



## Official Secrecy

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This Note sets out the historical background to the current laws on official secrecy. It also provides a brief summary of notable cases which have involved official information legislation.

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# 1 A brief history of official secrets legislation in the UK

## 1.1 The main legislation on official secrecy

In short, the *principle* Acts relating to official secrecy, control of the security services and disclosure of information 'in the public interest' are:

- *Official Secrets Act 1889*
- *Official Secrets Act 1911*
- *Security Service Act 1989*
- *Intelligence Services Act 1994*
- *Public Interest Disclosure Act 1998*

Other pieces of legislation also relevant to this subject are:

- *Official Secrets Act 1920*
- *Official Secrets Act 1939*
- *Human Rights Act 1998*
- *Regulation of Investigatory Powers Act 2000*
- *Freedom of Information Act 2000*

Also of interest may be the common law offence of 'misconduct in public office'.<sup>1</sup>

## 1.2 *The Official Secrets Act 1889*

The first Official Secrets Act was passed with very little debate or opposition in 1889. Section 1 was concerned with espionage and the notion of unlawful disclosure of information; Section 2 with the concept of breach of official trust. As introduced, the Bill included no public interest defence. However, the Government amended the legislation in response to objections the fact that the Bill would penalise the disclosure of information contrary to the interests not only of the state but also any part of government; criticism of a government department which might in many instances be for the benefit of the state would become a crime.<sup>2</sup> The bill was changed to include a public interest defence.

Section 2(1) laid down that:

*Where a person, by means of his holding or having held an office under Her Majesty the Queen, has lawfully or unlawfully either obtained possession of or control over any document, sketch, plan, or model or acquired any information and at any time corruptly or contrary to his official duty communicates or attempts to communicate that document, sketch, plan or information to any person to whom the same ought not, in the interest of the state, or otherwise in the public interest, to be communicated at that time, he shall be guilty of a breach of official trust.*

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<sup>1</sup> Library Standard Note, SN/PC/4909, *Misconduct in public office*

<sup>2</sup> Clive Ponting, *The Right to Know: The inside story of the Belgrano Affair*, 1985, p16

The Act therefore established a criminal sanction for certain breaches of official trust, but it was limited to breaches which could be shown to be contrary to the public interest.

### **1.3 The Official Secrets Act 1911**

The 1911 Act was passed in response to the growing threat to the United Kingdom of international espionage. The 1911 Act repealed the 1889 Act. Section 1 set out sterner provisions on spying. Section 2(1) on breaches of official trust was extended such that, in the words of the Frank Report:

they clearly intended it to operate as a general check against civil servants of all kinds. Official papers show that from 1889 to the present day the civil service has always seen this as one of the objects of the Official Secrets Acts and has never regarded the Acts as being confined to matters connected with the safety of the State.<sup>3</sup>

The relevant wording of the new Section 2 was:

*If any person having in his possession or control any sketch plan...or information which relates to or is used in a prohibited place or anything in such a place or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by an person holding office under His Majesty or which he has obtained owing to his position as a person who holds or has held office under HM, or as a person who holds or has held a contract made on behalf of his Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract*

(a) communicates the sketch, plan, model, article, note, document or information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it, or

(b) retains the sketch, plan model, article, note or document in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it;

that person shall be guilty of a misdemeanour.

It has been argued that the 1911 Act did also allow a public interest defence. However, Douglas Hurd, Home Secretary in 1989, declared during the Second Reading of the *Official Secrets Bill 1988-89* that:

Many have sought to argue such an interest but the judgements have never given cause to accept the argument. We are talking about the proposition that there should be a defence, rather than that we should retain an existing defence. We do not believe that a blanket defence of public interest should have a place in the proposals...<sup>4</sup>

### **1.4 The Official Secrets Acts 1920 and 1939**

The 1920 Act was concerned mostly with espionage. It enacted in permanent form certain Defence of the Realm Regulations which the Government wished to preserve in peacetime. However, section 6 of the 1920 Act gave power to require information in connection with offences under the Official Secrets Acts. This gave rise to a reoccurring controversy culminating in the row over the conviction of a journalist who failed to reveal the source of certain police information published in his newspaper. The 1939 Act substituted the old Section 6 with a new section which limited the special powers of interrogation under the Act

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<sup>3</sup> Franks report p123

<sup>4</sup> HC Deb 21 Dec 1989 c465 (Second Reading of the Official Secrets Bill)

to cases of offences or suspected offences under Section 1 of the 1911 Act, i.e. practical cases of espionage.

### **1.5 The Franks Report 1972**

In 1971 a committee was appointed “to review the operation of section 2 of the Official Secrets Act 1911 and to make recommendations”. Lord Franks was appointed as chairman. The Committee concluded that:

...the present law is unsatisfactory, and that it should be changed so that criminal sanctions are retained only to protect what is of real importance.<sup>5</sup>

In particular, they:

found section 2 a mess. Its scope is enormously wide. Any law which impinges on the freedom of information in a democracy should be much more tightly drawn. A catch-all provision is saved from absurdity in operation only by the sparing exercise of the Attorney General’s discretion to prosecute. Yet the very width of this discretion, and the inevitable selective way in which it is exercise; give rise to considerable unease. The drafting and interpretation are obscure. people are not sure what it means, or how it operates in practice, or what kinds of action involve real risk of prosecution under it.

The Report recommended:

- The replacement of section 1 by an Espionage Act (para 103)
- The replacement of section 2 by an Official Information Act (para 100)

Such an Official Information Act would define both general categories of official information, unauthorised disclosure of which might injure “the security of the nation or the safety of the people”, and also the particular items of information within these broad categories, unauthorised disclosure of which might cause “serious injury” i.e. a classification system.

Franks also proposed that the mere receipt of information should no longer be an offence but its further communication would, if the prosecution could prove (a) that there had been a contravention of the Act by some other persons and (b) that the accused knew this or had reasonable ground to believe that this was the case. The Act would also create a new offence of communicating or using official information of any kind for public gain.

The report was not well received. The then Conservative Government thought it went too far, while journalists thought it too timid.

### **1.6 The Official Secrets Act 1989**

The Labour Government in 1978 had published a White Paper *Reform of Section 2 of the Official Secrets Act* which did not tackle the ‘normal sanctions of the rules of conduct against disclosure of official information’ and failed to translate into law before the election of 1979.<sup>6</sup>

Richard Shepherd introduced his own Private Member’s Bill in 1988 which included an explicit public interest defence. Richard Shepherd said that:

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<sup>5</sup> Home Office, *Departmental Committee on Section 2 of the Official Secrets Act 1911*, Cmnd. 5104, September 1972, para 275

<sup>6</sup> Merlyn Rees, HC Deb 22 Nov 1976

We wish to distinguish between that information should lead to criminal prosecution, and general information, which needs lesser disciplinary controls. Without that distinction, we will not have a free society.

The Bill applies only to specified classes of protected information. Disclosures of other information would not be a criminal offence. That is not to say that such information would become freely available. Much of it would continue to require protection, but that protection would not include the threat of prosecution.<sup>7</sup>

The Labour Opposition supported the Bill. The Bill was defeated 271-234. Lord Bethall introduced substantially the same Bill in the Lords in February. It received an unopposed second reading on 20 April but made no further progress.<sup>8</sup>

The Conservative Government introduced the *Official Secrets Bill* in 1988. By this time it had become widely accepted that existing legislation had become discredited and unworkable. A number of high-profile cases had drawn attention to the weaknesses in the law.

The new Act did not, as had been hoped by reformers, contain provision for a public interest defence. The Government argued that a general public interest defence would make it impossible to achieve maximum clarity in the law and its application; and that 'it cannot be acceptable that a person can lawfully disclose information which he knows may, for example, lead to loss of life simply because he conceives that he has a general reason of a public character for doing so'.<sup>9</sup> It also argued that by the time a public interest defence could be mounted on the grounds that the information disclosed gave reasonable cause to believe that there had been some neglect of public duty, significant damage could already have been caused.

The new Act repealed and replaced the catch-all Section 2, and removed the disclosure of much official information from the scope of the criminal law. In its place, there were six categories of official information which were subject to criminal sanctions if disclosed:

- security and intelligence,
- defence,
- international relations,
- information obtained in confidence from other states or international organisations,
- information likely to result in the commission of an offence, or likely to impede detection,
- and special investigations under statutory warrant (e.g. interception of communications).

The concept of harm or damage caused by particular disclosure of information by Crown servants and government contractors was applied to these categories. (For those who are not Crown servants or government contractors the prosecution has also prove that the defendant knew or had good reason to know that specific harm was likely to be caused by the disclosure.)

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<sup>7</sup> HC Deb 15 January 1988 vol 125 c564

<sup>8</sup> HL Deb 20 April 1988 vol 495 cc1566-1610

<sup>9</sup> Cm 408 1987-88

The new Act exempted the intelligence and security services from the 'damage' tests, and made the fact of disclosure by members of these services an 'absolute' offence:-

1.—(1) A person who is or has been—

(a) a member of the security and intelligence services; or

(b) a person notified that he is subject to the provisions of this subsection,

is guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force.

(2) The reference in subsection (1) above to disclosing information relating to security or intelligence includes a reference to making any statement which purports to be a disclosure of such information or is intended to be taken by those to whom it is addressed as being such a disclosure.

(3) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he makes a damaging disclosure of any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as such but otherwise than as mentioned in subsection (1) above.

(4) For the purposes of subsection (3) above a disclosure is damaging if—

(a) it causes damage to the work of, or of any part of, the security and intelligence services; or

(b) it is of information or a document or other article which is such that its unauthorised disclosure would be likely to cause such damage or which falls within a class or description of information, documents or articles the unauthorised disclosure of which would be likely to have that effect.

During the passage of the Bill the Shadow Home Secretary, Roy Hattersley reflected the dissatisfaction with the 'harm' concept.

As the Bill stands, the law requires conviction if a disclosure 'prejudices the capability of, or part of, the armed forces of the Crown to carry out their tasks' and that applies whatever the task, no matter how trivial or temporary. That is how harm is defined. That is a wholly unreasonable criterion against which to measure guilt, to obtain conviction and justify a prison sentence. A much more reasonable test would be for the jury to decide whether disclosure was damaging... to the *national interest*<sup>10</sup>

The Bill passed its second reading in the House of Commons by 298 to 221 votes. It passed its third reading by 320 to 196.<sup>11</sup>

Official Secrecy and Freedom of Information, though kept apart in terms of legislation, have been seen as two sides of the same coin. The *Freedom of Information Act* was passed in 2000. Discussing opposition efforts to introduce a 'Right to Know' Bill in 1993, which would have provided a public interest defence in certain circumstances, Patrick Birkinshaw wrote:

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<sup>10</sup> HC Deb 15 Feb 1989 c361

<sup>11</sup> Full details about the debates in the Commons on the Bill are available in the House of Commons Research Note No. 437, *The Official Secrets Bill 1988-89: The Commons debates*, 2 March 1989.

The 1993 Bill provided a replacement of the Official Secrets Act. This was singularly missing from the FOIA of 2000. Many claim that that the 1989 Act is now ready for pensioning off, like section 2 the 1911 Act before it.... The Act will remain because the respectable body of opinion going back to Franks in 1972 has expressed the view that there is a role for the criminal law to punish wrongful disclosure outside the area of espionage. That is not disputed. The role of the law should be to punish breaches causing serious damage where there is no public interest in disclosure.<sup>12</sup>

### 1.7 **Security Service Act 1989**

A further reform in 1989 was the *Security Service Act* which imposed the first elements of legal control over the service. This Act, it has been argued, was precipitated in part by the revelations of Cathy Massiter and Peter Wright, former employees of MI5 about the activities of their employer. A commentator wrote:

The subsequent legal battles, principally in Australia and the UK but also in other countries, made the mystery surrounding the existence and basic activities of the Service look rather ridiculous. This is not the place to undertake a detailed analysis of the affair but it is important to recognise that measures protecting intelligence information in the new Official Secrets Act and the placing of the Security Service on a statutory basis are two sides of a coin.<sup>13</sup>

The Service was placed under the authority of the Secretary of State (in practice the Home Secretary) and a Commissioner and Tribunal were introduced to investigate complaints about service activities; the functions of the Service and the responsibilities of the Director General were set out in the Act. But it did not include a parliamentary committee to examine the expenditure, policy or administration of the Service. That Committee, the joint Parliamentary Committee on Security and Intelligence, appointed by the Prime Minister with the agreement of the Leader of the Opposition, was established under the 1994 Act,<sup>14</sup> but had fewer powers than a conventional select committee as had been recommended by the Home Affairs Select Committee in 1992.<sup>15</sup> Further detail on the Security and Intelligence Committee is contained in Library Standard Note, *Intelligence and Security Agencies*.<sup>16</sup>

### 1.8 'Whistle-blowing' and the *Public Interest Disclosure Act 1998*

The *Public Interest Disclosure Act 1998* came into force in July 1999, following attempts during the 1990s to protect 'whistleblowers' who raised wrongdoing at work and were victimised or punished. The current Act enables workers who raise certain issues of concern in particular circumstances – called 'protected disclosures', such as damage to the environment or a criminal offence – to complain to an employment tribunal if they are dismissed or suffer any other form of detriment for doing so. The legislation covers workers in the private and public sectors but Section 11 excludes the disclosures which would be an offence under the *Official Secrets Act*.<sup>17</sup>

The issue of public interest defence, for example in relation to health and safety matters, had been aired during the debate on the *Official Secrets Bill* of 1989.<sup>18</sup> Two Members in 1995-96 attempted to introduce protection for whistle-blowers. Don Touhig introduced a Private

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<sup>12</sup> Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (3<sup>rd</sup> edition 2001)

<sup>13</sup> K G Robertson, *Secrecy and Open Government* (1999)

<sup>14</sup> Birkinshaw, above, p 42. Ch 1 contains a full critique of the 1989 *Security Service Act*

<sup>15</sup> Home Affairs Select Committee *Accountability of the Security Service*, HC265 1992-93

<sup>16</sup> Library Standard Note, SN/HA/1132, *Intelligence and Security Agencies*

<sup>17</sup> Birkinshaw, above.

<sup>18</sup> for example Sir Bernard Braine during the Committee stage of the Bill HC Deb 2 Feb 1989 c450-54



Member's Bill in 1995 to "protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; to protect the identity of sources of information." Tony Wright (the Member for Cannock Chase) likewise introduced a ten-minute rule bill, the *Whistleblower Protection Bill*, in 1995.

Disclosure of official information and the argument for a public interest defence have been closely associated with 'whistle-blowing', and Clive Ponting, Sarah Tisdall, Cathy Massiter and Katherine Gun, for example, have been defended as whistle-blowers alerting the public to official malpractice. (Details of their cases are set out below.) As discussed above, Section 1 of the *Official Secrets Act* provides no defence where a disclosure is made in the public interest or caused no damage to national security.

The 1998 Act, as far as the Civil Service is concerned, needs to be considered alongside the duty of confidentiality of civil servants, laid down in the non statutory *Civil Service Code*. The latest version of the Code was issued on 6 June 2006. It states:

15. Your department or agency has a duty to make you aware of this Code and its values. If you believe that you are being required to act in a way which conflicts with this Code, your department or agency must consider your concern, and make sure that you are not penalised for raising it.

16. If you have a concern, you should start by talking to your line manager or someone else in your line management chain. If for any reason you would find this difficult, you should raise the matter with your department's nominated officers who have been appointed to advise staff on the Code.

17. If you become aware of actions by others which you believe conflict with this Code you should report this to your line manager or someone else in your line management chain; alternatively you may wish to seek advice from your nominated officer. You should report evidence of criminal or unlawful activity to the police or other appropriate authorities.

18. If you have raised a matter covered in paragraphs 15 to 17, in accordance with the relevant procedures [1], and do not receive what you consider to be a reasonable response, you may report the matter to the Civil Service Commissioners. The Commissioners will also consider taking a complaint direct. Their address is:

3rd Floor, 35 Great Smith Street, London SW1P 3BQ.  
Tel: 020 7276 2613  
email: [ocsc@civilservicecommissioners.gov.uk](mailto:ocsc@civilservicecommissioners.gov.uk)

If the matter cannot be resolved using the procedures set out above, and you feel you cannot carry out the instructions you have been given, you will have to resign from the Civil Service.

<sup>1</sup> The whistleblowing legislation (the Public Interest Disclosure Act 1998) may also apply in some circumstances. The Directory of Civil Service Guidance gives more information: [www.cabinetoffice.gov.uk/propriety\\_and\\_ethics](http://www.cabinetoffice.gov.uk/propriety_and_ethics) .

The organisation Public Concern At Work, the whistleblowing charity, has commented that:

The Directory of Civil Service Guidance dates from 2000. The existing text (vol 2 pp 54- 56) summarises the 1998 Act effectively. It then goes on to state that:

6 The Civil Service Code advises that you should report any actions that are inconsistent with its provisions (paragraph 11). First you should raise the issue

with your line manager. If for any reason you would find that difficult you should report the matter to the nominated appeals officer within your department.

7 If you are unhappy with the response you receive, you may report the matters to the Civil Service Commissioners (paragraph 12 of the Civil Service Code). Exceptionally the Civil Service Commissioners will consider accepting a complaint direct.

These paragraphs are more introspective than PIDA and difficult to reconcile with the Civil Service Code which states (now in para 17) that evidence of criminal or unlawful activity should be reported to 'the police or other appropriate authorities'.

PIDA protects disclosures to statutory regulators such as the National Audit Office because the existence of such protection makes it more likely that concerns will be properly raised and addressed internally. However this beneficial effect can only be achieved if staff and managers are aware of the external route. Contrary to the spirit and letter of PIDA, paragraph 8 of the Guidance then states

8 These procedures should also be used if you wish to make any other disclosure covered by the 1998 Act.

The final section of the Guidance emphasises this different approach and is difficult to reconcile with the legislation:

**Will I be protected if I blow the whistle before going through the internal procedures?**

9 Only you can make this judgement, and in doing so you will need to consider the preceding paragraphs carefully. It is preferable and this is at the heart of the Public Interest Disclosure Act to raise the matter internally if appropriate and practical. It is after all in the interests of the organisation and its workforce that issues and concerns are aired in this way. If you are in any doubt you should speak to your departmental nominated officer. Your conversation will be treated in absolute confidence

First, this implies that internal disclosure is not whistleblowing. Secondly, it gives an overly complicated and negative impression of the protection available where an official goes, say, to the National Audit Office, the Information Commissioner or another prescribed regulator. Thirdly, as expressed it appears to put the departmental nominated officer in an impossible position if he is told of some serious malpractice as he is expected to keep it confidential rather than see that it is dealt with in the Department's interests.<sup>19</sup>

A press notice released by the FDA, the civil service union, at the time of the Damien Green affair in December 2008 quoted the General Secretary Jonathan Baume as stating:

"It is an absolute rule that civil servants should not and must not leak government information. To do so undermines the core purpose of the civil service, and undermines the critical bond of trust between elected ministers and their civil servants. It is a serious disciplinary offence. If a civil servant believes that there are questions of maladministration, or has a crisis of conscience, then the Civil Service Code provides routes for addressing that".

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<sup>19</sup> Public Concern at Work, *Whistleblowing and Whitehall*, [http://www.pcaaw.co.uk/policy/policy\\_pdfs/whistleblowing\\_whitehall.pdf](http://www.pcaaw.co.uk/policy/policy_pdfs/whistleblowing_whitehall.pdf)

"Nor should MPs of any party encourage or condone leaking by civil servants. Whatever any apparent short-term political gain, no MP benefits by corroding the political impartiality of the civil service, and that relationship of trust between ministers and civil servants, which are both necessary to good governance in the UK".<sup>20</sup>

Giving evidence to the Public Administration Select Committee in December 2008, Sir Gus O'Donnell, Head of the Home Civil Service and Cabinet Secretary, stated:

Civil servants must act in a way that deserves and retains the confidence of ministers while ensuring they are able to establish the same relationship with those they may be required to serve in some future government. For us that is a crucial principle. Leaks undermine that confidence of ministers in the Civil Service, as my predecessors Lord Butler and Turnbull have said; they are corrosive and reduce the quality of debate inside government. If a civil servant feels that as a matter of conscience of public interest there is something about which he or she is concerned there are routes through the management chain and the matter can be reported directly to the independent civil service commissioners. That is part of the new code about which I feel very strongly.<sup>21</sup>

Also of interest is the Common Law Offence of "misconduct in public office", more information on this offence is available in the separate Library Standard Note, *Misconduct in Public Office*.<sup>22</sup>

## **2 Notable cases involving official secrets legislation or leaks of government information**

### **2.1 Winston Churchill**

During the 1930s Winston Churchill received a certain amount of information on matters of defence such as German air power. One supposed informant was Desmond Morton, a civil servant who worked in an intelligence position. In *In Search of Churchill* Churchill's biographer Martin Gilbert offers the following information about Desmond Morton:

From the moment that Hitler came to power, Morton brought Churchill details of German industrial production, and, as it grew by leaps and bounds, of German aircraft production. These figures were always denied by Baldwin and his ministers. But Churchill knew that they came from the same Intelligence source that was providing the ministers themselves. When Morton gave me lunch at his London club in 1966, while I was still working for Randolph, he was far too discreet to enter into these details. But much later, when I was working through the Churchill papers, I found a clue. Among the notes that Churchill dictated after the war, when writing his war memoirs, was one in which he wrote about an episode directly linked to the knowledge that Morton was giving him about the German Air Force:

I happened to see Mr Baldwin in his own room at the House on some other matter and we had a friendly chat. I thought I would give him a hint in private and I told him 'speaking as an old colleague' that he was not getting the true information. He had better be careful. He had better look into the matter himself, personally. He had better look below the top officials at the Air Ministry who informed him. He had better see some subordinates for himself and cross-question them.

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<sup>20</sup> <http://www.fda.org.uk/Media/Civil-servants-must-not-leak-says-FDA-general-secretary.aspx>

<sup>21</sup> Uncorrected Evidence, *Minutes of evidence taken before the Public Administration Committee: Leaks and Whistleblowing in Whitehall*, To be published as HC 83-i 2008-09

<sup>22</sup> See House of Commons Library Standard Note, *Misconduct in Public Office*

'You are being misled,' I said. 'The truth does not reach to ministerial levels'. I could hardly say more, without endangering my sources of information, which were in fact his own Secret Service.

Mr Baldwin seemed suddenly impressed. I knew him very well. For five years we had worked closely together. He gave me a piercing look and I thought I had struck to the core. We parted on our usual friendly terms; but nothing seemed to come of it.<sup>23</sup>

Desmond Morton is the subject of a book sponsored as part of the Cabinet Office's Official Histories programme published in 2007. The book written by Gill Bennett, *Churchill's Man of Mystery*, describes the description of Morton as Churchill's 'mole' as an "attractive but largely mythical" idea.<sup>24</sup> Bennett questions whether any information passed between Morton and Churchill was in fact secret and if it was, whether any permission was given by the serving Prime Minister for the information to be shared with Churchill. She concludes that there is no evidence that information was passed from Morton to Churchill which would not have been available elsewhere, and that there was also no written evidence that permission for any leak was given. She writes:

Morton supplied Churchill with information, corroboration and advice, telling him not just what he asked for but also what, in Morton's view, he needed to know. This raises the key question that has underpinned a central 'Morton myth': did he pass to Churchill information that the latter had no right to see? He had the opportunity to do so: the two men corresponded frequently, and contemporary observers have attested to their regular meetings at Chartwell, when Morton would stroll over after dinner for discussions late into the night, sometimes bringing with him useful documents – assumed by many to be secret Intelligence reports. According to one of Churchill's literary assistances, Morton pledged him secrecy, professing 'high patriotic motives', while an innocent Churchill – who 'really had no guile' – was merely hungry for the information denied him by the authorities. Stories like this have created an enduring impression that Morton deliberately supplied secret information to Churchill. In fairness, it must be said that this impression was fostered by the parties themselves, and in particular by Morton, who had his own reasons for perpetuating it. There is, however, no hard documentary evidence to suggest that Morton supplied anything to Churchill that he would not have been entitled, and indeed in many cases welcome, to see. The evidence points, in fact, in the other direction.

There is, of course, no way of proving that Morton ever showed Churchill a document whose circulation would have precluded his seeing it; but everything about his character and training argues against it. Morton was certainly a man to bend the rules where necessary: but the protection of secrecy had informed his entire professional career...<sup>25</sup>

Bennett concludes:

No two accounts coincide exactly, some asserting with authority that Morton passed secret material to Churchill, others that Churchill's position as a Privy Councillor gave him sufficient access. On the basis of the available evidence, Morton's image as 'mole' does not stand up to scrutiny, though it was entirely in keeping with his character to enjoy the image while rejecting the reality. Since no papers have been found, in Morton's bank or anywhere else, to shed further light, there is no way of settling the

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<sup>23</sup> Martin Gilbert, *In Search of Churchill*, pp118-119

<sup>24</sup> Gill Bennett, *Churchill's Man of Mystery: Desmond Morton and the World of Intelligence*, p150

<sup>25</sup> *Ibid*, p172

question definitively at this distance. Perhaps the best answer is to emulate Churchill, who replied in response to a direct question on the point from Colville: 'Have another drop of brandy'.

Bennett also writes about others who are supposed to have passed official information to Churchill during this time. She writes that:

...the documentary – as opposed to anecdotal – evidence suggests that much of the material he passed on was hardly 'secret', even if Churchill would not have seen it in the normal course of events... And after all, Wigram's superior, Vansittart, was aware of Wigram's communication with Churchill; if he suffered any pangs of conscience, these were occasioned more by the infringement of professional etiquette than by the level of sensitivity of the information imparted.<sup>26</sup>

## 2.2 Duncan Sandys

On 27 June 1938 Duncan Sandys raised on the floor of the House the fact that he had been asked by the Attorney General about the sources of information Mr Sandys had used to draft a parliamentary question. The Attorney General had, Mr Sandys, said, threatened him with prosecution under the *Official Secrets Acts*. This was denied by the Attorney General. The details of Mr Sandys' allegations and the general question of the applicability of the *Official Secrets Acts* to Members was referred to a special select committee, the Select Committee on the Official Secrets Act. This issued a first report in September 1938<sup>27</sup> and a further report in April 1939.<sup>28</sup> The first considered the statement to the House by Sandys and his summons to appear before the military court. The second looked at the applicability of the Official Secrets Acts to Members in discharge of their Parliamentary duties.<sup>29</sup>

The reports concluded that the soliciting or receipt of information was not a proceeding in Parliament, but that it would be inadvisable to attempt to define "the extent of immunity from prosecution under the Official Secrets Act to which members of parliament are or ought to be entitled."<sup>30</sup>

## 2.3 William Owen

In January 1970 William Owen, the then Member for Morpeth, was arrested and charged with communicating evidence useful to the enemy, under section 1 of the *Official Secrets Act 1989*. On 6 May he was found not guilty of all eight charges. The charges were reported in *The Times* as:

...communicating information calculated to be, or which might be, or was intended to be, useful to an enemy between August 1961, and June, 1962; a similar offence between January and December 1963, and on three charges of doing an act preparatory to communicating information by receiving money from a member of the Czechoslovakian Embassy for periods between January and December, 1967, January and December 1968, and January and December 1969.<sup>31</sup>

*The Times* further reported that:

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<sup>26</sup> *Ibid*, p175

<sup>27</sup> HC 173 1937-38

<sup>28</sup> HC 101 1938-39

<sup>29</sup> See also SN/PC/4905, [Parliamentary Privilege and Individual Members](#)

<sup>30</sup> *Ibid* paras 16 and 22

<sup>31</sup> 'Owen is cleared on all eight charges', *The Times*, 7 May 1970

Throughout the trial Mr Owen insisted that he never passed classified information to two Czechoslovak intelligence officers working in London. He admitted that during a period of nine years he received from them about £2,300 but claimed that often he would invent information to pass on to them when the "pumped" him during lunchtime appointments.<sup>32</sup>

## 2.4 Jonathan Aitken and the Daily Telegraph

In 1971 Jonathan Aitken, who was then a prospective parliamentary candidate, was accused of offences under the Official Secrets Act for passing on classified information to the *Sunday Telegraph* about the Biafran war in Nigeria. He was acquitted of all charges having pleaded that it was his "duty in the interests of the state" to have done so. In 1970, the Attorney-General refused to prosecute Sir Hugh Fraser MP who had demanded his own prosecution alongside that of Aitken.<sup>33</sup>

## 2.5 Sarah Tisdall

Sarah Tisdall was a junior civil servant employed in the private office of the Foreign Secretary and engaged principally in clerical duties. In October 1983 she anonymously delivered two documents written by the then Defence Secretary, Michael Hesteltine, to *The Guardian* newspaper. The documents contained information on the expected arrival date for cruise missiles at Greenham Common, along with information about the manner in which the Defence Secretary proposed to handle the announcement in Parliament and the press.

After being interviewed by the police, Sarah Tisdall admitted leaking the documents. On 9 January 1984 she was charged under Section 2 of the Official Secrets Act. In a hearing held at the Central Criminal Court, Miss Tisdall pleaded guilty. The judge, Mr Justice Cantly, gave her a custodial sentence of six months. He stated:

Unfortunately, in these days, it is necessary to make perfectly clear, by example, that any person entrusted in confidence with material which is classified as secret, who presumes to give himself permission but decides that, none the less, it will be published, will not escape a custodial sentence by asserting, however, honestly, that he thought it would do no harm, or even that he thought it was a good thing to do.

A 1985 article in *Political Quarterly* by Robert Pyper discussed the reasons why Miss Tisdall leaked the information:

Public statements by Miss Tisdall at a later date show that she had two reasons for leaking the documents. The first was quite specific: Michael Hesteltine's plans for dealing with the public relations aspects of the missiles' arrival amounted, in Miss Tisdall's words, to a decision that "he was not going to be accountable to Parliament that particular day". He was going to leave the House of Commons in order to conduct a press conference at the base, before the Opposition had a chance to question him in detail about his statement. The second reason was her general disenchantment with government policies which were affecting her as a civil servant and as a voter.<sup>34</sup>

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<sup>32</sup> *Ibid*

<sup>33</sup> See Oxford Dictionary of National Biography entry for Sir Hugh Fraser, and Geoffrey Robertson, 'Mr Green's arrest is an affront to democracy', *The Evening Standard*, 4 December 2008

<sup>34</sup> Robert Pyper, 'Sarah Tisdall, Ian Willmore, and the Civil Servant's "Right to Leak"', *Political Quarterly*, Vol 56, p73, 1985

## 2.6 Ian Willmore

December 1983 Ian Willmore, an administrative trainee at the department of Employment, leaked a memorandum to *Time Out*. The memorandum included information about advice the Master of the Rolls, Sir John Donaldson, had given advice to Michael Quinlan, the Permanent Secretary in the Department of Employment, on the future of the law relating to industrial relations. Pyper has written that:

Like Sarah Tisdall, Ian Willmore had two sorts of grievance against the Government, and these provided the motivation for him to leak a secret document to the press. He was discontented in a general sense because of what he saw as cynical government interference in the traditional independence of Civil Service departments... Willmore's second, immediate reason for leaking was (although tinged with political considerations) mainly concerned with his deeply felt need to publicise what he viewed as an instance of constitutional subversion.<sup>35</sup>

Willmore had been a member of the Labour Party for almost seven years at the time.

The Attorney-General, Sir Michael Havers QC, decided against prosecuting Willmore, saying that Section 2 should be used sparingly and only when absolutely necessary.

## 2.7 Clive Ponting

In 1985 Clive Ponting sent two documents about the sinking of the ship the *General Belgrano* to Labour MP Tam Dalyell. Ponting admitted sending Mr Dalyell the documents, and was prosecuted under the *Official Secrets Act 1911*. Ponting's defence was that the disclosure had been in the public interest, and that the information was privileged as it was to a Member of Parliament. The trial summing up by the judge contained the following points:

The prosecution have got to prove that Mr Dalyell was not a person to whom it was in the interest of the state in his [Ponting's] duty to communicate the information. His duty, I direct you, means an official duty, a duty imposed upon him by his office... namely that of Assistant Secretary in the Ministry of Defence.

...What, then of the words, 'the interests of the state'? Members of the jury I direct you that those words mean the policies of the state as they were in July 1984 when Mr Ponting communicated the information to Mr Dalyell, and not the policies of the state as Mr Ponting, Mr Dalyell, you or I might think they ought to have been... I direct you in law that it is no defence that he honestly believed that it was his duty to leak the documents in the interests of the state if, in fact, it was not his duty to do so in the interests of the state.<sup>36</sup>

The jury, nevertheless, found Mr Ponting not guilty.

## 2.8 David Shayler

David Shayler was charged under three counts of passing documents and information to the *Mail on Sunday* in August 1997. The documents and information contained potentially serious allegations against the secret services. After a French court refused to agree to a British extradition request, Mr Shayler eventually returned to Britain to face trial. He was prosecuted under Section 1 of the *Official Secrets Act 1989*. He was supported in his case by Liberty. In November 2002 he was jailed for six months. The judge, Mr Justice Moses, told

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<sup>35</sup> *Ibid*, p74

<sup>36</sup> Cited in *The right to know: the inside story of the Belgrano affair*, Clive Ponting, 1985

Mr Shayler that he “had taken it upon himself to decide what he thought was in the public interest”.

The House of Lords examined the defences available to Shayler and noted that, firstly, the 1989 Act afforded no public interest defence and secondly, that it was compatible with Article 10 of the European Convention on Human Rights (right to free expression), since the ban on disclosure was not absolute, but referred to disclosure without lawful authority.<sup>37</sup> The Court of Appeal had earlier found that the defence of duress or necessity of circumstance was not available to Shayler, but held that this defence was available when a defendant committed an otherwise criminal act to avoid an imminent peril of danger to life or serious injury.<sup>38</sup>

When Mr Shayler was found guilty, the *Guardian* wrote:

Stella Rimington, the former head of MI5, told the *Guardian* last year that the absolute ban imposed by the secrets act was "unrealistic". There is not even a system in place to enable former civil servants - let alone security and intelligence officers - to have their books or memoirs vetted, she said.

We are not saying there should be no criminal charge for revealing genuinely secret information, merely that a person, if prepared to take the risk of disclosure, should be allowed to argue before a jury that he or she acted in the public interest. If necessary the court could go in camera and the jury could even be vetted. Ironically, this could lead to more openness. Shayler's trial was heard in public, which meant that he was not allowed to argue his case fully in front of a jury.

The security and intelligence agencies should be subject to more scrutiny, with a system protecting genuine whistleblowers, because the onus is on these services to show they are not indulging in political activities or abusing civil liberties...

...It [the Government] is trying in particular to stop journalists from writing about allegations that MI6 officers were involved with Islamist extremists plotting to assassinate the Libyan leader, Muammar Gadafy. More than two years ago, dismissing attempts by the government to gag the *Guardian* and *Observer*, the appeal court described the Gadafy allegation as raising "critical public issues". It added: "Inconvenient or embarrassing revelations, whether for the security services or for public authorities, should not be suppressed."

In opposition, Labour frontbenchers, including Tony Blair, argued and voted for a public interest defence as the Official Secrets Act passed through parliament in 1989. Now they are in power, they should introduce it.<sup>39</sup>

## 2.9 Katherine Gun

An employee of GCHQ, Katherine Gun admitted to leaking an email calling for British help in spying on UN diplomats in January 2004.

The Attorney General announced in February 2004 that a prosecution against Katherine Gun, an employee at GCHQ, would not proceed. According to press reports, the legal doctrine of necessity was a main aspect of the defence Katherine Gun's lawyers would have offered, if the Crown Prosecution Service had not withdrawn the case against her.<sup>40</sup>

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<sup>37</sup> *R v David Michael Shayler* [2002] HL 11

<sup>38</sup> 1 WLR 2206 [2001]

<sup>39</sup> Richard Norton-Taylor and John Wadham, 'The public has the right to the truth', *Guardian* 6 November 2002

<sup>40</sup> 'Risky business of prosecutions under the Official Secrets Act' *Guardian* 26 February 2004



Necessity is a common law doctrine, defined as pressure of circumstances compelling one to commit an illegal act.<sup>41</sup>

The Court of Appeal held in the Shayler case that a defence of necessity was available when a defendant committed an otherwise criminal act to avoid an imminent peril of danger to life or serious injury. The act was subject to a test of proportionality, so that the act should be no more than reasonably necessary to avoid the harm feared. There was no reason in principle why the defence should not apply to offences under the 1989 Act.

Ms Gun's lawyers argued for the release of the Attorney General's advice to the Government about the legality of the war in Iraq in order to support her case that she was attempting to prevent unnecessary deaths in the conflict. In his statement on the Gun case, the Attorney General, Lord Goldsmith, said:

Yesterday at the Central Criminal Court, the Crown offered no evidence in the case of Katharine Gun. Ms Gun had been charged under Section 1 of the Official Secrets Act. The effect of offering no evidence was that the case against Ms Gun was discontinued.

I hope that it will help the House if I first explain what the process is in respect of prosecutions under the Official Secrets Act. Prosecutions under it are governed by the normal rules applied by the Crown Prosecution Service when considering any prosecution—the code for Crown prosecutors—and there is the additional requirement of the Attorney-General's consent before a prosecution can go ahead.

I should say at the outset that, when making decisions under the code for Crown prosecutors, the Crown Prosecution Service acts in the public interest and decisions for which it is responsible are taken by it independently. I also remind the House that, when making decisions about whether to consent to a prosecution, the Attorney-General makes his decision in the public interest, and not in the interests of the Government.<sup>42</sup>

The Attorney General continued:

I recognise that many in the House will want to know more about the detailed basis on which counsel concluded that there was no longer a realistic prospect of conviction. However, as the matter concerns issues of intelligence it is not appropriate for me to do so, even to this House. As to the impact of the decision on the conduct of future prosecutions, it is the case that the substantive law is always kept under review and the effect of particular prosecutions on the substantive law considered.<sup>43</sup>

The DPP, McDonald, was reported as stating that there was no prospect of conviction since the prosecution could not disprove the defence of necessity.<sup>44</sup>

Subsequently, a Parliamentary question appeared to reveal that the Home Office was undertaking some sort of review of the Official Secrets Act:

**Mr. Shepherd:** To ask the Prime Minister who is to chair the review of the Official Secrets Act 1989; and if he will make a statement. [158687]

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<sup>41</sup> *Oxford Dictionary of Law* 1997

<sup>42</sup> HL Deb 26 February 2004 c338

<sup>43</sup> HL Deb 26 February 2004 c341

<sup>44</sup> 'Secrets law to be revealed in wake of Gun case' *Financial Times* 27 February 2004

**The Prime Minister:** The Official Secrets Act, as with all areas of the criminal law, is kept under review. The Home Secretary has made it clear that the Home Office is considering the implications of recent events for this legislation.<sup>45</sup>

However, no further information has been forthcoming about any particular review of the Act.

## 2.10 David Keogh and Leo O'Connor

In this case, a civil servant, David Keogh, and an MP's researcher, Leo O'Connor who worked for Anthony Clarke MP, were found guilty of breaching the Official Secrets Act after disclosing a classified letter from Tony Blair's private secretary for foreign affairs in April 2004. Mr Clarke immediately sent the letter back to Number 10. He lost his seat in 2005 and was not charged under the Act.

The Government argued that the contents of the document could be heard only by the jury with no press or public present. The judge agreed and also made it clear he regarded the contents of the document as sensitive enough that the press could not report what Mr Keogh said when he was asked in open court about what preyed on his mind when he first saw the document.

The judge, Mr Justice Aikens, said Keogh's "reckless and irresponsible" actions could have cost British lives:

You decided that you did not like what you saw. Without consulting anyone, you decided on your own that it was in the best interest of the UK that this letter should be disclosed. Your reckless and irresponsible action in disclosing this letter when you had no right to could have cost the lives of British citizens. This disclosure was a gross breach of trust of your position as a crown servant.<sup>46</sup>

## 2.11 Derek Pasquill

Derek Pasquill was a Foreign Office official accused of leaking confidential documents to the *New Statesman* and the *Observer* newspaper during 2005 and 2006. The documents concerned the Government's views on secret CIA rendition flights and contacts with Muslim groups. The case was abandoned on 9 January 2008 when prosecutors said that documents to be disclosed as part of legal proceedings would have undermined its case that the leaks were damaging. The *Guardian* reported the *New Statesman's* editor as saying:

This was a misguided and malicious prosecution, particularly given that a number of government ministers privately acknowledged from the outset that the information provided to us by Derek Pasquill had been in the public interest and was responsible in large part for changing government policy for the good in terms of extraordinary rendition and policy towards radical Islam.<sup>47</sup>

The Foreign Office was quoted with the following comments:

"It is important that the necessary confidentiality of government information is protected and the leaking of any official documents is therefore absolutely contrary to the good business of government," a Foreign Office spokesman said.

"As Mr Pasquill may be subject to internal disciplinary procedures, any further comment would be inappropriate".

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<sup>45</sup> HC Deb 4 March 2004 c1093w

<sup>46</sup> As quoted in 'Gagging order as two are jailed for leaking Blair-Bush memo', *The Guardian*, 11 May 2007

<sup>47</sup> "Victory for press freedom" over leaks', *Guardian*, 9 January 2008

David Howarth tabled an Early Day Motion on the Pasquill affair:

That this House notes the collapse of the case against Derek Pasquill; believes that the law about official secrets should be based on preventing damage to the public interest rather than preventing embarrassment for the leading party; and calls for an enquiry into the case of Derek Pasquill and for a review of the Official Secrets Act 1989.<sup>48</sup>

The Motion received 51 signatures.

## 2.12 Thomas Lund-Lack

In July 2007 a senior civilian worker at Scotland Yard was jailed for eight months for leaking information about a planned al-Qaeda attack on the West. Thomas Lund-Lack, a retired detective inspector with the Metropolitan Police, admitted willful misconduct in public office by disclosing a Joint Terrorism Analysis Centre report to a *Sunday Times* journalist. A second charge of breaching the *Official Secrets Act 1989* was, it was reported, expected to "lie on file".<sup>49</sup> The judge who sentenced him, Mr Justice Gross, said, "Disclosure of this nature should and ought to attract immediate custody. I shall impose such a sentence in this case with no little sadness but equally no hesitation".<sup>50</sup>

## 2.13 The loss of Government papers

During 2007 and 2008 a number of cases have come to light where civil servants have mislaid sensitive information. At least one civil servant has faced prosecution under the Official Secrets Acts. In a case reported by *The Daily Telegraph* Richard Jackson, a Cabinet Office official, was fined £2,500 under the Official Secrets Act after he left classified papers relating to al-Qaeda and Iraq on a train.<sup>51</sup> According to *The Independent* the paperwork was found by a member of the public and handed over to the BBC. It was subsequently produced on the evening news by the security correspondent, Frank Gardner.<sup>52</sup>

In October 2008 the Cabinet Minister James Purnell left confidential papers on a train which related to the case of a constituent. Jonathan Baume, the head of the FDA, said that Mr Purnell should suffer the same consequences as civil servants in such cases.

## 3 Information on prosecutions under official secrecy legislation

Prosecutions under the OSA are only undertaken with the permission of the Attorney General, and they are rare. The following PQ from 2004 gives some information about those arrested and convicted under the Act:

Mr. Nigel Jones: To ask the Secretary of State for the Home Department how many people were (a) arrested, (b) charged and (c) convicted under the Official Secrets Act in each year since 1997. [152322]

Mr. Blunkett: Arrest data is not collected centrally at the level of detail requested.

The available information, relating to persons proceeded against at the magistrates' courts and found guilty at all courts under the Official Secrets Act 1911 and 1989 is

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<sup>48</sup> EDM No. 690 2007-08

<sup>49</sup> 'Met employee jailed for Sunday Times leak', *PA Business*, 27 July 2007

<sup>50</sup> 'Former police officer jailed for secrets leak', *PA Business*, 27 July 2007

<sup>51</sup> 'Purnell's papers: union wants action', *The Daily Telegraph*, 3 November 2008

<sup>52</sup> 'Officer faces charge over secret files left on train', *The Independent*, 30 September 2008

shown in the table. It is not possible from the data held centrally, to identify summary offences under the Official Secrets Act 1920.

Statistics on court proceedings for 2003 will be published in the autumn.

Number of persons proceeded against at the magistrates' courts found guilty at all courts under the Official Secrets Act 1911 and England and Wales 1997 to 2002 <sup>1</sup>

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|      | Proceeded against | Found guilty <sup>2</sup> |
|------|-------------------|---------------------------|
| 1997 | 1                 | 1                         |
| 1998 | 2                 | 1                         |
| 1999 | --                | 1                         |
| 2000 | 3                 | --                        |
| 2001 | --                | --                        |
| 2002 | 1                 | 2                         |

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<sup>1</sup> These data are on the principal offence. <sup>2</sup> Persons found guilty may exceed the number proceeded against in some prosecution may have taken place in an earlier year.<sup>53</sup>

A list of prosecutions under Section 2 of the Official Secrets Act 1911 between 1911 and 1987 is included as an appendix to a 1988 House of Commons Library Reference Sheet.<sup>54</sup>

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<sup>53</sup> HC Deb 6 February 2004 c1120w

<sup>54</sup> Appendix B to House of Commons Library Reference Sheet No 88/7, *Official Secrets Bill [Bill 9 of 1988-89]*, 16 December 1988