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AUTHORS: Cemil KAYA

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# OFFICIAL SECRECY IN THE UNITED KINGDOM AND THE ROLE OF THE FREEDOM OF INFORMATION ACT WITH REGARD TO REDUCING SECRECY

*Doç.Dr. Cemil KAYA\**

*“The issues touch the heart of government in a Parliamentary democracy too closely”<sup>1</sup>.*

## **Introduction**

Openness is essential to the full development of democracy. The logic of democracy demands that, in principle, government information must be open to the public. Because it enables citizens to exercise some control of their governments and helps citizens to protect themselves from government’s arbitrary actions. Of course, there would be some legitimate exceptions in a democracy, such as national security, crime prevention and personal privacy but they should be justified by law, explicitly spelled out by law and must be narrowly construed. Also, exceptions should not be too vague because vague terms give public officials too much discretion to withhold information. Nowadays, governments are growingly more open due to internal or external pressures.

On the other hand official secrecy is a reality in each country. Similar observation from Rowat’s two studies point out that “The Commonwealth countries have inherited the tradition of secrecy from an earlier era of absolute monarchy”<sup>2</sup> and that “Governments inherited the principle of

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\* Associated Professor Doctor, Selcuk University Law Faculty.

<sup>1</sup> The Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911. Cmnd. 5104 – The Franks Committee. Para 15, p. 13.

<sup>2</sup> **Rowat**, Donald C, How Much Administrative Secrecy? The Canadian Journal of Economics and Political Science, vol. 31, 1965, issue 4, p. 491; **Rowat**, Donald C, The

administrative secrecy from the period of absolute monarchy in Europe, when the king was in control of all information released about the government”<sup>3</sup>. Although governments later became responsible to parliaments, they preserved the tradition of official secrecy<sup>4</sup>. Why is official secrecy necessary? The most important *raison d’être* of official secrets is simply the convenience of those in power<sup>5</sup>. Other arguments, which are in favour of official secrecy, are that assumption of that efficiency requires secrecy<sup>6</sup>, good government is closed government<sup>7</sup>, openness would seriously interfere with the day-to-day work of government<sup>8</sup> and openness would cost more money<sup>9</sup>. Also civil service discipline, the fear of dismissal and the avoidance of embarrassing questions are quite enough reasons for keeping information from the public<sup>10</sup>.

These reasons, *inter alia*, can cause much government information to be withheld from the public. However, these arguments have not been confirmed in the UK administrative structure. For instance, the UK’s administrative system is notably less effective and less wasteful than its counterparts<sup>11</sup>. Then, open government is likely to be more honest and efficient than government behind closed doors. Access to official information is also a citizen’s best insurance policy to guarantee that government is conducted in the public interest. On the other hand, in the UK most people believe that official secrecy is about protecting the national security against spies. Also they assume that laws to enforce that kind of

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Problem of Administrative Secrecy, International Review of Administrative Sciences, vol. 32, 1966, p. 100.

<sup>3</sup> Rowat, Donald C, Comparative Survey. In Rowat, Donald C (Ed.), Administrative Secrecy in Developed Countries, Colombia University Press, New York 1979, p. 20.

<sup>4</sup> Rowat, Comparative Survey, p. 20.

<sup>5</sup> Michael, James, The Politics of Secrecy. The Case for a Freedom of Information Law, Robendene Ltd, Amersham 1979, p. 5.

<sup>6</sup> Michael, The Case, p. 5, 17.

<sup>7</sup> Ponting, Clive, Secrecy in Britain, Basil Blackwell, Oxford 1990, p. 1, 43.

<sup>8</sup> Rowat, Comparative Survey, p. 10–11; Craig, Paul, Administrative Law, Sweet & Maxwell, 6<sup>th</sup> Edition, London 2008, p. 225.

<sup>9</sup> Michael, The Case, p. 20; Craig, p. 225.

<sup>10</sup> Michael, The Case, p. 6.

<sup>11</sup> Michael, The Case, p. 5.

secrecy are for everybody's benefit. But that is true only providing a very small part of the information is kept secret by government. Most official secrets are kept from the public for reasons that have nothing to do with national security<sup>12</sup>. Also, "... history teaches that secrecy cannot always be equated with improved security and instead may harm the nation"<sup>13</sup>. This article deals with official secrecy in the UK in terms of official secrets acts. For this purpose first, the article will focus on the history of the UK's official secrecy legislation, the attempts that have been made to change it and the most important official secrecy cases that have arisen. Second, it will analyze the current Freedom of Information Act (FOIA) in the light of the issue of official secrecy.

### **The Official Secrets Acts: Growth of the Secret State**

Within western democracies the UK has a powerful and persistent culture of secrecy. Richard Crossman, Labour Cabinet Minister and commentator on the British constitution, once called it the real "British disease"<sup>14</sup>. A lot of secrecy cases are sufficient to provide evidence to support this description<sup>15</sup>. Also according to Rowat, "to question the principle of administrative secrecy is to question a long cherished tradition of the British parliamentary system"<sup>16</sup>. Indeed, Christoph reached the same conclusion by stating that "the habit of secrecy, then, has deep roots in British political and administrative development"<sup>17</sup>. Furthermore, this disease actually applies not only to the UK, but to all Commonwealth countries<sup>18</sup> and it has deeply influenced Canada<sup>19</sup>.

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<sup>12</sup> **Michael**, The Case, p. 5.

<sup>13</sup> **Fuchs**, Meredith, Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy. *Administrative Law Review*, vol. 58, 2006, issue 1, p. 139.

<sup>14</sup> **Vincent**, David, The Culture of Secrecy: Britain, 1832–1998, Oxford University Press, Oxford 1998, p. 10; **Ponting**, p. 42.

<sup>15</sup> **Michael**, The Case, p. 9.

<sup>16</sup> **Rowat**, Administrative Secrecy, p. 479.

<sup>17</sup> **Christoph**, James. B, A Comparative View: Administrative Secrecy in Britain, *Public Administration Review*, vol. 35, 1975, issue 1, p. 28.

<sup>18</sup> **Rowat**, Donald C, Administrative Secrecy and Ministerial Responsibility: A Reply, *The Canadian Journal of Economics and Political Science*, vol. 32, 1966, issue 1, p. 84.

Official secrecy has a long history in the UK with its infamous official secrets acts, which have institutionalised official secrecy<sup>20</sup>. The UK had no official secret act until the nineteenth century. But this situation began to change in the late nineteenth century due to some internal and external pressures<sup>21</sup>, such as the functions of government departments expanded, the number of civil servants increased, and the number of newspapers and readers grew. Also there were a number of cases where official documents were leaked to the public, such as William Guernsey case in 1858, Charles Marvin case in 1878 and Terry Young case in 1887<sup>22</sup>. So governments wanted to guard official secrets and protect official documents. The UK's first Official Secrets Act (OSA) was passed in 1889<sup>23</sup>. The 1889 OSA was directed against state servants and also covered espionage and treason<sup>24</sup>. The Act introduced two things. Firstly, "it made it a criminal offence for a person to trespass on state property, for the purpose of wrongfully obtaining information, obtaining any document, sketch, plan, model or knowledge of anything which he was or was not entitled to obtain, or to communicate any of these items to someone to whom it was not in the interests of the State for the communication to be made". Secondly it, "introduced the offence of breaching an official trust as a result of holding or having held office under the Queen"<sup>25</sup>. This provision was the precursor of the infamous section 2 of the 1911 OSA<sup>26</sup>. The inadequacies of the original OSA and leaks continued, therefore, the Government wanted to introduce a new OSA. Actually the

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<sup>19</sup> Rowat, Administrative Secrecy, p. 481, 488; Rowat, The Problem, p. 99.

<sup>20</sup> Wilson, Des, 1984 .... and onwards? The level and effects of secrecy in Britain today. In Wilson, Des (Ed.), The Secrets File: The Case for Freedom of Information in Britain Today, Heinemann Educational Books, London 1984, p. 1.

<sup>21</sup> Ponting, p. 1.

<sup>22</sup> Ponting, p. 2.

<sup>23</sup> Chapman, Leslie – Chapman, Robin, The Official Secrets Act: Its History and Effect, In Secrecy, or the Right to Know? A Study of the Feasibility of Freedom of Information for the United Kingdom, The Library Association, London 1980, p. 4; Griffith, John, The Official Secrets Act 1989, Journal of Law and Society, vol. 16, 1989, number 2, p. 273; Ponting, p. 5.

<sup>24</sup> Hooper, David, Official Secrets: Use and Abuse of the Act, Coronet Books, Kent 1987, p. 31; Griffith, p. 273.

<sup>25</sup> Chapman – Chapman, p. 4.

<sup>26</sup> Chapman – Chapman, p. 4.

reason was clear that “the national interest required new legislation”. For this reason a draft bill was prepared, but the Government waited for the right time. In 1911 the political climate, in particular the German spy scare and the Agadir Crisis<sup>27</sup> gave this opportunity to the Government. After 22 years, the 1911 OSA replaced the Act of 1889<sup>28</sup>. Remarkably, the 1911 OSA Bill passed through all its stages in the Parliament in less than one hour’s debate<sup>29</sup>. There were some protests, “but the general response was one of unspoken loyalty”<sup>30</sup>.

It was the toughest act in western democracies<sup>31</sup> with its most important first two sections<sup>32</sup>. Section 1 of the 1911 OSA provided penalties for spying. In this respect, it was an offence to enter into top secret establishments or to collect, publish or communicate any official document or information. The Act strengthened the spying provisions of the existing

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<sup>27</sup> “Germany sent its gunboat the *Panther* to Agadir in Morocco in June 1911, increasing international tension and the fear of war. This event provided an excellent occasion to pass the Official Secrets Act, which had been prepared for just such an eventuality. The subcommittee on foreign espionage of the Committee of Imperial Defence had been researching the subject since 1909 and had prepared a draft Bill in 1910, drawing on the draft Bills of 1896 and 1908”. **Hooper**, p. 38.

<sup>28</sup> **Birkinshaw**, Patrick, *Reforming the Secret State*, Open University Press, Milton Keynes 1990, p. 3; **Birkinshaw**, Patrick, *Freedom of Information: The Law, the Practice and the Ideal*, Butterworths, 3<sup>rd</sup> Edition, London 2001, pp. 114–115; **Wade**, H. W. R. – **Forsyth**, Christopher, *Administrative Law*, Oxford University Press, 9<sup>th</sup> Edition, Oxford 2004, p. 54; **Chapman – Chapman**, pp. 4–5; **Ponting**, pp. 7–10; **Delbridge**, Rosemary – **Smith**, Martin, *The Secrecy Debate in Britain*. In Delbridge, Rosemary – Smith, Martin (Eds.), *Consuming Secrets. How Official Secrecy Affects Everyday Life in Britain*, Burnett Books, London 1982, p. 5; **Christoph**, p. 26; **Hooper**, pp. 33–34; **Griffith**, p. 273; **Philips**, O. Hood – **Jackson**, Paul – **Leopold**, Patricia, O. Hood Phillips & Jackson: *Constitutional and Administrative Law*, Sweet and Maxwell, 8<sup>th</sup> Edition, London 2001, p. 599; **Williams**, David, *Not in the Public Interest*, Hutchinson, Oxford 1965, p. 25.

<sup>29</sup> **Birkinshaw**, *Secret State*, p. 3; **Wade – Forsyth**, p. 54; **Ponting**, p. 10; **Delbridge – Smith**, p. 5; **Christoph**, pp. 26–27; **Hooper**, pp. 39–40; **Philips – Jackson – Leopold**, p. 599; **Williams**, p. 25; **Thompson**, Donald, *The Committee of 100 and the Official Secrets Act, 1911*, Public Law, Summer 1963, p. 203, 205; **Wilson**, Des, *Information is Power: The Causes of Secrecy*. In Wilson, Des (Ed.), *The Secrets File: The Case for Freedom of Information in Britain Today*, Heinemann Educational Books, London 1984, p. 13.

<sup>30</sup> **Williams**, p. 26.

<sup>31</sup> **Christoph**, p. 26.

<sup>32</sup> See selected Official Secrets Act cases between 1915 to 1987, **Hooper**, pp. 346–385.

legislation that it caused several prosecutions<sup>33</sup>. The most problematic part of the 1911 Act was section 2. It made it a criminal offence for any person to communicate to any person any information which he or she had obtained in his or her capacity as a Crown servant or contractor, unless he or she had authority so to do or unless it was a person to whom it was in the interest of the state his or her duty to communicate the information<sup>34</sup>. The 1911 OSA was amended in 1920 and 1939. Griffith makes clear that both section 2 in OSA 1889 and OSA 1911 respectively that “Section 2 of the Official Secrets Act 1889 fell primarily in the ‘who dunnit’ principle in that it caught all Crown servants and some government contractors but no one else. However, it had the limitation that Crown servants had to be shown to have acted corruptly or contrary to their official duty. What these words meant was never tested in the courts, all but one of the cases brought under the Act being concerned with the different section which concerned espionage. Section 2 of the 1911 Act carried the ‘who dunnit’ principle almost to its extreme and added to the ‘who’ considerably. The section was a catch-all in two senses. It caught all kinds of information and almost all those in any way involved. Overwhelmingly those charged have been either Crown servants and those who have received information from Crown servants”<sup>35</sup>.

Meanwhile, many prosecutions were brought under section 1 and particularly under section 2 of the Act. The most well-known cases were Compton Mackenzie case in 1931, Edgar Lansbury case in 1934 and the Duncan Sandys Affair case in 1938<sup>36</sup>. Griffith reported that between 1955 and 1985, 52 persons were prosecuted under section 2 of whom 36 were convicted<sup>37</sup>. In 1962, five men and one woman members of the Committee of 100, who were an anti-nuclear weapons group, were convicted under section 1 for entering a RAF station. The men were sentenced to 18 months’ imprisonment and the woman was sentenced to 12 months’ imprisonment<sup>38</sup>.

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<sup>33</sup> Chapman – Chapman, p. 4.

<sup>34</sup> Griffith, p. 274; Christoph, p. 26.

<sup>35</sup> Griffith, p. 277.

<sup>36</sup> Ponting, pp. 58–60.

<sup>37</sup> Griffith, p. 274.

<sup>38</sup> Thompson, p. 201; Philips – Jackson – Leopold, p. 599; Hooper, p. 108

In 1968 the Fulton Committee Report on the Civil Service<sup>39</sup> stated that “... the administrative process is surrounded by too much secrecy. The public interest would be better served if there were a greater amount of openness”<sup>40</sup>. The Report suggested that “the Government should set up an inquiry to make recommendations for getting rid of unnecessary secrecy in this country. Clearly, the Official Secrets Acts would need to be included in such a review”<sup>41</sup>. But it was a failure that the Commission itself didn’t carry out this review<sup>42</sup>. The response to the Report was a White Paper produced by the Labour Government in June 1969 called “Information and the Public Interest”<sup>43</sup>. The most important secrecy case occurred in 1971, commonly referred to as the Sunday Telegraph case. A journalist, Jonathan Aitken, was prosecuted for embarrassing the Labour Government with an article, based on a leaked document, suggesting that ministers had misled Parliament about arms sales to Nigeria<sup>44</sup>. His subsequent acquittal was the turning point of section 2’s life<sup>45</sup>. The Conservative Party manifesto at the 1970 General Election promised to eliminate unnecessary secrecy concerning the workings of government, and to review the operation of the Official Secrets Act. In pursuit of that undertaking, in 1972 a Committee of Inquiry headed by Lord Franks was established. Franks Committee on Departmental Committee on Section 2 of the Official Secrets Act 1911<sup>46</sup>, reviewed the Section 2 in detail, criticised its draconian nature, and reported on its considerations of

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<sup>39</sup> Cmnd. 3638.

<sup>40</sup> The Report, para. 277, p. 91.

<sup>41</sup> The Report, para. 280, p. 92.

<sup>42</sup> **Jacob**, Joseph, *Some Reflections on Governmental Secrecy*, Public Law, Spring 1974, p. 29.

<sup>43</sup> Cmnd. 4089.

<sup>44</sup> **Birkinshaw**, *Secret State*, p. 4; **Ponting**, p. 61; **Griffith**, p. 274; **Wraith**, Ronald E, *United Kingdom*. In Rowat, Donald C. (Ed.), *Administrative Secrecy in Developed Countries*, Colombia University Press, New York 1979, pp. 205–206; **Thomas**, Rosamund, *The Secrecy and Freedom of Information Debates in Britain*, *Government and Opposition*, vol. 17, 1982, number 3, p. 99; **Hooper**, pp. 112–132; **Wilson**, Des, *The Struggle to Overcome Secrecy in Britain*. In Wilson, Des (Ed.), *The Secrets File: The Case for Freedom of Information in Britain Today*, Heinemann Educational Books, London 1984, p. 125.

<sup>45</sup> **Birkinshaw**, *Secret State*, p. 4.

<sup>46</sup> Cmnd. 5104.



it<sup>47</sup>. The committee found that “it covers a great deal of ground, and it creates a considerable number of different offences. According to one calculation over 2,000 differently worded charges can be brought under it”<sup>48</sup>. The scope of the section described as a “catch all”<sup>49</sup>. Eventually the Committee recommended that “Section 2 of the Official Secrets Act 1911 should be repealed, and replaced by narrower and more specific provisions”<sup>50</sup>. Furthermore, the Franks Committee found Section 2 “a mess”<sup>51</sup>. But these recommendations were not followed by the Government of the day until 1978<sup>52</sup>. Following the conviction of three defendants in the so-called ABC trial (Crispin Aubrey, John Berry and Duncan Campbell)<sup>53</sup> in July 1978 the James Callaghan’s Labour Government published a White Paper<sup>54</sup> entitled “Reform of Section 2 of the Official Secrets Act 1911” by which the government accepted the need for reform. Paper agreed that the “catch-all” nature of section 2 was no longer right. But at the same time, in March 1979, Callaghan was forced from office after losing a vote of confidence in the House of Commons. This event resulted in the dissolution of Parliament<sup>55</sup>. So this attempt failed and some official secret trials continued. In 1983 Sarah Tisdall, a Foreign Office clerk, leaked documents on Cruise missile deployment plans to the Guardian. Documents showed that Michael Heseltine, the Secretary of State for Defense, was misleadingly holding back information from Parliament and the British public on the

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<sup>47</sup> For a critique of the Franks Report, see. **Birtles**, William, (1973). *Big Brother Knows Best: The Franks Report on Section Two of the Official Secrets Act*, Public Law, Summer 1973, p. 109.

<sup>48</sup> The Report, para. 16, p. 14.

<sup>49</sup> The Report, para. 17, p. 14.

<sup>50</sup> The Report, para. 278, p. 102.

<sup>51</sup> The Report, para. 88, p. 37.

<sup>52</sup> **Birkinshaw**, *Secret State*, p. 4; **Bradley**, Anthony W. – **Ewing**, Keith D, *Constitutional and Administrative Law*, Pearson Longman, 14<sup>th</sup> Edition, London 2007, p. 617.

<sup>53</sup> See details of the case: **Aubrey**, Crispin, *Who’s Watching You?*, Penguin Books, London 1981; **Nicol**, Andrew, *Official Secrets and Jury Vetting*, *Criminal Law Review*, May 1979, pp. 284–291; **Leigh**, David, *The Frontiers of Secrecy*, Junction Books, London 1980, pp. 230–242; **Hooper**, pp. 133–156.

<sup>54</sup> Cmnd. 7285.

<sup>55</sup> **Birkinshaw**, *Secret State*, p. 4; **Delbridge – Smith**, p. 11.

timing of the arrival of the first Cruise missiles to the RAF base at Greenham Common. She was prosecuted under the OSA and received six month prison sentence<sup>56</sup>. National security was not an issue in the leak. Her prosecution was solely to deter other persons<sup>57</sup>. After two years from the Tisdall case, in 1985 Clive Ponting<sup>58</sup>, a senior civil servant in the Ministry of Defence, leaked documents (known colloquially as the Crown Jewels) on the sinking of the Argentinean cruiser General Belgrano by the British Submarine HMS Conqueror during the Falklands conflict to an MP. Documents showed that the Conservative Government was misleading the House of Commons about the sinking of the Belgrano. No national security risk was present in the leak. But Ponting was arrested, charged and tried but he was acquitted. The jury decided that disclosed information was in the interests of the state<sup>59</sup>. There was another notorious case two years later, associated with the name of the Spycatcher. In 1987 Peter Right, a former MI5 officer, wrote his memoirs in the book called "Spycatcher" published in Australia. In the book, he alleged that in the 1960s, MI5 officers were plotting to bring down Labour Prime Minister Harold Wilson. The British government attempted to stop the book being published in Australia, but lost the action. The government appealed but lost in June 1988<sup>60</sup>. The case revealed important flaws in the law, therefore, proposals were prepared to deal with them. Then the Government's White Paper<sup>61</sup> on Reform of Section 2 of the OSA 1911 appeared in June 1988<sup>62</sup>. And as a result of media coverage, wide public discussion of particular legal cases, and main political party promises and attempts, after 78 years, section 2 was reformed by 1989 OSA. But not much changed in the official secrecy by the adoption of 1989 OSA. The UK

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<sup>56</sup> **Birkinshaw**, Secret State, pp. 4–5; **Griffith**, p. 275; **Ponting**, pp. 63–64; **Hooper**, pp. 157–176.

<sup>57</sup> **Birkinshaw**, Secret State, p. 5.

<sup>58</sup> See further, **Ponting**, Clive, The Right to Know: The inside Story of the Belgrano Affair, Sphere Books Limited, London 1985.

<sup>59</sup> **Birkinshaw**, Secret State, pp. 4– 5; **Birkinshaw**, Ideal, p. 119; **Ponting**, pp. 64–65; **Griffith**, p. 275; **Hooper**, pp. 177–204; **Thomas**, pp. 95–96 and 101–102.

<sup>60</sup> **Birkinshaw**, Secret State, p. 5; **Birkinshaw**, Ideal, pp. 121–122; **Ponting**, pp. 65–66.

<sup>61</sup> Cm. 408.

<sup>62</sup> **Birkinshaw**, Secret State, p. 7.

remains an excessively secret state<sup>63</sup>. The 1989 OSA seeks to exclude any public interest defence, applies not only to civil servants disclosing unauthorised material, but also to any person, including journalists, and demands absolute and life-long duty of confidentiality or life-long silence on all members and former members of the security and intelligence services<sup>64</sup>. Indeed, supporting this assessment, Ponting believes that “Britain’s long standing culture of secrecy and tradition of closed government will not disappear with the repeal and replacement of section 2. The 1989 Official Secrets Act merely alters the way information is controlled; it allows no more disclosure of information than before. The Act itself does nothing to reduce official secrecy in Britain”<sup>65</sup>. As a consequence, today many believe that the 1989 OSA as a whole, like section 2 before it, is ready for pensioning off<sup>66</sup>.

### **The Freedom of Information Act: A Sufficient Change?**

So far the topic has concentrated upon the maintenance of secrecy and the steps taken by the UK government to protect information. However, another side of the coin is access to government information. The UK has not until recently had any general freedom of information legislation such as exists within many other countries. Since the 1960s many other countries have introduced freedom of information laws across the world. Sweden is often quoted as a pioneer in this context because of its legal tradition concerning freedom of information which dates back to the 18<sup>th</sup> century. Almost 250 years ago, the Swedish constitution provided for open access to official documents and full information to any citizen about administrative matters. The American Freedom of Information Act was passed in 1966, and went into effect in 1967. Norway and Denmark introduced theirs laws in 1970. France followed in 1978 and in 1982 Canada, Australia and New Zealand all passed freedom of information acts. In general, these laws establish a legal right of access to government information, subject to certain

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<sup>63</sup> **Palmer**, Stephanie, Tightening Secrecy Law: The Official Secrets Act 1989, Public Law, Summer 1990, p. 243.

<sup>64</sup> **Palmer**, p. 243; **Griffith**, p. 279.

<sup>65</sup> **Ponting**, p. 81.

<sup>66</sup> **Birkinshaw**, Patrick, Government & Information: The Law relating to Access, Disclosure and Their Regulation, Tottel Publishing, West Sussex 2005, p. 157.

exemptions, and introduce a right of appeal against a refusal by government to release information. The exemption areas from public disclosure most commonly are defence, foreign affairs, and legal proceedings. The UK has lagged behind other countries in the world. Some attempts were made over years but freedom of information legislation was delayed in UK. The strangeness of the issue was that while the UK insisted on keeping official information from the citizens, some of them have already been made available from abroad over years, particularly from the United States and Swedish Freedom of Information Acts<sup>67</sup> An important attempt occurred in July 1977, in the form of the Croham Directive<sup>68</sup>, written by the Sir Douglas Allen, Head of the Civil Service, that “its intention was to propose a more open approach, as an alternative to legislation, and it did create the opportunity for more flexibility and disclosure of information”<sup>69</sup>. In fact, very little was disclosed under it. In 1979 a major attempt to introduce freedom of information legislation in the form of a private member’s bill introduced by Clement Freud MP, but lapsed when Parliament was dissolved after vote of confidence in March 1979<sup>70</sup>. In January 1984 a new Campaign for freedom of information was launched<sup>71</sup>. The Campaign for Freedom of Information in the UK ensured that open government continued to be a topic for public discussion and its first major achievement was with the Local Government (Access to information) Act 1985 which came into operation in

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<sup>67</sup> **Michael**, The Case, pp. 10–16, 25; **Tye**, James, The Deadly Cost of Secrecy, In *Secrecy, or The Right to Know? A Study of the Feasibility of Freedom of Information for the United Kingdom*, The Library Association, London 1980, p. 29; **Meacher**, Michael, Why Are We So Secret About Our Secrets? In *Secrecy, or The Right to Know? A Study of the Feasibility of Freedom of Information for the United Kingdom*, The Library Association, London 1980, p. 33.

<sup>68</sup> The Civil Service Department Directive on Disclosure of Official Information, 6 July 1977.

<sup>69</sup> **Wilson**, Power, p. 21.

<sup>70</sup> **Marsh**, Norman S, Public Access to Government-Held Information in the United Kingdom: Attempts at Reform. In *Marsh, Norman S. (Ed.), Public Access to Government – Held Information*, Stevens & Son Ltd., London 1987, p. 266; **Michael**, James, The Politics of Secrecy, Penguin Books, Harmondsworth 1982, p. 192; **Wilson**, Struggle, pp. 129–131.

<sup>71</sup> **Ponting**, p. 73; **Wilson**, Struggle, p. 134.

April 1986<sup>72</sup>. The Act was a major advance in open government in the UK. In July 1993, a White Paper entitled *Open Government* was published<sup>73</sup> and after that a Code of Practice on Access to Government Information was introduced in April 1994 and revised in January 1997.

The new Labour Government came into office committed to legislation on freedom of information, and in December 1997 published a White Paper entitled “Your Right to Know: The Government’s Proposals for a Freedom of Information Act”<sup>74</sup>. Then, the draft Freedom of Information Bill published in May 1999<sup>75</sup>. In the end, the Bill became the Freedom of Information Act (FOIA) 2000 with minor amendments<sup>76</sup>. Actually, prior to the enactment of the FOIA, some legislation, such as the Local Government (Access to Information) Act 1985, the Land Registration Act 1988, the Access to Medical Records Act 1988, the Environment and Safety Information Act 1988, and Data Protection Act 1998, which repealed the Data Protection Act 1984 and the Access to Personal Files Act 1987, had been passed, but these were no substitute for more general freedom of information legislation.

Part I of the FOIA 2000 creates a general right of access to information. Section 1/1, provides that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case to have that information communicated to him. However, the general right is restricted by other provisions of the FOIA. Section 1/3 states that where a public authority reasonably requires further information in order to identify and locate the information requested, and has informed the applicant of that requirement, the authority is not obliged to comply with section 1/1 unless it is supplied with that further information. The general

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<sup>72</sup> **Tant**, A. P, *The Campaign for Freedom of Information: A Participatory Challenge to Elitist British Government*. Public Administration, vol. 68, Winter 1990, p. 483; **Chapman**, Richard A, Introduction. In Chapman, Richard A. & Hunt, Michael (Eds.), *Open Government*, Routledge, London & New York 1987, p. 26.

<sup>73</sup> Cm. 2290.

<sup>74</sup> Cm. 3818.

<sup>75</sup> Cm. 4355.

<sup>76</sup> **Austin**, Rodney, *The Freedom of Information Act 2000 – A Sheep in Wolf’s Clothing?* In Jowell, Jeffrey – Oliver, Dawn (Eds.), *The Changing Constitution*, Oxford University Press, 6<sup>th</sup> Edition, Oxford 2007, p. 393.

right further restricted by section 2. Its title is “Effect of the exemptions in Part II”. This is so either where any provision of Part II confers absolute exemption, or where, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing whether the public authority holds the information, or in disclosing the information. Part II of the FOIA specifies the numerous exemptions, contained in section 21 to 44 inclusive, thereby restricts the general right in section 1. Actually Part II of the Act creates 23 exemptions. According to Austin, the FOIA remains a sheep in wolf’s clothing<sup>77</sup>. Because “first, the range of exemptions is far wider and more extensive than in any other statutory freedom of information regime in any comparable democratic state. Many of the exemptions are absolute, requiring no proof, other than wide, conclusive, discretionary ministerial certification, of identifiable harm to national or public interests, and even the qualified exemptions are subject to a test of simple prejudice which is relatively easy to satisfy ... Second, there is no right of access to government records, ... Third, the free-charging regime does not set a standard nominal fee for FoI requests, ... Fourth, the obligations to establish publication schemes have been so diluted that there is no duty to publish information of any specified type ... Fifth, the right of ministerial veto undermines any credibility to the claim that the Act creates a legally enforceable individual right of access”<sup>78</sup>. He goes further that with these negative aspects, “it might have been better not to have legislated”<sup>79</sup>. Also Jackson and Leopold agreed that “it is questionable whether the Act with its extensive exemptions will ensure that there is more open government, there is plenty of opportunity provided by the Act to foster continued secrecy in government”<sup>80</sup>. It is easily apparent that effectiveness of freedom of information acts, in part, will depend on the range of exemptions and the way in which these are interpreted<sup>81</sup>. For this reason, on the one hand the list of exemptions contained in the FOIA is too long<sup>82</sup>, on

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<sup>77</sup> Austin, p. 397, 406.

<sup>78</sup> Austin, pp. 397–399.

<sup>79</sup> Austin, p. 405.

<sup>80</sup> Philips – Jackson – Leopold, p. 616.

<sup>81</sup> Craig, p. 224.

<sup>82</sup> Wade – Forsyth, p. 59.

the other hand a number of the exemptions, such as formulation of government policy, are very broad<sup>83</sup>. It is for this reason that the UK FOIA is certainly weaker than the United States, New Zealand and Ireland Acts<sup>84</sup>. Moreover, “the general formula used in the FOIA is that information can be withheld if its disclosure would, or would be likely to, prejudice the interest specified in the exempt category. This is by way of contrast to earlier formulations, where the criterion had been ‘substantial prejudice’. The breadth of the exemptions is compounded, by the ‘enforcement override’ that the Act accords to certain public bodies”<sup>85</sup>.

### **Conclusion**

In conclusion, the UK has a representative, responsible, accountable, and democratic system of government. This parliamentary democracy model to some extent has been emulated and adapted by other countries, especially by the Commonwealth countries. But the UK has a long standing system of official secrecy when compared to other Commonwealth countries. However, democracy demands that government must be open unless some legitimate interest requires official secrecy. Official secrecy undermines the health of democracy and “is the enemy of rational decision making – and the friends of political prejudice”<sup>86</sup>. The UK’s first Official Secrets Act adopted in 1889 was seen as a vehicle for maintaining official secrecy, as Birtles said the Official Secrets Acts are basically based on the theory of privilege<sup>87</sup> because the Government can manage information and maintain the tradition of official secrecy by Official Secrets Act. As we seen before in the 1970s and 1980s some prosecutions under the OSA attracted enormous publicity. Although the first Official Secrets Act of 1889 has been four times amended – in 1911, 1920, 1939 and 1989 – discussions on the official secrets haven’t finished. The UK has not questioned official secrecy until recently because it has been a strong inherited tradition. One good progress was achieved in 1989 when the 1989 OSA replaced the all-embracing 1911 OSA, including

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<sup>83</sup> Craig, p. 227.

<sup>84</sup> Birkinshaw, Regulation, p. 76.

<sup>85</sup> Craig, p. 227.

<sup>86</sup> Wilson, 1984, pp. 2-4.

<sup>87</sup> Birtles, p. 119.

the “catch-all” nature of Section 2, but in many respects it is the effective safeguard for administrative secrecy in the UK by removing the public interest defence. So the UK, even after a series of reforms in terms of official secrecy in recent years, is characterised by considerable official secrecy.

In 2000 the UK partly abandoned official secrecy in adopting the FOIA. With many others Wilson’s dream came true after writing that “I have no doubt that this legislation will one day be introduced and one day be passed”<sup>88</sup>. All the main political parties have at one time or another committed them in principle to the FOIA. But Labour Governments made great effort to legislate it. The Act came fully into force in 2005. It can be easily said that the UK, in the widest sense, is less secretive now than it was four years ago. Undoubtedly, freedom of information is vital if there is to be an informed public, which can participate in public life and hold the government to account. Preference is important whether all official information is secret unless made public or all official information is public unless made secret. From this perspective in the UK, a few years ago the preference was “official information is secret unless made public”, today turned into “official information is public unless made secret”. Although the FOIA is too recent to reach any firm conclusions, the UK’s infamous past with official secrecy indicates that the culture of secrecy in the UK would change slowly. A long-standing tradition of official secrecy cannot be reversed overnight by adopting freedom of information law. It can be argued that after the FOIA the UK still wants to preserve to some extent official secrecy. The effectiveness of the FOIA will, of course, depend on the ways in which it is implemented and on the extent of their use by citizens in gaining access to information. Of course citizens should have a right to access such information unless there are good reasons such as national security, trade secrets, and personal privacy against its release. But exemptions contained in the FOIA are much broader than its counterparts. This can cause much official information to be withheld from the public. Finally one thing is certainly true that there is still a long distance to travel for more open government as Chapman said two decade ago that “In a country like the United Kingdom where ideal democracy is unattainable,

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<sup>88</sup> **Wilson**, Des, Freedom of Information by Law: An Alternative to Secrecy. In Wilson, Des (Ed.), *The Secrets File: The Case for Freedom of Information in Britain Today*, Heinemann Educational Books, London 1984, p. 158.



demands for more ‘open government’ would continue, even after the repeal of the Official Secrets Act and the enactment of both an Official Information Act and a Freedom of Information Act”<sup>89</sup>.

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<sup>89</sup> Chapman, p. 27.

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