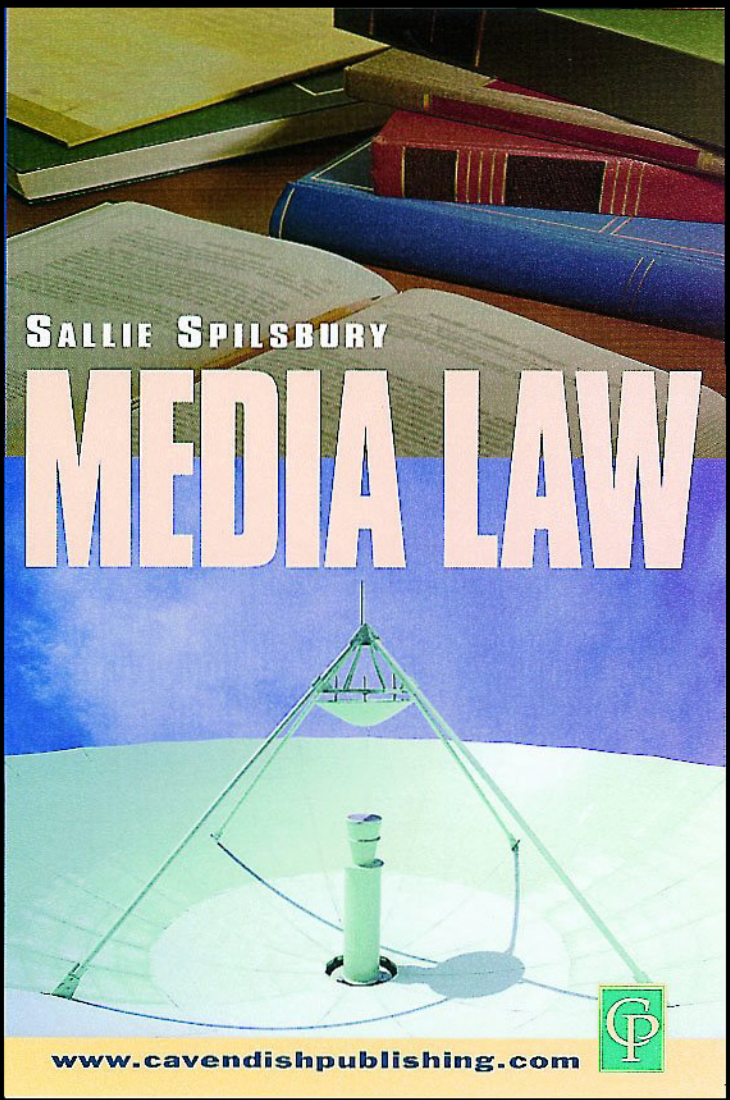
SALLIE SPILSBURY
MEDIA LAW
www.cavendishpublishing.com

GOVERNMENT SECRECY AND FREEDOM OF INFORMATION

OFFICIAL SECRETS

Statutory restraints

Official secrets legislation imposes wide ranging restrictions on freedom of expression which apply to the communication of what might be termed government or 'official' information. The law which applies to the communication of official secrets is to be found in a number of statutes which provide for various criminal offences.

The Official Secrets Act 1911

Section 1

The section creates a criminal offence, punishable by up to *14 years'* imprisonment for the following activities:

(1) If any person *for any purpose prejudicial* to the safety or interests of the State:

(a) approaches, inspects, passes over or is in the neighbourhood of, or enters any prohibited space[1] within the meaning of the Act; or

(b) makes any sketch, plan, model or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or

(c) obtains, collects, records or publishes or communicates to any other person any secret official code word or pass word or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to any enemy,

he shall be guilty of a felony [emphasis added].

Section 1(2) provides that where the charge concerns the making, obtaining, collection, recording, publication or communication of any sketch, plan, model, article, note, document or information relating to or used in a prohibited place it will be deemed to be for a purpose prejudicial to the safety or interests of the State, unless the contrary is shown by the defendant.

1 See SI 1994/968 for the definition of 'prohibited place'. It is a wide definition, in large part dependent on declarations by the Government as to whether the place is prohibited on the ground that information about the place or its destruction or obstruction would be useful to the enemy.

In other words, the burden of proof of showing that the s 1(2) activities were *not* for a purpose prejudicial to the safety or interests of the State lies on the *defence*. And, as any lawyer knows, trying to prove a negative is a very difficult thing indeed.[2]

The Act provides that no prosecution under s 1 may be brought without the consent of the Attorney General.[3]

Section 1 has been described as 'the most draconian law on the British statute book'.[4] The section is headed: 'Penalties for spying'. But the actual wording of the section does not confine itself to spying. It uses the phrase 'prejudicial to the safety or interest of the State'. The width of the offence is therefore dependent on the way in which that phrase is interpreted.

The House of Lords had to consider the ambit of the s 1 in *Chandler v DPP*.[5] In the *Chandler* case, the accused persons, who were pacifists, organised a demonstration at a military airfield. The airfield fell within the definition of 'prohibited place' under the Act. The demonstration was to involve the unauthorised entry onto a number of aircraft in order to prevent them taking off. The accused were charged with conspiracy to commit a breach of s 1 of the Act. The issue was whether their actions fell within s 1 – were they for purposes prejudicial to the safety or interest of the State? The House of Lords were of the view that they were, expressly confirming that s 1 was *not* confined to espionage. The following points are of relevance to the media:

(a) the Act refers to purposes prejudicial to the State. But who determines what the interests of State are? The House of Lords held that this was a decision for the government rather than for the court, at least in relation to matters relating to defence and national security. It was not for the court to determine what the government's policy should have been. This view was confirmed by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*,[6] who said:

> National security is the responsibility of the executive government, what action is needed to protect its interests is … a matter for which those on whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves;

(b) having identified what the State regards as the interests of the State, the question whether the accused's act was prejudicial to those interests *is* a question for the jury. Lord Reid stressed that a trial judge was entitled to

2 This switch in the conventional burden of proof may fall foul of Art 6 of the European Convention on Human Rights (right to a fair trial).

3 Official Secrets Act 1911, s 8.

4 Robertson, G, *The Justice Game*, 1999, Vintage.

5 *Chandler v DPP* [1962] 3 All ER 142.

6 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, p 952.

direct the jury that if they find that the accused acted with the purpose of interfering with the interests of the State as identified by the government they must hold that the purpose was prejudicial;

(c) on the facts of the *Chandler* case, did the intended sabotage amount to a prejudicial purpose? The House of Lords were unanimous in upholding the convictions under s 1. The majority held that the word 'purpose' in s 1 did not involve an examination of the subjective motives of the accused (which might have been, in the *Chandler* case, the avoidance of the threat of war). Instead, the relevant factor in deciding what the purpose of the demonstration had been was the direct and immediate *effect* of the defendant's acts which, on the facts, was the immobilisation of the airfield. This purpose was prejudicial to the interests of the State.

Under s 1(b) and (c) of the 1911 Act, the mere possession of any document or article which *might* be useful directly or indirectly to an enemy constitutes an offence provided that it is obtained or collected for a purpose prejudicial to the safety or interest of the State. Investigative journalism may fall within the ambit of the section. A journalist who collects or publishes articles which relate to defence matters, for example, might be guilty of an offence under the section unless she can prove that the material is not held or published for a purpose prejudicial to the State.

The only real protection against prosecution lies with the Attorney General. It is to be hoped that he will exercise a sense of proportion in deciding whether to permit a prosecution under s 1. Case law indicates that s 1 charges should only be brought in the clearest and most serious of cases.[7]

The danger for the media of having s 1 lurking on the statute book was highlighted in the 1970s with the prosecution of two journalists under s 1 of the Act.[8] The prosecution is known as the *ABC* case – from the initials of the surnames of the defendants. The charges centred on an interview conducted by the journalists with a former soldier who, during the course of the interview, disclosed details about the interception of communications by the military and security services. One of the journalists also faced charges because he had been found to have an extensive private library of information relating to communication interception activities – even though he information contained in his library was already in the public domain.

The s 1 charges against the journalists were eventually dropped at the trial at the insistence of the trial judge rather than as a result of a decision by the prosecution.

7 *R v Audrey, Berry and Campbell*, unreported, but see Aubrey, C, *Who's Watching You?*, 1980, Penguin, for more detail.

8 *Ibid*.

The Human Rights Act 1998 will hopefully provide a safeguard against disproportionate prosecutions under s 1. The provisions of that Act were considered in Chapter 1.

Under s 5 of the Official Secrets Act 1989, a person is guilty of an offence under the 1989 Act if without lawful authority he discloses any information, document or other article which he knows, or has reasonable cause to believe, to have come into his possession as a result of a contravention of s 1 of the Official Secrets Act 1911.

Section 1 of the Official Secrets Act 1920

The 1920 Act provides for the following offences which may be of relevance to the media:

1(2) If any person:

(a) retains for any purpose prejudicial to the safety or interests of the State any official document, whether or not completed or issued for use, when he has no right to retain it, or when it is contrary to his duty to retain it, or fails to comply with any directions issued by a government department or any person authorised by such department with regard to the return or disposal thereof; or

(b) allows any other person to have possession of any official document issued for his use alone, or communicates any secret official code word or pass word so issued, or, without lawful authority or excuse, has in his possession any official document or secret official code word or pass word issued for the use of some person other than himself, or on obtaining possession of any official document by finding or otherwise, neglects or fails to restore it to the person or authority by whom or for whose use it was issued, or to a police constable; or

(c) without lawful authority or excuse, manufactures or sells, or has in his possession for sale any such die, seal or stamp as aforesaid,

he shall be guilty of a misdemeanour.

The Official Secrets Act 1989

The 1989 Act identifies specific areas in relation to which the disclosure and/or publication of official information by the media may give rise to criminal liability.

The Home Secretary who had responsibility for introducing the legislation professed that the intention was to prise the criminal law away from the great bulk of official information[9] by:

(a) limiting the categories of official information for which a prosecution may be brought under the 1989 Act; and

(b) providing that the disclosure must cause damage before a prosecution may be brought.

The consent of the Attorney General is required before a prosecution may be brought under the 1989 Act (unless the prosecution relates to crime and special investigation powers, where the consent of the DPP is required).[10]

The categories of information to which the 1989 Act applies are as follows:

(a) security and intelligence matters (s 1);

(b) defence (s 2);

(c) international relations (s 3); and

(d) crime and special investigation powers (s 4).

Each of the above sections makes it an offence for Crown servants, government contractors[11] or, in the case of s 1 (security and intelligence matters), past and present members of the security and intelligence services, to disclose information, documents or articles relating to the type of information covered by the section in question.

The Act contains a definition of each of the above categories of information, as follows:

- '*Security and intelligence*' means the work of, or in support of, the security and intelligence services or any part of them.[12]
- '*Defence*' means:
  (a) the size, shape, organisation, logistics, order of battle, deployment, operations, state of readiness and training of the armed forces of the Crown;
  (b) the weapons, stores or other equipment of those forces and the invention, development, production and operation of such equipment and research relating to it;
  (c) defence policy and strategy and military planning and intelligence;

9 Douglas Hurd, *Hansard*, 21.12.88, Vol 144, col 460.

10 Official Secrets Act 1989, s 9.

11 Which includes any person who is not a Crown servant, but who provides or is employed in the provision of goods and services to the Government.

12 Official Secrets Act 1989, s 1(9).

(d) plans and measures for the maintenance of essential supplies and services that are or would be needed in time of war.[13]

- '*International relations*' means the relations between States, between international organisations or between one or more States and one or more international organisations and includes any matter relating to a State other than the UK or to an international organisation which is capable of affecting the relations of the UK with another State or with an international organisation.[14]
- In relation to *crime and special investigation powers*, s 4 applies to information, documents or other articles the disclosure of which would or would be likely to:
  (a) result in the commission of an offence; or
  (b) facilitate an escape from legal custody or the doing of any act prejudicial to the safekeeping of persons in legal custody; or
  (c) impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders.

Section 4 also applies to information obtained through a lawful interception of communications or as a result of an unauthorised warrant issued under s 3 of the Security Services Act 1994.

The activities of the media in relation to official information are regulated by s 5 of the Act.

Section 5 applies where:

(a) any information, document or other article protected against disclosure by the earlier sections of the Act [that is, relating to security and intelligence, defence, international relations or crime and special investigation powers] has come into a person's possession as a result of having been:
  (i) disclosed (whether to him or another) by a Crown servant or government contractor without lawful authority; or
  (ii) entrusted to him by a Crown servant or government contractor on terms requiring it to be held in confidence or in circumstances in which the Crown servant or government contractor could reasonably expect that it would be so held; or
  (iii) disclosed (whether to him or another) without lawful authority by a person to whom it was entrusted or mentioned in sub-paragraph (ii) above; and

(b) the disclosure without lawful authority of the information, document or article *by the person into whose possession it has come* is not an offence under

13 Official Secrets Act 1989, s 2(4).

14 *Ibid*, s 3(5).

ss 1, 2, 3 or 4 [that is, the person to whom the information, etc, has been given is not himself a member of the security and intelligence service or a Crown employee or government contractor. If the person did fall within these categories, any disclosure would be an offence under whichever of ss 1, 2, 3 or 4 is relevant to the category of information in question].[15]

Example

X is a journalist who is not a Crown servant or a government contractor. He is given an official memo from the Secretary of State for Defence's office to the Treasury. The memo states that that a significant number of machine guns used by the British Army have defective firing mechanisms. The information is disclosed to him by a civil servant. The disclosure is not authorised.

Section 5 will apply to this scenario. The memo concerns defence matters and so falls within one of the categories of information protected under the Act (in this case, by s 2).

The provisions of s 5

(2) Subject to sub-ss (3) and (4) below, the person into whose possession the information, document or article has come is guilty of an offence if he discloses it without lawful authority *knowing, or having reasonable cause to believe*, that it is protected against disclosure by ss 1, 2, 3 and 4 and that it has come into his possession as mentioned in sub-s (1) above.

Example

In our scenario, X will commit an offence if he discloses the contents of the memo provided that he knew or had reasonable cause to believe:

(a) that the information is protected against disclosure under s 2 of the Act; and

(b) that it has come into his possession in one of the ways set out above in relation to s 5(1).

This is for the prosecution to prove.

Section 5 contains other requirements. They are as follows:

(3) In the case of information or a document or article protected against disclosure under ss 1 to 3 above [relating to security and intelligence, defence and international relations respectively], a person does not commit an offence under s 5 unless:

(a) the disclosure by him is damaging; and

15 Official Secrets Act 1989, s 5(1).

(b) he makes it knowing, or having reasonable cause to believe, that it would be damaging.

The burden of proof in relation to these matters rests with the prosecution.

The test for damage is drawn widely in relation to each type of disclosure. In relation to *security and intelligence*, a disclosure is damaging if it causes damage to the work of, or any part of, the security and intelligence services or it is 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 other articles, the unauthorised disclosure of which would be *likely* to have that effect.

In relation to *defence*, a disclosure is damaging if it damages the capability of, or any part of, the armed forces of the Crown to carry out their tasks or leads to loss of life or injury to members of those forces or serious damage to the equipment or installations of those forces or otherwise endangers the interests of the UK abroad, seriously obstructs the promotion or protection by the UK of those interests or endangers the safety of British citizens abroad. A disclosure is also damaging if it is of information, documents or other articles which is *likely* to have any of the above effects.

In relation to *international relations*, a disclosure is damaging if it endangers the interests of the UK abroad, seriously obstructs the promotion or protection by the UK of those interests or endangers the safety of British citizens abroad or it is of information or of a document or article which is such that its unauthorised disclosure would be likely to have those effects.

There is no requirement for the prosecution to show damage in relation to disclosures relating to crime and special investigation powers.

Example

In our example scenario, the prosecution must prove that the disclosure by X of the contents of the memo caused damage of the type set out above in relation to defence matters, or was likely to do so, and that X made the disclosure knowing or having reasonable cause to believe that it would be damaging.

If, at the time of the disclosure, British troops were engaged in hostile military activity, the disclosure of failings in its artillery could be said to be likely to be damaging according to the above criteria. The enemy might be encouraged to take advantage of the deficiencies which X has revealed. X would probably be found to have reasonable cause to believe that damage would be caused.

Continuing with the requirements of s 5:

(4) A person does not commit an offence under sub-s (2) above in respect of information or a document or other article which has come to his possession as a result of having been disclosed:

(a) as mentioned in sub-s (1)(a)(i) above by a government contractor; or

(b) as mentioned in sub-s (1)(a)(iii) above,

unless that disclosure was by a British citizen or took place in the UK, in any of the Channel Islands or in the Isle of Man or a colony.

In our example, the memo must have been disclosed to X by a person who satisfies these requirements.

Disclosures in the public interest

There is no public interest defence under the 1989 Act.

Example

X's disclosures about the defective guns which have been supplied to the Army might raise matters which are of genuine public concern. However, under the 1989 Act that will not provide X with a defence to the charge.

An attempt to insert into the Freedom of Information Bill[16] a public interest defence which would apply to the 1989 Act has been unsuccessful. One of the grounds which the new Labour Government has given for rejecting the insertion of such a defence is that a person to whom the 1989 Act applies would feel able to decide for himself whether the disclosure of sensitive information is justified on public interest grounds.

This argument is disingenuous. The decision whether a public interest defence had been made out would be for the jury, not for the party making the disclosure.

The omission of a public interest defence has been criticised on the basis that Crown servants and government contractors who fall within the Act's provisions are discouraged from disclosing official information of the type covered by the Act because of a fear that the disclosure will be found likely to cause the damage specified in the Act. Crimes, abuses and scandals may accordingly go undetected. If a public interest defence were in place, officials would be encouraged to come forward to disclose wrongdoing. The court could weigh the damage which has been caused by the disclosure, or the likelihood of such damage, against the fact that the publication of the information is in the public interest when deciding whether an offence had been committed.

The lack of a public interest test may also render the official secrets legislation incompatible with the European Convention on Human Rights. The reader is referred to Chapter 1 for an analysis of the jurisprudence of the European Court of Human Rights on the Convention right to freedom of

16 Which is going through Parliament at the time of writing.

expression. The court has emphasised that limitations on the publication of material which is in the public interest must be shown to be necessary. Under the Convention, the acceptable limitations on freedom of expression include national security, territorial integrity and public safety. However, the danger is that broad restrictions on disclosure of information concerning these matters may go further than is strictly necessary to safeguard the permitted derogations from the right to freedom of expression. A public interest defence would go a long way to ensuring that limitations on disclosure are compatible with the Convention.

Supporters of the 1989 Act point out that there is no need for a public interest defence, because the scheme of the Act provides that information should not be communicated, only where it is damaging to the interests identified in the Act. However, the definition of damage in relation to each of the categories identified above is both broad and vague. Almost any disclosure about the armed forces might be said to be likely to damage their capability to carry out their tasks and therefore satisfy the requirements of damage. This is the case even though the disclosure might be made with the objective of alerting the public to serious deficiencies in, for example, the provision of equipment. The same is true of the other categories of information.

As matters currently stand, the media's ability to report on security and intelligence services, defence matters, international relations and crime and investigation powers are curtailed more restrictively than is necessary to safeguard the public interest. It is to be hoped that the coming into force of the Human Rights Act will help to confine official secrets restrictions to ensure that they operate only where they are both necessary and proportionate.

Disclosure of information in the public domain

Equally significant is the omission of a defence under the Act that the information which has been disclosed by the media is already in the public domain. The government responsible for the introduction of the 1989 Act justified this omission by pointing out that prior publication is taken into account in the Act because it is a relevant consideration in assessing whether damage has been caused by the disclosure. A defendant can argue that the fact that the material in question is already in the public domain makes it unlikely that damage will be caused by the publication. But that will not automatically be the case. The then Home Secretary observed that:

> It is perfectly possible to have partial, incomplete publication in a distant publication with no particular circulation and then to argue that to pick up that information, put it in a different form, and splash it across the news, so ensuring major circulation, would provide a further harm. We cannot assume in advance that it would not, and it would be foolish to admit an overarching

> defence of prior publication. That is why we propose to leave the matter to the jury.[17]

The first prosecution of a writer/journalist under s 5 of the Act was recently dropped before it came to trial. The prosecution was against the writer Tony Geraghty and concerned his book about the military history of 'the Troubles' in Northern Ireland, *The Irish War*. A military internal inquiry found that the book did not threaten lives or the conduct of present operations in Northern Ireland.[18] Nevertheless, a prosecution was commenced against Mr Geraghty on the ground that he had been given access to confidential information. It would appear that the contents of the book were in the public domain before the publication of Mr Geraghty's book. However, as we have seen, that in itself is not a defence (although it is likely to make it more difficult to show that the disclosure was damaging). Mr Geraghty pleaded not guilty, relying on the fact that the book did not cause damage to Irish security or defence. In December 1999, the charge was dropped against him. It is interesting to note that no action was taken against the book, which remained on sale whilst the prosecution was proceeding.[19] It would be difficult for the prosecution to show that the book was damaging when it had made no attempt to obtain an order removing the book from sale.

Other provisions under the 1989 Act

Section 6 of the Act applies to information, documents or other articles entrusted in confidence to other States or international organisations. It is an offence to make an unauthorised disclosure of such information when it relates to security and intelligence, defence or international relations where it is known or where there is reasonable cause to believe that the information was disclosed to the State or international organisation in accordance with s 6 and that its disclosure would be damaging (see above for the definition of 'damaging'). Where the information is disclosed without the authority of the State or organisation, the prosecution must prove that this fact is known and that there is reason to believe that it has been disclosed in such circumstances.

Section 8(4) of the Act provides that, where a person has in his possession or control any document or other article which it would be an offence for him to disclose under s 5, he commits an offence if he fails to comply with an official direction for its return or disposal. Similarly, where he obtained the document or article from a Crown servant or government contractor on terms requiring it to be held in confidence or in circumstances where there is a reasonable expectation that it will be so held, he fails to take such care to

17 *Hansard*, 21.12.1998, Vol 144, col 464.

18 Geraghty, T (2000) *The Times*, 8 February.

19 See, also, (1999) *The Guardian*, 12 May and (1999) *The Guardian*, 23 June.

prevent its unauthorised disclosure as a person in his position may reasonably be expected to take.

Non-statutory restraints

The DA notice system

The DA (or defence advisory) notice system is a method of providing guidance to the media as to what information relevant to national security may or may not be made public. The guidance is provided by the Defence Press and Broadcasting Advisory Committee, which is a body made up of civil servants, and representatives of the media.

The system is voluntary and non-binding.

The committee has issued a number of DA notices which are written in broad terms and which are intended to provide general guidance to the media. They have no legal standing. Compliance with a DA notice will not necessarily mean that the publication of material will not give rise to criminal liability under the official secrets legislation or, indeed, any other type of liability.

The DA notices currently in force cover the following matters:

(a) operations, plans and capabilities;

(b) non-nuclear weapons and operational equipment;

(c) nuclear weapons and equipment;

(d) cyphers and secure communications;

(e) identification of specific installations;

(f) security and intelligence services.

The key figures in the system are the committee's secretary and deputy secretary who can be contacted by the media for advice. A request for advice usually concerns the application of the broad wording of the notices to a specific set of circumstances. The secretary's advice is not binding. The media may therefore choose not to follow it.