This will, of course, not be conclusive. The court may, for example, conclude that the material did <u>not</u> fall within the provisions of the Act. But it will in some cases at least be an obstacle to the defendant establishing that he had no reasonable cause to believe that the material was protected.

If it were decided to retain the present classifications for OSA material only, it would in any event be desirable to add an explicit OSA prefix, since journalists, for example, will not be as familiar as civil servants with the new system of classification.

I acknowledge a danger: where there has been a mistaken failure to give a document an OSA classification it will be harder to get a conviction in respect of its unauthorised disclosure. And care not to over-classify must be enjoined upon originators, if the evidential value of an OSA classification is not to be lost.

On balance, however, I am satisfied that there would be an overall advantage. I do not think that prosecutions even under the more sharply focussed new Act are going to be so easy that this advantage can prudently be foregone.

I am copying this minute to the Foreign Secretary, the Chancellor of the Exchequer, the Home Secretary, the Defence Secretary, the Chancellor of the Duchy of Lancaster, the Secretary of State for Energy and to Sir Robin Butler, the Director General of the Security Service and 'C'.

P. M.

14 July 1989

Security Pt 3.
Reform of Official Secrets Act

Published Papers

The following document, which was enclosed on this file, has been removed and destroyed.
Published items are not kept by the Cabinet Office.

Command 408: Reform of Section 2 of the Official Secrets Act 1911

HMSO [ISBN 0 10 104082 2]

Signed A Wayland Date 25/6/2024

COPRA
Cabinet Office

NDPM
2/6

MO 23/2E

PRIME MINISTER

OFFICIAL SECRETS - REVISION OF THE CLASSIFICATION SYSTEM

at flap

1. I strongly support the comments which the Home Secretary offered, in his minute of 22nd May, on Sir Robin Butler's submission on this subject.

2. In addition to the very weighty arguments that he puts forward, I believe that the use of the prefix OSA would get us into a great deal of practical difficulty. There is a lot of older classified material in the Defence field which we lack the available staff effort to reclassify but which still requires protection. If we were to adopt the prefix system we should, in effect, have to run a hybrid system to cope with this older material. Such a system would cause much confusion about which material came within the ambit of the new legislation; and that would not help our present security arrangements.

3. I am sending a copy of this minute to the Foreign and Commonwealth Secretary, the Chancellor of the Exchequer, the Home Secretary, the Secretaries of State for Trade and Industry and Energy and to Sir Robin Butler.

G.Y.

Ministry of Defence

31 May 1989

SECURITY: Official Secrets Act Pt 3.

PM/89/025

PRIME MINISTER

Official Secrets: Revision of the Classification System

1. I have seen the minutes from the Home Secretary and the Chancellor commenting on Sir Robin Butler's submission of the same date about the revision of the classification system.

2. Sir Robin Butler's submission fully reflects my view, including my support for the proposal that sensitive material no longer covered by the Official Secrets Act should be protected by a separate privacy marking system. I endorse the Home Secretary's view that to act otherwise would not only run counter to the spirit of the new Act but also possibly leave us open to accusations of having misled Parliament.

3. It should in my view be possible to introduce satisfactory arrangements for classifying documents under two distinct systems and for educating officials in the new arrangements. We could arrange for adequate physical protection to be provided for <u>all</u> our sensitive material, whether or not covered by the Act.

4. I am sending copies of this minute to the Home Secretary, the Chancellor of the Exchequer, the Secretaries of State for Defence, Trade and Industry and Energy and to Sir Robin Butler.

(GEOFFREY HOWE)

Foreign and Commonwealth Office
31 May 1989

RESTRICTED

SL3BKN

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBIN BUTLER

REVISION OF THE CLASSIFICATION SYSTEM

The Prime Minister has seen your minute of 23 May and minutes by the Home Secretary, the Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster and the Foreign Secretary. She discussed these with you today. She noted the two main arguments for changing the classification system; that the Government should be seen to be responding to the Official Secrets Act, and that the prior classification of a document which is likely to be protected by the OSA, while not conclusive, improves the chances of securing a prosecution.

The Prime Minister considered that both the options being put forward involved the originator labelling a document in advance according to whether it would be protected by the OSA or not. But this was something which would be determined by the courts on a test of harm and the classification could, therefore, do no more than indicate the view of the originator at the time the document was prepared. She also queried the rationale of dividing information which might enjoy the statutory protection of the OSA from that which would be protected by other statutes.

In her view, documents should continue to remain 'Secret/Confidential/Restricted' and those working in the Civil Service should continue to respect the classification regardless of whether it was protected by the OSA, another statute, or disciplinary proceedings.

She asked for further consideration to be given to the option of retaining existing classifications but with circulation of guidance on the protection which different categories of information enjoy, highlighting the changes brought about by the OSA. She also requested that the Attorney General should give his views on the value of having the originators classify documents as protected by the OSA when this could only be a guide to what the courts might ultimately decide.

6

RESTRICTED

I am copying this minute to Stephen Wall (Foreign and Commonwealth Office), Alex Allan (H M Treasury), Colin Walters (Home Office), Brian Hawtin (Ministry of Defence), John Alty (Chancellor of the Duchy of Lancaster), Stephen Haddrill (Department of Energy), Michael Saunders (Law Officers' Department) and to the Director General of the Security Services and to 'C'.

AT

ANDREW TURNBULL

31 May 1989

PRIME MINISTER

CLASSIFICATION OF OFFICIAL DOCUMENTS

The position to which I was moving and to which your comments also point is that we should not attempt a classification system which seeks ex ante to reflect whether information is protected by the OSA or not.

There are two weaknesses in the arguments underlying either of the systems which Sir Robin has put forward. First, whether a document is protected by the OSA is not for the originators to determine but the court. The courts, in determining whether harm has been done will take into account whether harm was done at the time the document was released rather than whether harm would have been done if it had been released at the time it was written and classified. (Many documents start by being highly classified but are overtaken as the information is released in other ways). Use of either the OSA prefix or the Privacy marking can be no more than a guide.

Secondly, the OSA is the most important of the Acts imposing criminal sanctions on the unauthorised release of information but it is not the only one. If one is going to have an OSA prefix, why not one for these other Acts, e.g. taxation and social security.

If the contemporaneous classification into OSA and other has no legal effect, why not stick to Secret/Confidential/ Restricted for everything?

You may like to seek Sir Robin's reaction to this.

Patricia A Parkin

pp ANDREW TURNBULL

30 May 1989

JD3AGG CONFIDENTIAL

PRIME MINISTER

MEETING WITH SIR ROBIN BUTLER

I Classification of documents - see folder 1.
You may wish to discuss this with Sir Robin Butler before taking a decision.

II Machinery of Government - see folder 2.
Sir Robin Butler has completed his look at the case for merging the Department of Energy with the Department of Trade and Industry. He concludes that it would be feasible from this summer, but not essential. It will be helpful to take a decision on this before you have your discussion on 4 June about the next reshuffle. In coming to a decision, you need to keep an eye on who could handle such a very large Department. Sir Robin Butler also seeks a decision on the successor to Sir Brian Hayes.

III Cabinet Business - see folder 3.
Two and a half hours have been set aside on Thursday, 15 June, for the OD discussion on EC competence.

AT

AT

26 May, 1989.

CONFIDENTIAL

PRIME MINISTER

REVISION OF THE CLASSIFICATION SYSTEM

Sir Robin Butler minuted you in December seeking agreement in principle that the classification of documents should be revised to distinguish between those papers containing information in the six categories protected by the Official Secrets Act and those not so covered. You agreed that work on this should be put in hand.

He has now done this but has been unable to reach agreement. The arguments are set out in his minute at Flag A. All departments accept that the classification system now needs to be revised and that information outside the OSA needs to be properly protected (some of this information is sufficiently sensitive to carry criminal sanctions in specific legislation). But there is no agreement on how best to do this. Two options have been identified:

i. documents containing information protected by the Act should continue to use the existing classifications, eg, Secret, Confidential, Restricted; documents containing information not covered by the Act should be designated Strictly Private or Private;

ii. all documents should continue to use the Secret, Confidential, Restricted labels, but those protected by the Act should bear the prefix OSA.

Option i. is favoured by FCO, MOD, the Agencies and the Home Office - Flag B:

- they feel that to continue with the old labels for all papers would indicate to the outside world that nothing really had changed;

- they fear that confusion could be caused if a document carrying the classification, say, Confidential could be interpreted as either something protected by the Act under the old regime or something not protected under the

new regime. The only way to avoid this would be to put the OSA prefix on all existing documents, a massive task.

The Treasury (Flag C) and DTI (Flag D) believe that to introduce new terminology for information not protected by the Act would encourage people to handle such documents with insufficient care. They are particularly worried about economic information, eg pre-publication statistics or budget papers.

Sir Robin supports Option i. and has set out his reasons at Flag E.

Which view do you take?

May we discuss

AT

I think this is a man-made problem.

The documents remain Confidential, Secret or whatever. That need has not changed. It is only the mode of enforcement that has changed. Those of complete integrity will treat the two different enforcements the same way because for them the question doesn't arise.

ANDREW TURNBULL
26 May 1989

For others? It is still dishonourable to give away sensitive information even though not indictable. MT

c cc PS/MC cc Back-up

Treasury Chambers, Parliament Street, SW1P 3AG
01-270 3000

PRIME MINISTER

file with A

REVISION OF THE CLASSIFICATION SYSTEM

I have seen Sir Robin Butler's minute to you of 23 May, and the Home Secretary's comments in his minute of 22 May.

When reform of the Official Secrets Act was under consideration, I agreed that economic and financial information should be excluded from its provisions. This was, however, on the understanding that such information would continue to be fully protected.

It is clearly desirable that we should distinguish between those documents which are covered by the new Act, and those which are not. But this is all we need to do. We do not wish to suggest that there is any change at all to the degree of protection afforded to other information, some of which is highly market sensitive. We do not, for example, want to suggest that the penalties for improper disclosure of this information would be any less - in some cases disciplinary action will be more severe than anything we could expect from OSA proceedings. Nor do we wish to suggest that the OSA defines material which is covered by the criminal law and that which is not; there are over 150 cases where official information is protected by statutory provisions other than the Official Secret Act.

If all we wish to do is say what information is covered by the Official Secrets Act and what is not, the simple way to do this is

print "Official Secrets Act" in full or "OSA" in short on those documents which are so covered. It would be both unnecessary and misleading to change the classification system - misleading both to people at home and to people overseas with whom we share delicate information.

The alternative terminology suggested in paragraphs 6 and 7 of Sir Robin Butler's minute is subject to the obvious risk that we should be seen to be reducing the protection afforded to some very highly sensitive information indeed. It is hard, for example, to believe that "strictly private" would convey the sensitivity of Budget material in the way that "Budget Secret" does - and the consequences of Budget leaks can be extremely serious.

I am copying this minute to the Foreign and Commonwealth Secretary, the Home Secretary, the Secretaries of State for Defence, Trade and Industry and Energy, to the heads of the security and intelligence agencies, and to Sir Robin Butler.

N.

[NL]
26 May 1989

dti

the department for Enterprise

TO: RESTRICTED

PRIME MINISTER

FROM:

TONY NEWTON

25 May 1989

In David Young's absence I am writing to comment on Sir Robin Butler's submission to you of 23 May about revision of the classification system.

2. As I see it, the key test we should apply in this matter is to ask which of the two proposals is most likely to safeguard effectively the secrets and confidences of the Government, both those covered by the new OSA and those of comparable sensitivity in economic, commercial and other fields. The protective markings we choose must carry the right message effectively to thousands of staff, senior and junior. In my view the proposal to retain CONFIDENTIAL and SECRET for all sensitive material, whether protected by the OSA or not, offers the best way forward: the labels are of long-standing and well-understood and will best ensure compliance and a minimum of leaks.

SB2ABM

Recycled Paper

3. I do not wish to detract from the presentational difficulties to which Douglas Hurd has referred. However, we should not attempt to obscure - otherwise we might indeed be accused of misleading - the fact that some of the material freed from the OSA umbrella will continue to be subject to specific criminal sanctions in other Acts (more than 10 of them) and moreover that we intend to protect limited quantities of other sensitive material by the Service's disciplinary code. That message would need careful presentation - as it would under either proposal. The presentational problem does not therefore clearly point to one solution rather than the other. Whichever solution is adopted we must make crystal clear that we intend to continue to protect <u>all</u> our secrets and confidences, and not only those covered by the OSA.

4. I am copying this minute to the Foreign and Commonwealth Secretary, the Chancellor of the Exchequer, the Home Secretary, the Secretaries of State for Defence and Energy, Sir Robin Butler and the head of the security and intelligence agencies.

TN

TN

SECURITY: Official Secrets Act
PTS

A

cc Bartlett

Ref. A089/1342

PRIME MINISTER

Revision of the Classification System

In my minute to you of 16 December I proposed: at flag

(i) that the security classification system should be revised to bring it into alignment with the provisions of the new Official Secrets Act; and

(ii) that the privacy marking system should be revised and enhanced to ensure that sensitive information no longer covered by the provisions of the Act will continue to receive adequate protection.

2. You endorsed this approach and agreed a form of words for the Home Secretary to use if pressed on the issue of classification during the passage of the Official Secrets Bill. (In the event it did not prove necessary for the Home Secretary to use the formula publicly.) Officials were asked to work out detailed proposals for the implementation of the necessary changes.

3. We have devised a satisfactory system for classifying material protected by the new Official Secrets Act. Broadly the approach to be followed is that all material in the fields of security and intelligence, defence and international relations (including the confidences of foreign governments) should be classified at least CONFIDENTIAL if its disclosure would be damaging within the meaning of the Act. Such material could be given a higher classification (SECRET or TOP SECRET) depending on the severity of the damage that would be caused by unauthorized

disclosure. RESTRICTED will be retained for material requiring a lower level of protection in the categories of defence and international relations (eg material received from an ally and classified RESTRICTED by the originator). Material relating to special investigation powers will be classified using similar criteria.

4. There is, however, a major difference of view between departments which the Official Committee on Security has been unable to resolve, over one aspect of the system to be adopted for protecting sensitive material, for example in the economic and financial field, which is no longer covered by the Act but which would be classified CONFIDENTIAL and SECRET under the present system. Disclosure of some of the material continues of course to be prohibited by the criminal law under specific statutes (often because the material has been obtained under compulsory powers). There is no intention of reducing the level of protection which such material should receive in future. The disagreement is over how this should be achieved.

5. The Treasury, supported by the Department of Trade and Industry and the Department of Energy, are opposed to abandoning the use of CONFIDENTIAL and SECRET for sensitive material no longer covered by the Act concerning for example the economic and commercial interests of the nation. They argue that the first purpose of a marking is to guide staff at all levels on the physical protection and handling of material; and that to have five different categories rather than three is a likely source of confusion. They therefore considered that the simplest and clearest way to distinguish material likely to be caught by the provisions of the Act is to add "OSA" as a prefix (or suffix) to material classified under the system described in paragraph 3

above. Sensitive economic and financial and commercial information could then continue to be classified CONFIDENTIAL and SECRET as at present. They believe that to use different terminology for the protection of such material is unnecessary and would send the wrong signal to staff. They believe that it would be difficult to avoid the idea gaining currency that material protected by different markings was intrinsically less important than material classified CONFIDENTIAL and SECRET and could be treated less carefully. The result would, they believe, be an unacceptable weakening of the protection it was given.

6. The Home Office, supported by the Foreign and Commonwealth Office, the Ministry of Defence, OMCS, Security Service and the other security and intelligence agencies favour the introduction of new terms to replace CONFIDENTIAL and SECRET for such material no longer covered by the Official Secrets Act. They argue that new terminology is essential to highlight the change in the approach to official secrets introduced by the new Act and to enable staff to distinguish clearly between material caught by the provisions of the Act and other material. They believe that to carry on using the same terminology for protecting information no longer covered by the Act would expose the Government to criticism that it was failing to honour the spirit of the Act and the Home Secretary's defence of its provisions. The FCO, the MOD and the security and intelligence agencies are also strongly opposed to the proposal to add the prefix OSA to classified material in the fields of security and intelligence, defence and international relations because of the confusion which they believe that this would cause internationally and domestically. One source of domestic confusion would be that highly classified

material pre-dating the new scheme would either have to be re-classified with the OSA prefix, which would be a massive task, or would bear the same classification as material not covered by the new Act which would be highly confusing.

7. Those who hold this view would propose for sensitive material no longer protected by the Official Secrets Act to replace the CONFIDENTIAL and SECRET markings with markings such as PRIVATE and STRICTLY PRIVATE respectively (the precise terms can be settled in the light of Ministers' decision on this submission). They argue that staff will adapt to the new terminology and that the process of re-education that will be necessary whatever terminology is adopted should ensure that there will be no weakening of the protection given to material classified in this way.

8. I am sorry to trouble Ministers with this issue. But the Departments concerned regard it as important and serious since we have been unable to resolve it at official level, I must ask for your guidance on the choice between the approach in paragraph 5, on the one hand, and that in paragaphs 6 and 7 on the other.

9. I am copying this minute to the Foreign and Commonwealth Secretary, the Chancellor of the Exchequer, the Home Secretary, the Secretaries of State for Defence, Trade and Industry and Energy and to the heads of the security and intelligence agencies.

FER.B.

ROBIN BUTLER

23 May 1989

Security: Official Secrets Act A3

E

ce B[illegible] LP

Ref. A089/1350

MR TURNBULL

Revision of the Classification System

I am putting forward a submission to the Prime Minister about an irritatingly small point which I have not been able to resolve in the Official Committee on Security. It is about whether the classifications CONFIDENTIAL, SECRET and TOP SECRET should continue to be used for material no longer covered by the new Official Secrets Act. The submission has been cleared with the Departments concerned but you might like my own views and advice on handling.

2. The problem arises from the Treasury, the Department of Trade and Industry and the Department of Energy who are reluctant to give up the terms CONFIDENTIAL, SECRET and TOP SECRET for sensitive economic and financial information (eg budgetary) not covered by the new Act. They fear that the use of different terms will cause staff to take the protection of such material less seriously.

3. Other Departments, such as the Home Office, FCO, MOD and the Intelligence agencies favour using different terms - eg PRIVATE and STRICTLY PRIVATE for such material. The Home Office in particular feel that the Government will look silly if, having passed a new Act which does not cover economic and financial material - and which the Government claimed was a liberalising measure - they continue to apply the words SECRET and CONFIDENTIAL as they did before the Act was passed.

4. I share the view of the Home Office. It seems to me that, having passed a new Official Secrets Act, the Government cannot continue as before. Staff will anyway have to get used to the new distinction between the material covered by the new Act and that which remains sensitive but is not covered by it, and it should be possible to accustom them to guarding carefully material covered by different classifications.

5. I hope that it will not be necessary for the Prime Minister to hold a meeting on this subject. Much depends on how hard the Chancellor of the Exchequer and the Secretary of State for Trade and Industry and the Secretary of State for Energy choose to press the points which their officials have been making. I suggest that, if they do not comment in terms which require a Ministerial discussion, the Prime Minister should decide in favour of the approach in para 7 of my submission.

NA Woolley

pp ROBIN BUTLER

23 May 1989

Security: Official Secrets Act
Pt 3

PRIME MINISTER

OFFICIAL SECRETS - REVISION OF THE CLASSIFICATION SYSTEM

Sir Robin Butler's submission to you of 22 May seeks your guidance on the revision of the classification system now that the Official Secrets Act has been passed.

2. Although it may seem a narrow and bureaucratic point, I believe that we should use a distinct classification system for sensitive material which is no longer covered by the Official Secrets Act. To do otherwise could call into question our good faith in presenting and defending the Bill as a measure confined to material which should be protected by the criminal law. If we use **CONFIDENTIAL** or **SECRET** for material which is caught by the Act and continue to use it also for material which is not caught by the Act, it will be said that nothing has changed. During the Bill's passage we argued accurately that some important information - for instance on economic matters - would be removed from the scope of the criminal law. If that information is not in future protected by some system separate and different from the system that protects material covered by the new Act, we may be accused of misleading Parliament.

3. I think too that it is important that we have two distinct systems so that staff can see immediately whether they are dealing with information protected by the Act or not.

4. I do not believe that the simple addition of **OSA** as a prefix to the existing markings would prevent criticism. It would not mark a sufficient distinction between what the Act protects and what has to be protected by other means. In any event such a practice would be confusing to our allies receiving such documents. I am not wedded to **PRIVATE** and **STRICTLY PRIVATE**, but I am sure that we should carry through into the terminology of our classification systems the principles of the Act. I do

not believe that this will reduce the level of protection given to material that is not protected by the Act. All Departments are going to have to instruct their staff in the new arrangements and draw attention to their continuing liabilities under the criminal law, the civil law and the Civil Service code of discipline.

5. I am sending copies of this minute to the Foreign and Commonwealth Secretary, the Chancellor of the Exchequer, the Secretaries of State for Defence, Trade & Industry and Energy and to Sir Robin Butler.

Douglas Hurd.

22 MAY 1989

Security OPA IV 3.

CONFIDENTIAL

SCH

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

MR. WOOLLEY

CABINET OFFICE

DUTY OF CONFIDENCE: INTERNATIONAL AGREEMENTS

The Prime Minister has seen the paper by officials circulated as OD(DIS)(89)2, Philip Mawer's letter to you of 13 April and your reply of 24 April. While accepting the principle of informal soundings with the four countries mentioned, she wondered whether confidentiality would in practice be sustained. She therefore felt it better to wait until the Official Secrets Bill had received Royal Assent before making any approaches.

I am copying this minute to the Private Secretaries to Members of OD(DIS).

AT

ANDREW TURNBULL

26 April 1989

CONFIDENTIAL

LRWBYA

PRIME MINISTER

DUTY OF CONFIDENCE: INTERNATIONAL AGREEMENTS

The official group covering policy on Defence and Security Information has been examining the prospects for negotiating international agreements for the protection of confidential information. Their report - Flag A - examines the prospects for securing enforcement abroad of UK judgments, for initiating legal action abroad, and for pre- and post-publication restraints. It seeks Ministerial agreement for exploratory soundings to be undertaken on a confidential basis with Australia, Canada, New Zealand and the United States. It recommends against trying to negotiate further agreements in the international copyright field.

The Home Secretary is content for these informal soundings to take place but has pointed out that if any agreement required changes in the law on the duty of confidence that would be inconsistent with his statement at Second Reading on the Official Secrets Bill that the Government had no such plans - Flag B.

Cabinet Office - Flag C - advise that any change in the law on confidence would be sufficiently far into the future for this not to be an obstacle of such soundings. In any case Ministers would have an opportunity to decide whether the benefits from an international agreement were likely to be such as to make it worth proposing a change in the law here.

On this basis, agree informal discussions with the four countries, with care taken to ensure that these remain confidential while the Official Secrets Bill is still passing through Parliament?

How can we ensure this? (can the soundings not wait?)

(ANDREW TURNBULL)

25 April 1989

010

Mr Turnbull.

C

CONFIDENTIAL

CABINET OFFICE

70 Whitehall London SW1A 2AS

01-270 0101

From the Secretary of the Cabinet and Head of the Home Civil Service

Sir Robin Butler KCB CVO

Ref. A089/1022

24 April 1989

Dear Philip,

Duty of Confidence: International Agreements
Advice on OD(DIS)(89) 2

WILL REQUEST IF REQUIRED

Thank you for your letter of 13 April.

As you know, it was agreed by OD(DIS) at their meeting on 28 November last year (OD(DIS)(88) 2nd Meeting) that, in the light of the Law Lords' judgment on the Peter Wright case, it appeared that there was no need to legislate to change the civil law on the duty of confidence. As you point out, the Government's position was subsequently made clear in the Home Secretary's statement at Second Reading on the Official Secrets Bill.

The advice in OD(DIS)(89)2 does not suggest revising that conclusion. From a domestic point of view, the Wright judgment indicates that the civil law of confidence is broadly satisfactory as it stands (although OD(DIS) concluded that if subsequent judgments were unsatisfactory, the position might have to be reviewed). However, in assessing the possibilities for international agreements, the OD(DIS)(O) working group were bound to draw attention to the fact that those with whom we might hope to conclude such agreements would expect them to be reciprocal. This might result in requests from partners that could only be met by making changes to the law of confidence. (We shall only know whether we are likely to be faced with such a situation once potential negotiating partners have been sounded out, a process that is likely to take some months.)

It would of course be for Ministers to decide in such circumstances whether they wished to amend the law of confidence, if that were the price for an agreement, or whether

/they would prefer

P J C Mawer Esq
Home Office

CONFIDENTIAL

they would prefer to forego such an agreement. If they concluded that the price was worth paying, they would presumably be able to explain that circumstances had changed since the Second Reading of the Official Secrets Bill and that it was worth amending the law of confidence in this country for the wider benefits that an international agreement, or agreements, would bring.

With regard to your second point, the intention is that soundings should be undertaken with the greatest possible discretion. We shall ensure that all possible care is taken if such soundings begin either before the Official Secrets Bill is given the Royal Assent, or in the immediate aftermath of the Bill's passage through Parliament.

I am sending copies of this letter to Andrew Turnbull in No 10 and to the Private Secretaries of other members of OD(DIS).

Yours ever,

Trevor Woolley

(T A Woolley)
Private Secretary

CONFIDENTIAL

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

17 April 1989

Dear Philip,

OFFICIAL SECRETS BILL: LORD BETHELL'S NEW CLAUSE ON PUBLICATIONS

The Prime Minister has seen the draft speaking note attached to your letter to me of 14 April. Although she was content with most of it she felt that the first paragraph on the last page gave too much the impression that a new concession was being made, which was inconsistent with the argument elsewhere in the note that the Government was adhering to a longstanding and reasonable position. She also noted that the statement that publication would be authorised only in "rare and exceptional circumstances", which was made at an earlier stage in the Bill, was not repeated. She felt that this would be noted and interpreted as a retreat.

Both these points can be dealt with as follows:

(i) Page 3, seven lines from the bottom, delete "sparingly" and substitute "... has in the past only been given in rare and exceptional circumstances and on a case-by-case basis."

(ii) First paragraph on page 5 to begin, "I repeat therefore the assurance that I gave earlier. While authority to publish will be given only in rare and exceptional circumstances, all relevant plans and proposals ...".

I am copying this letter to Nick Gibbons (Lord Privy Seal's Office) and to Trevor Woolley (Cabinet Office).

Yours sincerely

Andrew Turnbull

(ANDREW TURNBULL)

Philip Mawer, Esq.,
Home Office.

CONFIDENTIAL

PRIME MINISTER

OFFICIAL SECRETS BILL: LORD BETHELL'S NEW CLAUSE ON PUBLICATIONS

Attached is the speaking note drafted for Lord Ferrers to use on Tuesday. For the most part this is a persuasive and reasonable account of the Government's position. It does, however, need to be strengthened in two respects.

First, the drafting of the assurance at the top of the last page is too forthcoming in tone and gives the impression that something is being conceded beyond the position set out earlier. Secondly, the phrase "only in rare and exceptional circumstances" used at an earlier stage in the proceedings is not used. I think this would be noticed and interpreted as a concession. This is inconsistent with the argument that the Government is doing no more than explain the status quo.

These points can be dealt with as follows:

(i) Page 3, seven lines from the bottom delete "sparingly" and substitute "... has in the past only ever been given in rare and exceptional circumstances and on a case-by-case basis".

(ii) First paragraph of page 5. To avoid the impression that this is a new assurance substitute "I repeat therefore the assurance that I gave earlier. While authority to publish will be given only in rare and exceptional circumstances, all relevant plans and proposals ...".

Agree subject to these amendments?

ANDREW TURNBULL

14 April 1989

KK1AOB

From: THE PRIVATE SECRETARY

CONFIDENTIAL

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

14 April 1989

Dear Andrew,

OFFICIAL SECRETS BILL: LORD BETHELL'S NEW CLAUSE ON PUBLICATIONS

When the Home Secretary met the Prime Minister on Tuesday, he said that we would be putting to the Prime Minister a form of words for Lord Ferrers to use at Report stage on the Official Secrets Bill on 18 April in opposing Lord Bethell's new clause which would make statutory provision for the authorisation of publications by members and former members of the security and intelligence services and by people notified that they were subject to the same obligations.

... I attach a draft speaking note on the new clause whose main lines have been cleared with interested departments and agencies and agreed by Sir Robin Butler. The Home Secretary will be seeing the draft over the weekend. I would be glad if you would let me know in the course of Monday 17 April whether the Prime Minister is content.

A copy of this letter and the draft note go to Nick Gibbons and to Trevor Woolley.

Yours sincerely,

Philip Mawer

P J C MAWER

Andrew Turnbull, Esq
Private Secretary
10 Downing Street

CONFIDENTIAL

OFFICIAL SECRETS BILL

New Clause After Clause 8

LORDS REPORT

NOTES ON AMENDMENTS

Lord Bethell

After Clause 8 insert the following new Clause-

> (".-(1) A person who is or has been a member of the security and intelligence services or who has been notified that he is subject to the provisions of section 1(1) above may, only if he has obtained the consent of the Secretary of State, publish, or disclose for the purpose of a publication information which is or has been in his possession by virtue of his position as a member of those services or in the course of his work while the notification is or was in force.
>
> (2) The Secretary of State shall not withhold his consent under subsection (1) above if he is satisfied beyond reasonable doubt that the publication can take place without-
>
> (a) endangering national security; or
>
> (b) causing harm to the work of the security and intelligence services or any part of them; or
>
> (c) otherwise being contrary to the national interest.")

RESIST

Effect

The New Clause introduces a statutory procedure for members and former members of the security and intelligence services and for notified persons who wish to publish information about their work or disclose it for the purpose of someone else's publication. It requires them to obtain the consent of the Secretary of State but sets out the only grounds on which the Secretary of State could withhold such consent.

SPEAKING NOTE

I am glad to have this opportunity to explain again the Government's position on the authorisation of memoirs and other books by members and former members of the security and intelligence services.

I understand the position from which my noble Friend (Lord Bethell) and some other of my noble Friends come to this matter. I recognise their concerns. I should not wish to take issue with them were it not for very good reasons. I know my hon Friends are fair-minded people and so I ask them to consider very carefully whether this is really a matter which should be dealt with in primary legislation in the way proposed in this amendment.

I want first to give your Lordships a clear assurance about the drafting of the Bill because I know there has been some misunderstanding and misapprehension about this.

My Lords the Bill does nothing to change either the steps which must be taken in order to obtain authority for disclosures, or the policy for considering the memoirs of serving or former members of the security and intelligence services - or indeed of any other Crown Servant.

My Lords, the Bill allows for disclosures to be made by serving Crown Servants and by notified people, provided that such a disclosure is made in accordance with a person's official duty. It allows too for former Crown Servants (including former members of the security and intelligence services) to make disclosures with lawful authority if they have an official authorisation for their disclosures.

The arrangements for former Crown Servants to seek such authorisation are of long-standing. They involve the former Crown Servant getting the necessary authority from his former department or agency.

The new law does not require any change to these arrangements or in their operation. I think most of your Lordships will agree that it is right that there should continue to be a requirement to obtain authority for the

disclosure of such matters. The Bill provides for such authority to be given.

There is, I venture to hope, nothing between my noble Friend and the Government on that central point. Authority can be given for publications. This amendment is not necessary to achieve that.

The rule for such publications will also remain what it has always been: no member or former member of one of these services should plan publications without seeking and obtaining authority from his current or former employer to do so.

It is right, however, that I should make clear to your Lordships that the presumption will continue to be - just as it has been in the past - against giving authority for detailed accounts to be published of the work of the security and intelligence services. It will continue to be the exception and not the rule for authorisation to be given in these circumstances.

In making this clear in previous debates I am afraid that some noble Lords may have believed that we were breaking new ground. This is not the case. There has never been a convention that members and former members of the services should commonly publish accounts of their work. Permission has only ever been given sparingly in the past and on a case by case basis. So this will continue to be the case in the future.

This amendment, my Lords, would, however, break new ground. And it would do so in ways which are, I suggest, highly undesirable.

First, it would introduce a formal statutory procedure for authorising publication. That procedure would apply only to members and former members of the security services and to notified people. It cannot be right, my Lords, to

create such elaborate statutory procedures ensuring and encouraging full-blown publications in this area when there is rightly no such encouragement or statutory requirement for any more modest forms of disclosure.

Secondly, the amendment would create a presumption in favour of publication. I have already explained to your Lordships that the presumption must be against publication.

Thirdly, the creation of such a statutory presumption would inevitably act as an encouragement to those who may be tempted to breach their obligations; and an encouragement to some outside the security and intelligence services to persuade members and former members to say more than they should.

Fourthly, I want to confirm that the criterion for authorisation is, as it has always been, a judgement about whether publication would harm national security directly or indirectly and not a consideration of possible embarrassment. I hope your Lordships will find that reassuring.

But, my Lords, it cannot be right to institute a statutory procedure which requires that formal statutory criteria must in all cases always be applied to every jot and tittle of what someone would like to publish. What scope for argument that would introduce! What pressure it would put on the Secretary of State always to have to tell the author in detail exactly why national security would be damaged - when perhaps, having been so long away from the service, he really ought not to know. How unnecessary it would be to delve into the nitty gritty when the publication is manifestly not the sort of thing which could ever be published in any form.

My Lords, we must avoid these difficulties and we can do so on the basis of the present Bill.

I can give your Lordships this assurance. All relevant plans and proposals if properly raised at the right time will be carefully considered and decisions made on a case by case basis. [Only if pressed: If a member of the services or a former member has anxieties about the propriety of a decision to refuse authorisation, he can take those anxieties to the Staff Counsellor.]

This amendment my Lords would go much further than that. It suggests that the relationship between a member of the service and his employer or former employer in this matter must be regulated by statute. I think the Noble Lord, Lord Home was right to say that this is not a matter for legislation: after the most careful consideration following the Committee's debate, that remains our view as well. A statutory provision like this is not the way we have done these things up to now and is not, my Lords, to our minds a sensible or palatable recipe for the future.

There is no reason to conclude from this, my Lords, that authority to publish will be withheld in future in every conceivable case. I have given a clear and I believe reasonable explanations and assurances. Of course, the interests of history and of historians need to be recognised. But so too my Lords does the interests of the continuing safety and security of the nation as a whole. There is nothing particularly new about this and nothing in the Bill which requires or suggests any change in our approach.

I hope therefore, that with this further explanation, my noble Friend will withdraw his amendment.

From THE PRIVATE SECRETARY

CONFIDENTIALITY

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

13 April 1989

Dear Trevor,

attached

DUTY OF CONFIDENCE: INTERNATIONAL AGREEMENTS
ADVICE ON OD(DIS)(89)2

The Home Secretary has seen a copy of this paper by officials covering an interim report setting out the issues involved and proposing that informal, exploratory soundings should be undertaken with a number of other countries. He is content for work to proceed as proposed, subject to two points. The Working Group's report suggests that if any bilateral agreements were concluded, that might require changes in the substantive law of breach of confidence. That proposal sits uncomfortably with the Home Secretary's statement at Second Reading in the House of Commons on the Official Secrets Bill (which was agreed with the Lord Chancellor's Department) that the Government had no such plans. The case for a change in the substantive law would need to be carefully examined and assessed, therefore, when the time comes.

Second, although the timescale for the work proposed by officials should not pose any problems for the Official Secrets Bill, if soundings have begun with other countries before the Bill receives the Royal Assent it will be important that the greatest care should be taken that news of them should not leak before then, or even in the aftermath of the passing of the Bill through Parliament.

The Home Secretary would be grateful if these two points could be borne in mind as the work proposed is carried forward.

I am copying this letter to the Private Secretaries to the Prime Minister and other members of OD(DIS).

Yours sincerely,

P J C MAWER

Trevor Woolley, Esq.

CONFIDENTIAL

R. Turnbull
Now
CDP

FROM

NICHOLAS
BETHELL

TELEPHONE
01-402-6877

73 SUSSEX SQUARE
LONDON W2 2SS

Charles Powell Esq
10 Downing Street
LONDON SW1

3rd April 1989

Dear Mr Powell,

Lord Bethell, who is in Moscow this week, has asked me to send you a copy of his letter of March 31st to the House of Lords Public Bill Office, withdrawing his Amendment to the Official Secrets Bill.

Yours sincerely,

Harriet Sharrard

Mrs Harriet Sharrard
Assistant to Lord Bethell

FROM
NICHOLAS
BETHELL

TELEPHONE
01-402 6877

73 SUSSEX SQUARE
LONDON W2 2SS

The Public Bill Office
House of Lords
Westminster
London SW1A 0PW

31st March 1989

Dear Sir,

I wish to withdraw the amendment standing in my name to the Committee stage of the Official Secrets Bill.

The issue raised by my amendment is now being considered by ministers, most of whom have been away this past week, and I hope that it will then be possible to clarify the position of contemporary historians wishing to make use of material originating in the secret services.

If necessary, the amendment will be re-tabled at the Report stage.

Yours sincerely,

Bethell

Lord Bethell

Nº 9
05 M

0900A

DEPARTMENT OF HEALTH AND SOCIAL SECURITY
Richmond House, 79 Whitehall, London SW1A 2NS
Telephone 01-210 3000

From the Secretary of State for XXXXXXXXXX Health

CONFIDENTIAL

The Rt Hon Nigel Lawson MP
Chancellor of the Exchequer
Treasury
Parliament Street
LONDON
SW1P 3AG

28 February 1989

Dear Nigel,

PROTECTION OF TAXPAYER INFORMATION FOLLOWING REFORM OF OSA

Thank you for a copy of your letter to the Prime Minister on 17 February proposing the introduction of specific criminal sanctions to protect the confidentiality of taxpayer information.

I am content for your proposal to proceed. It should not interfere in any way with the authorities exchanges of information with this Department, which in any event usually involve the exchange of aggregated or anonymised data such as the results of enquiries into the levels of doctors' and dentists' practice expenses.

I am copying this letter to recipients of yours.

Yours ever,
K.

KENNETH CLARKE

SECURITY: Official Secrets Act

CONFIDENTIAL

Foreign and Commonwealth Office

London SW1A 2AH

22 February 1989

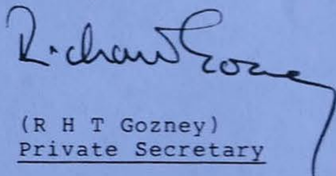
Dear Jonathan,

Protection of Taxpayer Information
Following Reform of the Official Secrets Act

The Foreign Secretary has seen the Chancellor's minute of 17 February to the Prime Minister and is content with the proposed action.

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

Yours ever,



(R H T Gozney)
Private Secretary

Jonathan Taylor Esq
HM Treasury

CONFIDENTIAL

Security: Reform of Official Secrets Act

A3

CONFIDENTIAL

PRIVY COUNCIL OFFICE
WHITEHALL. LONDON SW1A 2AT

NBPM

PRC6 22/2

21 February 1989

Dear John

PROTECTION OF OFFICIAL INFORMATION : SOCIAL SECURITY

Thank you for your letter of 27 January seeking H Committee's agreement that a new clause should be added to the Social Security Bill to ensure that the unauthorised disclosure of Social Security information continues to be protected by the criminal law after the Official Secrets Bill comes into effect.

The Prime Minister, Douglas Hurd, Norman Fowler and Norman Lamont indicated that they were entirely content in principle with your proposal. Norman Fowler was concerned that the new provision should not make the sharing of information within Government more difficult. I understand that you are in touch separately with Treasury Ministers and Douglas Hurd about the arrangements for announcing your proposal together with the similar arrangements proposed for information held by the Inland Revenue and Customs and Excise. No other colleague has commented and you may take it therefore that, subject to account being taken of the point made by Norman Fowler, you have H Committee's agreement to the introduction of your proposed new clause.

I am copying this letter to the Prime Minister, members of H Committee, Norman Lamont, Peter Brooke, Sir Robin Butler and First Parliamentary Counsel.

Yours ever

John

JOHN WAKEHAM

The Rt Hon John Moore MP
Secretary of State for Social Security
Department of Social Security
Richmond House
Whitehall
LONDON
SW1A 2NS

CONFIDENTIAL

CC B'ham ✓

10 DOWNING STREET

Prime Minister

The main problem is the handling of the Official Secrets Bill. After two days in Committee, they are still on first clause with 16 left. At some stage a guillotine will be required, but with the mood of time used by Government's own "supporters", Chief Whips position is weakened.

AT

[illegible]

MJ 2DHF

10 DOWNING STREET

LONDON SW1A 2AA

From the Private Secretary

19 February 1989

Dear Jonathan,

PROTECTION OF TAXPAYER INFORMATION FOLLOWING REFORM OF THE OFFICIAL SECRETS ACT

The Prime Minister was grateful for the Chancellor's minute of 17 February. She agrees wholeheartedly with the action proposed by the Chancellor and the Secretary of State for Social Security.

I am copying this letter to the Private Secretaries to members of Cabinet and to Trevor Woolley (Cabinet Office).

Yours,

Paul

Paul Gray

Jonathan Taylor Esq
HM Treasury

chex.rm/jmt1/34 **CONFIDENTIAL**

Prime Minister!
Content for these new criminal sanctions to protect information about individual taxpayers to be included in the Finance Bill; and for an announcement next week during Report Stage of the O.S. Bill? And for parallel measures on social security?
RRC6
17/2

Treasury Chambers, Parliament Street, SW1P 3AG
01-270 3000

PRIME MINISTER

Yes – agree wholeheartedly

PROTECTION OF TAXPAYER INFORMATION FOLLOWING REFORM OF OSA

As foreshadowed in the White Paper which preceded the Official Secrets Bill, I have been considering whether there should be a specific criminal sanction in this year's Finance Bill to protect the confidentiality of taxpayer information after reform of Section 2 of the Official Secrets Act 1911. I have concluded that it is essential to do so in order to protect certain categories of information relating to identifiable persons and held by the Inland Revenue and Customs and Excise in connection with their general responsibilities for assessing and collecting taxes and duties.

The information I have in mind is that which is obtained by the two Revenue Departments from taxpayers, as individuals or organisations, liable to taxes and duties, or from third parties about identifiable taxpayers; also information generated within the departments which is derived from that information or which is sent back to taxpayers as well as judgements which the Departments make on the basis of the information obtained.

In effect, this amounts to covering the contents of the taxpayer's file. I am not seeking to cover departmental information such as instructions, policy papers or general management matters.

This taxpayer information needs to be protected against unauthorised disclosure by former employees as well as present employees of the two Departments. I have also decided the measure should cover the staff of the National Audit Office, the Parliamentary Commissioner for Administration and of the various tax appeal tribunals such as the General and Special Commissioners of Income Tax and the VAT Tribunals, who have access to taxpayer files or information. Consultants working for the two Departments will also be covered.

The penalties proposed on conviction are up to 2 years imprisonment or a fine or both on indictment and 3 months or a fine or both on summary conviction. The threat of a criminal prosecution is seen as a long-stop for the very worst cases to underpin the normal Civil Service disciplinary measures, up to and including dismissal.

I recognise that extending criminal sanctions to all Inland Revenue and Customs staff covers a not insignificant proportion of the Civil Service, but the purpose of the measure is to protect the individual citizen, by protecting private information which the Government has concerning his or her tax and business affairs. Protecting this information must be right, irrespective of whether or not Government information is protected. When Section 2 of the Official Secrets Act is removed and if nothing is put in its place, it could well be perceived by the taxpayer that without a criminal sanction his protection is gone. He would not necessarily see sufficient protection in the disciplinary Code and there would be no protection at all against disclosure by former employees. I believe that Parliament will welcome the fact that we are taking these powers for the protection of the taxpayer: indeed, we would be rightly criticized were we to fail to do so.

I have checked on the position in three other countries - the United States, Australia and France - and all three have similar provisions to those I seek to introduce. (It is worth noting that

this is despite the fact that both the United States and Australia have freedom of information legislation). In the United States the maximum penalty on conviction is 5 years imprisonment.

John Moore is proposing analogous protection for social security (including national insurance contributions) information about individuals and companies and wants to provide for this in the Social Security Bill. He recently wrote to John Wakeham about it (27 January). We both see an advantage in announcing what we are proposing during the debates on the Official Secrets Bill and I am seeking Douglas Hurd's agreement to an announcement during Report Stage next Wednesday (22 February). If this is not possible then an arranged Parliamentary Question may be the way forward.

Provided you and colleagues are content, I propose to introduce the measure to provide criminal sanctions for wrongful disclosure of taxpayer information in this year's Finance Bill. Any delay would leave a gap following repeal of Section 2 during which this confidential information would no longer be protected.

I am copying this letter to all Cabinet colleagues and to Sir Robin Butler.

[N.L.]
17 February 1989

HOME SECRETARY

OFFICIAL SECRETS BILL : OFFENCE OF DISCLOSING INFORMATION WHICH MIGHT BE USED TO GAIN UNAUTHORISED ACCESS TO PROTECTED INFORMATION

In your minute to the Prime Minister dated 14 February you proposed an amendment to Clause 8(6). This Clause makes it an offence to disclose information which can be used to obtain access to protected information. The amendment which you propose would require the prosecution to show that the discloser knew or had reasonable cause to believe that the information he disclosed would be likely to be used to gain access to protected information.

An amendment formulated in this way would require proof not only that the defendant knew that the information disclosed could be used to gain access to protected information, but also would require some proof of the intent, or state of mind, of the person receiving the information. This could impose an unnecessarily difficult burden upon the prosecution.

The purpose of the proposed amendment would be met by a requirement that the prosecution prove that the defendant knew, or had reason to believe, that the information could be used to gain access to protected information, and that the circumstances in which it was disclosed are such that it would be reasonable to expect that it might be used for that purpose without authority. This formulation indicates more clearly that the test is objective rather than subjective.

I am copying this minute to the Prime Minister, members of OD(DIS) and to Sir Robin Butler.

P.M.

16 February 1989

CONFIDENTIAL

EAMA NT

AG
LPS

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

15 February 1989

OFFICIAL SECRETS BILL: OFFENCE OF DISCLOSING INFORMATION WHICH MIGHT BE USED TO GAIN UNAUTHORISED ACCESS TO PROTECTED INFORMATION

The Prime Minister has seen the Home Secretary's minute of 14 February setting out a proposed amendment to Clause 8(6) of the Bill. She was unhappy with this as she felt the revised clause could create a loophole. She has commented that the person seeking the information - say for a book - has only to say that he or she will not use it but wants it solely for background information or to establish accuracy, then the person giving the information has a defence.

Please could you consider this point and advise on how it might be dealt with.

I am copying this letter to the Private Secretaries of members of OD(DIS) and to Sir Robin Butler.

ANDREW TURNBULL

P J C Mawer Esq
Home Office

CONFIDENTIAL

Prime Minister
This is the amendment mentioned by the Home Secretary today. Content?
AT 14/2

PRIME MINISTER

OFFICIAL SECRETS BILL: OFFENCE OF DISCLOSING INFORMATION WHICH MIGHT BE USED TO GAIN UNAUTHORISED ACCESS TO PROTECTED INFORMATION

This minute is to seek the agreement of colleagues to my making a minor change to the proposals in our Official Secrets Bill as it relates to the ancillary offence of gaining access to information protected under the Official Secrets Bill.

2. The provision at present makes someone guilty of an offence if he discloses official information which can be used to obtain access to protected information and if the circumstances in which it is disclosed are such that it would be reasonable to expect that it might be used for that purpose without authority. The offence is in clause 8(6) of the Bill. It attracts the same penalty as the main offences. It follows closely the analogous provision in our 1979 Bill, except that that provision offered a defence of prior publication - that the information had already been made public.

3. We shall need to explain the provision on 16 February in response to an amendment proposing that it be removed.

4. I propose to hold firm on the principle of this offence. Not to do so would create an obvious loophole. But I think I should offer to look more closely at the drafting and the test of use. That should, I hope, see off pressure for a prior publication defence for this provision alone and would avoid further efforts to unpick this offence.

5. I would propose then, following the Committee undertaking, to table an amendment on Report which would require the prosecution to show that the discloser knew or had reasonable cause to believe that the information would be likely to be used to gain access to protected information. This follows more closely the presentation of the other main offences in the Bill by referring to what the discloser had reasonable cause to know and it should head off pressure for prior publication type defences since we can argue that information already widely available would not meet the use test for the offence.

6. I do not think this change will substantially affect the circumstances in which in practice a prosecution might be brought (and it might later be criticised for that), but it will help to make our position a good deal more defensible; and would be very helpful in avoiding opening up a whole new area of controversy towards the end of the Committee Stage.

7. I am copying this minute to the other members of OD(DIS) and to Sir Robin Butler. I am sorry for the shortness of notice, but I hope you will agree that unless I hear from colleagues by noon on 16 February, I may offer to look again at the drafting of clause 8(6) during the Committee Stage later that day; and that, subject to any comments on the detail by close on 17 February, I may table an amendment for Report Stage the following week on the lines proposed in this minute.

Douglas Hurd.

14 February 1989

14.11 [illegible] PM.9

10 DOWNING STREET

Prime Minister

I expect Lord President will want to discuss the progress made on the Official Secrets Bill, where progress last week was disappointingly slow, with much of problem being created by Govt. members

NLW
27/1

From: THE PRIVATE SECRETARY

Prime Minister
Another good speech from the Home Sec.
AT 22/12

cc PAB
D.C

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

21 December 1988

Dear Andrew,

OFFICIAL SECRETS BILL

... I enclose for the Prime Minister's information a copy of the speech which the Home Secretary will make later today on the Second Reading of this Bill.

Copies also go to Stephen Wall (FCO), Paul Stockton (Lord Chancellor's Department), Mike Maxwell (Northern Ireland Office), David Crawley (Scottish Office), Brian Hawtin (Ministry of Defence), Alison Smith (Lord President's Office), Michael Saunders (Law Officers' Department) and Trevor Woolley (Cabinet Office).

Yours sincerely,

Philip Mawer

P J C MAWER

Andrew Turnbull, Esq
Private Secretary
10 Downing Street

HOME SECRETARY'S SECOND READING DEBATE SPEECH
OFFICIAL SECRETS BILL: 21 DECEMBER 1988

I beg to move that the Official Secrets Bill be now read a second time.

We ask the House today to agree in principle that the criminal law should be prised away from the great bulk of official information. We propose that it should be used to protect unauthorised disclosure of six limited areas. We shall be asking the House to agree on the scope and definition of those areas. Within the areas to be protected we introduce a number of tests of harm which the prosecution will have to prove. We mean that the criminal law should protect, and protect effectively, information whose disclosure is likely to cause serious harm to the public interest, and no other.

This is a coherent and ambitious reform. It is bolder and more open than anything attempted by any Government in this field since the war. Beside it the Labour proposals in the 1978 White Paper look pale, timid and restrictive. The present law is both too wide and too weak. After sixteen years of dickering and dispute since the Franks Report I believe the time has come to settle on the successor to Section 2 of the 1911 Act.

We published a White Paper in June this year which set out the Government's proposals. It was debated here in July. We

/promised then

promised then to listen carefully to the points made in the debate and to take account of them as we prepared the Bill, and we have done so. Before returning to my general theme I would like to describe briefly the changes between the White Paper and the Bill.

First, the Bill has introduced a harm test for the disclosure of information received in confidence from a foreign Government or international organisation. In the White Paper this was an absolute offence. I listened carefully to the powerful advocacy of my rt hon and Learned Friend the member for Richmond (Mr Brittan) and my hon Friend the member for Westminster North (Mr Wheeler). This change has not escaped the obfuscation in which some critics have tried to shroud the Bill. The Bill makes clear [clause 3(3)] that the prosecution may argue that the fact that a confidence has been broken may jeopardise our interests abroad as much as the content of the information which has been disclosed. But it creates no obligation on the jury to accept that argument. Nor does it allow the harm test to be by-passed. There is no absolute offence here: there _is_ a harm test. The prosecution has to prove that the disclosure jeopardised UK interests abroad. The fact that a confidence was disclosed would not by itself be enough if our interests had not been put at risk.

/It seems

It seems to me reasonable that the criminal law should operate against those who deliberately breach the confidence of another country or international organisation when they have good reason to know that this is likely to harm our interests abroad. These confidences are not entered into capriciously. The test in the Bill relates to our national interests abroad, not the interests of another country or any international organisation - and the decision is for the jury.

We have looked carefully too at the harm test as it will now govern the whole of the foreign affairs field. My rt hon and Learned Friend the member for Richmond (Mr Brittan) suggested that this test was too vague and too easily met. It is not easy to provide language which draws the line in the right place, but on reflection, we thought there was a way of reflecting the proper concerns of the criminal law without risking undermining the effective conduct of the country's foreign policy. We have not therefore introduced in the Bill the White Paper reference to a disclosure prejudicing dealings with another government or international organisation. This part of the test now much more accurately catches its purpose. It is not about maintaining good relations with other countries. Here too it is whether a disclosure jeopardises the interests of the United Kingdom abroad.

/Third,

Third, we have considerably narrowed the crime category. We spoke in the White Paper of penalising the disclosure of information likely to be useful in the commission of offences. The language has a long pedigree. It goes back to the Franks Report, the Labour Government's White Paper and indeed the previous 1979 Bill. But it was suggested to us, for example by the Guild of British Newspaper Editors, that the words were too vague and too wide. The language would, it was argued, cover all sorts of information of a general kind which might conceivably be useful in committing an offence but where the chain of circumstance was too long and too uncertain to justify involving the criminal law. This was never our intention. We have therefore provided a narrow and precise definition for this sort of disclosure so that it will be necessary to prove that the disclosure resulted in the commission of an offence or was likely to have this effect.

Fourth, we have made clear in the Bill what information is to be protected in the area of interception. We have tied this category specifically and only to the unauthorised disclosure of information about or arising from a special investigation. Such an investigation must be undertaken under the authority of a warrant authorised by the Secretary of State under the Interception of Communications Act 1985 or, if Parliament agrees

/our proposals,

our proposals, under the Security Service Bill. The obfuscators at one time suggested that the press would no longer be able to report the belief of a citizen that his telephone was being tapped. That is nonsense.

So we now have a Bill which is tighter in its drafting, narrower in its scope, and more specific in its meaning than our White Paper proposals.

I return to its main purpose.

Many have failed to grasp, or tried to trivialise the impact of these proposals. They have suggested that this Bill will do no more than withdraw the criminal law from frivolous and unimportant information - the menu in the Home Office canteen, the colour of Ministers' carpets and the teabags they use. In fact this Bill will remove the protection of the criminal law from the great bulk of sensitive and important information - including policy documents and Cabinet discussions on education, health and social security. Economic information and budget preparations will no longer have the protection of the criminal law. Nor will material within the protected areas in this Bill which fails to meet a relevant harm test.

Ah, said the obfuscators, but you will compensate for this by legislating to strengthen the civil law on the duty of confidence. You will impose through the civil law what you withdraw from the criminal law. Where is that clause, Mr Speaker? How have we smuggled it in? Sadly for the obfuscators, it never existed. Having studied the Spycatcher judgment, having considered its implications, and the present state of the law most carefully, I can tell the House taht we have no plans to introduce legislation to amend the civil law of confidence.

Ah, said the obfuscators, they will do it all by discipline. The thumbscrews are out, the inquisition is organised. Of course there should be loyalty and discipline within any ordered institution. Even the most chaotic newspaper or private company seeks to provide for this by rules of discipline. Now that the criminal law is to be withdrawn from a great mass of information the Civil Service Code needs to take account of that in its ground rules. But there will be no tightening of disciplinary arrangements and the necessary rewriting will, of course, be discussed with the trade unions. The obfuscators have suggested all sorts of tricks and traps, but failed to prove the existence of any of them.

It is not safe to remove the protection of the criminal law from all official information altogether. Those who disclose

official information without authority may cause such a degree of harm to the country's interests that it is right they should face criminal proceedings. The criminal law is as necessary to protect the public interest in this area as in any other.

But if we are to provide protection in these limited areas, the law must be effective. I make no apologies about that. There can be no credit to Parliament in passing legislation which it knows is flawed, or fudged. It is against this yardstick that I ask the House to consider the arguments of those who wish to overlay the specific definitions and tests in this Bill with blanket defences claiming prior publication and disclosure in the public interest.

The prior publication defence would mean that anyone who could show that his disclosure had been published before at any time or in any form, or anywhere, could in no circumstances commit an offence by his disclosure. It is an offer of immunity from prosecution which I do not think this House should contemplate.

Of course prior publication can be relevant to a prosecution and, for the first time ever, this Bill recognises that fact. With the very narrow exception of special investigations, the

jury will always have to consider whether a journalist who had published a piece of information which had already appeared elsewhere, had in fact caused the specific harm provided in law, and had good reason to know that its publication would cause that harm. It would be for the prosecution to prove both the harm and the knowledge of harm, and to do so beyond reasonable doubt.

In many instances, such a case, if it were ever brought, would fall at that point if there had been prior publication. The defence would argue successfully that prior publication meant that the disclosure being discussed had done no further harm. But not always. There may be circumstances where the timing and placing of a fresh publication was bound to cause harm which an earlier publication had not. For example, a front page spread in a daily newspaper on an item previously carried in a technical journal in another country might well cause serious further harm. There can be no certainty about such matters; and a sensible provision should not suggest that there is. That is why we propose to leave it with the jury.

Our decision to sweep away the proposal for a Ministerial certificate and to replace it with clear and objective criteria for the jury has also changed the whole context of the debate about the so-called public interest defence. So indeed have the proposals in the Security Service Bill before the House.

/There are

There are those who have sought to bolster their case for such a defence by suggesting that there is at present a public interest defence in section 2. That argument does not stand up.

On the basis of the judgments which have been cited as relevant to this matter, we can find none which suggests there is such a defence in the present law. Many have sought to argue such an interest but the judgments have never given any cause to accept that argument. Proponents of the public interest defence must accept that they are asking Parliament to add a new defence, not retain an existing one.

We do not think such a blanket defence can have any reasonable or legitimate place in the proposals which are before the House. It is for Parliament to make clear to the courts what it believes to be in the public interest for the protection of official information. We are asking Parliament to say that it is not in the public interest knowingly to damage the work of the security and intelligence services, knowingly to prejudice the capability of the armed forces, knowingly to jeopardise the country's interests abroad, knowingly to put our citizen's lives at risk, knowingly to add to the crime rate or knowingly to disclose details relating to special investigations under authorised warrants.

/The Bill

The Bill provides that the jury shall consider whether such public interest tests have been met in respect of an individual case. The public interest will therefore be at the heart of the case. The defendant will be able to argue that his disclosure either did not satisfy any relevant harm test - or that he had no reason to know that it did. For someone who was not a Crown servant or government contractor - a journalist, for example, it would be for the prosecution to prove this beyond all reasonable doubt.

Many supporters of a public interest defence have argued that a person may make a disclosure which does good not harm, or that any harm done is so modest as not to merit a criminal sanction. The Bill invites Parliament to establish the few areas and the few cases where a disclosure always causes harm, and in all the other areas provides a harm test which allows the defendant to make precisely these points. That is what a harm test is all about.

The Bill does not allow, however, for someone to say: "Yes, I know my disclosure did the damage set out in the legislation, and what's more I knew that it would, but I divined a different public interest which, in my view, justified my otherwise criminal action".

If people really think that such arguments should be allowed, that the court should be left to balance some sort of competing interest, that it is alright that lives should be lost, or the national interest endangered, as long as one public servant's perception of maladministration, wrong-doing or misconduct should be aired in the press, then I believe we should be close to concluding that these are not matters which can be regulated by the criminal law. We should be close to saying that it is more properly a matter of dispute between the Government and one of its employees whether a disclosure is in the public interest: it is a matter which must be settled by a civil court on the balance of probabilities.

I do not believe the House wants to banish the criminal law from these matters, and I cannot recommend it. The House will of course want to discuss whether we have accurately identified the matters to be protected by the criminal law, and whether we have reasonably set the right levels of harm, but I cannot advise the House to avoid or fudge such questions by introducing a general public interest get-out that has no place in the operation of the criminal law.

Let us take a practical example. In the area of defence the prosecution would have to prove, for example, that the disclosure

was "likely to prejudice the capability of the armed forces" and of course that the defendant knew that this was likely. That may be a hard thing to prove. It would be perfectly in order for the defendant to argue if he could that so far from prejudicing, his disclosure had enhanced the capability of the armed fores. But no responsible person should want a defendant to argue that while he knew that his disclosure would prejudice the capabilities of the armed services to defend us, it was justified on other grounds, for example, because he believed it was in the public interest that the misconduct of a Minister should be exposed, or that the Government's defence policy should be reversed. That is the nature of the over-arching public interest defence which some propose.

I recognise that there are some members of this House who wrestle hardest with this argument in the context of our proposal that members of the security and intelligence services, and some who work with them, must continue to be subject to the criminal law if they make any unauthorised disclosure about their work. The very fact that we argue, as we have consistently argued, that such people cannot talk about their work creates a secret garden which journalists and others naturally want to enter.

It is right that there should be safeguards and controls in this area. The Security Service Bill proposes clearer safeguards and controls for that Service. But it is wrong to think that further safeguards should be provided by giving members of the services open access to the front pages of our national newspapers.

Our security services are there to protect the nation as a whole. They can protect us effectively, for example against terrorism, only to the extent that their operations stay secret. If members or former members of the services make unauthorised disclosures they may be putting at risk the lives not just of their colleagues, but of all of us. They know this when they take on this work. Many operations depend on the use of techniques whose details are not known and for which there are no other means of averting the threat. They depend too on people who help the services knowing that their help will <u>never</u> be made public. When they read any disclosure by a person claiming to be a member of the services, that trust is shaken and the damage can be irreparable.

We have in recent years moved forward in this field. We now have the independent Staff Counsellor for the security and intelligence services. He is there to ensure that the anxieties

of members of the services about their work can be considered at the highest levels. We have introduced the Security Service Bill, which makes clear the extent of the Security Service's remit and the authority and control for its activities. As the House will know, those members of the public or organisations who feel aggrieved by the Service's activities would be able to take their complaint to an independent Tribunal, as they can already take a complaint about the interception of their communications to an independent Tribunal.

There are therefore effective and reasonable ways for members of the security services and others affected, to ensure that anxieties are not smothered and concern about wrong-doing is not overlooked. The aggrieved insider and the aggrieved citizen outside are both catered for. Those who suggest that members of the services should be free to make unauthorised disclosures about their work to members of the public or to journalists have failed to recognise that there are already better avenues for considering such matters. They are making a proposal which could leave the country's security dangerously exposed.

I have tried to deal with some of the real anxieties, and some of the obfuscation, to which the White Paper and the Bill have given rise. It does sometimes happen that the critics of a

/measure create

measure create a caricature in which they themselves come to believe. It was so, I recall, with the Police and Criminal Evidence Bill. Most hon members will recall the tumult, the accusations, the heated meetings, going far beyond anything which even Mr Des Wilson has so far contrived. In the end the Bill was passed, the tumult subsided, the interest groups turned to something else, the caricature was found to be false, and the Act struck the balance which Ministers had described when defending it. So it will be with this Bill.

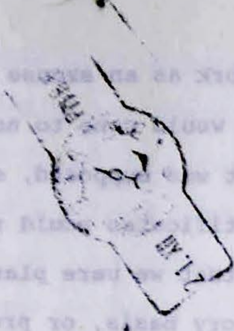
Of course it is not, does not pretend to be, a Freedom of Information Bill. But it comes from a government which has actually freed more information than any of its recent predecessors. The Bill itself lifts from journalists much of the tension inherent in the present law. The House need not have too much sympathy perhaps with those who lamented for decades about the tyranny of Section 2 - and today complain with equal melancholy now that they are to be relieved of it - particularly those who have not yet bothered to understand exactly of what that relief consists.

Finally, let us look back eleven months ago, to the aftermath of the unhappy debate on the Bill of my hon friend the member for Aldridge-Brownhills. Then it was widely supposed that we were

/doing a little

doing a little perfunctory work as an excuse for voting against his Bill, but that this work would come to nothing. Even if we did venture on a proposal, it was supposed, even by my hon friend, that Ministerial certificates would reign supreme. There was of course no suggestion that we were planning to put the Security Service on a statutory basis, or provide a remedy for the aggrieved citizen. It was assumed that by and large we would stay stuck in the trenches dug deep and manned devotedly by the last Government in the days of the rt hon gentlemen for Birmingham, Sparkbrook, Morley and South Leeds and Plymouth Devonport.

Now there is something of a change, is there not? We are now exactly in the position which I then hoped for. I am proud to be the mover and sponsor of the two Bills before the House. When the clouds of obfuscation roll away, they will be seen for what they are. Conservative measures certainly, in that they have at their heart the effective protection of the citizen from specific and grave dangers. But radical reforms also, because they open windows which have remained closed and cobwebbed, because they define clearly what has been confused, because they strike in 1988 a balance designed for today. The Bill will greatly reduce the scope of the criminal law. It will provide a modern fair and effective way of protecting this country's necessary secrets. It will banish the criminal law from vast areas for ever. I commend it to the House.



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CONFIDENTIAL

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBIN BUTLER

OFFICIAL SECRETS BILL:
SECURITY CLASSIFICATION SYSTEM

The Prime Minister has seen your minute of 16 December and has agreed the recommendations in paragraph 6.

I am copying this minute to Stephen Wall (Foreign and Commonwealth Office), Philip Mawer (Home Office), Alex Allan (HM Treasury), Brian Hawtin (Ministry of Defence), Stephen Haddrill (Department of Energy) and Jeremy Godfrey (Department of Trade and Industry).

AT

(ANDREW TURNBULL)
19 December 1988

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Prime Minister
Agree proposals - para 6?
AT 16/12

Ref. A088/3630

PRIME MINISTER

Official Secrets Bill: Security Classification System

The Official Committee on Security have considered the implications of the Official Secrets Bill for the security classification system. This minute seeks your agreement that the Home Secretary should say in debates on the Bill that the present classification system will be amended to reflect the new legislation.

2. The White Paper on the reform of the Official Secrets Act made it clear that the Government had no intention of including any legislative provisions relating to the classification system in the Official Secrets Bill, and the Bill was drafted accordingly. The six categories of protected information set out in the Bill were chosen to reflect the degree of harm which disclosure of information would cause to the public interest. The classification system operates on broadly the same basis: documents are classified according to the degree of harm which their unauthorised disclosure would cause to the national interest. It will therefore be expected that the present classification system should be brought into line with the categories set out in the Bill. The issue, which was touched upon in the Debate on the White Paper on Official Secrets, is almost certain to be raised during the passage of the Bill and Ministers will need to be in a position to respond positively.

3. There are two main arguments for changing the classification system:

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i. it would be difficult to defend leaving our classification system unchanged by the Bill. If there is material which merits classification on grounds of national security, but which does not fall into any of the categories set out in the Bill, then either the categories should be widened (which would run counter to the whole thrust of the Bill) or the scope of the classification system should be narrowed so as to prevent its application to material the disclosure of which is not so harmful to the national interest as to require protection of the criminal law;

ii. the Law Officers believe that the chances of securing a conviction under the terms of the Bill would be somewhat improved if classifications were only applied to material which falls into one or more of the protective categories since it would then be harder for the defence to argue that the discloser did not know that the material in question was protected.

4. Nevertheless, alignment of the classification system with the categories set out in the Bill presents difficulties. It will be essential that information not falling into any of the protected categories but which hitherto has carried a classification (eg information relating to economic policies) should continue to receive adequate protection. This can be achieved by revising and enhancing the present privacy marking system (the "in confidence" markings) which applies to sensitive but unclassified material. The present classification system is well understood and deeply entrenched. Given that any changes to it could not be made retrospective, there is likely to be some confusion during the change over period when large quantities of material marked under the old system would coexist with material marked under the new one. A major programme of re-education will be required. Since the operation of the criminal law does not depend on classification, and not all

material covered by the new Bill will necessarily be classified, it will be important to make it clear to civil servants that the absence of a classification will not necessarily absolve them from liability to prosecution under the new law.

5. If Ministers agree that the classification system should be brought into line with the provisions of the Bill, detailed proposals will be worked up. The new arrangements ~~will not~~ need to be introduced until the Act comes into force, which will probably be some months after the Bill has been given the Royal Assent. In the meantime, however, an early decision in principle is needed so that Ministers can be briefed in time for the Second Reading Debate which is expected to take place before the Christmas recess.

6. The purpose of this minute is to seek your agreement that:

a. the classification system should be revised to take account of the terms of the Bill and that the privacy marking system should be revised and enhanced in order to protect material which would no longer attract a security classification;

b. officials should now work up detailed proposals for the implementation of the necessary changes; and

c. if questions are raised on these issues during the Second Reading Debate, the Home Secretary should speak on broadly the following lines:

"If the Bill is passed we shall review and revise the system for classifying documents. In future, a document would only be given a security classification if the classifier considered that it fell within the categories covered by the Act. There will, of course, be other information, for example on economic or

FRBAPW

personnel matters, which will no longer be covered by the new Act but which may be highly sensitive and, as in any organisation, will need to be protected. It will, therefore, continue to be essential to ensure that such information receives a suitable alternative marking which gives it the necessary protection from disclosure."

7. I am copying this minute to the Foreign and Commonwealth Secretary, the Home Secretary, the Chancellor of the Exchequer, and the Secretaries of State for Defence, Energy and Trade and Industry.

FERB

ROBIN BUTLER

16 December 1988

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File

SRWBSN

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBIN BUTLER

OFFICIAL SECRETS BILL

I have shown the Prime Minister your minute of 6 December about the power in the Official Secrets Bill for the responsible Minister to "notify" individuals or groups who work closely with the security and intelligence services and impose on them the same obligations of secrecy as on members of those services.

The Prime Minister agrees that the list of people to be notified under the new legislation should include those Ministers closely involved with the intelligence services, as well as civil servants and others. She also agrees that during the debate on the Official Secrets Bill the Home Secretary should confirm that it will extend to those whose responsibilities require them to have a detailed knowledge of the work of the security and intelligence services, but he should decline to give the list of Ministerial offices which would be covered in this way.

I am copying this minute to the Private Secretaries to the Foreign and Commonwealth Secretary, the Home Secretary, the Secretary of State for Defence and the Attorney General.

(N. L. WICKS)
7 December 1988

CONFIDENTIAL

KK

Prime Minister
Agree that Ministers closely involved with the security services should be "notified" and that the Home Secretary should take the line in Parliament recommended at x in paragraph 4?
N.L.W.
6.12

Ref. A088/3532

MR WICKS

The Official Secrets Bill

The Prime Minister will recall that there is a power in the Official Secrets Bill for the responsible Minister to "notify" individuals or groups who work closely with the security and intelligence services and impose on them the same obligations of secrecy as on members of those services. It needs to be decied whether Ministers whose responsibilities involve them closely with the intelligence services and gives them access to sensitive information should be among those to be notified in this way.

2. Ministers are, of course, subject to the Official Secrets legislation like other people. When they take up and leave office, they are required to sign a declaration accepting their obligations under the Act as civil servants are. They are not positively vetted for reasons both of principle and practicality, but the reasons for absolving them from positive vetting do not affect their liability under the Official Secrets legislation.

3. The list of people to be notified under the new legislation is not to be made public but it seems to me and to the Home Office that it should include those Ministers closely involved with the intelligence services as well as civil servants and others. I understand that the Home Secretary agrees. The liability under the new legislation only applies in respect of information acquired while the person has been notified that he holds a post connected with the security and intelligence services. A Minister cannot notify himself, and the arrangements will need to take account of this.

FRBAPC

4. The Home Secretary was asked during the debate on the Address whether notification would extend to Ministers but did not reply. I recommend that during the debates on the Official Secrets Bill the Home Secretary should confirm that it will extend to those where responsibilities require them to have a detailed knowledge of the work of the services, but he should decline to give the list of Ministerial offices which will be covered in this way.

5. I should be glad to know whether the Prime Minister agrees.

6. I am copying this letter to the Private Secretaries to the Foreign and Commonwealth Secretary, the Home Secretary, the Secretary of State for Defence and the Attorney General.

fR.R.B.

ROBIN BUTLER

6 December 1988

FRBAPC

SECRET

PRIME MINISTER

ENFORCING THE DUTY OF CONFIDENTIALITY

As your office has been told, I will have to leave this afternoon's OD(DIS) meeting to answer Oral Questions in the House. If the discussion is still continuing, I will come back after 3.30.

There is a specific point, on which I should give my views in case I should be absent for that part of the discussion - the possible introduction of a judicial tribunal procedure in order to close the jurisdiction loophole to pensions forfeiture. I would be content in principle to see this change made but I am very doubtful that the Official Secrets Bill offers the most sensible way of achieving this.

I am copying this minute to members of OD (DIS) to the Lord Advocate and to Sir Robin Butler.

JW

28.11.88

SECRET

CONFIDENTIAL

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

AB to see type

24 November 1988

Dear Mr de Waal,

OFFICIAL SECRETS BILL

As you know, the Bill is to be considered by the Legislation Committee on 29 November. If the Committee approves introduction of the Bill in the House of Commons as proposed I should be grateful if you would arrange for notice of presentation to be Tabled on the same day for introduction of the Bill at the commencement of public business Wednesday 30 November. After consulting the Home Secretary's office I can confirm that we should like the Bill published on Wednesday, 30 November immediately following presentation.

The Bill should be presented by Mr Secretary Hurd, supported by:

The Prime Minister
Secretary Sir Geoffrey Howe
Mr Secretary Younger
Mr Secretary King
Mr Secretary Rifkind
Mr John Patten

It has been agreed that there will be no Press Conference on 30 November but that a Press Notice will be issued that day. I should be grateful if you would arrange for 150 copies of the Bill, addressed to the Home Secretary, to be delivered to the Vote Office on the morning of 30 November, embargoed until the time of publication that afternoon.

I am sending copies of this letter to Andy Bearpark (Prime Minister's Office), Shaun Mundy (Cabinet Office), Alison Smith (Lord President's Office), Murdo Maclean (Chief Whip's Office, Commons), Rhodri Walters (Chief Whip's Office, Lords) and Brian Shillito.

Yours sincerely

J A Gilbert

J A GILBERT
Parliamentary Clerk

C H de Waal Esq CB QC

CONFIDENTIAL

Prime Minister
This is a neat paper.

N.C.U.
25.11

CONFIDENTIAL

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SIR ROBIN BUTLER

c Mr Wicks

OD(DIS): Pensions

There was one point arising at the Prime Minister's briefing this morning which you asked me to pursue. This was whether, even if the legislation on pensions forfeiture were to be somewhat delayed because of the difficulty of finding time for it and a suitable vehicle in the legislative programme, it would nevertheless be possible to rely on an early statement of intention by the Government having more or less immediate force.

2. I have spoken to the Lord Chancellor's Department who in turn have consulted the Treasury Solicitor. The view is that this probably would be possible, subject to the following provisos -

i. the statement of intention by HMG would have to be reasonably precise;

ii. the gap between the statement and the passage of legislation should not be unreasonably long, i.e. we would need to legislate at the latest in the session after next;

iii. the legislation itself would probably have to contain explicit features making clear that it was retrospective in effect to the date of the Government's statement of intention;

iv. politically this would engender some controversy.

3. Ideally we also need a view from the Attorney General's office who, since the Burmah Oil case, are apparently an obligatory point of reference for all retrospective provisions touching the Civil Service. The relevant people have not been available today.

4. I also discussed with the Lord Chancellor's Department the possibility of setting up the tribunal of fact for pensions forfeiture by executive act during the period between the Government's statement of intention and the passage of legislation. I am told that this could not be done since it would not then be established by law as required under Article 6 of the European Convention of Human Rights.

P J WESTON

25 November 1988

CC B/up

-6(A-C)

Jp 0680

MR WICKS

Enforcing the Duty of Confidentiality: OD(DIS)(88) 65

The Prime Minister is to hold a preliminary discussion with Sir Robin Butler tomorrow.

2. My concerns centre on the problem of how to avoid publication abroad by a disaffected member of the intelligence community, followed by serialisation in the newspapers at home, thereby sidestepping our defences in two simple moves. In our discussion earlier in the year with the Prime Minister we saw this as perhaps the critical issue. We recognised that a reformed Official Secrets Act might well provide an appropriate punishment if the man returned to the jurisdiction; but what we were looking for was a method of preventing the revelations before they were made, or at least before they were made in this country.

3. I doubt whether these concerns have been satisfactorily answered in the Report, though it may be that there is no entirely satisfactory answer.

4. In dealing with this issue the Report strikes a rather complacent note. It is true that the Law Lords came down on our side on the substantive law; but if we cannot enforce the law in the cases we are talking about that helps us very little. The Report also seeks to brush aside the problem of the overseas offender as a practical rather than a legal one (paragraph 2.6); I don't derive much comfort from this. Nor do I find the "sliding scale" argument in the same paragraph reassuring (the thought that the courts may not refuse an injunction where there has been only a trickle of publication abroad): in most situations in the future the publication

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abroad is likely to be widespread, not just in some obscure magazine.

5. In earlier papers the thought was considered that any further civil legislation might provide that confidentiality was only lost when information became widely available to the UK public as a whole. This may now be seen as too controversial, following hard on the Lords' judgment, or impracticable, requiring us to prevent imports of the offending publication. But before we abandon this line of enquiry altogether I should have liked to see it examined, if only to be dismissed, in the Report.

6. Subject to this, I should be prepared, reluctantly, to accept the Report's conclusion that we abandon the attempt for legislation on the civil law of confidence, also that any benefits to be gained would probably be outweighed by the disadvantages. There is the related point that further legislation could impose too great a Parliamentary burden and could prejudice the smooth passage of the Security Service Bill and that reforming the OSA.

7. The possibility of international agreements to restrain harmful publication is certainly worth exploring, but we should not rest too many hopes on it and in any case it will take a long time.

8. It follows from the above that I would favour action on pensions, since, failing further legislation, this may be the only effective deterrent against the non-resident offender. I accept that pension forfeiture would have its loopholes, since no way has been found to extend forfeiture to personal pensions, or to pension assets transferred out of public service schemes. I also accept that there could be Parliamentary criticism of the tribunal procedure as a trial in absentia, though I think this could be balanced by a

healthy distaste for continuing to pay considerable sums of public money to those guilty of treachery.

9. As regards the legislative vehicle for covering pensions forfeiture, I think it would be better to avoid provisions in the Official Secrets Bill. In any case old-fashioned treason would probably need to be covered in the tribunal procedure and Parliamentary Counsel advises that treason could not be included in the Official Secrets Bill. This would seem to point to the alternative of a self-contained Bill later in Parliament.

10. I have no objection to the remaining recommendations in the Report, ie that work should be done on using a Crown copyright as a second barrel to a claim in confidence; that the Civil Service Code should be amended to bring out the general duty of civil servants not to breach confidence; and that current undertakings by members of the security and intelligence services should include a provision that the English courts have jurisdiction in the case of a breach of confidentiality committed abroad.

PERCY CRADOCK

24 November 1988

FROM THE RIGHT HONOURABLE THE LORD MACKAY OF CLASHFERN

HOUSE OF LORDS,
LONDON SW1A 0PW

CONFIDENTIAL

PRIME MINISTER

Enforcing the duty of Confidentiality:
Meeting of OD(DIS)

1. I much regret that I shall be unable to attend the meeting of OD(DIS) on 28 November as I shall be sitting judicially. It may nevertheless be helpful if I set out my views on the Fourth Report to Ministers - OD(DIS)(88)65 in advance of that meeting.

2. As far as a possible reform of the civil law of confidence is concerned, I entirely endorse the conclusions reached by officials that legislation on the civil law of confidence is unnecessary and would bring no benefit commensurate with the disadvantages incurred. The judgment of the House of Lords in Guardian and others v. Attorney-General has vindicated the Government's position as to the existence of the duty of confidence of members of the security and intelligence services, whilst the requirements in the civil law to prove damage do in fact closely correspond to the requirements to prove offences under the Official Secrets Bill. Accordingly, a statement by the Government that it has no intention of changing the civil law of confidence would, in my judgment, assist the passage of the Official Secrets Bill in the House of Lords.

3. I would also support the conclusion of officials that further work be done to examine the possibility of international agreements to restrain or discourage harmful publications abroad. The recent visit by the Attorney-General to Australia and New Zealand has given some encouragement in this direction. The negotiation of such agreements will be a difficult and sensitive task and their implementation would probably require primary legislation in this country as well as in the other countries concerned.

4. As far as copyright is concerned, I agree that further work on possible assignments of future copyright should be left in abeyance, unless and until it appears that the equitable vesting of copyright in the Crown (as referred to in the House of Lords' judgment) does not, after all, provide a workable remedy. It would, however, be useful for further work to be undertaken on the question whether such a vesting of copyright in the Crown would be recognised in foreign jurisdictions so as to permit the Crown to bring copyright infringement proceedings in those jurisdictions. Nevertheless, it should be recalled that copyright is at best only a secondary remedy to prevent breaches of confidence, since the fair dealing exceptions under the international copyright conventions would allow some publication of the confidential information.

5. I have no particular comment to contribute on the work on terms of employment of civil servants, save to endorse the conclusion that the Code be amended in line with Sir Robert Armstrong's note of December 1987.

6. As far as work on pensions forfeiture is concerned, I still have considerable doubt as to whether the exercise of establishing an expatriate forfeiture regime is worth the controversy it will arouse. The fact that there are no practicable means to prevent the transfer of personal pensions out of the public service scheme, and no means of "tracking"

pension assets if there has been such a transfer, must make the forfeiture scheme of negligible value as a deterrent. The requirements of the European Convention on Human Rights - notably Article 6 which guarantees a fair and public hearing by an independent tribunal - would have to be taken into account in devising an acceptable procedure for such forfeiture. As you will see from Appendix II to Annex D to the Fourth Report, I have discussed a possible procedure with the Law Officers. This would involve an independent tribunal making a declaration of fact that a person has committed an offence under the Official Secrets Acts and would have been convicted had he been so charged. In the light of this declaration the minister would make a decision on forfeiture which would, of course, be subject to judicial review in the normal way. I apprehend that such a procedure will be criticised as a trial in absentia and, perhaps, as an attempt to circumvent the function of a jury.

7. If such a forfeiture scheme were to be included in the Official Secrets Bill, it appears that it would increase its scope and add very considerably to the difficulties of securing its passage in both Houses. In answer, therefore, to the question posed by the OD(DIS) paper, I would strongly suggest that provisions on pensions forfeiture should not be included in the current Official Secrets Bill.

8. I am copying this minute to members of OD(DIS), to the Lord Advocate and to Sir Robin Butler.

M of C

24 November 1988

SECRET

B.0280

PRIME MINISTER

c Sir Robin Butler

OD(DIS) MEETING AT 2.30 PM ON 28 NOVEMBER

Chairman's Brief

ENFORCING THE DUTY OF CONFIDENTIALITY

ATTENDANCE

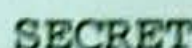
1. All members of the Sub-Committee will attend, namely the Foreign and Commonwealth Secretary, the Home Secretary, the Lord President and the Attorney General. The Chancellor of the Exchequer, The Lord Chancellor, the Lord Privy Seal and the Lord Advocate are also invited, although the Lord Chancellor is unable to attend, and Mr Lawson will be represented by the Paymaster General.

CONCLUSION

2. The paper points the Committee to concluding -

a. legislation on the civil law of confidence, in the light of the Lords' judgment, is unnecessary;

b. further work should be done on the possibility of negotiating international agreements to limit the risk that the duty of confidence can profitably be breached abroad;



c. no further work be done on future assignment of copyright;

d. but work should be done on using a claim to Crown copyright as a second barrel to a claim in confidence where the duty is, or threatens to be, breached;

e. the Civil Service Code should be amended to bring out the general duty of all civil servants not to breach confidence;

f. current undertakings by members of the security and intelligence services should include a provision that the English courts have jurisdiction in case of a breach of confidentiality committed abroad;

and Ministers will need to take a view on whether -

g. a judicial tribunal provision should be introduced to close the jurisdiction loophole to pensions forfeiture.

BACKGROUND

3. The meeting will discuss the Fourth Report of the Official Group on Enforcing the Duty of Confidentiality (OD(DIS)(88)65), 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 to the paper on the

Way Ahead in and after the Wright Case (OD(DIS)(88)22) discussed by OD(DIS) on 14 March. Earlier consideration by Ministers was postponed pending the Law Lords' judgment on the Wright case which was delivered on 13 October. That judgment was satisfactory in the sense that the Law Lords unanimously upheld the lifelong duty of confidence owed to the Crown by members and former members of the security and intelligence services; and also held that third parties were bound by a duty of confidence where they come into possession of information from such sources. But the major difficulty remained: that in a future Wright-type case the offender is free to escape the jurisdiction and seek widespread publication abroad as a device for circumventing the obstacles to publication at home, and perhaps even achieving that too in due course. The work done by officials has concentrated on measures which seemed to offer some cumulative prospect of rendering any such future offence or breach of the duty increasingly unattractive or unrewarding: the hope being that a series of such measures bearing on the duty of confidence would, taken in conjunction with the reform of Section 2 of the Official Secrets Act, constitute a substantial deterrent. Unfortunately it is clear that no simple solutions exist, although further work in some areas opened up by the Law Lords may yet yield dividends.

HANDLING

4. The cover note to OD(DIS)(88)65 suggests that the meeting might focus particularly on the points for decision listed in Section III of the Note by Officials (paras. 3.1

a-h). You may wish to treat these as your agenda. For ease of reference they are repeated below in bold type, with additional comments.

Reform of the Civil Law

a. Do Ministers accept that legislation on the civil law of confidence is unnecessary and that any benefits would be outweighed by the disadvantages (paragraphs 2.3-2.5)?

The Law Lords ruling in the Wright case makes it clear that members and former members of the security and intelligence services owe a lifelong duty of confidence to the Crown. And there is much that can be relied on to prevent publication in the United Kingdom in future cases. But the judgment was not absolutely watertight on prior publication, conceding that the widespread publication achieved abroad by "Spycatcher" had destroyed the Crown's case on further damage by publication in the United Kingdom. In the circumstances, do the Sub-Committee agree that legislation on the civil law could do nothing to close this loophole? (The Attorney General.)

b. Should officials be instructed to do further work on international agreements (paragraphs 2.6-2.7)?

The Wright case has highlighted the problem of disclosure outside the jurisdiction. International agreements with close allies, for example

help reduce the risk of such disclosure, above all by making it unprofitable and focussing on the need to prevent unjust enrichment by the breacher of confidence or his agents. How feasible are such agreements? What is the position and the prospects in the United States, likely to be crucial as the main English speaking market? Do we need to undertake formal bilateral discussions with close intelligence allies on all this (US, Canada, Australia, New Zealand)? The Attorney General will have views after his recent visit to Australia and New Zealand. The Foreign Secretary may also wish to comment.

Assignment of Copyright

c. Do Ministers agree that no further work should be done on future assignment of copyright (paragraphs 2.9-2.10)?

Before the Law Lords' judgment on "Spycatcher", consideration was being given to seeking formal assignment of future copyright from members of the security and intelligence services. Serious difficulties had been identified as regards drafting such an assignment, limiting it to members of the security and intelligence services, and enforcing it abroad. A more promising avenue may be that indicated by the Law Lords' suggestion that the Crown might be able to claim in equity the copyright in any work relating to his service published by a present or future

member of the security and intelligence services. Do the Sub-Committee agree? (The Attorney General, the Foreign Secretary, the Home Secretary.)

d. Should further work be done to assess the prospects of bringing proceedings in the UK courts on the basis of copyright (paragraphs 2.9-2.10)?

Should this new copyright avenue now be explored energetically? Is there a case pending, or on the horizon, in which a claim in copyright should be made as a second barrel to the claim in confidence, thereby testing the Law Lords' suggestion? If not, how can the possibility of a claim in copyright be highlighted for its deterrent effect? What are the chances that, if the principle is established in the English courts, its enforcement in a particular case could also be established abroad? (Attorney General.)

Terms of Employment

e. Should the Civil Service Pay and Conditions of Service Code (the Code) be amended (as foreshadowed in the White Paper on reform of the Official Secrets Act) in line with Sir Robert Armstrong's revised note of December 1987 (paragraphs 2.13-2.14)?

Do the Sub-Committee agree that, rather than define civil servants' duty of confidentiality anew by primary legislation, it would be better to rewrite the present Code paragraphs? The new Official Secrets Act will in any event necessitate changes to the Code. These could now be made in line with the revised note on the duties and responsibilities of public servants issued by Sir Robert Armstrong in December 1987. (Annexed to this brief.) The Home Secretary may wish to comment. He is likely to consider that the controversy that would surround legislation would complicate passage of the Official Secrets Bill.

f. Do Ministers accept that members of the security and intelligence services should not be asked to sign formal contracts (paragraph 2.15)?

Are the strengthened undertakings now demanded of the security and intelligence services, and of GCHQ staff, enough? If the jurisdiction provision were also included in the current undertakings required of new staff, would that undertaking be extended to all existing staff? If not, why not? (Foreign Secretary, Home Secretary and Attorney General.)

Pensions

g. Should a judicial tribunal procedure be introduced in order to close the jurisdiction loophole to pensions forfeiture (paragraphs 2.16-2.23)?

Pension forfeiture imposed by judicial tribunal would provide a sanction against those who breach the duty of confidence but escape the jurisdiction. But it would not be comprehensive since no way has been found to extend forfeiture to personal pensions, or pension assets transferred out of public service schemes. Despite this loophole, and likely Parliamentary criticism of the tribunal procedure, do the Sub-Committee think that this would have a useful deterrent effect? (Attorney General, Home Secretary.)

h. When should any legislation on "g." be introduced? Should it be added to the Bill to reform Section 2 (paragraphs 2.24-2.28)?

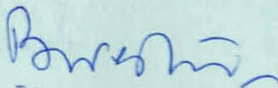
On your instructions, contingent drafting is taking place to include pensions forfeiture provisions in the Official Secrets Bill. The Home Secretary, however, is extremely reluctant to see such provisions included in the Bill on the grounds that this would make passage of it much more difficult and would lay it open to damaging amendment. He would therefore much prefer to see any decision to proceed with pension forfeiture introduced in a different Bill. In practice, since the legislative programme is already crowded, and the Treasury say they have no suitable Bill of their own, this would probably

mean a self-contained Bill in the second half of the Parliament. (Home Secretary, Lord President, the Chancellor of the Exchequer.)

How would new forfeiture provisions compare with the present situation? Treason (Section I) would surely also need to be covered if the tribunal procedure were introduced for the new Section II offences. But if, as Parliamentary Counsel advises (para.2.24), treason could not be included in the Official Secrets Bill, does this effectively preclude the Official Secrets Bill as a legislative vehicle for pensions forfeiture? (Attorney General.)

NEXT STEPS

5. You may like to suggest a further meeting of OD(DIS) in six months to take stock of the further work to be done by officials.



P J WESTON

Cabinet Office
23 November 1988

THE DUTIES AND RESPONSIBILITIES OF CIVIL SERVANTS
IN RELATION TO MINISTERS

Note by the Head of the Home Civil Service

In February 1985, with the consent of the Prime Minister, I issued a note of guidance restating the general duties and responsibilities of civil servants in relation to Ministers. That note was reproduced in a Written Answer by the Prime Minister to a Parliamentary Question on 26 February 1985 (OR 26 February 1985, cols 130 to 132). In the light of subsequent discussion, including observations of the Treasury and Civil Service Select Committee and the Defence Committee of the House of Commons and comments from the Council of Civil Service Unions, I have expanded the note of guidance, and a revised version is now issued. As previously, the note is issued after consultation with Permanent Secretaries in charge of Departments and with their agreement. As with the earlier version, this revised version is issued with the consent of the Prime Minister, and will be reported by her to the House of Commons.

2. This note is concerned with the duties and responsibilities of civil servants in relation to Ministers. It should be read in the wider context of Ministers' own responsibilities, which were set out in the Government's reply to the Seventh Report from the Treasury and Civil Service Committee (Cmnd 9841):

> "The Government believes that Ministers are well aware of the principles that should govern their duties and responsibilities in relation to Parliament and in relation to civil servants. It goes without saying that these include the obligations of integrity. They include the duty to give Parliament and the public as full information as possible about the policies, decisions and actions of the Government, and not to deceive or mislead Parliament or the public. In relation to civil servants, they include

the duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching policy decisions; the duty to refrain from asking or instructing civil servants to do things which they should not do; the duty to ensure that influence over appointments is not abused for partisan purposes; and the duty to observe the obligations of a good employer with regard to terms and conditions of service and the treatment of those who serve them."

3. Civil servants are servants of the Crown. For all practical purposes the Crown in this context means and is represented by the Government of the day. There are special cases in which certain functions are conferred by law upon particular members or groups of members of the public service; but in general the executive powers of the Crown are exercised by and on the advice of Her Majesty's Ministers, who are in turn answerable to Parliament. The Civil Service as such has no constitutional personality or responsibility separate from the duly constituted Government of the day. It is there to provide the Government of the day with advice on the formulation of the policies of the Government, to assist in carrying out the decisions of the Government, and to manage and deliver the services for which the Government is responsible. Some civil servants are also involved, as a proper part of their duties, in the processes of presentation of Government policies and decisions.

4. The Civil Service serves the Government of the day as a whole, that is to say Her Majesty's Ministers collectively, and the Prime Minister is the Minister for the Civil Service. The duty of the individual civil servant is first and foremost to the Minister of the Crown who is in charge of the Department in which he or she is serving. The basic principles of accountability of Ministers and civil servants are as set out in

Government's response (Cmnd 9916) to the Defence Committee's Fourth Report of 1985-86:

- Each Minister is responsible to Parliament for the conduct of his Department, and for the actions carried out by his Department in pursuit of Government policies or in the discharge of responsibilities laid upon him as a Minister.

- A Minister is accountable to Parliament, in the sense that he has a duty to explain in Parliament the exercise of his powers and duties and to give an account to Parliament of what is done by him in his capacity as a Minister or by his Department.

- Civil servants are responsible to their Ministers for their actions and conduct.

5. It is the duty of civil servants to serve their Ministers with integrity and to the best of their ability. In their dealings with the public, civil servants should always bear in mind that people have a right to expect that their affairs will be dealt with sympathetically, efficiently and promptly.

6. The British Civil Service is a non-political and professional career service subject to a code of rules and disciplines. Civil servants are required to serve the duly constituted Government of the day, of whatever political complexion. It is of the first importance that civil servants should conduct themselves in such a way as to deserve and retain the confidence of Ministers, and to be able to establish the same relationship with those whom they may be required to serve in some future Administration. That confidence is the indispensable foundation of a good relationship between Ministers and civil servants. The conduct of civil servants should at all times be such that Ministers and potential future Ministers can be sure that that confidence can be freely given,

and that the Civil Service will at all times conscientiously fulfil its duties and obligations to, and impartially assist, advise and carry out the policies of, the duly constituted Government of the day.

7. The determination of policy is the responsibility of the Minister (within the convention of collective responsiblity of the whole Government for the decisions and actions of every member of it). In the determination of policy the civil servant has no constitutional responsibility or role distinct from that of the Minister. Subject to the conventions limiting the access of Ministers to papers of previous Administrations, it is the duty of the civil servant to make available to the Minister all the information and experience at his or her disposal which may have a bearing on the policy decisions to which the Minister is committed or which he is preparing to make, and to give to the Minister honest and impartial advice, without fear or favour, and whether the advice accords with the Minister's view or not. Civil servants are in breach of their duty, and damage their integrity as servants of the Crown, if they deliberately withhold relevant information from their Minister, or if they give their Minister other advice than the best they believe they can give, or if they seek to obstruct or delay a decision simply because they do not agree with it. When, having been given all the relevant information and advice, the Minister has taken a decision, it is the duty of civil servants loyally to carry out that decision with precisely the same energy and good will, whether they agree with it or not.

8. Civil servants are under an obligation to keep the confidences to which they become privy in the course of their work; not only the maintenance of the trust between Ministers and civil servants but also the efficiency of government depend on their doing so. There is and must be a general duty upon every civil servant, serving or retired, not without authority to make disclosures which breach that obligation. This duty

applies to any document or information or knowledge of the course of business, which has come to a civil servant in confidence in the course of duty. Any such unauthorised disclosures, whether for political or personal motives, or for pecuniary gain, and quite apart from liability to prosecution under the Official Secrets Acts, result in the civil servant concerned forfeiting the trust that is put in him or her as an employee and making him or her liable to disciplinary action including the possibility of dismissal, or to civil law proceedings. He or she also undermines the confidence that ought to subsist between Ministers and civil servants and thus damages colleagues and the Service as well as him or herself.

9. Civil servants often find themselves in situations where they are required or expected to give information to a Parliamentary Select Committee, to the media, or to individuals. In doing so they should be guided by the policy of the Government on evidence to Select Committees, as set out in memoranda of guidance issued from time to time, and on the disclosure of information, by any specifically departmental policies in relation to departmental information, and by the requirements of security and confidentiality. In this respect, however, as in other respects, the civil servant's first duty is to his or her Minister. Thus, when a civil servant gives evidence to a Select Committee on the policies or actions of his or her Department, he or she does so as the representative of the Minister in charge of the Department and subject to the Minister's instructions*, and is accountable to the Minister for

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*A Permanent Head of a Department giving evidence to the Committee of Public Accounts does so by virtue of his duties and responsibilities as an Accounting Officer as defined in the Treasury memorandum on The Responsibilities of an Accounting Officer; but this is without prejudice to the Minister's responsibility and accountability to Parliament in respect of the policies, actions and conduct of his Department.

the evidence which he or she gives. As explained in paragraph 2, the ultimate responsibility lies with Ministers, and not with civil servants, to decide what information should be made available, and how and when it should be released, whether it is to Parliament, to Select Committees, to the media or to individuals. It is not acceptable for a serving or former civil servant to seek to frustrate policies or decisions of Ministers by the disclosure outside the Government of information to which he or she has had access as a civil servant

10. The previous paragraphs have set out the basic principles which govern the relations between Ministers and civil servants. The rest of this note deals with particular aspects of conduct which derive from them, where it may be felt that more detailed guidance would be helpful.

11. A civil servant should not be required to do anything unlawful. In the very unlikely event of a civil servant being asked to do something which he or she believes would put him or her in clear breach of the law, the matter should be reported to a senior officer or to the Principal Establishment Officer, who should if necessary seek the advice of the Legal Adviser to the Department. If legal advice confirms that the action would be likely to be held to be unlawful, the matter should be reported in writing to the Permanent Head of the Department.

12. There may exceptionally be circumstances in which a civil servant considers that he or she is being asked to act in a manner which appears to him or her to be improper, unethical or in breach of constitutional conventions, or to involve possible maladministration, or to be otherwise inconsistent with the standards of conduct prescribed in this memorandum and in the relevant Civil Service codes and guides. In such an event the matter should be reported to a senior officer, and if appropriate to the Permanent Head of the Department.

13. Civil servants should always recall that it is Ministers, and not they, who bear political responsibility. A civil servant should not decline to take, or abstain from taking, an action because to do so would conflict with his or her personal opinions on matters of political choice or judgment between alternative or competing objectives and benefits; he or she should consider the possibility of declining only if taking or abstaining from the action in question is felt to be directly contrary to deeply held personal conviction on a fundamental issue of conscience.

14. A civil servant who feels that to act or to abstain from acting in a particular way, or to acquiesce in a particular decision or course of action, would raise for him or her a fundamental issue of conscience, or is so profoundly opposed to a policy as to feel unable conscientiously to administer it in accordance with the standards described in this note, should consult a senior officer. If necessary, and if the problem cannot be resolved by any other means, the civil servant may take the matter up with the Permanent Head of the Department and also has a right, in the last resort, to have the matter referred to the Head of the Home Civil Service through the Permanent Head of the Department; detailed provisions for such appeals are included in the Civil Service Pay and Conditions of Service Code. If the matter still cannot be resolved on a basis which the civil servant concerned is able to accept, he or she must either carry out his or her instructions or resign from the public service - though even after resignation he or she will still be bound to keep the confidences to which he or she has become privy as a civil servant.

ROBERT ARMSTRONG

Cabinet Office
1 December 1987

NBPM

MO 23/2E

PRIME MINISTER

OFFICIAL SECRETS BILL

at flag

1. I have seen a copy of the Home Secretary's minute to you of 9th November and I am content with his proposed changes to the Bill.

2. I am sending a copy of this minute to OD(DIS) colleagues and to Sir Robin Butler.

G.Y.

Ministry of Defence

15th November 1988

SECURITY: Official Secrets Pt 2

FCS/192/88

HOME SECRETARY

Official Secrets Bill

1. Thank you for sending me a copy of your minute of 9 November to the Prime Minister.

2. Your minute reflects our recent exchanges on the points concerning international relations and interception, and I agree that we should now press ahead, as you suggest.

3. I am copying this minute to the recipients of yours.

(GEOFFREY HOWE)

Foreign and Commonwealth Office
15 November 1988

SECURITY: Official Secrets Act
Pt 2

CONFIDENTIAL

File
SRW

10 DOWNING STREET
LONDON SW1A 2AA

From the Principal Private Secretary 14 November 1988

Dear Philip,

OFFICIAL SECRETS BILL

The Prime Minister has seen the Home Secretary's minute of 9 November in which he seeks Ministers' agreement to implementing the proposals in the Official Secrets White Paper, subject to certain changes which he describes in his minute.

The Prime Minister agrees, subject to the views of colleagues, that the Home Secretary should proceed as he proposes in his minute.

I am sending a copy of this letter to the Private Secretaries to members of OD(DIS) and Sir Robin Butler.

Yours ever,
Nigel Wicks

(N. L. WICKS)

Philip Mawer, Esq.,
Home Office.

CONFIDENTIAL

Prime Minister

Content with the proposals of the Home Secretary in his minute attached?

N.L.W.
10.11

CONFIDENTIAL

B.0270

Yes

MR WICKS

Official Secrets Bill

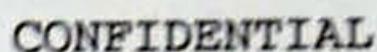
You asked for comments on the Home Secretary's minute of 9 November to the Prime Minister. Broadly speaking the Home Secretary sweeps up in his minute a number of points on which he has been in separate correspondence or discussion with colleagues directly concerned during the last few months. He is thus not trying to take anyone by surprise. The main points seem to me to be as follows.

Information obtained in confidence from foreign governments and international organisations (Paragraph 4)

A harm test is inserted for this category of information, to help meet widespread criticism.

Interception (Paragraphs 5 and 6)

The Bill will specify that the offence relates to information obtained under a warrant issued under the Interception of Communications Act 1985. This means that other interception information, e.g. from GCHQ, will be covered by the provisions of the Bill relating to the security and intelligence category, with a damage test for disclosures by third parties. The purpose is to avoid dangerous probing in Parliament about areas of interception not covered by the 1985 Act.

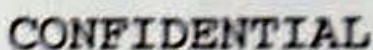


Information entrusted in confidence to another State or international organisation (Paragraph 8)

The earlier draft of the Bill provided as a defence under this heading that it would suffice to show that the information in question had at the time of the alleged offence already been made available to the public with the authority of the State in question. This would come close to conceding a prior publication defence, which HMG will wish to rebut strongly throughout the debate on this Bill. Mr Hurd therefore now proposes that there be no such specific defence; but that it will be up to the prosecution to prove as part of the offence that disclosure had taken place without the authority of that state or international organisation.

International relations (Paragraphs 9 and 10)

Mr Hurd follows the Foreign Secretary in extending the definition of international relations to provide for protection for information about the internal affairs of another state (e.g. to prevent leakage of items such as Sir James Craig's despatch on Saudi Arabia). But he also follows him in sharpening the definition of the test of harm by substituting "jeopardises the interests of the United Kingdom abroad" for the earlier "prejudices relations between the United Kingdom and another state".



<u>Pensions</u> (Paragraph 12)

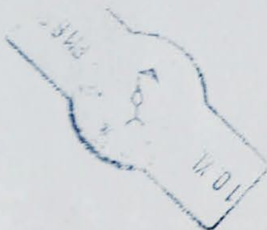
The proposed amendment is purely consequential. This does not touch the matter which officials are pursuing separately (and which will come to Ministers in OD(DIS) on 28 November): the proposal to introduce pensions forfeiture for the special offence and to authorise this by means of a judicial tribunal where the miscreant has fled the jurisdiction.

P J WESTON

10 November 1988

Copy: Mr Woolley

Security
Official Secrets Act Pt 2



10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary 10 November 1988

Dear Michael,

COPYRIGHT AS A WEAPON IN CONFIDENCE CASES

The Prime Minister has seen the Attorney General's minute of 8 November about the use of copyright as a weapon in confidence cases.

Subject to the views of other Ministers, she agrees with the approach in the Attorney General's minute.

I am copying this letter to the Private Secretaries to other members of OD(DIS), Paul Stockton (Lord Chancellor's Office), Alan Maxwell (Lord Advocate's Office) and Sir Robin Butler.

Yours ever,
Nigel Wicks

N. L. Wicks

Michael Saunders, Esq.,
Law Officers' Department.

CONFIDENTIAL

SECRET

4

(20)

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBIN BUTLER

PENSIONS FORFEITURE FOR OFFICIALS COMMITTING OFFENCES OVERSEAS

I have shown the Prime Minister your minute of 9 November in which you sought the Prime Minister's agreement to give Parliamentary Counsel the present Instructions and to seek his views on the possibility of drafting provisions, on a contingent basis, in the time available.

The Prime Minister agrees that you should proceed as you propose in your minute.

N. L. WICKS

10 November 1988

SECRET

Prime Minister
Agree to proceed as F.E.R.B. suggests in §4?
N.C.W. 9.11
Yes

Ref. AO88/3263

MR WICKS

Pensions Forfeiture for Officials Committing Offences Overseas

Flag A

Your minute of 8 November said that you thought that the Prime Minister might be content to authorise asking Parliamentary Counsel to draft new pensions forfeiture provisions, on a contingency basis, provided that these were on the basis of a much simpler scheme than that which appeared to be envisaged in my minute of 7 November.

Flag B.

2. I should explain that the complexity lies not in the scheme which I believe is in essence straightforward but in the fact that the scheme inevitably involves novel points of jurisdiction since we would be taking rights away from people outside our territory who have not been tried for any offence. This characteristic is intrinsic to any scheme for this purpose. Instructions to Parliamentary Counsel must inevitably be detailed, and in this case we clearly have to be exceptionally careful about the soundness of the law we are proposing. The length of the Instructions is not, however, in direct relationship to the complexity of the end-product.

3. We do not, of course, yet know how difficult the draftsman will find it to turn these Instructions into provisions in a draft Bill. We cannot be sure even now that he will be able to meet the timetable but his chances of doing so are clearly improved if he is given the Instructions straight away.

4. In the light of this I think that the best course may be, if the Prime Minister agrees, to give Parliamentary Counsel the present Instructions and seek his views on whether he can draft the provisions on a contingent basis in the time available. If he says that they are too complex to draft in time for the Official Secrets Bill, the issue lapses. But I do not think that there is any other way in which we can keep open the possibility of legislating on pensions forfeiture in the 1988-89 Session.

F.E.R.B.

ROBIN BUTLER

9 November 1988

SECURITY. Off. Secrets Act pt 2

CONFIDENTIAL

Cab Off
pending advice

Prime Minister

OFFICIAL SECRETS BILL

This minute is to seek colleagues' agreement to implementing the proposals in the Official Secrets White Paper subject to the changes which I set out in this minute.

2. This minute does not address the wider questions of what action we might take, including legislation, following the Wright judgement. I understand we shall be receiving advice from officials on this shortly.

Background

3. The White Paper was published in June and debated in both Houses in July. We were able to deploy effectively the considerable narrowing of the scope of the present law which our proposals represented, and I think we made a good start. We were helped by an exaggerated advance press and by being able to isolate our more extreme critics from others who had points to make on the detail. We did so by promising to consider the detail as we came to draft the Bill. Nothing has been said to cause us to reconsider the main provisions of the Bill, to which we can hold firmly with a good expectation of success. That expectation can be enhanced if we can meet one or two of the subsidiary points raised by constructive critics.

Information Obtained In Confidence

4. I have discussed with the Foreign Secretary the best way of securing the provision relating to information received in confidence from foreign governments and international

/organisations

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organisations. We have concluded that despite the widespread criticisms, we ought to keep such a broad category in the Bill, but we should provide a harm test to be applied to unauthorised disclosures of such information. This would enable us to rebut criticisms that we are protecting trivial information from abroad. The harm test would be the same as for the disclosure of information relating to international relations, although we would make clear that it would be possible to show that the harm was caused by the fact of disclosure (because, for example, of the breach of trust) or by the harm caused by disclosure of the information itself.

Interception

5. I propose, also with the agreement of the Foreign Secretary, that the category of information relating to the interception of communications should relate to information about or obtained under a warrant issued under the Interception of Communications Act 1985. The reference to interception in the 1979 Bill was unspecific and we reflected this in the White Paper. But much has happened in this area since 1979. Unless we clarify the scope of the provision, we shall face well-directed amendments and pressure intended to identify those areas of interception which are not covered by that Act. We could give no satisfactory responses without risking damage to interception operations. An equally unpalatable consequence is that an unspecific provision would provide an opportunity to challenge the scope of the 1985 Act. We must avoid anything which is likely to unsettle that.

6. This would mean that we shall need to rely on the security and intelligence category - with its damage test for disclosures by third parties - to protect interception information, eg from GCHQ, which does not require a warrant under the 1985 Act. We should be able to reinforce this protection by the designation of

/those individuals

those individuals who are not members of the security and intelligence services, but who would nevertheless be notified as subject to the special offence. This should offer a reasonable degree of protection. After the most careful consideration, I am convinced, and the Foreign Secretary agrees, that, in practice, the benefits of trying to go for a wide and generalised interception provision are far outweighed by the risk this presents to exposing again in Parliament the present arrangements and procedures for interception.

Crime

7. I propose also that we should avoid easy attacks on the crime category by making clear that it relates to information which results in, or is likely to result in the commission of crime, rather than in using language which appears to cover everything that could be said to be useful in the commission of crime. This should not diminish the practical effectiveness of the provision, but will give us sounder ground on which to stand.

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Information entrusted in confidence to another State or an international organisation

8. I propose to implement our proposal to protect certain information which we provide in confidence to other States or international organisations. When we considered this in May, we agreed to provide a defence that the disclosure had been committed by or the information published with the authority of the other State or organisation concerned. But this defence of previous authority or previous publication is perilously close to looking like a prior publication defence. I am sure we would be unwise to allow mischief makers to suggest we had conceded at least part of their point. We can easily avoid the danger by making these provisions part of the offence itself and so for the

/prosecution to

prosecution to establish. This is fully consistent with our policy on the way we handle prosecution for non-Crown Servants (to whom the provision can only apply) - and avoids what could be an own goal.

International Relations

9. The Foreign Secretary has asked that we should extend the definition of international relations from that used in the 1979 Bill so as to provide protection for information about the internal affairs of another State or an international organisation. We are bound to be criticised for this, but it is clearly right that the reports and assessments compiled by the Diplomatic Service and others should be protected, and I propose to strengthen the definition in the Bill in this way.

10. The Foreign Secretary has also suggested that the part of the test of harm which was referred to in the White Paper as prejudicing relations between us and another State or international organisation should be drafted in the Bill as a test that the disclosure jeopardised the United Kingdom's interests abroad. The rest of the test would relate to disclosures which seriously obstructed the promotion or protection of our interests, or which endangered the safety of British citizens. This sharpening of the test would help to avoid the accusation that the test was unacceptably wide, while still enabling us to protect the long-term as well as the immediate interests of the United Kingdom. This is a worth-while change which should help presentation while protecting the substance. We would make a similar change in the defence category to the reference there to the harm caused by a defence disclosure to our interests overseas.

/Extra-territorial

Extra-territorial Jurisdiction

11. The Foreign Secretary had raised doubts earlier in the year about the proposal in the White Paper to extend extra-territorial jurisdiction to Government contractors of foreign nationalities who make disclosures abroad. He feared, and other colleagues shared his fears, that to take such jurisdiction would weaken our position in resisting moves by other States to assert jurisdiction over actions by British citizens in this country. Having considered this matter further, I do not seek to press the matter against colleagues' views, and I propose, therefore, to make the necessary change to the Bill.

Pension Consequential

12. I propose that the Bill should make a consequential amendment so that convictions for offences under this Bill can be relevant to the forfeiture provisions of public service pension schemes. The schemes already make such provision for offences under the existing Official Secrets Acts so, unlike separate suggestions for extending the forfeiture provisions in respect of people living abroad, this represents no change of principle. While there are powers to amend these schemes by subordinate legislation, a number require first the consent of Trade Unions, or of individuals covered by the scheme. A single consequential provision in the Bill - which can, I understand, be included with other consequential amendments in a Schedule - would avoid the need for such consent.

Other Provisions

13. I intend to legislate for all the other central planks in our White Paper on the lines we have already agreed. I propose, therefore, to continue with the security and intelligence

/category,

category, together with its special offence, to continue to provide protection for disclosures relating to defence and international relations and to continue to cover information sent by us in confidence to other States or international organisations which relate to security or intelligence, defence, or international relations.

14. I propose also to continue with the carefully directed harm tests for these categories. We have based our definitions for each category on those used in 1979, but have refined them to make sure they meet the specific damage tests and do not leave us unnecessarily exposed to difficult amendments.

15. We shall continue to distinguish in these offences between Crown Servants and Government contractors and others. We shall be defining Crown Servants and Government contractors in the same way as we did in 1979, including a power to prescribe by Order and subject to affirmative resolution those who fall outside the definition but whom we still want to be treated as Crown Servants. We need to take this power and will be expected to do so in the way we did in 1979.

16. I propose that we should continue to resist the entirely predictable pressure for a public interest defence and for a defence of prior publication. The Wright judgement has been deployed by our critics to try to increase the pressure on us but I am responding robustly. I do not however underestimate the Parliamentary difficulties ahead, and that is one reason why I believe it is right to make the more detailed changes to the White Paper proposals which I have set out in this minute.

Conclusion

17. I invite colleagues to agree that I should make the changes to the Bill which I have described, but should otherwise stick to

/the main

the main proposals in our White Paper. If colleagues are content, I shall complete the preparation of the Bill on this basis.

18. I am copying this minute to OD(DIS) colleagues and to Sir Robin Butler. Unless you or colleagues think that we need a meeting to discuss these matters, I propose that they be cleared in correspondence. It would be helpful to have responses by 15 November.

Douglas Hurd.

9 November 1988

SECURITY

~~Secr~~ Official Secrets Act pt 2

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10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

SIR ROBIN BUTLER

PENSIONS FORFEITURE FOR OFFICIALS COMMITTING OFFENCES OVERSEAS

The Prime Minister has seen your minute of 7 November about the possibility of including in the Official Secrets Bill provisions for the forfeiture of pensions of officials who go outside the jurisdiction and publish books in the way that Peter Wright did.

The Prime Minister is most concerned to see that the Treasury Solicitor's instructions to Parliamentary Counsel for the possible legislation run to over 30 pages. She has no faith in a scheme of such complexity and she would like the Treasury Solicitor to devise a much simpler scheme, which runs to say no more than three pages of instructions, perhaps by targeting the arrangements more precisely.

I think that provided a simpler scheme can be devised, the Prime Minister would be content for Parliamentary Counsel to be asked to draft, on a contingency basis, the necessary provisions, as you suggest in paragraph 6a of your minute.

N.L.W.

N.L. WICKS

8 November 1988

SECRET

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PRIME MINISTER

COPYRIGHT AS A WEAPON IN CONFIDENCE CASES

1. Three Law Lords in the Guardian/Observer/Sunday Times appeal suggested that where confidentiality owed to the Crown is breached a constructive trust may arise vesting in the Crown the copyright in the published material.

2. No argument had been addressed to the Lords. The matter was fully argued in the Court of Appeal, when Lord Donaldson described as `compelling` the reasons advanced by my team as to why, after long deliberation, copyright was not claimed by the Crown.

3. I have now reviewed the position, in consultation with Lord Alexander QC., Hugh Laddie QC. (a copyright specialist), Treasury Counsel and the Treasury Solicitor.

4. The Lords` judgments are innovative and are considered to derive from a laudable reluctance to see a future Mr Wright (within the jurisdiction) grow rich by treachery.

5. In Australia it would not have availed us to claim a constructive trust vesting the copyright in the Crown, because it would have been necessary first to prove an

CONFIDENTIAL

actionable breach of confidentiality, which in the event the Australian courts baulked at.

6. In the English proceedings the claim could in any event only have been levelled at the Sunday Times, never at the Guardian or Observer. In addition to overcoming the inherent legal difficulties, the Crown would have had to apply to join Wright and Heinemann (Australia) as co-defendants with the Sunday Times. This would probably have been refused as being oppressive in the light of the separate proceedings against them in Australia deriving from the same facts.

7. For the future I consider we should claim copyright against another Mr Wright as a second barrel to the claim in confidence, in the light of the Lords` judgments. If copyright in the relevant material were to be vested in the Crown it would advantageously confer on the Crown a right to enforce it against any third party infringing it, who might himself owe no duty of confidentiality. But the "fair dealing" defence in copyright claims means that copyright is a second-best card to play against disclosure.

8. As against Mr Greengrass, the ghost- writer of Spycatcher, there is an absolutely clear-cut case in confidence to sustain a claim for an account for profits.

He will have had a share in the copyright, but he may have assigned it. To add a copyright claim to the claim which we will bring against Greengrass in confidence, with the consequential need to join Heinemann (Australia) and Wright himself, would be needlessly complex, and this should not be done.

9. I firmly advise, too, against playing the copyright card against any who in future may seek to publish Spycatcher (except, of course, as agents for Wright), or who may seek to include extracts from it in, say, another book, or who as booksellers may try to sell it. There can be little money left in the book now, after the BBC uncharacteristically exposed Wright as a charlatan. Public opinion currently holds that we have been vindicated, but it could slip away into irritation if we took so complex a sledgehammer to crack shrivelled nuts of this sort.

10. Copies of this minute go to members of OD(DIS), to the Lord Chancellor, The Lord Advocate and to Sir Robin Butler.

P.M.

8 November 1988

SECRET

Prime Minister 1(A-C)
Agree course (a) in §6, as F.E.R.B recommends.
N.L.W. 7.11

Ref. A088/3236

PRIME MINISTER

Pensions Forfeiture for Officials Committing Offences Overseas

I need to obtain your instructions on a awkward point of timing in relation to the Official Secrets Bill.

2. Since the Spycatcher judgment, officials have been working on various ways of plugging the loopholes left by the Spycatcher judgment, particularly the loophole that former Crown servants can go outside the jurisdiction and publish books like Peter Wright did. We will be bringing the conclusions to a meeting of OD(DIS), but, partly because your diary is so congested, we have not been able to arrange a meeting before 28 November.

3. One of the measures which we have been preparing is forfeiture of pensions. At present it is only possible for pensions to be forfeit if someone has been tried and convicted of a serious offence: Kim Philby was still entitled to claim pension from us!

4. The Treasury and the Treasury Solicitor have now devised a scheme for the forfeiture of pensions involving the establishment of a judicial tribunal to authorise forfeiture against an absentee. The scheme is complex: the Treasury Solicitor's instructions to Parliamentary Counsel run to over 30 pages. It will take several weeks for Parliamentary Counsel to draft the necessary provisions.

5. The only Bill on the horizon in which the provisions could be included is the Official Secrets Bill. The business managers consider it of great importance that this Bill is introduced on

PAYAAP

1 December so that it is available before the second reading of the Security Service Bill. If a decision was taken at the Ministerial meeting on 28 November to go ahead with pensions forfeiture legislation and drafting then started, it would be impossible to include it in the Bill as published. We are advised that the House authorities may well not allow the provision to be tacked on to the Bill subsequently.

6. There appear to be three possible courses:

a. Ask Parliamentary Counsel to draft the necessary provisions now so that, if Ministers so decide on 28 November, they will be ready to include in the Official Secrets Bill as published: the risk here is that this could involve Parliamentary Counsel in substantial abortive work, particularly because Treasury Ministers are not thought to be keen on the scheme and the Home Secretary does not like the idea of complicating the Official Secrets Bill by including it.

b. Do no further work now, recognising that pensions forfeiture could not be included in the Official Secrets Bill but that, if Ministers decided to go ahead with it, they could announce that they would do so as soon as another legislative vehicle, or a Bill specifically for the purpose, could be introduced.

c. Abandon now the idea of pensions forfeiture.

I should be reluctant about c. because I think that pensions forfeiture may be the most effective measure available to the Government in closing the loophole left by the Spycatcher judgment for former Crown servants outside the jurisdiction. As between a. and b., I think that the choice is more evenly

balanced. I prefer a., but I recognise that this may involve abortive work if Ministers do not like the scheme or if the Home Secretary's objections to including it within the Official Secrets Bill prevail.

7. I am copying this minute to the Lord President.

F.E.R.B.

ROBIN BUTLER

7 November 1988

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PART 2 ends:-

HOME OFFICE TO FCO 19.7.88

PART 3 begins:-

FERB to PM. 7.11.88