Chapter 12

RIGHT TO KNOW AND RIGHT TO REPLY

The Official Secrets Act is not to protect secrets but to protect officials.

Jonathan Lynn and Antony Jay

12.1 With the landmark decision of the Supreme Court in the Life Insurance Corporation case, confirming a Gujarat decision, the people's right to know has been elevated to the status of a constitutional right. Though the judgment was only on the peculiar facts of the case without laying down any absolute proposition, it was the first time the Supreme Court was trying to resolve the conflict between the freedoms of the press and speech. Implicit in the court's judgment is the recognition sub silentio of the right of reply without specifically dealing with its scope and dimension in the context of the guarantee of


The case arose following the refusal of the Life Insurance Corporation to publish a rejoinder sent by Prof. Manubhai Shah, executive trustee of the Consumer Education and Research Centre, Ahmedabad, in justification of his study paper exposing the discriminatory practices of the Corporation in its magazine Yogakshema. The study paper entitled "A Fraud on Policy Holders - a shocking story" was first published in The Hindu. The newspaper also published a counter written by a Director of the Corporation and a rejoinder to it sent by the author of the study paper. Subsequently, the Yogakshema carried the counter alone without publishing either the study paper or the rejoinder.

12.3 Though the Corporation claimed editorial privilege, which undoubtedly is part of the freedom of expression, the refusal to publish the rejoinder was characterised as both unfair and unreasonable: unfair because fairness demanded that both viewpoints were displaced before the readers to enable them to draw their own conclusions; and unreasonable because there was no

logic or proper justification for refusing publication. The Corporation was compelled to publish views which it does not like as a means for achieving "balanced presentation" — an alternative remedy in the United States for defamation.

12.4 There is statutory recognition of this right from the very beginning as far as the Press Council of India is concerned. As per section 14(1) of the Press Council of India Act, non-publication of a relevant matter can be objectionable and may be construed as a professional misconduct. As per Regulation 3(1)(c) of the Press Council (Procedure for Inquiry) Regulations, a complainant has to draw the attention of the newspaper, news agency, editor or other working journalist concerned to the non-publication of the matter along with the complaint. The Council itself has power, vide section 14(2) of the Act, to require any newspaper to publish any particulars relating to an inquiry.

12.5 At the same time the Council is recognising editorial privilege as part of the freedom of expression. No newspaper is bound to publish each and every article, letter, news item, or picture sent to it...
for publication; the editor has the right to choose the material, keeping in view its suitability. The editor has the discretion to edit the matter without any distortion. This discretion should be exercised in a fair and objective way. In the Onlooker/Arun Shourie case of 1984, the Council reiterated the public's right to reply. The Council had, in many of its adjudications, held that an editor/publisher who assails a person or his work ought to publish the reply of the person, should he send one. In the instant case articles were published in the Onlooker attacking Arun Shourie's work and raising grave doubts about his professional competence. The editor of Onlooker stated that he also endorsed the view that every person who had been adversely commented upon in any publication had a right of reply and in the instant case he was compelled to make an exception for the reason that the issue had by then become sub judice. The Press Council, however, was of the view that the magazine ought to have published the reply; but in the absence of any ostensible mala fide on the part of the editor, the matter was allowed to rest there.

5. Andhra Fatrika and Bharati/T Ramalingeshwara Rao, a case decided by the Press Council in 1968.

12.6 The right of reply is a limited right limited only to reply to anything damaging that has already been written. Parochial writing being the essence of freedom of expression, real balance in the presentation of news and views is not possible. It can only be an artificial fairness or balance. Balancing out viewpoints for the sake of an artificial fairness can pose the problem, at times, of having to balance the views of Jesus Christ with those of Judas Iscariot.

In journalism, it is not so much what you cover which is important as what you do not cover. The decision to omit is often as important as the decision to commit.

12.7 The Tornillo case in the United States will illustrate this point. The validity of a Florida right of reply statute was in issue. The Miami Herald argued that the statute, by requiring a newspaper to grant political candidates a right to equal space in order to answer such newspaper's criticism, violated the freedom of the press guarantee. In invalidating the statute,
the United States Supreme Court invoked two arguments: First, it thought that a right of reply would induce editors to shun controversy with the result that vigorous public debate would be diminished; second, enforced access would intrude into editorial function, in other words, that a governmental direction what to print was as incompatible with the constitutionally guaranteed freedom of the press as a censor's direction of what not to print. Chief Justice Burger, speaking for the court, stated that "compelling editors or publishers to publish that which `reason' tells them should not be published is what is at issue in this case". With the issue thus characterised, the court had no difficulty in concluding that the right of reply statute was violative of the freedom of the press guarantee.

12.8 The Press Council's insistence on the right to reply is justifiably confined to persons who are aggrieved by a publication. The elevation of such a restricted right to the status of a general right will.

result in chaos and confusion, eroding the credibility of newspapers and intruding into the independence of the editor. At the same time, the inclusion of such a right as part of a voluntary code of ethics is a different matter. The First Press Commission wanted such a principle to be included in a code of journalistic ethics which was incorporated almost verbatim by the All-India Newspaper Editors’ Conference in the Code of Ethics for Editors adopted by it.\[^{11}\]

12.9 The rationale of the editor's obligation to publish the reply/rejoinder of the aggrieved person, according to Justice R S Sarkaria, former Chairman of the Press Council of India, follows as a necessary corollary from the axiom that the freedom of the press (which is a part of the freedom of speech and...)

\[^{11}\] The principle proposed by the Press Commission: Any report found to be inaccurate and any comment based on inaccurate reports shall be voluntarily rectified. It shall be obligatory to give fair publicity to a correction or contradiction when a report published is false or inaccurate in material particulars.

Clause 4 in the Code of Ethics for Editors adopted by the standing committee of the All-India Newspaper Editors’ Conference in May 1983 at Baroda says: Any report found to be inaccurate and any comment on inaccurate reports shall be voluntarily rectified. It should be obligatory to give fair publicity to a correction or contradiction when a report published is shown to be false or inaccurate in material particulars.
expression), is not so much a right of the newspaper’s publisher, reporter, or editor as of the public to know and be informed, from antagonistic sources, of all sides of an issue of public interest. 12

12.10 The right to reply is guaranteed by Article 14(1) of the American Convention on Human Rights which says:

Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communication outlet, under such conditions as the law may establish.

12.11 The Inter-American Court of Human Rights in its advisory opinion of 29 August 1986, given at the request of the Government of Costa Rica, fully examined the ambit of Article 14(1) and observed:

In the individual dimension, the right of reply or correction guarantees that a party injured by inaccurate or offensive statements has the opportunity to express his views and thoughts about the injurious statements. In

the social dimension, the right of reply or correction gives every person in the community the benefit of new information that contradicts or disagrees with the previous inaccurate or offensive statements. In this manner, the right of reply or correction permits the reestablishment of a balance of information, an element which is necessary to the formation of a true and correct public opinion. The formation of public opinion based on true information is indispensable to the existence of a vital democratic society.

12.12 The importance of these observations, as pointed out by Mr Soli Sorabjee, lies in their emphasis on the social dimension or the public aspect of the right of reply. It is not just an alternative remedy for defamation. It is a natural sequence of the people's right to know.

12.13 When Mr V N Gadgil, the Congress-I spokesman, attempted to create a statutory right of reply for the public vis-a-vis the press by moving the Press Bill 1994 in the Rajya Sabha, the same was referred to the Press Council by the Information and Broadcasting Ministry. The Council was of the view that the proposed legislation was vulnerable from the standpoints of its necessity, propriety, viability, workability, and above all, its constitutional validity. Describing the concept of a right of reply as

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12. Supra, note 3.
essentially an ethical issue, the Council said in a press release that it has, through its adjudications, firmly established the norm of journalistic ethics, that the editor of a newspaper shall promptly and with due prominence, publish, free of cost, at the instance of a person affected or feeling aggrieved or concerned by a publication in the newspaper, his contradiction/reply/clarification or rejoinder, sent to the editor in the form of a note or a letter.

When Mr. Tushar V. Mehta, the Special Officer of the Press Council, in his contribution to the Bill, it was

12.14 The Council feels that aberrations from this norm are not so widespread and endemic as to require suppression with punitive sanctions by law as contemplated in the Bill. Pointing out that the proposed legislation has a tendency to stifle investigative journalism, the Council said it would undermine the exercise of editorial direction, control and judgment as to the choice of the material and the decisions about the size and content of the newspaper and the treatment of public issues, public officials and politicians. The proposed legislation, according to the Council, has a potential for doing more harm to public interest than the stray lapses on the part of

newspapers to publish the reply of an individual affected by the report. Clauses 4 and 5 of the Bill requiring the concerned newspaper to print the reply of equal length of the report replied to, on the same page, at the same position and in the same type, within three days of the receipt, and clause 6 requiring the Council to appoint a panel to determine within ten days, whether or not sufficient grounds exist for meeting a demand for publication of the reply, were too procrustean, unrealistic, impracticable and unworkable. When Mr Gadgil withdrew his controversial Bill, it was a triumph for the Press Council.

12.15 In keeping with the spirit of the Universal Declaration of 1948, the Preamble of the Constitution of India embodies a solemn resolve of its people to secure, inter alia, to its citizens, liberty of thought and expression. And it is not a mere coincidence that the number of the Article dealing with liberty of thought and expression in both the documents is the same.\(^{15}\) However, the word information is
conspicuously absent in our Constitution.

12.16. India was a member of the Commission on Human Rights appointed by the Economic and Social Council of the United Nations which drafted the 1948 Declaration. As such it would have been eminently fit and proper if the right to information also was included in the rights enumerated and guaranteed under Article 19 of our Constitution. Article 55 of the United Nations Charter stipulates that the United Nations "shall promote respect for, and observance of, human rights and fundamental freedoms" and according to Article 56 "all members pledge themselves to take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55."

12.17. Information is essential for acquiring knowledge and skill which are absolutely necessary for the proper and effective exercise and enjoyment of the fundamental right of freedom of speech and expression. Depriving an individual of the right to information will have the deleterious effect of denial to that

(1949): All citizens shall have the right to freedom of speech and expression.

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individual of his fundamental right of freedom of speech and expression. However, problems arise in enforcing this right against the State and public bodies. The executive branch of the government, unlike the other two organs, often tends to cloak its operations in secrecy. It will not be possible for any citizen to play his responsible role of making government institutions accountable unless he is privy to necessary information. Public discussion is a political duty; a discussion can only be on the basis of information; a well-informed citizen is the sine qua non for the success of a democracy.

12.18 Maintaining a law similar to the Official Secrets Act of Great Britain which clearly establishes the principle of secrecy in government, the state is stifling the people's constitutional right to know. The Indian Official Secrets Act was enacted in 1923 and it is still in service in the constitutional era to muzzle free speech. The Act was unsheathed against a newspaper in free India for the first time in 1987 when Indian Express exposed a corporate fraud, quoting extensively from government files. That file did not have even a remote connection with national security. There was only one prosecution during 1931 to 1946 throughout the
whole of India\textsuperscript{15} and there has been hardly any reported High Court or Supreme Court case involving prosecution of the press under the Act.

12.19 Access to government information is a privilege which fosters understanding and communication between the government and the governed and helps to strengthen democracy. The Press Council has recommended the amendment of section 5 of the Official Secrets Act, permitting disclosures if it predominantly and substantially subserves the public interest.

12.20 Negativing the Government's claim of privilege, the Supreme Court said in State of U.P. v. Raj Narain:

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor

which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.\(^{17}\)

12.21 These observations of Justice K K Mathew were elevated to the status of a constitutional dicta when the Supreme Court in "the Judges Case"\(^ {18}\) called for an open government with the observation that "an open government is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception". Delivering the majority judgment, Justice F N Bhagwati said:

The citizen's right to know the facts, the true facts about the administration of the country is thus one of the pillars of a democratic state... but, this important role of the people can be fulfilled in a democracy only if it is an open government where there is full access to information in regard to the functioning of the government... The concept of open government is a direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed.

\(^{17}\) A.I.R. 1975 S.C. 865.

under Article 19(1)(a).19

12.22 Justice E S Venkataramiah appears to be in agreement with this hypothesis when he pointed out in the Indian Express Newspapers v. Union of India that freedom of expression has four special purposes to serve:

i. It helps an individual to attain self-fulfilment;

ii. It assists in the discovery of truth;

iii. It strengthens the capacity of an individual in participating in decision-making; and

iv. It provides mechanism by which it would be possible to maintain a reasonable balance between society and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle here is the right to know.

12.23 The right to know as a basic right was again highlighted by the Supreme Court when it rejected a plea made by the Reliance Petrochemicals Ltd to restrain Indian Express from publishing any article.

19. Ibid. at p. 234.
comment or report questioning the legality of the issue of convertible debentures by the company. Vacating the orders of injunction, the court said the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy.  

12.24 Just as the Supreme Court had ushered in the right to privacy by a liberal interpretation of Article 21 of the Constitution, the right to know and the right of access to information were elevated to the status of a fundamental right by a generous interpretation of Article 19(1)(a). The willingness of the court to accept jurisdiction on broad constitutional issues seems to be extending. It is based on the principle that certain unarticulated rights are immanent and implicit in the enumerated guarantees. And it is on this basis that we are demanding a legislation. Reliance Petrochemicals Ltd v. Indian Express, A.I.R. 1989 S.C. 190. However, in 1995, it was the turn of Indian Express to approach the Bombay High Court to restrain Magna Publishing Ltd from writing, publishing or republishing any article alleging that the Indian Express Newspapers Ltd., Bombay, was selling or transferring ownership and control of the newspaper to Australian media tycoon, Mr Rupert Murdoch. Such an article had appeared in the May 1995 edition of Island, a magazine published by the respondent. The restraint order was granted, both the court and the petitioner oblivious of the arguments raised in the Reliance case.
guaranteeing freedom of information.

12.25 Sweden was the first country to grant to its people the right of access to government information in 1812. Finland, Denmark, Norway, Austria, France and Canada have enacted similar legislation providing access to official information. In India, a noteworthy feature of the National Front's election manifesto in 1989 was the promise to amend the Constitution to incorporate the right to information as a fundamental right. That promise did not materialise; nor the attempt made by Mr Ramakrishna Hegde during his tenure as Chief Minister of Karnataka to enact the Karnataka Freedom of the Press Bill, 1988. The Bill had drawn on the exceptions listed by the Press Council of India in its recommendations for amending section 5 of the

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21. See Campbell, Public Access to Government Documents, 41 Aust. L.J. 73 (1967-68). There is a large literature pleading for openness in the government. For instance, see the collection of papers by different authors in T. N. Chaturvedi, (ed.), Secrecy in Government (1980); Report of the Franks Committee on Section 2 of the Official Secrets Act 1911 (1972); Galnoor, Government Secrecy in Democracies (1977); Rowat, Administrative Secrecy in Developed Countries (1979). Rowat says that Sweden's long experience with the right of public access "indicates that it changes the whole spirit in which public business is conducted. It gives public debate a more solid foundation, causes a decline in suspicion and distrust of officials, and this in turn gives them a greater feeling of confidence."
to this blanket obligation are set forth in the statute, touching on national defence, foreign policy, individual privacy etc. When disclosure is denied, an administrative appeal is provided which is subject to judicial review. The burden of proof is on the agency to demonstrate that the information requested is within the terms of a particular exemption. The Act has been used by the press, corporations and lawyers as a discovery tool for litigation purposes.

12.26 In the United States, the First Amendment protects the right to receive information and ideas. As pointed out by the Supreme Court in *Kleindieiest v. Mandel*, the First Amendment preserves "an uninhibited marketplace of ideas in which truth will ultimately prevail... It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences". Keeping this in view, the United States enacted the Freedom of Information Act to "clarify and protect the right of the public to information". Adopted in 1966 and extensively amended in 1974, 1976 and 1983, the Act established the enforceable right of any person to have access to information concerning the federal government, notwithstanding the existence of any special interest in the information by the government. Nine exceptions

to this blanket obligation are set forth in the statute, touching on national defence, foreign policy, individual privacy etc. When disclosure is denied, an administrative appeal is provided which is subject to judicial review. The burden of proof is on the agency to demonstrate that the information requested is within the terms of a particular exemption. The Act has been used by the press, corporations and lawyers as a discovery tool for litigation purposes.

12.27 In Britain, the Franks Committee was set up in 1977 to investigate the reform of the Official Secrets Act after all defendants were spectacularly acquitted in the historic Biafran secrets case involving the *Sunday Telegraph*. Calling for a wider diffusion of information, the Committee said:

A totalitarian government finds it easy to maintain secrecy. It does not come into the open until it chooses to declare its settled intentions and demand support for them. A democratic government, however, though it must compete with these other types of organisation, has a task which is complicated by its obligations to the people. It needs the trust of the governed. It cannot use the plea of secrecy to...
hide from the people its basic aims. It must provide the justification for them, and give the facts both for and against a selected course of action. Nor must such information be provided only at one level and through one means of communication. A government which pursues secret aims, or which operates in greater secrecy than the effective conduct of its proper function requires, or which turns information services into propaganda agencies, will lose the trust of the people. It will be countered by ill-informed and destructive criticism. Its critics will try to break down all barriers erected to preserve secrecy, and they will disclose all that they can, by whatever means, discover. As a result, matters will be revealed when they ought to remain secret in the interest of the nation.  

12.28 This is exactly what has happened and is happening in our country. The situation can be improved only by an appropriate legislation conferring on the people and the press the right to information.

12.29 This does not mean naked exposure of every limb of the body politic to public gaze. The demand for the removal of the purdah does imply that the body shall be repeatedly exposed on the outside of the burka be gently covered in the black meaning of secrecy, just as the right to freedom of information, while protecting the right to information as a human right, also provides the right to information within certain restrictions. This shall only be such as are provided by law and are necessary. When respect for the rights of individuals and the public interest is not in conflict, every citizen on the heels of the British and American willingness to

the removal of the purdah does imply that the body shall be decently covered. Let the veil of the burka be gently lifted in the open breeze as the body is covered in the black sheath of secrecy. Just as the right to freedom of speech and expression is subject to reasonable restrictions, the right to information can also be controlled and curtailed in the national interest and for preservation and protection of individual privacy and other cherished private rights of individuals.

12.30 The 1948 Universal Declaration, while projecting right to information as a human right, also provides that it can be subject to certain restrictions. This shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order, or of public health or morals.20

12.31 The U.N. Declaration had a catalytic effect on movements for 'open government' world over. Close on the heels of the British and American willingness to take legislative action to give its citizens right of

20. Article 29(2).
access to information, Canada and Australia enacted the Access to Information Act in 1982. New Zealand also passed similar legislation in 1983.

12.32 A survey of freedom-of-information laws passed in various countries would reveal that the right of access to information conferred thereby on the citizens is not unfettered. It is subject to several exemptions/exceptions indicated in broad terms.

Generally, the exemptions/exceptions under those laws entitle the government to withhold information relating to the following matter:

1. International relations.

2. National security (including defence) and public safety.

3. Investigation, detection and prevention of crime.

4. Internal deliberations of the government.

5. Information received in confidence from a source outside the government.

6. Information, which, if disclosed, would violate the privacy of an individual.

7. Information of an economic nature (including trade secrets) which, if disclosed would...
confer an unfair advantage on some person or concern, or subject some person or government to an unfair disadvantage.

8. Information which is subject to a claim of legal professional privilege, e.g., communication between a legal adviser and his client; between a physician and the patient.

9. Information about scientific discoveries.

12.33 With the promise of the National Front in its 1989 election manifesto to amend the Constitution to incorporate the right to information with drastic revision of the Official Secrets Act and the reiteration made in the 1996 Janata Dal manifesto, renewed interest in the area was generated. Though seminars and discussions were held in various fora and the media, there were variations in approach, perception, priorities and methods of achieving that object and tackling the related issues, namely:

i. Whether it is necessary to amend the Constitution to secure the right to information;

ii. Whether the object of securing this right can be adequately achieved by amending, revising or repealing the whole or part of the Official Secrets Act, 1923, and similar laws, such as those contained in sections 123 and 124 of the Evidence Act, Post office Telegraph Act, Customs Act etc.? If so, to what extent the amendments of the Official Secrets Act can be modelled after the British Official Secrets Act, 1911. If the object cannot be adequately achieved, whether it is necessary to enact simultaneously a Freedom of Information Act. If so, what model, if any, should be adopted for that purpose?
Act, 1923, and similar laws, such as those contained in sections 123 and 124 of the Evidence Act, Post and Telegraph Act, Customs Act etc.? If so to what extent the amendments of the Official Secrets Act can be modelled after the British Official Secrets Act, 1989?

iii. If the object cannot be adequately achieved, whether it is necessary to enact simultaneously a Freedom of Information Act. If so, what model, if any, should be adopted for that purpose?

12.34 For the answers, it will be suffice to extract from a speech delivered by Justice R S Sarkaria, former Chairman of the Press Council, at a seminar in New Delhi on 5 December 1992:

*Issue No.1* # The preponderent view held by eminent jurists, scholars and knowledgeable persons is that the right of access to government-held information is included in the fundamental freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. This view receives support from the observations of the Supreme Court, reiterated in several decisions and is therefore entitled to respect. It is therefore respectfully submitted that there is no pressing necessity to amend the Constitution for
securing to the citizens a right to information. This right, to my mind, is comprehended by the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution.

**Issue No.2** # India stands committed to 'open government'. The antiquated Official Secrets Act, particularly its section 5 and other allied provisions, need repeal and replacement by far more liberal provisions which would bring it in tune with Article 19(1)(a) and (2). Perhaps, it will be useful to adopt, with necessary changes and adaptations to peculiar Indian conditions, those provisions of the British Official Secrets Act, 1989 - minus its regressive features - which represents a substantial advance towards open government and freedom of access to information. Several archaic provisions in other statutes such as those contained in sections 123 and 124 of the Evidence Act will accordingly need suitable revision, replacement or repeal.

**Issue No.3** # If suggestions relating to issue number 2 are adopted, there will remain no imperative exigency of enacting a Right to Information Act on the lines of America's Freedom of Information Act. There is
need for caution in taking up such legislation. All is not well with the working of the US Act. It has been misused and subverted by anti-socials for pernicious purposes. In this context, the observations of Justice H R Khanna, an eminent jurist and a former Judge of the apex court, are pertinent:

Though provisions of the Act were used more often by business organisations seeking information regarding their competitors, criminals also made frequent use of those provisions with a view to securing information from law enforcement files about those who incriminated them. They also use it to try to avoid prosecution. The Director of Federal Bureau of Investigation in a lengthy testimony before the Congress recited numerous examples of the perverse effects of the use of the provisions of the Act. The Drug Enforcement Administration also reported many cases of its investigations having been aborted because of information derived by those violating the provisions of the Food and Drug Administration Law. The New York Bar Association in 1979 bemoaned the fact that the provisions of the Act were used as a carte blanche for unrestricted access to otherwise non-public information.
submitted by private citizens and business. It pointed out that ever-increasing plenitude of reports and information from the private sector has made the Federal Government's files a virtual treasury of valuable and sensitive information about private citizens and businesses.

12.35 The aforesaid issues/proposals for legislative reforms were also considered by the Press Council of India on a reference made to it in March 1990 by the Central Government. The views/comments of the Council were communicated to the Government in July 1990. So far, no action has been taken for bringing out the proposed legislative changes.

WHAT IS CONFIDENTIAL?

12.36 Any type of information, whether conveyed orally or preserved in writing, can be confidential. It may seem obvious to say that to be confidential information must be secret since that is the whole idea of confidence. Whether, and at what point, the publication of once-secret information destroys its confidentiality creates problems. The English court is faced with difficulties if asked to stop publication of Turnbull, The Spycatcher Trial (London: Heinemann, 1988).
material which has been published abroad. The English law of confidence is very different to the law of other countries, notably the United States, where prior restraint of publication in the media is forbidden. The history of Spycatcher litigation shows what a fiasco the law of confidence can produce. In Attorney General v. Observer, Guardian (1988) injunctions were ordered in June 1986 preventing newspapers from publishing allegations made by former senior MI-5 officer, Peter Wright, in his memoirs, Spycatcher. In June 1987 the House of Lords, by a three to two majority, ordered the continuation of those injunctions, although by that time the whole Spycatcher book had been published in the United States, and the major allegations in the book had been reported by the British press and

21. Peter Wright, whose 1987 tell-all autobiography, Spycatcher, touched off a furor with its claims that Soviet spies had infiltrated British intelligence services, had worked as a British counterintelligence officer for 20 years. He wrote Spycatcher after leaving the service, frustrated that his suspicions about Soviet penetration had been ignored by senior officials. When the book appeared, it was banned in Britain; the British government also sought unsuccessfully to ban it in Australia, where Wright lived. While debate raged over his betrayal of British intelligence secrets and the truth or falsity of his allegations, Spycatcher became a best seller, making its author a millionaire. See P. Wright, Spycatcher (New York: Viking, 1987); on the efforts of the Thatcher government to block publication, see M. Turnbull, The Spycatcher Trial (London: Heinemann, 1988).
television, and the media worldwide. By the time the case reached trial *Spycatcher* was being published in America (where it had topped the bestseller lists for ten weeks), Canada, Australia and Ireland, and was available throughout Europe. It could be imported freely into Britain. Both the trial judge (in November 1987) and the Court of Appeal (in January 1988) decided that an injunction should not be ordered against the newspapers, largely because of the book's widespread distribution. However, the injunctions were continued pending an appeal to the House of Lords.

12.37 The principle that disclosure of cabinet secrets can be restrained by injunction has been recognised in England in the *Crossman Diaries* case, in which the Attorney General sought orders preventing the *Sunday Times* and book publishers from publishing some of the diaries of the late Richard Crossman relating to his tenure as a Cabinet Minister. A member of the Cabinet owes a duty of confidence to other members of the Government. The Government applied to prevent publication of the diaries mainly on public interest grounds. Publication would deter cabinet discussions from having the frankness they needed for the effective running of government. The court refused an

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injunction - the information was several years old.

12.38 In 1995 when the Sunday Times and a book publisher, Harper Collins, tried to get the courts to stop the Daily Mirror from publishing what they called "purloined" material, they decided to argue on the wider issue of breach of confidence. The allegation was that the Mirror had paid a substantial amount for a stolen copy of Thatcher memoirs scheduled to be published solely in the Sunday Times under an arrangement with Lady Thatcher and her publisher, Harper Collins. The court, however, rejected the contention on grounds of public interest. They held that the political content of the material was such that the public was "entitled to have it placed before it at the earliest available opportunity, and particularly during a period of time when much public political interest will be focussed on the activities of the Conservative party in Blackpool". The decision was upheld on appeal, with the judge holding that the material was not confidential in the sense that the public was never intended to learn of it. Rather, it was material which the publisher and the Times newspapers had an obvious commercial interest in keeping confidential until the start of the exclusive serialisation by the latter.