Unauthorized and Damaging Disclosure of Protected Information: A Comment on the National Security (Legislative Provisions) Bill 2003

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> *'I could also see no way to invoke the Official Secrets Acts, when everybody knew about the project. I was young and green and had not yet fully realized that the Official Secrets Act is not to protect secrets but to protect officials.' ('Jobs for the Boys', in Jonathan Lynn and Antony Jay, Yes, Minister, Salem House Publisher, 1987, at p 151)*

In the leading case of *Lingens v Austria*,[1] the European Court of Human Rights remarked that 'freedom of political debate is at the very core of the concept of a democratic society'. Freedom of political debate presupposes adequate access to government information, without which citizen participation in public affairs and accountability of the government would not be meaningful. In modern society, the media plays a particularly important role, not only in imparting information and ideas and ensuring a free flow of information, but also in the exposure of corruption and abuse of power. The media can only effectively play this role and hence enhance the accountability of the government when it has adequate access to government information. The importance of the right to seek government information in a democratic society is recognized in Article 19 of the International Covenant on Civil and Political Rights as well as in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.[2] This right also exists in the domestic law of many common law and European countries.[3]

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1 (1986) 8 EHRR 103, at para 42.

2 UN Doc E/CN.4/1996/39.

3 Legislation providing access to official information exists in the USA, Canada, Australia, New Zealand, Denmark, Sweden, the Netherlands, Norway, the Philippines, Greece and France: see M Kirby, 'Freedom of Information – the Seven Deadly Sins' (1998) *European Human Rights Law Review* 245. I am grateful to my colleague Mr Eric Cheung who drew my attention to this article.

There are of course circumstances where it would not be in the public interest to disclose government information, but protection of state secrets should be an exception to the general right of access to official information and be narrowly and clearly defined. If the law is so unclear making it difficult to consider with reasonable certainty whether the publication of a story will infringe the law of national security, a prudent editor will tend to err on the cautious side by not publishing the story at all. Likewise, public servants who are unclear of the limits on what can be disclosed will tend to seal their lips. Thus, complicated or ambiguous law will lead to a culture of secrecy. In the context of state secrets, what is important is not so much about how many criminal prosecutions have been taken out, but what chilling effect the law has. Ambiguity is likely to lead to self-censorship.

Unfortunately, protection of state secrets in Hong Kong has never been considered in the context of being an exception to a general right of access to government information.[4] Before the changeover, the British Government imposed its own law on Hong Kong in this area. The Hong Kong Special Administrative Region ('the HKSAR') localized the English Act shortly before the changeover, with few amendments. Five years after the re-unification, amendments to the Official Secrets Ordinance were introduced on the pretext of implementing Article 23 of the Basic Law.[5] The reference to Article 23 is in fact misleading, as the amendments are not really required by Article 23. The Government argued that the existing provisions of the Official Secrets Ordinance 'already strike an appropriate and delicate balance between the need for open government and for protection of state secrets'.[6] It made no attempt to review the existing law. Instead, it expanded the existing law to give additional protection against leakage of government information on the ground that 'Article 23 should not be interpreted as implying that information other than state secrets needs no protection.'[7] The reference to Article 23 is hence disingenuous; the

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[4] Access to official information is governed by an administrative Code of Access, failure to comply with which could only be a subject of complaint to the Ombudsman. The Code of Access sets out no less than 14 exemptions, and of the 188 advisory committees to the Government, only a handful of them holds open meetings.

[5] Proposals to amend the Official Secrets Ordinance were contained in the National Security (Legislative Amendments) Bill 2003.

[6] *Proposals to Implement Article 23 of the Basic Law: Consultation Document* (HKSAR Government, 2001), para 6.14 (hereinafter referred to as the 'Consultation Document').

[7] Ibid, n 6.

amendments were indeed justified on other grounds such as plugging an existing loophole in the law. Yet by putting the amendments in the context of Article 23, the Government shifted the attention to the need to protect national security and diverted discussion from a comprehensive review of the existing law in the context of a right of access to government information.

Official Secrets Law in Hong Kong

For many years, disclosure of official secrets in Hong Kong was governed by English Acts. The British Government is probably more obsessed with keeping government information from the public than any other Western democracy.[8] As long ago as in 1873, a Treasury minute entitled '*The Premature Disclosure of Official Information*' already threatened dismissal of any civil servant who disclosed any official information. In another Treasury circular in 1875, civil servants were warned of the danger of having a close link with the press. In 1889, the first Official Secrets Act was enacted, apparently in response to the absence of any law to prosecute a dissatisfied civil servant who memorized the details of a secret treaty negotiated between England and Russia and disclosed them to a newspaper.[9] The Act made it an offence for any person to disclose information that he obtained as a result of his employment as a civil servant. The British Government soon found that the scope of the 1889 Act was too narrow, and in a misleading manner, introduced the draconian Official Secrets Act 1911. It was misleading in that it gave an impression that the Official Secrets Act 1911 was largely an anti-espionage measure. This was true with section 1, but section 2 went far beyond espionage, and had made even the disclosure of the number of cups of coffee consumed in a government department an offence.[10] Despite its sweeping nature and repeated criticisms,[11] the law remained on the statute book and was indeed enforced. It was liberalized some 78 years later by the Official Secrets Act 1989.

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8 J Robertson, *Freedom, the Individual and the Law* (1989), pp 129-131.

9 H Fenwick, *Civil Liberties* (Cavendish Publishing Ltd, 2nd ed, 1998), p 232.

10 See the *Report of the Committee on section 2 of the Official Secrets Act 1911* (*Franks Report)* (Cmnd 5104, 1972), para 50.

11 See the *Franks Report*, ibid; the *White Paper on Section 2* (Cmnd 7285, 1978); *Green Paper on Freedom of Information* (Cmnd 7520, 1979); *White Paper: Reform of Section 2 of the Official Secrets Act 1911* (Cmnd 408, 1988).

The draconian Official Secrets Act 1911 and its subsequent amendments were extended to Hong Kong by Order in Council and formed part of Hong Kong's law until 1992, when the Official Secrets Act 1989 was extended to Hong Kong by the Official Secrets Act (Hong Kong) Order 1992. The English provisions were repealed by section 27 of the Official Secrets Ordinance,[12] which was enacted in 1997 and modeled on the Official Secrets Act 1989.

The Official Secrets Ordinance creates 3 categories of offences. The first category relates to spying and espionage: sections 3-6. The second category covers unlawful disclosure of security and intelligence information by members of the security and intelligence services: section 13. The last category concerns unauthorized disclosure of protected information by a public servant or a government contractor: sections 14-17. In this regard, protected information refers to information relating to:

(1) security or intelligence,
(2) defence
(3) international relations, and
(4) the commission of offences and criminal investigations.

In relation to the first 3 categories of protected information, an offence is committed only if the disclosure is damaging, which is defined in the Ordinance for each type of protected information.

Section 18 falls into a further and different category, which is targeted at the public, including the media. It creates an offence when any person (other than security agents, public servants and government contractors), who comes into possession of the protected information through an unlawful disclosure or entrustment, makes a damaging disclosure which he knows or has reasonable cause to believe that the disclosure would be damaging. It envisages that the protected information comes into the hands of the public through an unauthorized disclosure by a public servant or government contractor, and does not cover situations in which the

[12] Cap 521. For a detail discussion, see Fu Hualing, "The National Security Factor: Putting Article 23 of the Basic Law in Perspective", in Steve Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press, 2001), at pp 73-98.

person comes into possession of the protected information by illegal access without involving a public servant or government contractor. This is the 'loophole' that the Government proposed to close by the amendments in the National Security (Legislative Provisions) Bill 2003.

The Amendments

The Government intends to preserve and strengthen the existing Official Secrets Ordinance. The National Security (Legislative Provisions) Bill 2003 ('the Bill') proposed to amend the Official Secrets Ordinance by introducing two new offences: unlawful disclosure of information that relates to any affairs concerning the HKSAR which are, under the Basic Law, within the responsibility of the Central Authorities (section 16A), and unlawful disclosure of protected information that is acquired by means of illegal access (section 18). The first offence extends the scope of protected information in the third category of offences to cover information relating to the relations between the HKSAR and the Central Authority. The second offence, which targets at the public, extends the prohibition against unauthorized disclosure to protected information acquired by illegal means. Section 18 also extends the prohibition against unauthorized disclosure to cover disclosure by both current and former public servants and government contractors. In both new offences, it is necessary to prove that the disclosure is damaging.

There are two other features in the amendment. In the new section 12A, it is provided that the provisions of Part III of the Official Secrets Ordinance are to be interpreted, applied and enforced in a manner that is consistent with Article 39 of the Basic Law. This clause was suggested by David Pannick QC in his advice to the HKSAR Government and was intended to allay public concerns that these provisions or their application would be inconsistent with the International Covenant on Civil and Political Rights as applied to Hong Kong. This clause is probably unnecessary, as under Article 11 of the Basic Law, all laws in Hong Kong have to be consistent with the Basic Law, including Article 39. It is stating the obvious and may create an undesirable impression that other provisions in the Official Secrets Ordinance do not have to comply with the requirements of Article 39.

Another feature is the right to elect for jury trial under the new section 24A. It provides that a person who is to stand trial before a magistrate or the District Court for specified offences may elect to stand trial before the Court of First Instance, which will be trial by jury. This is a welcome move, as experience elsewhere suggests that jury trial is an important safeguard against oppressive prosecution in political offences.[13] As the relevant offences can be tried on indictment and summarily, it is worthwhile to expressly provide that an accused who is charged before a magistrate and elects for jury trial before the Court of First Instance will not as a result face a heavier penalty.[14]

I. Unlawful Disclosure of Information that Relates to any Affairs Concerning the HKSAR which are within the responsibility of the Central Authorities

Under the proposed section 16A, a present or former public servant or government contractor commits an offence if he makes, without lawful authority, a damaging disclosure of any information, document or other article that relates to any affairs concerning the HKSAR, which are, under the Basic Law, within the responsibility of the Central Authorities. It is also necessary to prove that the information, document or other article is or has been in his possession by virtue of his position as a public servant or government contractor.

The reason for this amendment is that prior to the re-unification, information relating to the relationship between Hong Kong and the Mainland was protected under section 16 of the Official Secrets Ordinance, which prohibits damaging disclosure of any information relating to 'international relations'.[15] After the re-unification, it is no longer appropriate to regard the relations between Hong Kong and the Mainland as

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13 See, for example, the *Clive Ponting* case below.

14 On conviction on indictment, an accused may be liable to a fine of $500,000 and 2 years' imprisonment, whereas on summary conviction, he shall be liable to a fine at level 5 and 6 months' imprisonment: section 25.

15 Under section 2 of the Official Secrets Ordinance, 'international relations' includes 'any matter relating to the relations between the United Kingdom and Hong Kong or the external relations of Hong Kong'. The National Security (Legislative Provisions) Bill proposed to replace this part of the definition so that 'international relations' includes 'any matter relating to the relations between the HKSAR and any place outside the People's Republic of China', thus leaving the relations between the HKSAR and the PRC outside the scope of section 16.

'international relations'. Hence it is said that a new class of protected information should be created. This was said to be no more than a consequential amendment as a result of the change of sovereignty.[16]

The public remained alarmed. The almost mechanical justification of filling a gap left behind as a result of the change of sovereignty shows that the Government is utterly insensitive to the completely different constitutional and political setting in the United Kingdom and the PRC. While the Official Secrets Act is draconian, it is to some extent mitigated by the presence of a strong democratic and liberal political tradition, as well as a vigorous and free press in the United Kingdom. In contrast, anything that the Central Government dislikes could be labeled as state secrets in the Mainland. Reporters have been jailed for publishing the speech of the Premier before it was made public, or for publishing the gold reserves of the Bank of China (although this information was already in the public arena).[17] In the *Consultation Document*, the protected information was described as 'any information relating to relations between the Central Authorities of the PRC and the HKSAR'.[18] This proposal was met with strong opposition for being excessively vague. In the Bill, the scope of this category of protected information was cut down to 'any information, document or other article that relates to any affairs concerning the HKSAR which are, under the Basic Law, within the responsibility of the Central Authorities.' It was said that 'the free flow of economic and commercial information will not be affected.'[19]

However, the concession made in the Bill hardly allays the worries. In the first place, the protected information relates to the relations between the HKSAR and the Central Authorities, but the Bill does not define 'Central Authorities'. This term appears in Article 17 of the Basic Law and is not the same as the Central People's Government, which is also referred to in the Basic Law and defined in the PRC Constitution as the State Council.[20] The State Council consists of the Premier, the Vice-Premiers, some State councilors, the ministers in charge of the ministries of the State Council, the directors in charge of the commissions of the State Council, the

16 *Consultation Document,* para 6.18.
17 See J Chan, *On the Road to Justice* (Stepforward Publisher, 2000), pp 121-127
18 Para 6.18.
19 *Implementation of Article 23 of the Basic Law: National Security (Legislative Provisions) Bill – Explanatory Notes* (HKSAR Government, 2003), p 9.
20 Art 85, PRC Constitution.

Auditor General, and the Secretary General.[21] It is the highest organ of state administration. In contrast, the term 'Central Authorities' is not defined in either the PRC Constitution or the Basic Law. It could, for instance, cover the National People's Congress[22] and its Standing Committee,[23] or the Central Military Commission.[24]

Secondly, the protected information has to be related to affairs concerning the HKSAR which are, under the Basic Law, within the responsibility of the Central Authorities. A quick glance over the Basic Law shows that the following areas fall within the responsibility of the Central Authorities and hence information within these areas would become protected information:

(1) Foreign affairs: art 13
(2) Defence: art 14
(3) Assistance from the garrison in the maintenance of public order and disaster relief upon request from the HKSAR Government: art 14
(4) Appointment of the Chief Executive and the principal officials of the executive authorities of the HKSAR: arts 15, 45
(5) Scrutiny, and if appropriate, invalidation of laws enacted by the legislature of the HKSAR: art 17
(6) Extension of national laws to Hong Kong through Annex III: art 18
(7) Declaration of a state of war or a state of emergency and making order applying relevant national law to Hong Kong: art 18
(8) Issuance of certificate of "act of state" and "acts of state": art 19
(9) Granting extra powers to the HKSAR: art 20
(10) Election of deputies of the HKSAR to the NPC: art 21
(11) The establishment of Mainland offices and departments in the HKSAR: art 22

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[21] Art 86, PRC Constitution.

[22] For instance, under Art 159, the power to amend the Basic Law lies with the National People's Congress.

[23] The Standing Committee of the National People's Congress has a number of specific responsibilities over Hong Kong as defined in various articles of the Basic Law: see infra.

[24] Although the Central Military Commission is not directly referred to in the Basic Law, under art 93 of the PRC Constitution, the Commission directs the armed forces of the country, including the People's Liberation Army stationed in Hong Kong.

(12) Approval of entry of individuals from other parts of China to the HKSAR: art 22

(13) Issuance of directives in respect of the relevant matters provided for in the Basic Law: art 48(8)

(14) Authorizing the Chief Executive and the HKSAR Government to conduct external affairs and other authorized affairs: arts 48(9), 62

(15) Arrangement with foreign states for reciprocal juridical assistance: art 96

(16) Authorizing the maintenance of a shipping register: art 125

(17) Granting permission for access of foreign warships to the ports of the HKSAR: art 126

(18) Laying down provisions concerning nationality marks and registration marks for aircraft register: art 129

(19) Permission of access of foreign state aircrafts to the HKSAR: art 129

(20) Negotiation of air services arrangement between the HKSAR and other parts of the PRC and other states and regions: art 131-134

(21) Authorizing the participation of the HKSAR in negotiations at diplomatic level, in international organizations or conferences, extension of international agreements to the HKSAR and continued application of international agreements to the HKSAR: art 150, 152-153

(22) Authorizing the issuance of passport and travel documents to Chinese citizens: art 154

(23) Conclusion of visa abolition agreement with foreign states or regions: art 155

(24) Establishment of foreign consular and other official or semi-official missions in the HKSAR: art 157

(25) Interpretation of the Basic Law: art 158

(26) Amendment of the Basic Law: art 159.

This is a very long list and covers many different aspects of interaction between the HKSAR and the Central Authorities. It is difficult to see why the whole of this huge amount of information deserves secrecy and protection. It is certainly not true, as the Government alleged, that the protected information does not cover commercial or economic information. A policy decision to increase or expedite approval of exit visa to enable more Mainland residents to visit Hong Kong in order

to boost the tourist industry in Hong Kong would be a matter within Art 22. Negotiation of air services agreement is clearly economic or commercial in nature. Negotiations with the WTO to establish a free trade zone between the HKSAR, Macau, Taiwan and the Mainland within the framework of the WTO would come under external affairs and hence within the responsibility of the Central Authorities.

Apart from information of a commercial and economic nature, it may also cover information of a political nature, such as the appointment of the Chief Executive, or arrangement on surrender of fugitive offenders between the HKSAR and the Mainland. The scope of the protected information is so broad that virtually any information that has anything to do with the relations between the HKSAR and the Mainland will be caught by this provision. Moreover, information is protected by virtue of their falling into a class rather than by virtue of their content. Some of the information may not be sensitive or may even be trivial, and it is difficult to justify casting the net so wide.

Damaging Disclosure

The wide coverage of protected information is to some extent mitigated by the requirement that the disclosure has to be damaging. Under the proposed section 16A(2), a disclosure is damaging if the disclosure endangers national security, or the information is of such a *nature* that its unauthorized disclosure would be *likely* to endanger national security. In other words, it is necessary to show some harm to national security before the disclosure constitutes an offence. However, there is no requirement that the harm be real and substantial.

In determining whether disclosure endangers national security, it is obviously necessary to take into account the content of the information disclosed. The harm done has to flow from the information disclosed. In contrast, under the second limb of damaging disclosure, the damaging effect is to be determined, not by reference to the content of the information disclosed, but by the nature of the information disclosed. Trivial information which by itself cannot cause any harm may still be considered 'damaging' simply because it falls within a class the *nature* of which is such that the disclosure would *likely* endanger national security. For example, military

information relating to the operation of the People's Liberation Army in Hong Kong will be information of such a nature that its unauthorized disclosure would be likely to endanger national security, even though the information disclosed is about the amount of food they consumed daily at the headquarters of the PLA in Hong Kong. The prosecution would be required to prove is that the information falls within a class whose disclosure is likely to have the effect of endangering national security.

In *Lord Advocate v Scotsman Publications Ltd*,[25] which involved an action for breach of confidence to restrain the publication by a journalist of material relating to the work of the intelligence service, the House of Lords suggested that it was necessary to show a strong likelihood of harm as a result of the unauthorized disclosure and that the nature of the harm must be specified. The Crown conceded that the information disclosed was innocuous, but argued that harm would be done as the disclosure would undermine confidence in the security services. The House of Lords rejected this argument, as the nature of the document alone was unable to satisfy the requirement of harm. In coming to this conclusion the House of Lords also noted that there had already been a degree of prior publication.

While this is an encouraging decision, the ruling has to be treated with caution. It was decided in the context of breach of confidence rather than a violation of the Official Secrets Act 1989. It remains to be seen whether our judiciary will follow this decision by requiring the Government to show a strong likelihood of harm, as it may be argued that this is unrealistic in the context of national security. The further reason of the House of Lords that the nature of the document by itself was unable to satisfy the requirement of harm may not be followed, as it does not sit well with the express provision of the proposed section 16A(2)(b), which clearly provides that disclosure is deemed to be damaging if the nature of the information is such that its disclosure is likely to endanger national security. Harm need not flow from or be likely to flow from disclosure of the information in question. Nor is it necessary to show that harm has actually been done. It suffices to show that the disclosure of that class of information is potentially harmful.

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[25] [1990] 1 AC 812.

National Security

'National security' is defined as 'the safeguarding of the territorial integrity and the independence of the People's Republic of China.'[26] There is still considerable uncertainty in this definition. As the admitted purpose of the law in this area is to provide maximum clarity,[27] it is desirable that the phrase 'national security' be further refined so that it would not include protecting a government from embarrassment or exposure of wrongdoing, or concealing information about the functioning of its public institution, or entrenching a particular ideology or suppressing industrial unrest.[28]

As 'national security' is defined in the local legislation, its interpretation will, so the Government asserted, be in the hands of the judiciary in Hong Kong. This is welcome, but the matter is not entirely free from doubt. In the first place, Article 19 of the Basic Law provides that the Hong Kong courts shall have no jurisdiction over acts of state such as defence and foreign affairs, and the courts shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs, and such certificate is conclusive proof of the fact. It is unclear whether the question whether national security is endangered could be regarded as a 'fact of state' which will be conclusively proved by a certificate from the Chief Executive and hence outside the jurisdiction of the courts. Even if 'national security' is within the jurisdiction of the Hong Kong courts, it is unclear how far the view of the Central Authorities shall or will be taken into account in construing the meaning and the scope of this phrase. It may be argued that so long as the view is not binding on the Hong Kong courts, it is legitimate for the courts to take into account such view. The danger of this argument is that if the court decides to reject the 'view' of the Central Authorities, the Standing Committee of the National People's Congress may always conclude that the law then fails to give full effect to Article 23.[29]

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[26] Section 12.

[27] B Allcock, 'Media Have No Reason to Fear' (2002), http://www.basiclaw23.gov.hk/english/focus/focus2.htm

[28] See Johannesburg Principles, principle 2.

[29] See Art 17, Basic Law. In *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315, the Court of Final Appeal held that it had jurisdiction to declare legislative acts of the National People's Congress or its Standing Committee unconstitutional for being inconsistent with the Basic Law. This was strongly refuted by the Central Government. For details, see J Chan, HL Fu and Y Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press, 2000).

Defence

It is a defence to show that, at the time of the offence, the accused did not know *and* had no reasonable cause to believe that the information falls within the protected category of relations between the HKSAR and the Central Authorities or the disclosure is damaging.[30] Given the sweeping scope of the responsibility of the Central Authority over the HKSAR under the Basic Law, a defence that one did not have reasonable cause to believe that the information fell within this protected category can hardly be successful. Thus the only realistic defence is that he did not know and had no reasonable cause to believe that (1) the disclosure of the content will endanger national security and (2) the information disclosed belongs to a class disclosure of which will likely endanger national security. The defence is framed with reference to an objective mens rea. The fact that the accused *honestly* believes that the disclosure is not damaging is not a defence. Nor is it sufficient to show that the information disclosed does not endanger national security. He has to go further to show that there is no reasonable cause to believe that the information disclosed belongs to a class disclosure of which will *likely* endanger national security. Strong justifications are required to impose criminal liability on the basis of an objective belief, especially when there is no defence of public interest or reasonable excuse.

II. Disclosure of Protected Information Acquired by Illegal Access

While sections 13 to 17 of the Official Secrets Ordinance prohibit disclosure of protected information by public servants and government contractors, section 18 is directed at members of the public, notably journalists. It prohibits damaging disclosure of protected information by people who have obtained the information directly or indirectly from those who lawfully acquire the information in the course of performing their duties. The existing section 18 covers 3 situations of acquisition of protected information. The first is when the protected information is acquired directly

[30] Section 16A(3).

or indirectly from a public servant or government contractor who discloses it without authority. The second situation is when the protected information is entrusted to the defendant in confidence and the defendant discloses it without authority. The third situation is that the protected information is disclosed without authority by the person entrusted with the information in confidence, and the information is acquired by the defendant directly or indirectly from the entrustee.

The *Consultation Document* proposed to prohibit a 4th means of acquiring protected information, namely by unauthorized access, which was undefined. This was criticized as too vague. In the Bill, 'unauthorized access' was replaced by 'illegal access', which is defined in section 18(5A) as acquisition through the following illegal means, namely unauthorized access to computer by telecommunications, access to computer with criminal or dishonest intent, burglary, and bribery. Unlike the first three situations where the information is disclosed by a public servant or government contractor, in the fourth situation, it is not necessary to show that the protected information comes from a public servant or government contractor. [31] However, in practice, unless the protected information was acquired by hacking, theft or burglary, it is difficult to see how the protected information does not originate from a public servant or a government contractor.

While it is a welcome move to confine 'illegal access' to specified situations, it is difficult to see why bribery should be included as a distinct means of illegal access. If the public servant or government contractor is not permitted to disclose the protected information and he makes an unauthorized disclosure, the person who receives and discloses such information will be caught by the existing section 18. The addition of another offence of obtaining the protected information by illegal access will then be redundant.[32]

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[31] While section 18(1)(a) refers to information protected under sections 13 to 17 and therefore suggests that the information has to come from a public servant or a government contractor, section 18(6) clearly suggests that section 18(1)(a) merely refers to the category of protected information.

[32] Indeed, the same question can be asked in relation to a number of proposals in the Bill. For instance, most of the proposed proscription mechanism can already be done under the Societies Ordinance, and a number of offences on treason, sedition and secession are covered, albeit in different form, by the existing Crimes Ordinance.

Damaging Disclosure

It is necessary to prove that the disclosure is damaging, and that the disclosure was made knowing or having reasonable cause to believe that it would be damaging.[33] The problem of damaging disclosure is the same as that discussed under section 16A.

Difficulties Faced by the Press

It is necessary to prove that a defendant knows or has reasonable cause to believe that the information falls into one of the protected categories and that it has come into his possession by one of the prohibited means.[34]

In general, it is not difficult to prove that the defendant knows that the information falls into one of the protected categories, as the information will speak for itself. It is hardly open to an experienced journalist to say that he does not know or has no reasonable cause to believe that a document concerns the relations between the HKSAR and the Central Authorities. The difficulty is that he can also be easily said to have knowledge or reasonable cause to believe that the protected information is acquired by one of the prohibited means. Unless the information is disclosed through official channels, there is always a possibility that it was acquired by someone by illegal means. A prudent journalist may wish to confirm information that he obtains from non-government or anonymous sources with the Government before publishing it. However, if the Government denies the information or alleges that it was disclosed without authority, this would impute the media with knowledge or reasonable cause to believe that the information was acquired by illegal access. Similarly, the information may be leaked by a public servant. Yet it is difficult for a reporter to find out whether the leakage is unauthorized or whether the leakage is a means to test public reaction to a controversial measure. When confronted with a leakage, the Government's usual responses are first to deny the information, secondly to claim that the disclosure is

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33 Section 18(3).

34 Section 18(1). There are 4 categories of protected information under the Ordinance, namely, security or intelligence, defence, international relations, and commission of offences and criminal investigations: section 18(6).

unauthorized, and thirdly to make cries of moral indignation.[35] It is difficult for the media to refute the Government's allegations, and the information that can be published will then lie at the whim of the Government. This legal regime will make it difficult for the press to play its role as a watchdog of the government. The chance of a prosecution may be remote, but a prudent reporter (and a cautious proprietor) may not wish to take the risk and the safest course is not to report the story.

Alternatively, the information may be disclosed by a public servant who wishes to remain anonymous. In order to prove that the disclosure is authorized, the journalist may feel compelled to reveal his source, which, for public interest reasons, is protected from disclosure.

III. General Issues

Prior publication

Freedom of information guarantees the free flow of information that is in the public domain. Hence, compelling justifications will be required if there is any attempt to prohibit disclosure of information that is already in the public domain. In the context of the Official Secrets Ordinance, this raises two issues: first, whether prior publication is a defence to unauthorized disclosure, and secondly, whether the application of the criminal law is appropriate?

The defence of prior publication has been considered by the British Government in the White Paper preceding the enactment of the Official Secrets Act 1989.[36] The White Paper rejected this defence on the ground that repetition of a story may sometimes compound the damage or cause more harm than the original publication. It further pointed out that in certain circumstances, the gathering of information previously published in different places may create a much more damaging disclosure. It gave an example of compiling a list of addressees of public

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[35] Perhaps a fourth response is to set up a leak enquiry that will never report at the end, as it has often been said that 'the ship of state is the only type of ship that leaks from the top': see 'The Death List', in Jonathan Lynn and Antony Jay, *Yes, Minister* (Salem House Publisher, 1987), at pp 209-213.

[36] *White Paper: Reform of Section 2 of the Official Secrets Act 1911* (Cmnd 408, 1988), paras 62-64 (hereinafter referred to as the '*White Paper*').

figures, which in the compiled form could be of considerable value to a terrorist group. The Hong Kong Government endorsed these reasons and rejected prior publication as a defence.[37] With modern computer facilities and the ease of amassing and tabulating a wide range of information these days, the justifications put forward by the White Paper are hardly convincing. A terrorist group does not need the help of a journalist to put such information together for its own use.

The White Paper also suggested that prior publication would be a relevant factor in considering whether the disclosure is damaging. If no further harm is done, the subsequent publication will not be damaging.[38] This appears also to be the approach adopted by the House of Lords in *Lord Advocate v Scotsman Publications Ltd*.[39] On the other hand, the test of damaging disclosure covers not only whether the disclosure has endangered national security, but also whether it is of a nature disclosure of which is likely to have damaging consequences. This seems to open the possibility for the court to ignore prior publication and the actual effect of disclosure and to concentrate simply on the hypothetical effect of disclosure.

Freedom of information should only be restricted when there is strong justification and only when it is necessary to do so. In considering whether the restriction is necessary to achieve the legitimate objectives to be pursued, it is necessary to consider what alternatives there are in achieving the same objectives, in this case preventing the further spreading of damaging information. If there is an unauthorized disclosure, the Government may seek an injunction restraining its publication by an action of breach of confidence. In such an action the court has to weigh between breach of confidence and the public interest in publishing the information. If the information is obtained by illegal access, the person who acquires the information by illegal means can be punished by the criminal law, if he can be found. For others who are not involved in the illegal activities and who rely on the information already in the public domain, it is too oppressive to impose criminal liability on them, especially when neither prior publication nor public interest is a defence. To invoke the criminal law to suppress information that is already in the

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37 B Allcock, 'Media Have No Reason to Fear' (2002), supra, n 27.

38 The same reasoning was adopted by Mr B Allcock: see B Allcock, 'Media have no reason to fear', supra, n 27.

39 [1990] 1 AC 812.

public domain is clearly a disproportionate measure, when the civil action for breach of confidence is sufficient to protect whatever Government interest there is in restraining the publication of the information.

Public Interest

The Bill assumes that once the disclosure is damaging, no competing public interest can ever justify the disclosure. This assumption is questionable, as there are varying degrees of damaging disclosure, and it can hardly be the case that there are no circumstances where public interest in disclosure could outweigh the possible damage that might be caused.

In the *Clive Ponting* case,[40] the defendant was an Assistant Secretary in the Ministry of Defence. He was responsible for policy on the operational activities of the Royal Navy at a time when the Opposition was pressing for information relating to the sinking of the Argentine ship, the *General Belgrano*, by a British submarine during the Falklands war. The Secretary of State for Defence decided to withhold information from Parliament, and Ponting, who honestly believed that this was morally wrong, passed the information to a sympathetic member of the Opposition so as to facilitate effective scrutiny of the working of the government. He was charged with an offence under section 2 of the Official Secrets Act 1911. Notwithstanding the trial judge's direction that his official duty superseded any public interest, he was acquitted by a jury. In the *Sarah Tisdall* case,[41] the defendant was a relatively low ranking official working in the Foreign Office. She was concerned about the way in which information about the arrival of US cruise missiles into the country was being presented to Parliament and therefore leaked the information to the *Guardian*. She was charged with an offence under section 2 of the then Official Secrets Act 1911, and received a prison sentence of six months.[42] If these cases took place in Hong Kong under the Official Secrets Ordinance, it appears that neither of them would have a defence. They may disclose the protected information in order to expose an abuse

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40 [1985] Crim LR 318.

41 *The Times*, 26 March 1984.

42 The case led to a public outcry, and the outcome was generally regarded as too harsh: see Y Cripps, 'Disclosure in the Public Interest: The Predicament of the Public Sector Employee' [1983] *Public Law* 600.

of power in the government, but however laudable the objective is, the law does not afford them a defence. Is that the right approach?

The public interest defence was considered by the British Government in 1988.[43] It eventually rejected this defence for two reasons. First, the scope of such a defence is unclear and, would therefore lead to a wide range of unnecessary arguments and defeat the purpose of achieving maximum clarity in the law and in its application. Secondly, the intention is to apply criminal sanctions only where this is clearly required in the public interest. The Hong Kong Government endorsed these two reasons in rejecting the call for a public interest defence.[44]

The first reason is a drafting reason and does not address the central issue, namely whether it is right that there are no circumstances whatsoever that could justify unauthorized disclosure of the protected information, even when the information reveals serious corruption and abuse of power? The second reason will leave 'public interest' entirely in the hand of the Government.

While 'public interest' may be an unruly horse that is incapable of being precisely defined, this concept is by no means unfamiliar to the common law. The concept of necessity and proportionality in human rights jurisprudence requires a balance between the legitimate interest of protecting national security and other competing interests. In the *Spycatcher* case,[45] the European Court of Human Rights held that the injunctions granted by the English courts at the early stage of the action did not violate Article 10 of the European Convention partly because the domestic courts had recognized the conflicting public interests involved and had given them careful consideration.

The Government also sought support from the recent decision of the House of Lords in *R v Shayler,*[46] where it was argued that, under the Human Rights Act, an unauthorized disclosure could be justified if it was in the public interest. This case involved a member of the security service who, after leaving the service, disclosed a

43 *White Paper* 1988, para 60.
44 B Allcock, 'Media have no reason to fear', supra, n 27.
45 *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153, para 63.
46 [2003] 1 AC 247.

number of documents relating to security or intelligence matters to a national newspaper. The argument on public interest was rejected by the House of Lords, but on the basis that the relevant provisions of the Official Secrets Act could not, on a plain and natural reading, support the existence of such a defence. The court further pointed out that there were sufficient safeguards in the legislation, including judicial review, to ensure that the power to withhold authorization was not abused and that proper disclosures were not stifled. Lord Hutton, quoting with approval the judgment of Moses J, stated:[47]

> 'I accept that, in general, a restriction on disclosure cannot be justified as being proportionate without regard to the public interest in the particular disclosure. However, that proposition must be considered in the context of the statutory scheme in the instant case. There is no blanket ban on disclosure by a former member of the Security services. Where a former member of a security service seeks to expose illegality or avert a risk of injury to persons or property, he is entitled to approach any Crown servant identified in section 12(1) of the OSA 1989 for the purposes of that Crown servant's functions (see section 7(3)). It is not therefore correct to say that a restriction is imposed irrespective of the public interest in disclosure. If there is a public interest in disclosure, it is, at the very least, not unreasonable to expect at least one of the very large number identified to recognize the public interest, if it is well founded, and to act upon it.'

Lord Hutton stressed that members of security and intelligence services were in a special class. He held that 'if complaints to Crown servants were to prove fruitless and the appellant considered that the public interest required that he should disclose the information in his possession about alleged wrongdoing or incompetence to the press or other sections of the media, he would have another course open to him. This would be to apply, pursuant to section 7(3)(b), for official authorization to disclose the information to the public. If his complaints to official quarters had been fruitless and if official authorization were not granted, the

47 Ibid, at para 106.

appellant could apply to the High Court for a judicial review of the refusal to give official authorization.'.[48]

Thus, it can be seen that this case does not support a general argument that it is constitutional to impose restrictions on unauthorized disclosure of state secrets without any public interest defence. The case rests on the peculiar nature of security services and the existence of a wide range of safeguards to ensure that authorization for disclosure would not be improperly refused.

It should also be noted that a public interest defence does exist in existing law. Under section 30 of the Prevention of Bribery Ordinance,[49] it is an offence to disclose the details of an investigation of the ICAC if there is no 'lawful authority or reasonable excuse.' The Court of Appeal held that it would be a reasonable excuse if the disclosure were to reveal an abuse of power or any illegality committed by the ICAC.[50] Thus, if 'public interest' is considered to be too imprecise, a formula such as 'without reasonable excuse' could serve the same objective.[51]

Application to past public servants

The existing section 18(2) refers to 'a public servant or government contractor' only, and not a former public servant or government contractor. In contrast, sections 14 to 17 of the Ordinance refer to 'a person who is or has been a public servant or government contractor.' This is odd and as a matter of drafting, it is desirable that section 18(2) should be consistent with the offences in sections 14 to 17. Thus, the Government proposed to extend the proposed section 16A and the current section 18 to both present and past public servants and government contractors.

The Government's argument is reasonable from a drafting point of view. The question is whether it is reasonable, as a matter of policy, to impose a life long duty of confidentiality on all public servants who have retired or left the public services and

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48 Ibid, para 107.
49 Cap 201.
50 *Attorney General v Ming Pao Newspaper Ltd* (1995) 5 HKPLR 13 at 21, per Litton VP.
51 This example is another answer to the drafting objection.

all government contractors who have long completed the contracted project. While one can appreciate that a life long duty of confidentiality may have to be imposed on agents working in security and intelligence services,[52] it is less clear why *all* public servants and government contractors have to be subject to the same *life long* restriction. It seems more reasonable to impose a sanitization period beyond which the duty of confidentiality shall lapse. Under the current proposal, it is ironic that this duty of confidentiality can persist even after the information in question is released under the Public Records Ordinance or is publicly available at overseas archives![53]

In *R v Slayler*,[54] the court noted that for serving public servants, if they wish to disclose protected information, there is an internal mechanism whereby they can seek approval, and if approval is unreasonably refused, they can apply for judicial review. In contrast, for past public servants and government contractors, such mechanism will no longer be available. Once they leave government services, it would be difficult for them to ascertain whether the disclosure will have any damaging effect. Their only safe course is not to disclose anything that could fall even remotely in the category of information relating to the relations between the HKSAR and the Central Authority. The effect of the section is to create a climate of secrecy among public servants and government contractors.

In recent years, senior public servants such as Mr Christopher Patten, the last Governor, and Sir S Y Chung, a former senior member of the Legislative Council and the Executive Council, published their memoirs, in which they disclosed information relating to the Sino-British negotiations.[55] These memoirs provide valuable historical material for contemporary researchers. The effect of section 16A is likely to outlaw or at least to deter the writing of such memoirs in future. It may be argued that section 16A will be engaged only if the disclosure is damaging. The difficulty is that

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52 The life-long duty of confidentiality on the part of agents working in security and intelligence service was recognized by the House of Lords in *Attorney General v Guardian (No 2)* [1990] 1 AC 109

53 It is interesting to note that a fair amount of official information about Hong Kong can be obtained from the Public Record Office in the UK or public archives in the United States. Note that the fact that the information has been published elsewhere is not per se a defence and would not relieve former public servants and government contractors of this life-long duty of confidentiality.

54 [2003] 1 AC 247.

55 See J Dimbleby, *The Last Governor: Chris Patten & the Handover of Hong Kong* (Little, Brown & Co, 1997); S Y Chung, *Hong Kong's Journey to Reunification* (Chinese University Press, 2001).

it is very difficult to judge whether the disclosure will have such damaging effect, and the fact that they may honestly believe that the disclosure after so many years will not be damaging is not sufficient, unless they can further show that they have no reasonable cause for believing the disclosure is likely to be damaging.

It is also unclear how far section 16A applies to those public servants who have already retired when the section comes into effect. They no longer have any contractual relationship with the Government. Section 16A now imposes on them a statutory duty to maintain confidentiality in relation to information they acquired when they were public servants, which may be many years ago. Since the protected information refers to the HKSAR, which came into being only on 1 July 1997, the duty of confidentiality may not cover information that they acquired in the pre-97 regime. Thus, if a retired public servant discloses details of the Sino-British negotiation, he could not be charged with an offence under section 16A.

Conclusion

Secrecy breeds suspicion and mistrust. An open and accountable government should strive to disclose the maximum amount of government information. There are, of course, areas where disclosure of government information has to be restricted in order to protect equally important interests. Such restriction, however, should go no further than is strictly necessary and should be clearly defined.[56] Uncertainty and ambiguity will lead to self-censorship.

The proposed amendments to the Official Secrets Ordinance do not meet these general criteria. The scope of the category of protected information relating to affairs of the HKSAR, which are within the responsibility of the Central Authority, is both sweeping and vague. Information is protected by class or nature rather than by content, and the degree of harm required to show damaging effect is unclear. There is no defence of prior publication or public interest.

It is recommended that the following amendments be made:

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[56] See Johannesburg Principles, principles 11-19.

(1) Protected information should be defined by content and not by source or class;

(2) Damaging disclosure should require proof of a strong likelihood of specified harm or clear and present danger of harm, which harm should flow from the content of the information disclosed rather than from the nature or class of information disclosed;

(3) Subjective mental state should be required so that it would be a defence if one honestly believes that the information is not protected or that the information is lawfully acquired.

(4) Once information has been made generally available, by whatever means, whether lawful or not, there is no further justification for prohibiting further disclosure to the public. A civil action for breach of confidence is sufficient to protect whatever Government interest there is against further disclosure of the information concerned.

(5) There should be a defence of public interest or a defence of reasonable excuse so that no offence will be committed if the public interest in knowing the information outweighs the harm done, or likely to be done, by disclosure.

(6) The definition of 'national security' should be further refined to expressly exclude protection of the Government from embarrassment or exposure of wrongdoing or concealment of information about the proper functioning of public institutions.

(7) Protection of national security shall not be used as a reason to compel a journalist to reveal a confidential source;

(8) A time limit for prosecution, say, 6 months, shall be imposed.

(9) The entire Official Secrets Ordinance should be reviewed in the context of a public right of access to government information, and a Freedom to Information Ordinance shall be enacted to replace the current administrative regime governing the constitutional right of access to government information.

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