

## The United Kingdom's Official Secrets Act 1989

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The United Kingdom's Official Secrets Act (1989)<sup>2</sup> regulates both primary disclosure of information by former and currently employed public servants (including members of the security and intelligence services, the civil service and the armed forces) as well as secondary disclosure by anyone else. The Act differentiates among the penalties these various groups face if they engage in disclosure of information, as well as among the various defenses available to them.

The Act is problematic both on its face and as applied. First, the *mens rea* required for criminal culpability casts a wide net, and where the burden of proof falls is unclear. Second, the scope of the Act's applicability is vast: it prohibits members of the security services (armed forces and intelligence), as well as ordinary Crown civil servants from making unauthorized disclosures of information concerning intelligence, defence or international relations, or whose disclosure could result in the commission of an offence, facilitate an escape from legal custody, or impede criminal examinations. Third, defences are very limited: it is not a defence that information was false or was not formally classified, or that there was overriding public interest in disclosure. However, the law does require the prosecution to establish damage in cases of Crown employees other than those in the security services, which judges and juries have sometimes interpreted to provide a form of public interest defence. Fourth, the Act is often invoked to justify investigations that do not result in charges, or that result in charges that are eventually determined to be inappropriate or unfounded. Such use of the Act has disrupted the lives and careers of numerous suspects whether or not charges are brought or prosecuted.<sup>3</sup> Although the UK government has pursued fewer than a dozen cases through to trial under the 1989 Act, the impact of those cases together with the significant number of occasions on which the government has invoked the Act to justify investigations has clearly had a chilling effect in deterring disclosures of information of overriding public interest. Fifth, the ban on disclosures covers material that has ceased to be confidential because it has already been made public.<sup>4</sup> Finally, the Act and cases that have applied it impose a burdensome process for obtaining authorization for publication of information, whether to parliament or via the mass media, books and memoirs.<sup>5</sup> The process leaves considerable discretion up to authorizing officials and requires those who wish to disclose information to expend significant time, energy, and persistence.

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<sup>2</sup> Available at <http://www.legislation.gov.uk/ukpga/1989/6/contents>.

<sup>3</sup> See, e.g., the case of Major Milos Vladimir Stankovic, discussed below at fn. 73.

<sup>4</sup> Article 19 and Liberty, "[Secrets, Spies and Whistleblowers: Freedom of Expression in the UK](#)", 2000, Chapter 3.1.1, p. 20.

<sup>5</sup> The internal reporting mechanisms are set forth in paras 27-36 and 79 of the Act.

The United Nations Human Rights Committee in 2001 criticized the United Kingdom for its implementation of the Official Secrets Act in such a way as to have had a negative impact on journalism.<sup>6</sup>

The OSA is not the only tool at the state's disposal: members of security and intelligence agencies generally are required to sign contractual agreements that enable the state to bring civil actions for unauthorized disclosure upon a showing that is easier to satisfy than the criminal burden of proof.<sup>7</sup>

## **1. Persons to Whom the Law Applies**

### ***1.1 Primary Disclosures***

#### **Section 1: Information Relating to Security or Intelligence**

Members of the security and intelligence services (as well as some other civil servants who have been notified of penalties for unauthorized disclosure<sup>8</sup>) who make an unauthorized disclosure may be subject to penalty irrespective of whether the disclosure is damaging or not.<sup>9</sup> As related to their service, this applies to former members of security and intelligence services indefinitely.<sup>10</sup>

Harm test is also not applied in determining whether actions are deserving of criminal punishment.

Current or former service members who wish to disclose information must seek authorization from their superiors, former supervisors, or the Director General of the Service.<sup>11</sup> If authorization is denied, the service member must exhaust existing regulatory mechanisms for challenging the denial, and if these prove unsuccessful, must seek judicial review through the appropriate tribunal.<sup>12</sup> In the case of a challenge based on Article 10 of the European Convention on Human Rights (ECHR), that tribunal is the Investigatory Powers Tribunal (IPT), which has more

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<sup>6</sup> get UN HRC cite. See also Stoll v. Switzerland, No. 69698/01, (2008) 47 E.H.R.R. 59, 1294-95, in which the European Court of Human Rights warned against allowing the state's legitimate interest in protecting official secrets from becoming a mere pretext for suppressing freedom of expression, information, international scientific co-operation, and other protected communication.

<sup>7</sup> See, e.g. Ministry of Defense v. Benjamin Simon Glaire Griffin, 2008 WL 259601, para. 16 (noting "that the obligations imposed by the standard contractual provisions in Clauses (1) and (2) echo the wording contained in s. 1 of the Official Secrets Act 1989," and that "it is clearly intended to achieve the same public policy objectives, in the interests of national security, although to be enforced through the remedies available in civil litigation rather than by way of criminal sanctions.")

<sup>8</sup> OSA, Section 1(1)(b)

<sup>9</sup> OSA, Section 1(1)

<sup>10</sup> See, e.g. Her Majesty's Attorney General v. David Shayler, 2006 WL 2667649 (QB); A. v. B. (R. (on the application of A) v Director of Establishments of the Security Service) 2009 WL 4248620; Supreme Court; 09 December 2009

<sup>11</sup> Shayler, para. 15

<sup>12</sup> Elsevier, 152 NLJ 556, April 12, 2002

restrictive procedures than those of normal courts.<sup>13</sup> One critic noted that the onerous process required for authorization may cause frustrated security employees, especially those who have left the service, to publish without authorization (relatively easy in the age of international publication and Wikileaks) rather than appeal a negative decision.<sup>14</sup>

The process in the UK is more onerous and discretionary than in the United States, where the CIA established a Publication Review Board following a [what year?] US Supreme Court Decision.<sup>15</sup> Former employees must seek authorization from this Board to publish speeches, journal articles, theses, op-eds, book reviews, movie scripts, scholarly treatises and works of fiction, identified in the confidentiality agreement signed by employees prior to beginning work.<sup>16</sup> The Board provides a more manageable and impartial process than exists in the UK, given that the Board has five members in contrast to the single Director General in the U.K., and generally reviews manuscripts more expeditiously than does the Director General.<sup>17</sup>

“Ordinary” civil servants (Crown servants and government contractors) other than those specified in Section 1(1) are also prohibited to disclose “any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of [his] position.”<sup>18</sup> Nonetheless, as opposed to the blanket ban on disclosures by members of security and intelligence services, ordinary civil servants may be penalized only when they make a “damaging disclosure.”<sup>19</sup> Pursuant to Section 1(4), a disclosure is damaging if it causes or is likely to cause damage to the work of the security and intelligence services. The same provision also provides that the disclosed “information, document or article” will be damaging if it “falls within a class or description of information, documents or articles the unauthorized disclosure of which would be likely to have that effect.”<sup>20</sup> As a result, even if the disclosed piece of information is not in itself damaging, the disclosure may still be penalized. Section 1(3) covers “any information, document or other article” (emphasis added), regardless of whether it is classified or not.

The Act occasionally is used in concert with prosecutions for the common law offense of “misconduct in public office.” For instance, in the Damien Green affair, a parliamentary committee investigated police misconduct in failing to properly investigate charges of police wrongdoing.<sup>21</sup> The police resorted to “misconduct in public office” ostensibly to evade the limitations imposed by the OSA on the use of criminal law to protect government secrets,

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<sup>13</sup> Savage, Mora, “**Security** service memoirs and the jurisdiction of the Investigatory Powers Tribunal: the Supreme Court’s decision in A v B” Ent. L.R. 2010, 21(5), 196-199, p.196

<sup>14</sup> Id at 198

<sup>15</sup> Id. At 198-99. See *Snepp v. United States* [ cite]

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> OSA, Section 1(3)

<sup>19</sup> OSA, Section 1(3)

<sup>20</sup> OSA, Section 1(4)(b)

<sup>21</sup> Bradley, “The Damien Green affair – all’s well that ends well?” P.L. 2012, Jul, 396-407, 401, citing “the Campbell report” after the MP Sir Menzies Campbell who chaired the investigation).

highlighted by the clear abuse of public office the offense is usually used to prosecute.<sup>22</sup> Past offenses have included jury rigging by a jury officer, prison monitoring board members seeking sexual relations with prisoners, and police officers alerting drug dealers about proposed police operations.<sup>23</sup>

The White Paper on the OSA of 1989 justifies proscribing disclosure of all security-related information, whether true or false, on the basis that:

- 1) as a matter of policy, governments do not comment on the veracity of assertion about security or intelligence; and
- 2) statements by current or former members of the security and intelligence services have a “particular credibility” that allows false disclosures to cause as much damage as genuine revelations.<sup>24</sup>

## Section 2: Information Relating to Defence

Disclosure of a piece of “information, document or other article relating to defence”<sup>25</sup> may be penalized if it is damaging.<sup>26</sup> Disclosure of information relating to defence will be considered damaging if it damages or is likely to damage the capability of the armed forces to conduct their tasks, leads to a loss of life or injury of those forces or to serious damage to the equipment of those forces, endangers the interests of the United Kingdom or endangers the safety of British citizens abroad.<sup>27</sup> The provision refers to “*any* information, document or other article” (emphasis added), regardless of whether it is classified or not.

## Section 3: Information Relating to International Relations

Section 3 of the Act concerns the unauthorized, damaging disclosure by a civil servant of “any information, document or other article relating to international relations”<sup>28</sup> or “any *confidential* information, document or other article” (emphasis added) obtained from a foreign state or international organization.<sup>29</sup> Section 3(2) provides a definition of what constitutes a “damaging” disclosure of the above information, although the definition’s breadth is subject to criticism. Disclosure is considered damaging if it does or is likely to “[endanger] the interests of the United Kingdom abroad, seriously [obstruct] the promotion or protection by the United Kingdom of those interests or [endanger] the safety of British citizens abroad.”<sup>30</sup> According to Section 3(3), the confidential status of the disclosed information acquired from a foreign state or an international organization may be sufficient for establishing its disclosure’s damaging impact.

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<sup>22</sup> Bradley, “The Damien Green affair – all’s well that ends well?” P.L. 2012, Jul, 396-407, 401

<sup>23</sup> Id.

<sup>24</sup> Article 19 and Liberty, “[Secrets, Spies and Whistleblowers: Freedom of Expression in the UK](#)”, 2000, Chapter 3.1.1, p. 21 citing Reform of Section 2 of the Official Secrets Act 1911, Cm 408.

<sup>25</sup> OSA, Section 2(1)

<sup>26</sup> OSA, Section 2(1)

<sup>27</sup> OSA, section 2(2)(a)-(c)

<sup>28</sup> OSA, Section 3(1)(a)

<sup>29</sup> OSA, Section 3(1)(b)

<sup>30</sup> OSA, Section 3(2)(a)-(b)

The Official Secrets Act has been invoked to deny disclosure even to defendants in criminal cases, if disclosure would cause “real harm” to the UK government’s relations with other states or the national security of the UK.<sup>31</sup>

#### Section 4: Information Impacting Crime and Special Investigation Powers

Civil servants are barred from disclosing *any* information, document or other article that does or is likely to result in the commission of an offence, facilitate an escape from legal custody, or impede criminal examinations.<sup>32</sup> Pursuant to Section 4(3), the unauthorized disclosure of information that was acquired by warranted secret surveillance is also forbidden.

##### ***1.2 Secondary Disclosures***

#### Section 5: Information Resulting from Unauthorized Disclosures or Entrusted in Confidence

The Act also penalizes certain disclosures by “anyone”. Section 5 criminalizes the damaging,<sup>33</sup> or expectedly damaging,<sup>34</sup> disclosure of information by any person who has acquired it from a civil servant disclosing it through primary disclosure<sup>35</sup> or if the information has come to the person’s possession via secondary disclosure.<sup>36</sup>

#### Section 6: Information Entrusted in Confidence to Other State or International Organizations

Section 6 makes the secondary disclosure by any person of any information relating to security or intelligence, defence or international relations which has been communicated in confidence by or on behalf of the United Kingdom to another state or to an international organization an offence,<sup>37</sup> if its disclosure is damaging or could reasonably be expected to be damaging.<sup>38</sup>

##### ***1.3 Refusal to Return Confidential Information***

Section 8(6) provides that: “Where a person has in his possession or under his control any document or other article which it would be an offence under section 6 above for him to disclose without lawful authority, he is guilty of an offence if he fails to comply with an official direction for its return or disposal.”

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<sup>31</sup> S.C.L. 2008, May, 614-627, 618 case name? Al-Megrahi (Abdelbaset Ali) v HM Advocate, 2008 WL 833691, para 8.

<sup>32</sup> OSA, Section 4(2)(a)-(b)

<sup>33</sup> OSA, Section 5(3)(a)

<sup>34</sup> OSA, Section 5(3)(b)

<sup>35</sup> OSA, Section 5(1)(a)(i)-(ii)

<sup>36</sup> OSA, Section 5(1)(a)(iii)

<sup>37</sup> OSA, Section 6(1)(a)

<sup>38</sup> OSA, Section 6(2)

## **2. Defences and Knowledge Requirement**

It is not a defence under the Act that the disclosed information was not formally classified, or false, or that the public interest in disclosure outweighs the public interest in secrecy.<sup>39</sup>

The Act provides for only one defence for members of the security and intelligence services: according to Section 1(5), the service member needs to prove lack of knowledge, or lack of reasonable cause to believe, that the information disclosed related to security or intelligence.

“Ordinary” (non-security sector) Crown servants may avail themselves of two defences: first, the above defence, and, second, the defence of lack of knowledge, or no reasonable cause to believe, that the disclosure would have a damaging impact (as defined by the respective subsections).

In the case of secondary disclosure of information it is a defence if the person lacked knowledge, or had not reasonable cause to believe, that the information was protected against disclosure by the Act.<sup>40</sup> If the information relates to security, intelligence, defence or international relations, it is a defence if the disclosure was not damaging or the person lacked knowledge, or had no reasonable cause to believe, that disclosure would be damaging.<sup>41</sup>

## **3. Scope of information covered**

The OSA is restricted in scope to information concerning security and intelligence,<sup>42</sup> defence,<sup>43</sup> international relations,<sup>44</sup> or crime.<sup>45</sup>

## **4. Penalties**

Section 10(1) of the Act sets forth a maximum of 2 years’ imprisonment or an unlimited fine or both for conviction following indictment of any of the offences in the Act other than mere possession (see below).<sup>46</sup> Following summary conviction without indictment, the prison sentence may not be longer than six months and/or the fine may not exceed the statutory maximum.<sup>47</sup>

## **5. Related offences under the OSA: mere possession**

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<sup>39</sup> OSA, Sections 1(1) and 1(2)

<sup>40</sup> OSA, Section 5(2)

<sup>41</sup> OSA, Sections 5(3); and also 6(1) and 6(2) re information relating to security, intelligence, defence and international relations which the United Kingdom has communicated to a foreign state or international organization.

<sup>42</sup> OSA, Section 1

<sup>43</sup> OSA, Section 2

<sup>44</sup> OSA, Section 3

<sup>45</sup> OSA, Section 4

<sup>46</sup> OSA, Section 10(1)(a)

<sup>47</sup> OSA, Section 10(1)(b)

Sections 8(1) et seq. prohibit the mere possession by a Crown servant or government contractor of “any document or other article which it would be an offence under any of the foregoing provisions of this Act for him to disclose without lawful authority”. The offence carries a maximum penalty of 51 weeks.<sup>48</sup>

## 6. Civil Procedures to Address Unauthorized Disclosures

A popular means of preventing disclosures is the use of the civil remedy of an injunction. Injunctions may be sought to prevent breaches of contractual or fiduciary duties of confidence or copyright, or to prevent OSA offences. Injunctions have several advantages over criminal proceedings including: 1) the process to obtain an injunction generally moves more quickly than do criminal proceedings;<sup>49</sup> 2) the government bears a lighter burden of proof: it needs to establish only that it has an arguable case in law; that granting damages is inadequate; and that the balance of convenience favours granting the injunction; and 3) injunctions are generally politically less sensitive than OSA proceedings.<sup>50</sup>

Even evidence disclosed during the course of an OSA trial may be suppressed. In the Koegh case concerning the Bush-Blair memo about invading Iraq, the judge issued an indefinite injunction forbidding publication of evidence exposed accidentally during trial that had been deemed excluded prior to its exposure.<sup>51</sup> In an appeal by Times Newspapers Ltd. and 16 other media organizations, the court affirmed the indefinite injunction.<sup>52</sup>

In addition to injunctions, other procedures may be used for breach of confidence and other civil obligations, including: 1) delivery-up – on the basis that the Crown holds copyright of the documents; 2) damages – for loss incurred as a result of breach of contract, infringement of copyright or breach of fiduciary duties of confidence; and 3) account of profits – for all profits made from disclosure that results in breach of fiduciary duty and breach of copyright.<sup>53</sup>

## 6. Cases

Since the OSA 1989 entered into force, ten public servants with authorized access to confidential information, and three members of the public (a writer, an MP’s staff member, and a TV news producer) have been prosecuted under the Act for disclosures to the public, as detailed below. In five of these cases, charges were eventually dropped; and in another, a jury found the official not guilty. In one case, an official who pled guilty was fined. Five officials and one member of the

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<sup>48</sup> See amended section 10(2) of OSA, at <http://www.legislation.gov.uk/ukpga/2003/44/schedule/26/paragraph/39/prospective>.

<sup>49</sup> This is so even though the Human Rights Act 1998, Article 12.2, requires the presence of the person against whom the injunction is sought.

<sup>50</sup> Article 19 and Liberty, “[Secrets, Spies and Whistleblowers: Freedom of Expression in the UK](#)”, 2000, Chapter 3.2, p. 24-25, also citing *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396. House of Lords.

<sup>51</sup> *In re Times Newspapers Ltd and others v Court of Appeal*, [2008] 1 W.L.R. 234

<sup>52</sup> *Id.* at 242

<sup>53</sup> Article 19 and Liberty, “[Secrets, Spies and Whistleblowers: Freedom of Expression in the UK](#)”, 2000, Chapter 3.2, p. 26.

public served time in jail: two officials (a former MI6 agent and a navy petty officer) were each sentenced to 12 months (reduced to six months in the case of the MI6 agent); three others were sentenced to eight, six, and two months in jail, respectively; and an MP's staff member was sentenced to 3 months. The person who served one year, the longest time actually served, was a former intelligence agent who had attempted to sell the names and contact details of covert agents to Dutch agents.<sup>54</sup> In most of the cases, the public servants lost their jobs.<sup>55</sup> Details about these 13 cases follow.

### Charges Dropped in Five Cases

1. Derek Pasquill, a Foreign Office civil servant, was arrested and suspended with pay from his job in January 2006 for having leaked to a journalist Whitehall documents pertaining to the US practice of extraordinary rendition and UK government policy towards Muslim groups. He was charged with six counts of violating the OSA in September 2007. The case against him collapsed after internal FCO papers revealed that Pasquill's leaking of the information had actually been helpful in starting a constructive debate, and that one senior official had written that disclosure had not caused any harm, including to national security and international relations.<sup>56</sup> On January 9, 2008, charges were dropped against him, but he was dismissed from his job for gross misconduct in August 2008.<sup>57</sup>
2. In November 2003, charges were brought against Katharine Gunn, a translator for General Communications HQ (GCHQ), a British intelligence agency. She was accused of having leaked an email from the US National Security Agency requesting the UK's assistance in bugging the offices of six UN Security Council members that were considered swing votes on the issue of approval of the invasion of Iraq. The prosecution dropped the charges on Feb 25, 2004, the trial's opening day, shortly after the defence had asked the government for any records of advice about the legality of the war that it

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<sup>54</sup> David Houghton, a former Secret Intelligence Service employee, was charged under the OSA in 2009 for attempting to sell information marked as "secret" and "top secret," including the names, addresses and phone numbers of 426 British spies, to Dutch agents for £2m. He was sentenced to 12 months in prison on September 3, 2010. *Former MI6 man Daniel Houghton admits secrecy breach*. BBC News, 14 July 2010, as accessed: <http://www.bbc.co.uk/news/10629017>; *Bungling spy who tried to betray MI6 secrets for £2m walks free*. Daily Mail, 4 September 2010, as accessed: <http://www.dailymail.co.uk/news/article-1308718/MI6-worker-Daniel-Houghton-jailed-trying-sell-secrets.html#ixzz1h56xLtel>; Davies, Caroline. *MI6 man tried to sell colleagues' names for £2m*. The Guardian, 3 September 2010, as accessed: <http://www.guardian.co.uk/world/2010/sep/03/mi6-man-jailed-selling-names>

<sup>55</sup> In addition, on March 2, 2011, two Special Forces officers were charged under the OSA and released on bail. An internet search yielded no further information about these prosecutions. *Police investigate secrets breach*. The Independent, 09 April 2011, as accessed: <http://www.independent.co.uk/news/uk/crime/police-investigate-secrets-breach-2265581.html>; *Military Officials Secret Act 'breach' investigated*. BBC News, 9 April 2011, as accessed: <http://www.bbc.co.uk/news/uk-13024330>; *Special Forces scandal as officers are held 'for trying to leak secrets'*. Daily Mail, 9 April 2011, as accessed: <http://www.dailymail.co.uk/news/article-1375048/SAS-officers-held-trying-leak-secrets-Libya-Afghanistan.html#ixzz1h5Qwv5YM>

<sup>56</sup> Norton-Taylor, Richard. *Civil servant who leaked rendition secrets goes free*. The Guardian, 10 January 2008, as accessed: <http://www.guardian.co.uk/media/2008/jan/10/pressandpublishing.medialaw>

<sup>57</sup> Wikibin, <http://wikibin.org/articles/derek-pasquill.html>.

had received during the run-up to the war.<sup>58</sup> The director of public prosecutions and attorney general did not state their reasons for dropping the charges but it was widely assumed that they did not believe that they could persuade a jury to convict Gunn<sup>59</sup> and did not want to risk having to disclose the requested documents. Gunn was fired by GCHQ.

3. On December 3, 1998, the home of Tony Geraghty, a British-Irish writer and journalist, was searched and he was interviewed by the Ministry of Defence Police, after his book “The Irish War” on security and intelligence operations in Northern Ireland was published. Geraghty was charged with breaching Section 5(6) of the OSA in May 1999 on the basis that he took possession of protected documents and made a damaging disclosure by quoting from classified army documents in the book.<sup>60</sup> In searching his house, the authorities did not find any copies of the documents he cited in the book. Accordingly, the attorney general ended the prosecution.
4. The police also searched the home of Geraghty’s co-defendant, Nigel Wylde, a former government contractor. They came across evidence that indicated that Wylde had passed five confidential documents to Geraghty. Wylde was charged with making a damaging disclosure.<sup>61</sup> Charges were dropped against him only on November 1, 2000, when it became evident that “The Irish War” contained no information that had not already been publicly available, and therefore could not be damaging.
5. Neil Garrett of *ITV News* was arrested in October 2005 under the OSA after publishing internal police information about Jean Charles de Menezes, a Brazilian man shot dead by the London police on July 22, 2005 after he was misidentified as one of the suspects involved in the previous day’s failed bombing attempts. The story revealed that in an effort to deflect criticism, the police had misled the public about de Menezes’ actions before he was shot. Garrett was cleared in May 2006 after several detentions.

### **Found not guilty by a jury**

6. In February 2008, Nicholas Thompson, a senior Essex detective, was accused of leaking sensitive information and naming the maker of a confidential phone call in violation of

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<sup>58</sup> Oliver, Mark. *GCHQ whistleblower cleared*. The Guardian, 25 February 2004, as accessed: <http://www.guardian.co.uk/uk/2004/feb/25/iraq.pressandpublishing>

<sup>59</sup> See, e.g., Ben Emmerson, “It’s outrageous to accuse the Guardian of aiding terrorism by publishing Snowden’s revelations,” The Guardian, 2 December 2013.

<sup>60</sup> See: [http://en.wikipedia.org/wiki/Tony\\_Geraghty](http://en.wikipedia.org/wiki/Tony_Geraghty); Campbell, Duncan. Led by the nose. The Guardian, 2 November 2000, as accessed: Norton-Taylor, Richard. *Secrets breach denied*. The Guardian, 23 June 1999, as accessed: <http://www.guardian.co.uk/politics/1999/jun/23/freedomofinformation.uk1> <http://www.guardian.co.uk/politics/2000/nov/02/freedomofinformation.uk>;

<sup>61</sup> Norton-Taylor, Richard. *Secrets breach denied*. The Guardian, 23 June 1999, as accessed: <http://www.guardian.co.uk/politics/1999/jun/23/freedomofinformation.uk1>

Section 4(1) of the OSA.<sup>62</sup> He stood trial for two offences of unlawful disclosure of police information. A Southwark Crown Court jury found him not guilty of both charges in January 2005. However, Thompson, who had been required to resign from the Essex police when charged, did not get his job back.<sup>63</sup>

### **Fined**

7. On October 28, 2008, Richard Jackson, a senior civil servant at the UK Ministry of Defence, pleaded guilty to an offence under Section 8(1) of the Official Secrets Act 1989. Jackson had inadvertently left highly sensitive Whitehall intelligence files relating to Al-Qaeda and Iraq on a train, which were considered to have the potential to damage national security and UK international relations. The documents were found by members of the public. The City of Westminster Magistrates Court fined Jackson £2,500.<sup>64</sup>

### **Served a custodial sentence**

1. Richard Tomlinson, a British former MI6 officer, was charged and arrested in 1997 for violating the OSA by giving a 4-page synopsis of a proposed book detailing his career to an Australian publisher, even though it was never claimed that he had revealed any secret information. When it became clear that he would likely be held in pre-trial detention for two years, the maximum penalty he could serve, he instead pled guilty, was sentenced to 12 months in prison, and was released after six months for good behaviour. After serving his sentence, Tomlinson left to France where he made public allegations of MI6's wrongdoings. He was re-arrested in July 1998 in France on the basis that he was intending to make damaging disclosures regarding security and intelligence services. However, the UK government's attempt to extradite him failed. He then travelled to New Zealand where he was given an injunction obtained by the UK which prevented him from making any security related disclosures and complemented the UK injunction. In May 1999 when names of the spies were placed on the Internet, the government suspected him, and he was expelled from Switzerland where he was then living. In May 2000, Italian police with UK officials raided his apartment in Italy and took away personal papers and computer equipment.<sup>65</sup>

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<sup>62</sup> *Officer bailed on secrets charges*. BBC News, 18 February 2004, as accessed: [http://news.bbc.co.uk/2/hi/uk\\_news/england/essex/3500701.stm](http://news.bbc.co.uk/2/hi/uk_news/england/essex/3500701.stm)

<sup>63</sup> *Detective sacked after disciplinary hearing*:

<http://www.bernardmahoney.com/essexboystng/articles/dsadh.html>

<sup>64</sup> Tran, Mark. *Civil servant fined £2,500 for leaving secret al-Qaida files on train: Richard Jackson pleads guilty to breaching Official Secrets Act*. The Guardian, 28 October 2008, as accessed: <http://www.guardian.co.uk/uk/2008/oct/28/terrorism-security-secret-documents>

<sup>65</sup> Article 19 and Liberty, "[Secrets, Spies and Whistleblowers: Freedom of Expression in the UK](#)", 2000, Chapter 3.3, p. 27 citing "The spy who was snubbed" BBC News 13 May 1999, see: [news6.thdo.bbc.co.uk/hi/english/uk/newsid\\_342000/342853.stm](http://news6.thdo.bbc.co.uk/hi/english/uk/newsid_342000/342853.stm); David Leppard and Nicholas Rutherford, "The spies dragged in from the cold," The Sunday Times, 9 August 1998; Michael Evans, "Cook gags former MI6 spy in New Zealand," The Times, 6 August 1998 and Philip Wilan "Renegade spy to give himself up in return for tribunal hearing", The Guardian, 3 June 2000.

The book, named *The Big Breach*, was published in Moscow in 2001. After the Court of Appeal of England and Wales ruled in his favour, the book was made available in the UK. However, the British Government obtained a court order to confiscate proceeds from the book. In September 2008, MI6 ended all legal objections to the book, released the proceeds to Tomlinson, and admitted that its previous legal actions had been disproportionate. However, MI6 refused to reinstate him or compensate him for the loss of his career and pension.<sup>66</sup>

2. In October 1998, Steven Hayden, a Chief Petty Officer in the Royal Navy was jailed for 12 months after he sold secret information to the Sun newspaper for £10,000 for a story about an alleged plot by Iraq's leader Saddam Hussein to launch anthrax attacks in the UK. Hayden pleaded guilty to disclosing information relating to security and intelligence contrary to Section 1 of the OSA.<sup>67</sup>
3. Thomas Lund-Lack, a Scotland Yard employee, was charged with misconduct and breaching the OSA for having leaked secret information about a planned al-Qaida attack to the Sunday Times. He pleaded guilty to wilful misconduct in a public office and denied the latter charge.<sup>68</sup> He was sentenced for wilful misconduct and on July 27, 2007, he was jailed for eight months.<sup>69</sup>
4. In May 2007, David Keogh, a civil servant in the secret Pindar complex underneath the Ministry of Defence, was convicted of disclosing a memo, marked secret, which was damaging to international relations. The memo included information about a meeting on the situation in Iraq between US President George Bush and British Prime Minister Tony Blair at the White House in April 2004. While the memo's contents were never made public, high-level government witnesses at the three-week trial said it referred to operations by MI6 in Iraq and was "extremely sensitive" to US and British foreign policy. The defence lawyer said that the memo also referred to Blair's efforts to persuade Bush not to bomb Al Jazeera in Qatar. The defence's argument that the disclosure was not damaging was rejected. Keogh was sentenced to six months in jail and ordered to pay £5,000 in costs to the prosecution.
5. Leo O'Connor, a researcher working for Labour MP Tony Clarke, was convicted of having received the memo from Keogh and slipping it into a stack of the MP's papers. When the MP found it, he called the police. O'Connor was sentenced to three months.<sup>70</sup>

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<sup>66</sup> See [http://en.wikipedia.org/wiki/Richard\\_Tomlinson](http://en.wikipedia.org/wiki/Richard_Tomlinson).

<sup>67</sup> *UK Anthrax officer jailed for a year*. BBC News, 23 October 1998, as accessed: [http://news.bbc.co.uk/2/hi/uk\\_news/199796.stm](http://news.bbc.co.uk/2/hi/uk_news/199796.stm)

<sup>68</sup> See <http://z13.invisionfree.com/julyseventh/index.php?showtopic=1912>

<sup>69</sup> See:

<http://z13.invisionfree.com/julyseventh/index.php?s=43936a5148cc5d512e8aac1370351637&showtopic=1912&st=7>

<sup>70</sup> Summers, Chris. *When should a secret not be a secret?* BBC News, 10 May 2007, as accessed: <http://news.bbc.co.uk/2/hi/uk/6639947.stm>; *Secrets-leaker handed prison term*. Reuters, 10 May 2007, as accessed: <http://uk.reuters.com/article/2007/05/10/uk-britain-trial-secrets-idUKL1060345320070510>.

6. On 24 August 1997, *The Mail on Sunday* published articles based on information related to security and intelligence (composed of 28 files on seven topics, including several on Libyan links with the IRA, Soviet funding of the Communist party of Great Britain, agents' names and other highly sensitive information). A former Security Service (M15) member, David Michael Shayler, was accused of providing information to, and writing articles for, the newspaper. Prior to publication of the articles, Shayler had left the United Kingdom for France. The UK unsuccessfully sought his extradition for violation of the OSA on three counts (under Sections 1 and 4 of the Act). On his voluntary return to face the charges in 2000, he was arrested and subsequently tried. During the proceedings he argued that the disclosures he had made were necessary in the public and national interest (a necessity defence), a defence that Sections 1 and 4 of the OSA do not allow. The Court of Appeal concluded that rejection of a public interest defence was not incompatible with Article 10 of the European Convention on Human Rights,<sup>71</sup> and the House of Lords upheld the decision.<sup>72</sup> The House held that the ban on disclosures was not absolute. Instead, disclosure was permitted through designated steps of authorization and judicial review. On November 5, 2002, Shayler was sentenced to six months imprisonment, but was released after serving seven weeks under a home detention curfew scheme.<sup>73</sup>

### **Charges Investigated but never brought**

In several other cases, charges were investigated but never filed. For instance, in one notorious case, the Ministry of Defence Police investigated Major Milos Vladimir Stankovic, including by obtaining search warrants and arresting him for an interview. The major brought a civil suit seeking damages for false imprisonment, malicious prosecution, misfeasance in public office, negligence, and trespass. The judge, in 2007, found liability only for unlawful trespass, but noted that, "there is no doubt that what has happened to the Claimant has been unfair and the consequences serious."<sup>74</sup>

## **7. The 1911 OSA**

Section 2 of the Official Secrets Act 1911 made any communication of official information by a civil servant an offence, other than a communication to "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".

In the 1985 OSA prosecution of the civil servant Clive Ponting, who leaked information showing that ministers had misled Parliament about the sinking of the Argentinian cruiser General Belgrano, the defence argued that the phrase "in the interest of the State" meant the public

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<sup>71</sup> Regina v. Shayler [2002] UKHL 11, as accessed: <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020321/shayle-1.htm>; Wagner, Adam. *Human rights and the Official Secrets Act*. The Guardian, 19 September 2011, as accessed: <http://www.guardian.co.uk/law/2011/sep/19/official-secrets-act-human-rights-act>

<sup>72</sup> R v David Michael Shayler (2001) (summary), as accessed:

[http://www.1cor.com/1315/?form\\_1155.replyids=495](http://www.1cor.com/1315/?form_1155.replyids=495).

<sup>73</sup> Richard Norton-Taylor, *Former MI5 officer released from prison*, The Guardian, 24 December 2002.

<sup>74</sup> Stankovic v Chief Constable of the Ministry of Defence Police, Court of Appeal - Queen's Bench Division, 9 Nov 2007, [2007] EWHC 2608 (QB).

interest. The judge ruled that, as a matter of law, the interests of the state referred to the policies laid down by the government of the day, not any wider public interest which may have motivated the defendant, however genuinely he believed in it. However, the jury acquitted Ponting, in effect disregarding the judge's ruling. It is generally assumed that they believed the government had behaved worse than did Ponting.

The Act contained a defence for disclosures which were in the interest of the State, which was abolished with passage of the 1989 Act.

However, the legacy of the Ponting case lives on and it has been difficult for the government to bring prosecutions, even when there has been a clear breach of the law.

An earlier case concerned Sarah Tisdall, a Foreign Office clerk who, in 1983, leaked documents to the Guardian that revealed when US nuclear cruise missiles would arrive in England (and also how the then Minister of Defence, Michael Heseltine, would explain their arrival to the House of Commons).<sup>75</sup> The Guardian refused to disclose the source, the high court agreed, but the court of appeal reversed. The court concluded that, although the document did not harm national security but only concerned parliamentary tactics and thus was covered by the protection of sources (section 10) provision of the Contempt of Court Act, the sort of unreliable public servant who had leaked the document might leak something more dangerous next time, and so had to be exposed. The Court of Appeal found the six months' sentence to be appropriate in reflecting an element of deterrence.<sup>76</sup> The Guardian, forced by court order, provided the documents which led to Tisdall's being identified. In 1984 she was convicted and served six months.<sup>77</sup> The Guardian, however, was never tried for the secondary disclosure.

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<sup>75</sup> Preston, Peter. *A source of great regret*. The Guardian, 5 September 2005, as accessed: <http://www.guardian.co.uk/media/2005/sep/05/pressandpublishing.politicsandthemedial>

<sup>76</sup> Article 19 and Liberty, "[Secrets, Spies and Whistleblowers: Freedom of Expression in the UK](#)", 2000, Chapter 3, p. 19.

<sup>77</sup> From the Archive Blog: *22 October 1983: Sarah Tisdall*. The Guardian, as accessed: <http://www.guardian.co.uk/theguardian/from-the-archive-blog/2011/jun/03/guardian190-sarah-tisdall-1983>.