CHAPTER IV

The Official Secrets Act

Introduction

The Official Secrets Act, 1923[1] deals with two aspects—espionage or spying activity and disclosure of other secret official information. The former is dealt with by s. 3 and the latter by s. 5. It is s. 5 which is relevant and important for our purposes and deserves close scrutiny. S. 5 is obscurely worded. But it is an omnibus and a catch-all provision covering all kinds of secret official information whatever be the effect of disclosure. Literally read, it is the "disclosure" which is punishable and not the purpose of disclosure or prejudicial effect on certain interests deserving of protection in the national interest. Both the person communicating and the person receiving official information are guilty of an offence under the Act. If literally read and strictly applied, there will be daily innumerable prosecutions of the press, completely hampering its work. Fortunately, however, this has not happened. What makes the statute bearable is its extremely rare use by the government. There has been hardly any reported High Court or Supreme Court case involving prosecution of the press under the Act. The Press Commission in its report of 1954 stated: "Statistics showed that there was only one prosecution during 1931 to 1946 throughout the whole of India even while a foreign Government was in power."[2] There is no reported case after independence.

Though the use of the Act by the government may be rare, yet its detrimental effect on the press freedom cannot be denied. To judge the impact of the Act from figures of the reported cases may be misleading. It does not prove two very important aspects—the frequency of *threats* used by the government to prevent the press from publishing information, and the fear of violation of the Act by the press and the possibility of prosecution as a self-restraining factor in withholding information whose disclosure may be in the public interest. The Franks Committee has stated that section 2 of the English Act is rarely activated in the court room, but is seen by many as having a pervasive influence on the work and the behaviour of hundreds of thousands of people.[3]

It may be said at the outset that the question of amending the Act was examined by several committees and commissions. Thus it was examined

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1. For historical development of the Official Secrets Act, 1923 and the earlier Acts on the subject, see S. Maheshwari, *Open Government in India* (1981).

2. *Report of the Press Commission* 401 (1954).

3. *Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911* at 17 (1972).

by the Press Laws Inquiry Committee in 1948, the Press Commission in 1954, the Law Commission in 1971[4] and recently by a Study Group appointed by the Central Government in 1977 and comprising officials from the Cabinet Secretariat and the Ministries of Home Affairs, Finance and Defence.[5] Except for the Law Commission which suggested some changes with regard to the punishment under the Act, no other body has suggested any change. The Press Commission endorsed the views of the Press Laws Enquiry Committee "that the necessity of guarding State secrets was not confined to an emergency, nor was it practicable to define which confidential information should be published in the interests of the State. They thought that Government must be the sole judge in this matter and thay were confident that the popular democratic Government in India would utilise these provisions only in case of genuine necessity and in the larger interests of the State and the public".[6] However, the Commission made the important observation :

> We agree with the contention of the A.I.N.E.C. that merely because a circular is marked secret or confidential, it should not attract the provisions of the Act, if the publication thereof is in the interest of the public and no question of national emergency and interest of the State as such arises. But in view of the eminently reasonable manner in which the Act is being administered, we refrain from making any recommendation for an amendment of the Act.[7]

The above view of the commission does not of course flow from a literal reading of the Act, and the judiciary has not yet taken the view that if disclosure is justified in the public interest no prosecution can be launched against the persons concerned. The observation of the commission that the Official Secrets Act has hitherto been reasonably administered was made in 1954, and, unless there are built-in safeguards, there is no guarantee that the Act will continue to be so administered. Further, it is not known in how many cases the very existence of Act and the threats of its use against the press by the government have prevented the press from publishing secret information whose disclosure is in the public interest, and in how many cases disciplinary action has been taken against officials because of the leaks.

Composed as it was of civil servants the recommendation of the Study Group to maintain *status quo* was the expected outcome. According to the press reports the report of the Study Group was circulated amongst the states which have endorsed its view. Accordingly, the Central Govern-

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4. *Forty-third Report on Offences Against the National Security.*
5. See Maheshwari, Secrecy in Government in India in T. N. Chaturvedi (ed.), *Secrecy in Government* at 126 (1980).
6. *Report* at 401.
7. *Ibid.*

ment has decided to stick to the Act as framed in 1923 and not to make any changes in it.[8]

Analysis of section 5

S. 5 is widely worded and its provisions may be analysed under the following headings.

(*i*) *Person in possession of official information*

The coverage of persons having possession of official information who are liable under the section is extremely wide. It includes the following :

(*a*) Any person in possession or control of secret official information.
(*b*) Any person obtaining information in contravention of this Act.
(*c*) Any person to whom official information has been entrusted in confidence by any person holding office under the government.
(*d*) Any person obtaining or having access to information owing to his holding any office (present or past), or holding any government contract, or any person holding office under any of these persons.

(*ii*) *Person receiving the information*

Not only is the person communicating the information guilty of an offence under the section but also the person receiving it.

(*iii*) *The secret information*

The official information covered by the section is also extremely broad. Any kind of information is covered provided it is "secret". Thus it includes any official code, pass word, sketch, plan, model, article, note, document or information. The only qualification is that it should be "secret". Nowhere the word "secret" or words "official secrets" have been defined in the Act. One thing is clear that the Act extends only to official secrets and not to secrets of a private nature. Thus it will extend to secrets of a ministry or department of the government, but not to an incorporated body like a university, government company or public corporation.[9]

In the absence of any definition in the Act it is for the government to decide what it should treat secret and what not, though the government does not seem to be the sole judge of the matter as the courts can review the decision of the government[10]. The matter of judicial review is postpo-

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8. *The Hindustan Times*, June 5, 1979.
9. *Emperor* v. *R.K. Karanjia*, A.I.R. 1946 Bom. 322.
10. *State of Kerala* v. *K. Balakrishna*, A.I.R. 1961 Ker. 29; *Nand Lal More* v. *The State*, (1965) 1 Cr. L.J. 392 (Pb.).

ned for the present. The broad practice of the government and the officials authorised to disclose official information have been mentioned in chapter III. It is stated there that the government treats an information secret, even though there is no danger to national security or public safety or any other public interest, just because it will embarrass the government, that is, the political party in power.

(*iv*) *The disclosure of secret government information*

A literal reading of s. 5 indicates that disclosure of any kind of secret information will attract prosecution under the Act whatever be the purpose or its impact. Even if disclosure is justified in public interest the person or persons concerned will be liable to an action under the Act. s. 5 (1) (a) uses the blanket language by making punishable "wilful communication" of any official secret to any person, other than a person to whom he is authorised to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it. There are no exceptions like communication in public interest, etc. Everything is punishable whether national security or any other interest worth protecting is endangered or not. The section gives *carte blanche* to the executive to prosecute anyone disclosing official information or, as per s. 5 (2), any person voluntarily receiving such information knowing or having reasonable ground to believe that such information is being given to him in contravention of the Act.

These provisions are harsh and the only redeeming feature is that *mens rea*, or the mental element, is the necessary ingredient of an offence under the provisions, for the words used are "wilfully", "voluntarily", "knowing" or "having reasonable ground to believe". Thus a mere "leak", unless it was intentional or wilful, will not be covered by the Act, and the burden will be on the government to prove *mens rea* as in the case of any other offence. In a department where a matter or an information is handled by different persons it may be difficult to prove *mens rea* or fix responsibility for the leakage. This does provide some kind of safeguard to an individual against the harshness of the law.

(*v*) *Punishment under s.5*

The Act by itself does not classify punishments according to the degree or the nature of harm caused by the disclosure of secret information. There is a blanket provision which says that a person guilty of an offence under the section shall be punishable with imprisonment which may extend to three years, or with fine, or with both. Thus it is a matter of judicial discretion to fix the punishment in an individual case, subject to the maximum laid down in the section, keeping in view the circumstances of the case and the degree of harm caused to the nation.

Judicial review

Judicial review provides some safeguard to an individual against government arbitrariness in the matter of official secrecy. It is a court of law which has to determine whether a person has committed an offence under the Act or not. Apart from determining the facts of the case, has the court any role in deciding questions of law or any discretion in settling the contours of law? Two legal questions are relevant for judicial review in the area. One, the power of the court to determine whether a public document is "secret" or not. Second, the power of the court to pass judgment on the question whether the public interest justified disclosure. It seems clear that the word "secret" raises a jurisdictional issue and the courts have power to determine that jurisdictional question but it is not clear whether the courts have the additional power to decide the question of "public interest", and to say that if public interest justified disclosure the individual cannot be said to have committed the offence.

Quite often the issue of secrecy may not be separated from the issue of "disclosure in public interest". The determination of one may require passing an indirect judgment over the other. Thus in *Nand Lal More* v. *The State*,[11] while holding that budget proposals were closely guarded secrets until the budget was presented, the court stated that the reason for the same was that an individual might otherwise take steps to forestall them, *e.g.*, by dumping of goods or speculation on the stock exchange. The court is thus indirectly saying that budget proposals are secret documents because their premature disclosure is not in the public interest.

How far then does the court have power to determine the question of "disclosure in public interest", though the Official Secrets Act is at present silent in this regard ? In this context reference may be made to s. 123 of the Evidence Act, 1872 which gives power to the government to withhold its record from production in a court of law. The section provides : "No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit." Literally read this provision gives a kind of blanket power to the executive to withhold documents. However, the only justification of the existence of such a privilege is the requirement of public interest. Initially, in *State of Punjab* v. *Sodhi Sukhdev Singh*[12], the approach of the court was restrictive. If the court came to the conclusion that the document involved came in the category of "affairs of State", then it would leave it to the head of the department to decide whether he should permit its production or not—the court would

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11. *Ibid.*
12. A.I.R. 1961 S.C. 439.

not go into the question whether, as a matter of fact, public interest would be injured or not by its disclosure. Subsequently, in *State of U.P.* v. *Raj Narain*,[13] the court took a different position. In this case the court held that the courts had a residual power to decide whether the disclosure of a document is in the interest of public or not, and for that purpose they can inspect a document, if necessary, and the statement of the head of the department that the disclosure would injure public interest is not final.

Recently, in the *Judges*[14] case again the court took a liberal view of the disclosure of official documents under section 123 of the Evidence Act. The court held that it had a right to inspect documents in order to decide whether they related to the affairs of state, and whether on balance public interest justified their disclosure. In deciding the question of disclosure, the court has to consider the competing claims of public interest, namely, disclosure in the interest of administration of justice (which is a matter of public interest) and non-disclosure because of injury to some other aspects of public interest. The court showed reluctance to recognise the doctrine of "class documents" as conferring an *absolute* immunity from disclosure by virtue of the class to which the documents belong irrespective of their contents. Under the class doctrine may fall such documents as cabinet papers, minutes of discussions of heads of departments and high level documents relating to the inner working of the government machine or concerned with the framing of government policies. Even the "class documents" are subject to the "balancing" exercise by the courts. Mr. Justice Bhagwati stated as follows in this regard :

> There is nothing sacrosanct about the immunity which is granted to documents because they belong to a certain class. Class immunity is not absolute or inviolable in all circumstances. It is not a rule of law to be applied mechanically in all cases. The principle upon which class immunity is founded is that it would be contrary to public interest to disclose documents belonging to that class, because such disclosure would impair the proper functioning of the public service and this aspect of public interest which requires that justice shall not be denied to any one by withholding relevant evidence.

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13. A.I.R. 1975 S.C. 865.
14. *S.P. Gupta* v. *President of India*, A.I.R. 1982 S.C. 149. On the question of the privilege of the government regarding production of documents the majority opinion is that of P.N. Bhagwati, J. Out of 7 judges constituting the bench, four endorsed his views. E.S. Venkataramiah, J., wrote a separate concurring opinion on the subject. His views are on the lines of Bhagwati, J.

This is a balancing task which has to be performed by the Court in all cases.[15]

There is no reason why a similar approach is not to be followed in the case of prosecution for breach of official secrecy. However, the Franks Committee of U.K. seems to be against judicial review in matters involving national security, foreign relations and currency and reserves for it is the executive rather than the judiciary which has full access to what is happening in the government and the judiciary is not in a position to correctly assess the situation in the absence of the full information in its possession. The specific document involved may by itself not lead to an inference that its disclosure was in public interest. It is other related factors in conjunction with the specific document that may lead to the conclusion that its disclosure was injurious to national security. The committee was of the opinion :

> The damage caused by a particular disclosure may depend very much on the surrounding circumstances. On occasion the timing of the disclosure may be the crucial factor. For instance, the leakage of a report by an Ambassador to the Foreign Secretary might cause grave injury on one occasion, yet for fortuitous reasons the damage might be slight on another ostensibly similar occasion. Moreover the seriousness with which particular kinds of injury to the nation are viewed by Governments, Parliaments and the people change over time. These considerations underline the advantages of a system of marking each individual item of information, and reviewing these markings as circumstances change.
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> A correct assessment of the damage which a particular disclosure would cause often depends upon knowledge of a number of other related factors. In many cases these related factors are likely themselves to be secret, and to be known only to the Government. This would be a major drawback to any system which left all those coming into possession of official information within the categories to work out themselves, as best they could, whether or not that information came within some general criterion. There would be the risk of seriously damaging disclosures being made inadvertently by people who, through no fault of their own, lacked the information necessary to make a proper assessment.
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> In relation to these basic functions of government, the question of injury to the nation is essentially political, in the broadest sense of the term, not judicial. It is essentially a Government responsibility to assess the importance of information in our three categories. The Government is accountable to Parliament and the electorate

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15. *Ibid.* at 241. Also Lords Keith and Scarman in *Burmah Oil Co.* v. *Bank of England*, (1979) 3 W.L.R. 713, 749, 759.

> for its discharge of these basic functions. Any system which placed this responsibility elsewhere would detract from the responsibility of the Government to protect the security of the nation and the safety of the people. It would remove the element of constitutional accountability.[16]

Though what the committee says has some substance, yet the negation of judicial review means that the executive is given the final power to determine whether disclosure is in public interest or not and the possibility of its abuse by the executive may not be ruled out. It is essential to reconcile the two points of view. The courts essentially should have the authority to decide the question, whether a disclosure is in public interest or not. The role of the courts as a matter of theory will be important, but in practice judicial review may have to be marginal. Normally, the courts would pay due deference or respect to the executive determination, but in a clear case or extreme situation when the executive is acting wrongly, the courts would uphold the claim of disclosure. This would act as some restraint on the executive power rather than no restraint at all. Justifying judicial review against the suggestion of the Franks Committee, William Birtles says:

> There can thus be no alternative to letting the courts decide the issue as they do in the law of Crown privilege. The position was well put by Lord Morris of Borth-y-Gest in *Conway* v. *Rimmer*. 'I am convinced that the courts, with the independence which is their strength can safely be entrused with the duty of weighing all aspects of public interests and of private interests and of giving protection where it is found to be due'. In *camera* inspection by the trial judge is the only way to ensure that justice is done to the defendant. 'Otherwise there could not be public confidence that the interest of the nation was being kept distinct from the political interest of the government.'[17]

Wraith speaks in the same vein when he says:

> On the other hand, the Franks proposals would do nothing whatever to increase public access to administrative information. All they would do would be to relieve the public—and specially the press—of the anxiety and uncertainty that has hung over them in the past, though the press is disappointed that a proposal frequently

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16. *Report* at 54.

17. Big Brother Knows Best: The Report on Section Two of the Official Secrets Act, 1973 *Pub. Law* at 110-111.

advanced on its behalf finds no mention, namely *that it should be a defence in a prosecution that publication was in the public interest*".[18]

Suggestions and recommendations

The problem of reconciling through law the nation's need in government secrecy and its need in disclosure is quite a complex and difficult one. Two basic issues need to be tackled—the problem of classification of information and procedural safeguards to the individual against administrative abuse including the safeguard judicial review.

Classifying documents which are to be kept secret and those not is a formidable task and defies a satisfactory solution. Classification at the most will have to be broad and general with several exceptions. It will be difficult to bring within the four-corners of law all the possible details of classification. For instance, if defence is in the classified list of secrecy, still some matters relating to defence, like, defence factories or foreign purchases may not be entitled to secrecy under certain circumstances so as to expose corruption and mismanagement. On the one hand, a breach of secrecy in the matter of defence may seriously damage the nation, but on the other hand, Parliament and people have a close interest in questions of defence as a substantial portion of the country's resources is spent on the same. These kinds of problems do pose a dilemma even in the recognised areas of secrecy.

Let us examine the comparative position in Sweden, United States and England.

Sweden : As stated in the first chapter, the Swedish Constitution advocates openness but specifies certain documents which may be kept secret. The Constitution provides :

> To further free interchange of opinions and enlightenment of the public every Swedish national shall have free access to official documents. The right to have access to official documents may be restricted only if restrictions are necessary considering : (1) the security of the Realm or its relations to a foreign state or to an international organization ; (2) the central financial policy, the monetary policy, or the foreign exchange policy of the Realm ; (3) the activities of a public authority for the purpose of inspection, control, or other supervision ; (4) the interest of prevention or prosecution of crime ; (5) the economic interests of the State or the communities ; (6) the protection of the personal integrity or the

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18. Ronald E. Wraith, United Kingdom, in Rowat (ed.), ***Administrative Secrecy in Developed Countries*** 213 (1979). **Emphasis added. Also see *infra* text at 32 on the question of public interest as a defence in the case of prosecution for disclosure of official secrets.**

economic conditions of individuals ; or (7) the interest of preserving animal or plant species[19].

The Constitution also says that the specific cases in which official documents are to be kept secret shall be "closely defined" in a special statute. Rowat says: "As one might expect in a modern welfare state, this law, called the Secrecy Act, spells out an impressive list of matters that must be kept secret."[20] However, the general approach of the Swedish Government is openness rather than secrecy. "While in most countries all administrative documents are secret unless specific permission is given for their release, in Sweden they are all public unless legal provision has been made for them to be withheld."[21]

U. S. A.: Amongst the common law countries the United States has a better tradition of openness than any other country. Originally, the Administrative Procedure Act, 1946 had some provisions for access to documents but there were broad exemptions from these provisions. The attempt failed because of the broad exemptions and the vagueness of the language.[22] In 1966 was enacted the Freedom of Information Act which replaced the provisions of the 1946 Act. The Act was again amended in 1974.[23] The Act casts a positive duty on the government to supply information—this is an aspect which is considered in greater detail in the next chapter. Here it is important to mention the kinds of documents which are exempt from public access. The exemptions are :

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order ;
(2) related solely to the internal personnel rules and practices of an agency ;
(3) specifically exempted from disclosure by statute ;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential ;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency ;

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19. Quoted by Donald C. Rowat, Laws on Access to Official Documents, in T.N. Chaturvedi (ed.), *Secrecy in Government* 2 (1980).
20. *Ibid.* at 3.
21. *Ibid.* at 2. On secrecy in Sweden also see an article by Sigvard Holstad in Rowat (ed.), *Administrative Secrecy in Developed Countries* 29 (1979).
22. Rowat, *supra* note 19 at 10-11.
23. For details, see *ibid.*

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy ;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel ;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions ; or

(9) geological and geophysical information and data, including maps, concerning wells.

An important safeguard is given in the Act against abuse of power by the administrative authorities. There is a provision for filing a complaint in the district court of the United States against refusal to give access to documents. S. 3 provides as under :

> (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
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> (D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

It may be pertinent to point out that though the first exemption mentioned above gives power to the executive to specify documents that are to be kept secret in the interest of national defence or foreign policy, yet the exemption applies only when "they are in fact properly classified", which gives a jurisdiction to the courts to determine the issue. As Rowat says, a judge in the United States can examine "even classified documents to see if they were properly classified or whether excised parts were legitimately blanked out to protect national security or individuals. A department's fear that a decision to withhold information will be overturned by the courts is a very sobering corrective to oversecretiveness. If a citizen appeals to the courts and wins his case, the judge can now pay all of the court costs."[24]

England: The existing law in England on the question of criminal liability for disclosure of official secrets is the same as in India. But let us consider the recommendations of the Franks Committee in the matter of classification and safeguards against executive abuse. The Franks Committee did examine the viewpoint that the difficulties in the way of identifying and defining with certainty those kinds of information which should be covered, and the safeguard of control exercised by the Attorney-General in controlling prosecutions under the statute, justified the *status quo*. On the other hand, there was the argument that "the use of criminal law to restrict the publication of matters of public interest is undesirable in principle, smacking of censorship, and something to be kept to an absolute minimum,"[25] though the use of criminal law to deal with spies and traitors was perfectly justified.

The committee chose a middle path. It thought that the "distinction between espionage and leakage—that is, between those who intend to help an enemy and those who disclose information with no such intention—is important. The distinction should be reflected in the structure of the law. It has been obscured by the inclusion of section 2 in the Official Secrets Acts".[26] It accordingly suggested that s. 2 should be replaced by a separate statute to be known as the Official Information Act. In making recommendations as to the contents of the section it started with the basic premise that the criminal law should not be invoked except where there was a specific reason for giving this special protection to the information in question.

The committee recommended that the following information should be protected by criminal sanctions:

(*a*) Official information relating to matters which concern or affect the defence or security of the realm ;

(*b*) Foreign relations, i.e., matters which concern or affect foreign

24. *Supra* note 19 at 12.
25. *Report* at 39.
26. *Ibid.* at 41.

relations or the conduct of foreign relations. Some foreign affairs, as distinct from foreign relations between governments, are not secret at any stage.

(*c*) Information relating to any proposal, negotiations or decisions connected with alterations in the value of sterling, or relating to the reserves, including their extent or any movement in or threat to them.

The proposed Act should apply to the above categories of information only on the ground that unauthorised disclosure would cause at least *serious injury* to the interest of the nation. The court would not be concerned with the effect of disclosure on the interest of the nation, but the prosecution would have to satisfy the court that the information fell within this category. The committee suggested a few safeguards against overclassification. Firstly, the Secretary of State should make regulations about the classifications and de-classifications of documents, which include provisions on levels of authority at which decisions on classifications may be taken. Secondly, the minister should review the matter himself where there is an allegation that the classified information has been disclosed without authority before the prosecution is launched. Thirdly, there should be a non-statutory committee consisting of government representatives and outside interests to perform two functions—to guide the Secretary of State in making regulations and to guide the people outside whether the information in their possession is classified or not.

The criminal sanctions should also apply to the following official information :

(1) Information which relates to maintenance of law and order, *i.e.* information which is (*a*) likely to be helpful in the commission of offences ; (*b*) likely to be helpful in facilitating an escape from legal custody or acts prejudicial to prison security ; and (*c*) likely to impede the prevention or detection of offences or the apprehension or prosecution of offences.

(2) Cabinet proceedings and documents.

(3) Information given to government by private individuals, whether given by reason of compulsory powers or otherwise, and whether or not given on an express or implied basis of confidence.

Further, the use or disclosure of official information for purposes of private gain should be made an offence.

The institution of prosecutions should be controlled by the Attorney-General and the Director of Public Prosecutions. In the case of ordinary offences, that is, those relating to law and order and private gain, the prosecution should be authorised by the Director of Prosecution, but in the case of politically sensitive subjects of defence and national security, foreign relations, authorization should be done by the Attorney-General.

The question of official secrets was also examined in 1964 by a working party of *Justice*, the British section of the International Commission of Jurists. The working party consisted of three independent lawyers and three journalists chosen by the British Committee of the International Press Institute. It classified information as follows :

(1) Information prejudicial to the security of the State, e.g., defence and police;
(2) Information prejudicial to the national interest, e.g., foreign relations, banking and currency, commodity reserves;
(3) Information which through premature disclosure can provide opportunities for unfair financial gain by private interests;
(4) Information which is confided to Government departments on promise of non-disclosure;
(5) Information which is not prejudicial to the national interest or to legitimate private interests, and relates solely to the efficiency or integrity of a Government department or public authority.

The first four categories were to be covered by criminal sanctions. The Committee did not approve the use of criminal sanctions for the fifth category.[27]

It seems the working party of *Justice* had also recommended that in a prosecution for violating government secrecy it would be a defence that the publication was in the public interest. It was said :

> We recommend that it should be a valid defence in any prosecution under the Official Secrets Act to show that the national interest or legitimate private interests confided to the State were not likely to be harmed and that the information was passed and received in good faith and in the public interest.[28]

Recommendations of the Law Commission of India : There is mention of s. 5 of the Official Secrets Act in the report of the Law Commission on *Offences Against National Security*. Since the commission was not primarily concerned with the Official Secrets Act, it does not seem to have examined the question of amendment of s. 5 in depth. It devotes hardly two pages to the consideration of the section. The commission did not recommend any limitation on the present wide language of the section. It thought it fit to leave it "to the Government not to sanction prosecution where leakage of such information is of a comparatively trivial nature not materially affecting the interests of the State". However, it was of the opinion that s. 5(1) was cumbersome and lacked clarity and needed redrafting without any change in substance. It also made the recommendation

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27. See article by Wraith on United Kingdom in Rowat (ed.), *Administrative Secrecy in Developed Countries* 191-93 (1979).

28. Wraith, *Open Government* 63 (1977).

that the present prescribed punishment was inadequate in some cases and suggested a punishment of seven years for the disclosure of important official secrets, and the existing position in the case of others.

Our Approach : S. 5 is a catch-all provision and hinders the publication of information which is not prejudicial to legitimate national or private interests but whose publication may be in the interest of the community as against the interests of the political party in power. It is essential to restrict its operation by prescribing types of information which need protection from disclosure. Though these types or categories will be broad and primarily it will be the task of the executive to determine whether a document falls under any of the specified categories, yet there will be several advantages in such a specification. Firstly, it will lead a change in the present attitude of the executive to regard everything secret. Secondly, the press will have a better understanding as what it could safely publish without any kind of threat of prosecution and what calculated risk it is undertaking in the publication of other information. Thirdly, the courts would have some degree of control against the abuse of power.

We have surveyed above the position in Sweden and the United States and also the recommendations of the Franks Committee and *Justice.* From this survey it is clear that the following kinds of information needs protection from disclosure :

1. Information concerning defence or security of the nation.
2. Foreign relations.
3. Cabinet proceedings and documents (protection here is necessary in the interest of collective responsibility of the cabinet).
4. Monetary policy and foreign exchange policy, and economic plans and policies where premature disclosure may harm the national interests.
5. Maintenance of law and order, *i.e.*, information which is (a) likely to be helpful in the commission of offences; (b) likely to be helpful in facilitating an escape from legal custody or acts prejudicial to prison security; and (c) likely to impede the prevention or detection of offences or the apprehension or prosecution of offences. This will not include disclosure of information where the government is trying to suppress official excesses or misdeeds like Bihar blindings.
6. Private information given to the government in confidence.
7. Trade secrets.
8. Information which through premature disclosure can provide opportunities for unfair financial gain by private interests.

The above categories are broad. Everything under these categories cannot be considered to be secret. Even in the case of these categories,

information may have to be disclosed in public interest without violating national security or national interest. Public interest ought to be the overriding consideration in determining whether a person has violated the Official Secrets Act or not irrespective of the nature of the document or the category of secrecy to which it belongs. Thus, even a document coming in the category of national defence or security or foreign relations may justify disclosure because of the overwhelming consideration to expose administrative abuse or corruption. To ensure this objective it may be necessary to provide in the statute that it would be a defence in prosecution that publication was in the public interest. In England, the working party of *Justice* had made an express recommendation to that effect. This is also implied in the U.S. Freedom of Information Act which provides as a condition of exemption from public access that "the document is in fact properly classified as being in the interest of national defence or foreign policy".

Are there certain documents which require absolute protection against disclosure irrespective of their contents? Here the cabinet decisions and documents have presented some difficulty. In *Sukhdev Singh*[29], the view was taken in connection with s. 123 of the Evidence Act that cabinet proceedings enjoyed absolute protection. Under art. 74 (2) of the Constitution (art. 163 (3) in the case of a state) a court is prohibited from enquiring into what advice was tendered by ministers to the President. This provision of course does not apply to the disclosure of cabinet proceedings by the press. But, could it be taken to infer that cabinet proceedings should be regarded as *absolutely* secret under the Official Secrets Act? The answer seems to be generally in the negative. No such inference may be drawn from art. 74 (2). The provision is of limited applicability; it protects only the advice given by a minister to the President and not cabinet proceedings as such. Only when an order is personally signed by the President himself that art. 74 (2) will be operative and not when an order is signed by any other official the basis for which is a decision of the cabinet. There are not many orders which are signed by the President himself.[30] In general there does not seem to be any harm in the disclosure of cabinet agenda, that is, what matters came before the cabinet, and also in the disclosure of cabinet decisions.[31] It appears a cabinet minute hardly records dissenting voices.[32] Such an exposure would not go either against the candour theory or the collective responsibility of the ministers. Much more difficult is, however, the matter concerning documents submitted for cabinet decisions containing noting of the individual ministers or others in the department

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29. *Supra* note 12.
30. See M.P. Jain and S.N. Jain, *Principles of Administrative Law* 354-56 (1979).
31. Eagles, Cabinet Secrets as Evidence, 1980 *Pub. Law* 263, 270.
32. *Ibid.* at 267.

However, if these documents are given absolute protection, the question is where to stop? Should it extend to the lower reaches of the department? The problem is that it may lead to "the possibility of a privilege by annexure whereby all sorts of innocuous information could be concealed by including it as factual background in cabinet submissions".[33] All this makes out a case that cabinet proceedings ought not to be *absolutely* protected but subject to the "balancing test of public interest".[34] Cabinet proceedings may be given a secret classification but not "totally secret".

It will be the task of the judiciary to determine whether the prosecution under the Act is justified or not keeping in view the nature of the document, the category under which it falls and the public interest. The court may, however, give due deference to executive determination, the degree of deference depending upon the nature of the document and the category to which it belongs, *e. g.*, in the case of a document concerned with national defence or foreign relations the court may not easily allow the defence of public interest. However, the ultimate judge in these matters will have to be the court.

It is essential to have another safeguard for the individual and this pertains to control over prosecutions. In England, the Attorney-General exercises control over prosecutions under the Official Secrets Act. But this has been subject to criticism. The Attorney-General is a politician and a member of the government and this creates a doubt in his taking an objective view of the matter. The evidence presented before the Franks Committee "indicated quite widespread unhappiness about the Attorney-

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33. *Ibid.* at 271.

34. Eagles, *ibid.*, makes a forceful case for not giving cabinet decisions and papers absolute immunity from production before the courts.

It is true, as he mentions, that "those Commonwealth countries now gingerly experimenting with freedom of information legislation have generally excluded cabinet documents from its operation". *Ibid.* at 264. However, the case of imposing positive obligation on the government is somewhat different from publishing a leak by the press.

In the *Judges* case, *supra* note 14, the court took a restrictive view of documents comprehended within the phrase "advice tendered by Ministers to the President". It (per Bhagwati, J.) took the view that the material on which the "advice" is based cannot be said to form part of the advice. Thus in the matter of appointment (or non-appointment) of an additional judge, correspondence between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the basis of the decision of the government did not come within the purview of art. 74 (2). The court did not agree with its earlier ruling in *Sukhdev*, *supra* note 12, that the report of the Public Service Commission on the basis of which the Council of Ministers advised the Governor to remove a government servant from service was confidential and could not be required to be produced before a court because of art. 163 (3).

The court also held that the correspondence between the three functionaries mentioned above did not fall under the category of "class documents" enjoying absolute protection against production before courts.

General's control over prosecutions under section 2."[35] In India, though the Attorney-General is not a politician or a member of Parliament, yet he is a political appointee and he is more concerned with protecting the interests of the party in power than the individual. Giving of control over prosecutions to the Attorney-General does not seem to be a satisfactory solution. We have to think of alternatives. It may be appropriate to entrust the task to a committee consisting of the Attorney-General, the Chairman of the Press Council and another member of the Press Council nominated by the same. The view of the majority will prevail. The Press Council is an autonomous body and its task is to exercise control over the press and there is no reason why it would not take an objective view of the matter. The association of the Attorney-General is necessary because of two reasons—to ensure the presence of legal element in the committee and to represent the point of view of the government. It has to be made clear that the jurisdiction of this committee will only extend to s. 5 prosecutions and not to prosecutions for espionage or spying, that is, prosecutions under s. 3 of the Official Secrets Act, 1923.

35. *Report* at 20. Also Wraith, *Open Government* 63 (1977).