

Freedom of Expression-Based Restrictions on the Prosecution of Journalists Under State Secrets Laws: A Comparative Analysis

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Introduction

An inevitable tension exists between protecting national security interests and guarding the free flow of government information to the public. This tension has intensified as increased government efforts to prevent and prosecute leaks of protected state information have come into conflict with the public's right to receive and impart information about all manner of government conduct, including matters touching on national security.

Earlier this year, the U.S. Department of Justice found reason to believe that Fox News national security reporter James Rosen aided and abetted a violation of the U.S. Espionage Act when he reported on classified information allegedly obtained from a State Department security advisor.¹ In the United Kingdom, David Miranda, partner of *Guardian* columnist Glenn Greenwald, was detained for almost nine hours under the British Terrorism Act 2000 as he transited through Heathrow airport.² The British government seized digital documents he was carrying that related to *The Guardian's* reporting on govern-

1. See Ryan Lizza, *The D.O.J. Versus James Rosen*, NEW YORKER (May 20, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/05/the-doj-versus-journalist-gmail.html> (embedding application for search warrant as to Rosen's e-mail account, which contains a sworn statement from an agent of the Federal Bureau of Investigations "that there is probable cause to believe that the Reporter has committed or is committing a violation of [the Espionage Act], as an aider and abettor and/or co-conspirator"); Ann Marimow, *A Rare Peek into a Justice Department Leak Probe*, WASH. POST (May 19, 2013), http://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4-a479289a31f9_story.html.

2. See Alan Rusbridger, *David Miranda, Schedule 7 and the Danger that All Reporters Now Face*, GUARDIAN (Aug. 19, 2013), <http://www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule7-danger-reporters> (*The Guardian* editor describing Miranda's detention and stating that it "rightly caused international dismay because it feeds into a perception that the U.S. and U.K. governments—while claiming to welcome the debate around state surveillance started by [Edward] Snowden—

ment surveillance activities.³ Soon thereafter, *The Guardian* revealed that British security agents had earlier required the physical destruction of hard drives containing materials received from Edward Snowden, a former contractor with the U.S. National Security Agency.⁴ On the other side of the Atlantic, a member of the U.S. Congress has called for the criminal prosecution of Greenwald.⁵ And, as this article went to press, South Africa's Protection of State Information Bill was waiting on the desk of President Jacob Zuma, who may sign it into law or direct it to the Constitutional Court for review.⁶ Although a number of the bill's most controversial provisions were removed or amended, it still proposes to impose severe criminal penalties for the unauthorized receipt, possession, and publication of broadly-defined national security information, penalties that would significantly restrict media rights and intimidate those reporting on sensitive government matters.⁷

are also intent on stemming the tide of leaks and on pursuing the whistleblower with a vengeance. That perception is right.”).

3. *Id.*

4. See Julian Borger, *NSA Files: Why the Guardian in London Destroyed Hard Drives of Leaked Files*, *GUARDIAN* (Aug. 20, 2013), <http://www.theguardian.com/world/2013/aug/20/nsa-snowden-files-drives-destroyed-london> (“*The Guardian's* lawyers believed the government might [*inter alia*] start criminal proceedings under the Official Secrets Act.”); Olga Khazan, *Why the British Government Forced the Guardian to Destroy Its Hard Drives*, *ATLANTIC* (Aug. 21, 2013, 4:58 PM), <http://www.theatlantic.com/international/archive/2013/08/why-the-british-government-forced-em-the-guardian-em-to-destroy-its-hard-drives/278919/>.

5. See Jed Lewison, *Republican Congressman Peter King Calls for Prosecution of Glenn Greenwald*, *DAILY KOS* (June 12, 2013), <http://www.dailykos.com/story/2013/06/12/1215707/-Republican-congressman-Peter-King-calls-for-prosecution-of-Glenn-Greenwald#> (embedding video interview of U.S. Representative Peter King).

6. Protection of State Information Bill, B6-2010 (S. Afr. 2010), available at http://www.info.gov.za/speeches/docs/2013/info-bill_amended.pdf; Dept. of State Security, *Ministry welcomes the passing of the Protection of State Information Bill*, (“the Secrecy Bill”), (Apr. 25, 2013), <http://www.gov.za/speeches/view.php?sid=36029>; Sarah Evans, *Opposition Hopes for Secrecy Bill Court Review*, *MAIL & GUARDIAN* (Apr. 25, 2013), available at <http://mg.co.za/article/2013-04-25-will-the-secrecy-bill-go-to-the-concourt> (“Civil society and opposition groups cling to the hope that the controversial Protection of State Information Bill will go to the Constitutional Court.”).

7. See, e.g., David Smith, *South African Activists Vow to Fight on after MPs Pass ‘Secrecy Bill’*, *GUARDIAN* (Apr. 25, 2013), <http://www.theguardian.co.uk/world/2013/apr/25/south-african-activists-secrecy-bill> (“Freedom of speech activists acknowledge that the [Secrecy Bill] has been greatly improved and amended during five years of fierce national debate. But they warn that it still contains ambiguities and harsh penalties that could have a “chilling effect” on those seeking to expose official corruption”); Pierre De Vos, *New Improved Secrecy Bill: Still Bad, Still Unconstitutional*, *CONSTITUTIONALLY SPEAKING* (May 7, 2013), <http://constitutionallyspeaking.co.za/new-improved-secrecy-bill-still-bad-still-unconstitutional/> (“Because the definition is open-ended, it is conceivable that a cabinet minister or the owner of Nkandla could interpret ‘national security’ in a far broader manner than the examples mentioned in the definition of national security contained in the Bill to include almost anything that, in the mind of the classifier, would threaten ‘national security.’”); *South Africa:*

Unquestionably, national governments have a legitimate interest in maintaining the secrecy of information where there exists a substantial likelihood that its release to adversaries would put lives at risk and cause grave harm to public security. In the wake of acts of terrorism, alleged cyber-attacks, and related threats, many governments have tightened their hold on sensitive data and documents, and have pursued more aggressively those suspected of disclosing such information without authorization.

At the same time, modern democratic principles mandate that the state guarantee citizens' ability to exercise fully their right to free expression, a right that encompasses the derivative rights to receive and impart information. Freedom of expression is a "cornerstone" of democratic society, enabling all members to participate in decision-making processes—and especially in the political processes.⁸ But true and meaningful participation requires an informed public, that is, one with the benefit of access to information about all types of government activities. In recognition of these principles, at least 93 countries have enacted national legal frameworks establishing the public's right to request and receive official information, and in approximately two-thirds of these countries, the right finds its origins in the constitution itself.⁹

Caught in the middle of this tension between security and transparency are members of the media—and national security reporters in particular. Broadly speaking, journalists work in service of the public, performing the essential tasks of collecting, synthesizing, and disseminating information on matters of public concern. When this informa-

'*Secrecy Bill*' Improved but Still Flawed, HUMAN RIGHTS WATCH (Apr. 29, 2013), <http://www.hrw.org/news/2013/04/29/south-africa-secrecy-bill-improved-still-flawed> ("Despite substantial improvements to the secrecy bill, whistleblowers and journalists who expose corruption and other issues of public interest could still find themselves in prison").

8. See, e.g., *Claude-Reyes v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶¶ 84–85 (Sept. 19, 2006) [hereinafter *Claude-Reyes v. Chile*] (noting the recognition that "access to public information is an essential requisite for the exercise of democracy, greater transparency and responsible public administration"), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf; *id.* ¶ 85 ("[I]t can be said that a society that is not well informed is not a society that is truly free."); *Sunday Times v. United Kingdom* (No. 2), App. No. 13166/87, (Eur. Ct. H.R. 1991), ¶ 50(a)-(b) (1991) [hereinafter *Sunday Times*] ("Freedom of information constitutes one of the essential foundations of a democratic society"), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57708>.

9. *Constitutional Protections of the Right to Information*, RIGHT2INFO.ORG, www.right2info.org/constitutional-protections-of-the-right-to (Open Society Justice Initiative ed., last modified Jan. 9, 2012, 8:45 AM) (listing countries and relevant constitutional provisions); *Access to Information Laws: Overview and Statutory Goals*, RIGHT2INFO.ORG, <http://right2info.org/access-to-information-laws> (Open Society Justice Initiative ed., last modified Jan. 20, 2012 1:30 PM).

tion concerns the activities of government and government officials, these tasks take on special meaning, as they enable individual citizens to exercise democratic control, including by monitoring government and demanding accountability.¹⁰

Government information may reach a journalist in myriad ways. A reporter may conduct interviews or submit official records requests, and, although less frequently, a reporter may receive information from confidential or anonymous government sources—individuals who believe that the public has a right to know about the information in question, despite an official position that the material is to be withheld from the public.

National security reporters work no differently—only, because of the subject matter of their newsgathering, they face the risk of violating laws that criminalize the disclosure of state secrets each time they question a government source or informally receive a government or military record. Yet these reporters' activities are unquestionably critical to upholding the fundamental guarantee that, in a democratic society, the public is able to monitor, question, debate, and criticize all types of government conduct—even conduct involving military and national security affairs.

Examining the jurisprudence of domestic and international courts, as well as the policies and principles of intergovernmental entities, this article explores the constraints that the right to free expression—and the derivative rights to receive and impart government information—impose on the nature and scope of state secrets laws as applied to journalists.¹¹ Section I offers an overview of the right to obtain government information and the growing international consensus on the burdens to be imposed on government bodies when they seek to prevent access to data or documents touching upon national security matters. Section II surveys the laws, policies, and practices of state governments and intergovernmental bodies applicable to journalists working at the intersection of the public's right to receive sensitive state information on matters of public concern and the government's efforts to prosecute the receipt and dissemination of that very same information.

10. See, e.g., Claude-Reyes, ¶ 87 (recognizing that “[d]emocratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities.”); Sunday Times, ¶ 50(b) (“Not only does the press have the task of imparting . . . information and ideas [on matters of public interest]: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog.’”).

11. Although attempting to survey as many jurisdictions as possible, this article is far from exhaustive, due in part to challenges in assessing the existence of relevant decisions, laws, or standards in many countries.

Last, Section III identifies the free expression-based constraints that, in this modern constitutional era, guide the evaluation of the validity of state secrets laws as applied to the work routinely undertaken by national security reporters.

I. In the International Community, the Right to Access Sensitive Government Information is Well-Established

Across the globe, the public's right to access government information is robustly protected. International and regional law, as well as established state practice, reflect the fundamental nature of the right to obtain, possess, and disseminate such information—even when public disclosure implicates national security concerns.

Transparency in government in the public interest is integral to the proper functioning of a representative democracy.¹² Public disclosures are necessary, *inter alia*, to provide accountability for the conduct of public officials, to increase efficiency in public bodies, and to identify governmental wrongdoing or harm. Without access to government information, investigative journalists and watchdog organizations would be thwarted in their efforts to monitor government activities and, when necessary, to expose corruption or misconduct, including when the underlying activities involve sensitive governmental matters. Moreover, public disclosures of government-held information facilitate citizen involvement in areas of political, financial, and social decision-making; they are crucial for supporting informed and open debate at local and national levels.

In democratic states, access to information laws establish a presumption that all government-held information shall be available to the public unless specifically exempted.¹³ Simply put, a government record must be provided to a requestor unless and until the relevant government body demonstrates that the requested record is encompassed by a narrowly-drawn exception to disclosure. Substantial harm to national security certainly can provide a legitimate basis for constraining access to government-held information. However, unless

12. See generally, e.g., *International Standards: Right to Information*, ARTICLE 19 (Apr. 5, 2012), <http://www.article19.org/resources.php/resource/3024/en/international-standards:-right-to-information> (describing the public's right to access information controlled by government bodies and inter-governmental organizations and the value of that right).

13. See, e.g., ARTICLE 19, THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION, (1996) [hereinafter JOHANNESBURG PRINCIPLES], available at <http://www.article19.org/data/files/pdfs/standards/joburg-principles.pdf> (discussed *infra*, Section II).

such a constraint is carefully drawn to effectuate its specific purpose, the exception may defeat legitimate access to information critical to democratic oversight. Moreover, a vague or overbroad exception likely would come into conflict with constitutionally-based protections for free expression, including the basic rights to receive and impart information on matters of public concern.

Thus, in jurisdictions committed to the protection of fundamental democratic principles, limitations on public access to information related to national security information must be subject to rigorous review. An examination of international and regional laws, together with established state practice, reflect a growing consensus on the nature of this analysis, which generally requires that a government body seeking to prevent access to information must satisfy the following burdens:¹⁴

First, the public body must demonstrate that the information relates to a “legitimate national security interest,” i.e., an interest with the genuine purpose and effect of protecting the country’s existence, stability, or its territorial integrity—and not for the purpose of avoiding loss of confidence in government, embarrassment, or weakened public trust.

Second, the public body must demonstrate that the disclosure of the information at issue poses a “serious threat,” i.e., that there is an actual and demonstrable—not just a theoretical—likelihood of “substantial harm” to the national security interest.

Third, the public body must demonstrate that the “serious threat” or “substantial harm” identified outweighs the public interest in access to the information.¹⁵

Fourth, the public body must demonstrate that the limitation on access is clearly defined and constitutes the least restrictive means available to protect the national security interest at issue.

Finally, even where these burdens can be satisfied, the government may nonetheless make the requested information publicly available upon consideration of the nature or significance of the public interest

14. An extensive examination of the right to government-controlled information implicating national security concerns is reflected in the Global Principles on National Security and the Right to Information, prepared by the Open Society Justice Initiative and their partners after 14 meetings with 500 experts from over 70 countries from 2011 to 2013. See GLOBAL PRINCIPLES ON NATIONAL SECURITY AND THE RIGHT TO INFORMATION (THE TSHWANE PRINCIPLES) (Open Society Justice Initiative, 2013) [hereinafter THE TSHWANE PRINCIPLES], available at http://www.right2info.org/national-security/Tshwane_Principles.

15. *Id.* Principle 3.

in disclosure. This process is known as a “public interest override.” The override may be permissive or mandatory, that is, it may authorize discretionary disclosures or it may require the disclosure. In either case, the override authorizes, and immunizes, disclosure even where otherwise legally restricted, such as by a state secrets law.

The high bar to withholding public information reflects international recognition that the right to information is fundamental in a democratic society, and that a failure to protect this right in the face of “national security”—an amorphous and expansive concept—can result in the improper and abusive suppression of free expression.¹⁶

II. International and Regional Laws and State Practices Constrain Criminal Prosecutions of Journalists for the Unauthorized Disclosure of Sensitive Government Information

Although there exists a general international consensus as to the principles governing the right of access to sensitive state information,¹⁷ the laws, policies, and practices defining the permissible scope and nature of the prosecution of a journalist for receiving and disclosing national security information remain undeveloped. It is not uncommon to find that state secrets laws—many of which were enacted well before modern developments in free expression jurisprudence—have not been invoked in the newsgathering context, that no court has been tasked with examining whether the relevant law constitutes a valid restriction on rights to a free press, or that no legislature has considered the need for promulgating a public interest defense or similar provision to constrain the overbroad nature of many such laws. This Section explores the case law, statutes, and practical experiences of the limited number of jurisdictions where journalists’ rights to free expression—generally recognized to extend, in accordance with democratic principles, to the right to obtain and impart government information on matters of public concern—have come into actual conflict with statutes prohibiting the receipt, possession, and disclosure of certain classes of data and documents.¹⁸

16. See OFFICE OF DEMOCRACY & GOVERNANCE, U.S. AGENCY FOR INT’L DEV., *THE ENABLING ENVIRONMENT FOR FREE AND INDEPENDENT MEDIA: CONTRIBUTION TO TRANSPARENT AND ACCOUNTABLE GOVERNANCE* 33 (2002), available at http://www.global.asc.upenn.edu/fileLibrary/PDFs/ENABLING_ENV.pdf (warning that “government can enlist th[e] broad, ambiguous concept [of national security] to stifle or suppress free expression or criticism”).

17. See, e.g., THE TSHWANE PRINCIPLES, *supra*, note 14.

18. In contrast, a larger number of countries have established legal and/or regulatory frameworks concerning protections for government whistleblowers, i.e., government employees who release protected information in the public interest.

A. Canada

Canada broadly supports the right of a free press and of access to information through constitutional and statutory law, and thereby imposes significant limitations on the validity of any criminal prosecution of a journalist for obtaining, possessing, or publishing protected state information. The Canadian Charter of Rights and Freedoms, the bill of rights embodied in Canada's Constitution, was successfully invoked to invalidate portions of Canada's Security of Information Act, provisions that made it a criminal offense to "communicate, possess and retain certain categories of government information without authorization."¹⁹ These provisions—found defective in, *inter alia*, their vague and overbroad terms, lack of *mens rea* elements, and failure to include a public interest defense—have not been remedied through further legislation and, as of mid-2013, remain unenforceable.

1. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS,
THE SECURITY OF INFORMATION ACT, AND
O'NEILL V. CANADA (ATTORNEY GENERAL)

The Canadian courts have played a central role in guaranteeing the right to obtain and publish sensitive state information, including documents related to alleged terrorist activities. In *O'Neill v. Canada (Attorney General)*, the Ontario Superior Court of Justice struck down the so-called "leakage" provisions of Canada's Security of Information Act ("SOIA"), reasoning that they: (1) imposed impermissible restrictions on free expression in violation of section 2(b) of the Charter of Rights and Freedoms;²⁰ (2) were impermissibly vague and overbroad in violation of the liberty rights guaranteed by section 7 of the Charter;²¹ and (3) failed to contain an element of fault as also required by section 7 of the Charter.²² The court concluded that these restrictions on fundamental rights could not be saved as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society,²³ and were not limited by any common law public interest defense or the specific defense provided elsewhere in the SOIA.²⁴ Last, the court determined that the constitutional infirmities of the challenged SOIA provisions wrongfully enabled authorities to use allegations of criminal

19. See, e.g., *O'Neill v. Canada (Att'y Gen.)* (2006), 82 O.R. 3d 241, para. 14 (Can. Ont. Sup. Ct. J.) (summarizing invalidated provisions); *id.* paras. 85, 110 (invalidating portions of section 4 of the Security of Information Act).

20. *Id.* para. 84.

21. *Id.* paras. 65, 72.

22. *Id.* para. 80.

23. *Id.* para. 105.

24. *Id.* paras. 54–57.

activity to intimidate a member of the press into compromising her constitutionally-based right to protect the identity of her sources.²⁵

The Charter of Rights and Freedoms establishes, in section 2(b), the fundamental right of freedom of expression and opinion, and, in section 7, an individual's fundamental right to liberty.²⁶ All Canadian laws—including laws criminalizing the unauthorized release of protected government information, such as the Canadian SOIA—must be consistent with the rights protected by the Charter or may be stricken,²⁷ unless the restrictions on the right at issue can be saved as “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²⁸ While the government always bears the burden of overcoming this threshold, laws restricting the right to free expression by threat of criminal sanction are particularly suspect. In such cases, the government “bears a heavy burden”²⁹ of demonstrating that the restriction is justified in the “clearest of circumstances.”³⁰

The case of *O’Neill v. Canada* arose from a November 2003 article authored by journalist Juliet O’Neill and published by the *Ottawa Citizen* newspaper. The article concerned Maher Arar, a Syrian-born Canadian citizen and a reported target of the United States’ extraordinary rendition program. Deported in September 2002 from the U.S. to Syria, “Arar was allegedly tortured, interrogated and forced to sign a false confession pertaining to his involvement in terrorist activities.”³¹ Upon his return to Canada in October 2003, the public generally viewed Arar as an innocent victim; many questioned whether Cana-

25. *Id.* paras. 154–59, 163.

26. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter Charter of Rights and Freedoms], available at <http://laws-lois.justice.gc.ca/eng/const/page-15.html>; *id.* § 2 (“Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”); *id.* § 7 (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”).

27. Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.), available at <http://laws-lois.justice.gc.ca/eng/const/page-15.html>, *et seq.*; *id.* § 52(1) (“any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”).

28. *See, e.g., O’Neill*, 82 O.R. 3d paras. 85, 110 (invalidating portions of section 4 of the Security of Information Act pursuant to section 52 of the Constitution Act of 1982 and section 1 of the Charter).

29. *Id.* para. 86 (“where a freedom guaranteed by the Charter is infringed by a criminal prohibition, the Crown bears a heavy burden of justifying that infringement”).

30. *Id.* paras. 91–94.

31. *Id.* paras. 3, 141(1); *see also* Doug Struck, *Canadian Case Exposes Covert Role in Aiding U.S.*, CHI. TRIBUNE (June 28, 2005), available at http://articles.chicagotribune.com/2005-06-28/news/0506280234_1_maher-arar-public-hearings-inquiry.

dian authorities were complicit in his deportation.³² In her article, O'Neill included classified information leaked to her by a confidential official source—information that, if believed, undermined Arar's claim of innocence.³³ Hers was not the only such news report, which led politicians and the public to call on the government to investigate the identity of the officials who, Arar's supporters alleged, were disclosing information in an effort to turn public opinion against him.³⁴

In January 2004, the Royal Canadian Mounted Police ("RCMP") executed search warrants at O'Neill's home and the *Ottawa Citizen* office, searching for information that could identify the source of the classified information in her article.³⁵ The warrants were issued pursuant to section 4 of the SOIA, which criminalized the unlawful receipt of so-called "secret official" information and the communication of such information to persons not authorized to receive it.³⁶

The recognized purpose of section 4 is to deter and protect against the "unauthorized release of government information that carries with it some element of harm to the national interest if released, causing it to be categorized as 'secret official' or 'official.'"³⁷ Its terms provide up to 14 years' imprisonment for any person "who receives any secret official code word, password, sketch, plan, model, article, note, document or information,"³⁸ who "has in his possession any official document or secret official code word of password issued for the use of a

32. *O'Neill*, 82 O.R. 3d paras. 141(2), (7). See also Struck, *supra*, note 31.

33. *O'Neill*, 82 O.R. 3d paras. 141(3)–(4). The information suggested that Arar had a relationship to an Ottawa-based al-Qaeda cell. The information also suggested that Arar confessed to Syrian military intelligence that he had been trained at a terrorist training camp in Afghanistan. Clifford Krauss, *Canadian Mounties Seize Reporter's Files in Terrorist Case*, N.Y. TIMES, Jan. 22, 2004, at A3, available at <http://www.nytimes.com/2004/01/22/international/americas/22CANA.html>.

34. *O'Neill*, 82 O.R. 3d para. 141(9).

35. *Id.* paras. 140(25), (27).

36. Security of Information Act, R.S.C. 1985, c. O-5, § 4 (Can.) [hereinafter Security of Information Act or SOIA], available at <http://laws-lois.justice.gc.ca/PDF/O-5.pdf>; *O'Neill*, 82 O.R. 3d paras. 14, 85, 110. The warrants were issued on the basis of an affidavit setting out that the RCMP already had conducted surveillance of O'Neill, had obtained records from her Internet service provider, had searched her garbage, and had interviewed at least one person who received an e-mail message from her. *Id.* para. 141(23).

37. *O'Neill*, 82 O.R. 3d para. 29 (explaining that section 4 of the SOIA was "intend[ed] to criminalize and, therefore, deter and protect against the unauthorized release of government information that carries with it some element of harm to the national interest if released.").

38. Security of Information Act, § 4(3).

person other than himself,”³⁹ who fails to return it,⁴⁰ or who “communicates” a “secret official” item.⁴¹

O’Neill never was charged under the SOIA, but the search warrants alleged she had violated section 4’s receipt and retention provisions.⁴² O’Neill, together with the *Ottawa Citizen*, challenged the validity of the searches authorized by the warrants and of the seizures of documents and computer information, asserting that section 4 formed an unjustified restriction on fundamental rights established by the Charter.⁴³

The Ontario Superior Court of Justice nullified the challenged portions of section 4, concluding that they were facially invalid on multiple grounds. The court first found that section 4 restricted rights guaranteed by the Charter:

- The sections “constitute a *prima facie* violation of section 2(b) *Charter* rights. The sections restrict activity that attempts to convey meaning so that they restrict ‘expression’ Furthermore, their purpose is to restrict the free flow of government information and their effect is to limit freedom of expression including freedom of the press regarding the functioning of government institutions.”⁴⁴
- They breach section 7 of the Charter in their breadth and vagueness: the law “fails to define in any way the scope of what it protects”⁴⁵ and does “not sufficiently delineat[e] the risk zone for criminal sanction”⁴⁶ by omitting definitions for terms such as “secret official,” terms that are not defined elsewhere under the law.⁴⁷
- Two of the challenged subsections “impose criminal liability based solely on the prohibited act having been committed by the accused and as such . . . violate section 7 of the Charter,”⁴⁸ which prohibits “the imposition of imprisonment in the absence of proof of an element of fault referred to as the *mens rea*.”⁴⁹ Because the offenses impose a maximum penalty of 14 years’ impi-

39. *Id.* § 4(4)(b).

40. *Id.*

41. *Id.* § 4(1)(a).

42. *O’Neill*, 82 O.R. 3d para. 4. The newspaper was never alleged to have acted illegally. *See id.* para. 163.

43. *Id.* para. 5. O’Neill and the newspaper also asserted that the issuance and execution of the warrants constituted an abuse of judicial process. *See id.*

44. *Id.* para. 84 (citations omitted).

45. *Id.* para. 62.

46. *Id.* para. 72.

47. *Id.* paras. 36, 49.

48. *Id.* para. 82.

49. *Id.* para. 73.

sonment, they are considered “true crime” offenses that, as even the government agreed, “require proof of some blameworthy mental state.”⁵⁰

Next, the court determined that no other law constrained or “harmonized” the challenged sections such that the constitutional values at issue were nonetheless promoted, rejecting in particular the government’s suggestion that the court recognize a “general common law public interest defense to justify the unauthorized disclosure.”⁵¹

Last, the court concluded that the challenged portions were not “reasonable and demonstrably justified, so as to balance the interests of society with those of individuals and groups”—even though it found the purpose of the SOIA—deterring the unauthorized release of state secrets—as “pressing and substantial.”⁵² In this analysis, the court found that the broad language of section 4 “ha[s] not been well tailored to suit” the purpose of the law and “ha[s] not been carefully limited to be a ‘measured and appropriate response’ to the harms” sought to be addressed.⁵³ Among the defects, the court recognized that the challenged portions of section 4 “are able to criminalize a wide variety of conduct that should not be caught, for example, the communication, receipt or possession and retention of information that invokes no harm element to the national interest,” thus having a chilling effect on the exercise of freedom of expression.⁵⁴ For these reasons, the court concluded that the “state has not proven . . . that its restriction [of] fundamental Charter right[s] is demonstrably justifiable in a free and democratic society,”⁵⁵ and declared the challenged portions “of no force and effect.”⁵⁶

The court further concluded that the defects in section 4 allowed for abuse of the judicial process with regard to the RCMP’s investigation of O’Neill. It recognized that the RCMP, through the mere threat of criminal charges, was able to intimidate O’Neill and “gain ‘leverage’ against [her] in its quest to uncover the source of the leaks,” thereby infringing her constitutional right to “gather news and other informa-

50. *Id.* paras. 75–76, 80.

51. *Id.* paras. 54–55; *see also id.* paras. 41–53 (no limitation imposed by Canadian Access to Information Act); *id.* paras. 56 (no limitation imposed by the SOIA’s specific public interest defense); *id.* paras. 58–59 (no limitation imposed by prosecutorial discretion).

52. *Id.* paras. 95–98.

53. *Id.* paras. 99–102.

54. *Id.* para. 102.

55. *Id.* paras. 103–104.

56. *Id.* para. 110.

tion without undue governmental interference.”⁵⁷ The Canadian Attorney General elected not to appeal the *O’Neill* decision.⁵⁸ This case represents the one known instance in which the Canadian SOIA has been invoked with regard to a journalist’s receipt or publication of sensitive government information.⁵⁹

2. THE LIMITED PUBLIC INTEREST DEFENSE IN THE CANADIAN SOIA

The Canadian Security of Information Act contains an express public interest defense.⁶⁰ The defense does not apply to the leakage offenses contained in section 4, but only to offenses involving the communication of sensitive government information by government employees.⁶¹ As discussed above, although advocated by the government, the *O’Neill* court refused to recognize a “general public interest defense” broadly applicable to the SOIA, finding instead that the existence of such a common law defense was “dubious and specula-

57. *Id.* paras. 159–160 (citation and internal quotation marks omitted); *see also id.* para. 137 (“Freedom of the press is intended to complement and give effect to freedom of expression. It includes the ‘right to transmit news and other information [and] also the right to gather this information’” (citation omitted)); *id.* paras. 154–165 (reasoning as to findings on abuse of process).

58. Government Response to the Seventh Report of the Standing Committee on Public Safety and National Security, Subcomm. on the Review of the Anti-Terrorism Act, *Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues*, Parliament of Canada, <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3066235&Language=E&Mode=1&Parl=39&Ses=1&File=36> (last visited Sept. 20, 2013).

59. Indeed, since its enactment in 1985, only one individual has ever faced charges under the SOIA; a former official from the Canadian Navy pled guilty to selling state secrets between July 6, 2007, and January 10, 2012. *See* Ryan Van Horne, *Navy Spy Jeffrey Delisle Sentenced to 20 Years in Prison*, TORONTO SUN (Feb. 8, 2013), <http://www.torontosun.com/2013/02/08/navy-spy-jeffrey-delisle-to-be-sentenced>. Under a previous version of the law, then titled the Official Secrets Act, the Canadian government unsuccessfully sought to prosecute a media company under the leakage provisions; the case was dismissed on the basis that the information in question already had entered into the public domain. *R. v. Toronto Sun Publ’g Ltd.* (1979), 24 O.R. 2d 621, paras. 45–46 (Can. Ont. Prov. Ct. J.) (criticizing the leakage offenses as “ambiguous and unwieldy,” such that a “complete redrafting of the [Act] seems appropriate and necessary”).

60. Security of Information Act, § 15(1). The defense provides that “[n]o person is guilty of an offence under section 13 or 14 if the person establishes that he or she acted in the public interest.” *Id.* The burden of proof rests on the defendant to demonstrate that she “act[ed] in the public interest,” which is narrowly defined as acting “for the purpose of disclosing an offence under an Act of Parliament that he or she reasonably believes has been, is being or is about to be committed by another person in the purported performance of that person’s duties and functions for, or on behalf of, the Government of Canada” where “the public interest in the disclosure outweighs the public interest in non-disclosure.” *Id.* § 15(2). Seven factors are to guide a court in determining whether the public interest in disclosure outweighs the public interest in non-disclosure. *Id.* § 15(4). The multi-factor analysis is to be disregarded if disclosure of the information “was necessary to avoid grievous bodily harm or death.” *Id.* § 15(6).

61. *Id.* §§ 13–14.

tive.”⁶² In response to the *O'Neill* decision, a Special Senate Committee of the Canadian Parliament has suggested adding a public interest defense to section 4,⁶³ and other commentators have recommended expansion of the application of the existing statutory defense.⁶⁴ No amendments to the law are expected in the near future, however.

3. THE CANADIAN ACCESS TO INFORMATION ACT

Enacted in 1983, the Canadian Access to Information Act provides a broad right to information held by the federal government.⁶⁵ Government information is presumed to be subject to access unless it falls within a specific exception—including the exception for national security records—which allows but does not mandate that the head of a government institution refuse disclosure.⁶⁶ If a request for information is refused, the requestor may seek the assistance of an ombudsperson⁶⁷ and thereafter may apply to the Federal Court of Canada.⁶⁸ The Access to Information Act does contain a limited public interest override provision, but it is not applicable to the national security exception.⁶⁹

B. India

In India, the public right of access to government information is rooted in Article 19(1)(a) of the Constitution of India, which expressly protects the fundamental right of all citizens “to freedom of speech

62. *O'Neill*, 82 O.R. 3d paras. 54–57.

63. JENNIFER BIRD & DOMINIQUE VALIQUET, LIBRARY OF PARLIAMENT LEGISLATIVE SUMMARY, PUB. NO. 41-1-S7-E, BILL S-7: AN ACT TO AMEND THE CRIMINAL CODE, THE CANADA EVIDENCE ACT AND THE SECURITY OF INFORMATION ACT 24–30 (June 22, 2012), *available at* <http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/s7-e.pdf> (noting that the “House of Commons Subcommittee, while refraining from making recommendations with respect to section 4 of the SOIA, provided guidance in its report as to how, in its view, this section might be amended.”).

64. House of Commons, Standing Committee on Public Safety and National Security, Subcomm. on the Review of the Anti-terrorism Act, 39th Parl., 1st Sess., Final Report on *Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues* 75, 81 (2007) (Can.), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2798914&Language=E&Mode=1&Parl=39&Ses=1&CanadianFile=263>.

65. See Canadian Access to Information Act, R.S.C., 1985, c. A-1, ¶ 4 (last amended June 26, 2013) [hereinafter Access to Information Act], *available at* <http://laws-lois.justice.gc.ca/eng/acts/a-1/>.

66. *Id.* ¶ 4 (each citizen or permanent resident “has a right to and shall, on request, be given access to any record under the control of a government institution” subject to the Act’s exceptions and to other laws); *id.* ¶ 15 (exempting the disclosure of information “which could reasonably be expected to be injurious to” national security and related interests).

67. *Id.* ¶¶ 30–37.

68. *Id.* ¶ 41.

69. *Id.* ¶ 20(6) (applicable to the disclosure of, *inter alia*, emergency management plans and vulnerability of physical, communications, or other infrastructure).

and expression.”⁷⁰ The courts have broadly interpreted this provision to guarantee derivative free speech and free press rights, raising the suggestion that it would impose considerable constraints on the country’s colonial era state secrets law. Nonetheless, some journalists have been charged under the law—although it appears that no prosecution has been successful.

1. CONSTITUTIONAL PROTECTION FOR THE RIGHT TO KNOW

The Indian courts have affirmed that a “right to know”—that is, the public’s right to obtain government-held information—is grounded in Article 19(1)(a) of the Indian Constitution.⁷¹ In the seminal 1975 decision of *State of Uttar Pradesh v. Raj Narain*, the Indian Supreme Court not only recognized the constitutional basis of the public’s right to know, but also described the wide net cast by this right:

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. . . . The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.⁷²

In 1981, the Indian Supreme Court further explained, “[t]his is the new democratic culture of an open society towards which every liberal

70. INDIA CONST. art. 19, § 1, cl. a.

71. See, e.g., *State of Uttar Pradesh v. Narain*, (1975) 3 S.C.R. 333 (India); *Gupta v. President of India*, (1982) 2 S.C.R. 365 (1981) (India), <http://judis.nic.in/supremecourt/imgst.aspx?filename=21481>; *Secretary, Ministry of Info. & Broad. v. Cricket Ass’n of Bengal*, (1995) 2 S.C.C. 161, para. 44 (India) (“[t]he freedom of speech and expression includes [the] right to acquire information and to disseminate it.”); see also *Right to Information: India, National Level RTI*, COMMONWEALTH HUMAN RIGHTS INITIATIVE, <http://www.humanrightsinitiative.org/programs/ai/rti/india/national.htm> (last visited Sept. 20, 2013) (“the right to information is implicit in the right to freedom of speech and expression explicitly guaranteed in Article 19 of the Indian Constitution”).

72. *U.P.* at 360 (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)). Because the free speech and expression rights found in Article 19 are “based on the provisions in the First Amendment to the Constitution in the U.S.A.,” reference to decisions of the U.S. Supreme Court is proper “to appreciate the true nature, scope and extent of this right.” *Reliance Petrochemicals Ltd., v. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd.*, (1988) Supl. 3 S.C.R. 212, 223 (India).

democracy is [evolving] and our country should be no exception. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a).⁷³ And additional support for the right to know is found in Article 21 of the Indian Constitution, which guarantees the right to life and personal liberty.⁷⁴

Under Article 19 of the Constitution, Indian courts have enforced the public's right to know—even where that right is alleged to cause harm to state interests—on the basis that “exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration.”⁷⁵ For example, in *Gupta v. President of India*, the Supreme Court rejected the government's arguments that a standard policy of disclosure could be injurious to the state, explaining:

[D]isclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.⁷⁶

The *Gupta* case arose from the efforts of petitioners to gain public disclosure of correspondence by the Law Minister, the Chief Justice of India, and the Chief Justice of Delhi regarding the non-appointment of a judge for an additional term and the transfer of a High Court judge.⁷⁷ The government argued that the correspondence was protected from disclosure by Section 123 of the Indian Evidence Act, which prohibits giving evidence derived from unpublished official documents regarding affairs of state.⁷⁸

The Supreme Court set out a balancing test for determining whether a document relating to internal state affairs could be disclosed in a ju-

73. *Gupta v. President of India*, 2 S.C.R. para. 66.

74. *Reliance Petrochemicals*, Supl. 3 S.C.R. at 235 (“Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live”). The *Reliance Petrochemicals* decision involved the public's right to know about the Controller of Capital Issues' authorization of a public subscription of secured convertible debentures and the right of the press to publish a news article critical of the authorization, given that the judicial challenge to such authorization was pending before the courts.

75. *Gupta v. President of India*, 2 S.C.R. para. 65; see also *id.* (“an open government is . . . a powerful safeguard against political and administrative aberration and inefficiency”).

76. *Id.* para. 66.

77. *Id.* para. 55.

78. *Id.*

dicial proceeding. Under this test, the court must consider and weigh two competing interests: (1) potential injury to the interest of the State or the proper functioning of the public service and (2) the proper administration of justice that might be frustrated by non-disclosure.⁷⁹ In undertaking this exercise, the *Gupta* court determined that the production of the requested documents would not result in injury to the state and therefore ordered disclosure of the correspondence.⁸⁰

The court emphasized that no category of documents is exempt from this analysis, as it “is a balancing task which has to be performed by the Court in all cases”—even where the records at issue would otherwise be protected by law.⁸¹ Although there does not appear to exist any judicial decision involving the requested disclosure of national security information, the touchstone of the analysis would be whether the disclosure likely would result in actual harm outweighing the public interest in access to the information.

Finally, the Supreme Court has stricken as unconstitutional laws incompatible with the public’s right to know. As one example, in *People’s Union for Civil Liberties v. Union of India*, the court determined that, because “the foundation of a healthy democracy is to have well-informed citizens-voters,” a statutory restriction on the personal information that political candidates could be required to provide could not withstand scrutiny under Article 19.⁸² The court reasoned that “[t]rue democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate . . . is meaningless unless the citizens are well informed on all sides of the issues”⁸³

2. THE RIGHT TO INFORMATION ACT

India also provides statutory support for a right of access to information through the Right to Information Act (“RTIA”), enacted in

79. *Id.* para. 72.

80. *Id.* para. 85.

81. *Gupta*, 2 S.C.R. paras. 72–73 (“This balancing between two competing aspects of public interest has to be performed by the court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents”).

82. *People’s Union for Civil Liberties v. Union of India*, Writ Petition (civil) 490 of 2002, Writ Petition (civil) 509 of 2002, Writ Petition (civil) 515 of 2002 (India S.C. Mar. 13, 2003), available at <http://www.judis.nic.in/supremecourt/imgs1.aspx?filename=19044> (“for survival of true democracy, the voter must be aware of the antecedents of his candidate That information to a voter, who is a citizen of this country, is one facet of the fundamental right under Article 19(1)(a).”)

83. *Id.* at 18 (quoting *Secretary v. Cricket Ass’n*, para. 82) (internal quotation marks omitted).

2005.⁸⁴ The RTIA permits citizens to request information—broadly defined as material in any form—from public authorities.⁸⁵

The RTIA contains an explicit public interest override provision. Section 8 permits disclosure of information that would ordinarily be exempt—whether pursuant to the RTIA, the Official Secrets Act, or any other legislation—where the “public interest in disclosure outweighs the harm to the protected interests.”⁸⁶ Section 22 of the RTIA is clear that this override “shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act . . . and any other law.”⁸⁷

3. ATTEMPTED PROSECUTION OF JOURNALISTS UNDER THE OFFICIAL SECRETS ACT 1923

The Official Secrets Act 1923 (“OSA”) is commonly described as a “colonial relic,”⁸⁸ as it was enacted when India was under British rule and remains largely unchanged since that time. Section 5 of the OSA prohibits the “[w]rongful communication . . . of information.”⁸⁹ It provides criminal sanctions for any person who “voluntarily receives any secret official code or pass word or any sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe” it was communicated in violation of the OSA;⁹⁰ who fails to return it;⁹¹ or who “willfully communicates” such an item to anyone not authorized to receive it.⁹² Notably, the language of the leakage provisions of the OSA is similar to those provisions of the Canadian SOIA that were found constitutionally defective in *O'Neill v.*

84. The Right to Information Act, No. 22 of 2005, INDIA CODE (effective Oct. 12, 2005) [hereinafter Right to Information Act], available at <http://supremecourtofindia.nic.in/rti-act.pdf>.

85. *Id.* § 2(f).

86. *Id.* § 8(2) (“Notwithstanding anything in the Official Secrets Act 1923, nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.”).

87. *Id.* § 22 (“The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”).

88. See, e.g., Abhinav Garg, *Court Redefines ‘Official Secret,’ Relief to Scribe*, THE TIMES OF INDIA (Feb. 26, 2009), http://articles.timesofindia.indiatimes.com/2009-02-26/india/28003463_1_cbi-case-delhi-court-official-secrets-act.

89. The Official Secrets Act 1923, No. 19 of 1923 (enacted Apr. 2, 1923) (India) [hereinafter Official Secrets Act 1923], available at http://mha.nic.in/pdfs/Official_Secret_Act1923.pdf.

90. *Id.* § 5(2).

91. *Id.* § 5(1)(c).

92. *Id.* § 5(1)(a).

Canada; both find their origins in earlier versions of the British Official Secrets Act.

Although it does not appear that any journalist has been successfully prosecuted under the OSA for the receipt, retention, or publication of information touching upon matters of national security, journalists have been aggressively and—it appears—arbitrarily targeted under the law. Indeed, watchdog organizations have recognized that the OSA “continues to be a potent instrument in the hands of the State to browbeat the citizens and journalists and curb their fundamental rights, including the freedom of expression.”⁹³

The case against financial journalist Santanu Saikia is one such example. Saikia was arrested in 1999 for publishing the contents of a note from the Cabinet of India⁹⁴ regarding divestment policy.⁹⁵ Three years later, after an unsuccessful investigation into the identity of the individual who leaked the Cabinet note to him, Saikia was charged with violating the Official Secrets Act.⁹⁶ The prosecution extended over seven years. Finally, in 2009, a criminal court judge dismissed the case on two grounds. First, the court found no actual harm to the state resulted from the disclosure of the document at issue—indeed, it was common for news outlets to report on Cabinet papers.⁹⁷ Second, the court adopted a narrow interpretation of the law—following the Indian Supreme Court’s narrow interpretation of the OSA’s espionage provisions—in concluding that the OSA only provided sanctions for the unauthorized communication of a “secret official code or password,” not of a document bearing a “secret” designation.⁹⁸

Another is the detention of Iftikhar Gilani, New Delhi bureau chief for the *Kashmir Times*. Arrested and charged in June 2002 with the possession of classified documents in violation of the OSA, Gilani was jailed for seven months, until charges against him were dropped

93. FRIEDRICH-EBERT-STIFTUNG, ASIAN MEDIA BAROMETER: INDIA 2009 15, available at http://www.fesmedia-asia.org/uploads/media/INDIA_2009.pdf.

94. The Cabinet of India, formally known as the Council of Ministers, is a collective decision-making body of the government, consisting of the prime minister and the most senior government ministers. See, e.g., http://cabsec.nic.in/council_ministersof_state.php (listing members).

95. See Garg, *supra* note 88; see also FRIEDRICH-EBERT-STIFTUNG *supra* note 93, at 16; Transparency International UK, *Government Defence Anti-corruption Index—India: Question 29* (April 2012), <http://government.defenceindex.org/sites/default/files/documents/GI-assessment-India.pdf>.

96. Garg, *supra* note 88. Media and watchdog reports do not identify the provision under which he was charged.

97. *Id.*

98. *Id.*; see also *Abdulla v. State of Gujarat*, (1996) 1 S.C.C. 427 (India) (interpreting section 3 of the Official Secrets Act 1923).

in January 2003, withdrawn “for administrative reasons and in the public interest.”⁹⁹ Numerous sources explain that, while the documents at issue concerned military operations, they were readily available online and had been published in a Pakistani journal.¹⁰⁰

In contrast, in March 2012, when the contents of a letter to the Indian Prime Minister from the Army Chief describing the Army’s lack of preparedness were widely published by news entities, none was threatened with sanction.¹⁰¹

C. European Court of Human Rights

The European Court of Human Rights (“ECtHR”) has recognized the importance of disseminating information that touches on matters of public concern, acknowledging that, in certain circumstances, even the disclosure of sensitive government information should be encouraged and protected. The ECtHR aims to strike a balance between the public interest implicated and any competing national security concerns by evaluating secrecy on a case-by-case basis.

1. ARTICLE 10 OF THE EUROPEAN CONVENTION

Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) establishes “the right to freedom of expression,”¹⁰² including the right to divulge

99. Siddharth Varadarajan, *My Forward to Iftikhar Gilani’s “My Days in Prison,”* REALITY, ONE BITE AT A TIME: INDIA, ASIA AND THE WORLD (Feb. 1, 2005), <http://svaradarajan.blogspot.com/2005/02/my-forward-to-iftikhar-gilanis-my.html> (internal quotation marks omitted); see also *Attacks on the Press 2003: India*, COMM. TO PROTECT JOURNALISTS (Mar. 11, 2004, 12:04 PM), <http://www.cpj.org/2004/03/attacks-on-the-press-2003-india.php>.

100. *End to Iftikhar Gilani’s Ordeal in Sight*, THE TIMES OF INDIA (Dec. 23, 2002, 11:17 PM), http://articles.timesofindia.indiatimes.com/2002-12-23/india/27307804_1_documents-dgmi-delhi-police (letter submitted to court by Military Intelligence “clearly stated that the information . . . w[as] derived not from any classified Indian source but from a booklet published by the Institute of Strategic Studies, Islamabad”); *CPJ Welcomes Release of Kashmiri Journalist*, COMM. TO PROTECT JOURNALISTS (Jan. 13, 2003, 12:00 PM), <http://cpj.org/2003/01/cpj-welcomes-release-of-kashmiri-journalist.php> (quoting letter as concluding that documents were “easily available” and of “negligible security value”); see also Varadarajan, *supra* note 99.

101. See TSR Subramanian, *National Security vs Right to Know*, THE NEW INDIAN EXPRESS (Apr. 29, 2012, 9:45 AM), <http://newindianexpress.com/magazine/voices/article390689.ece>; see also *India’s Army Chief Describes ‘Alarming’ State of Military in Leaked Letter*, THE TELEGRAPH (Mar. 28, 2012, 9:33 AM), <http://www.telegraph.co.uk/news/worldnews/asia/india/9170730/Indias-army-chief-describes-alarming-state-of-military-in-leaked-letter.html> (describing contents of letter and confirming it was “widely reported by the Indian media”).

102. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR], available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20213/volume-213-I-2889-English.pdf>.

information on matters of public interest.¹⁰³ Article 10(2) requires that any “restrictions or penalties” on this right be “prescribed by law,” in pursuit of a legitimate interest,¹⁰⁴ and “necessary in a democratic society.”¹⁰⁵ The ECtHR has recognized that Article 10 imposes positive obligations on state governments, mandating that they affirmatively guarantee the existence of an environment in which the right to freedom of expression can be exercised.¹⁰⁶

2. THE *SPYCATCHER* CASES: *SUNDAY TIMES* AND *OBSERVER AND GUARDIAN*

In the *Spycatcher* cases—*Observer & Guardian v. United Kingdom*¹⁰⁷ and *Sunday Times v. United Kingdom (No. 2)*¹⁰⁸—violations of Article 10 were found as a result of injunctions imposed by the English courts on newspapers the *Observer*, *The Guardian* and *The Sunday Times*, as to publication of the details of the book *Spycatcher* and information obtained by its author, former British Security Service (MI5) officer Peter Wright.¹⁰⁹

a. Background

Following his resignation from MI5 in 1976, Wright sought to publish his memoirs in Australia, where he resided.¹¹⁰ His book, *Spycatcher*, detailed MI5’s operational organization, its methods and personnel, as well

103. The purpose of the ECHR is to “guarantee not rights that are theoretical or illusory but rights that are practical and effective.” *Airey v. Ireland*, App. No. 6289/73, 32 Eur. Ct. H.R. (ser. A) para. 24 (1979), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57420?{"itemid":\["001-57420"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57420?{).

104. These include “the interests of national security, territorial integrity or public safety, [or] for the prevention of disorder or crime.” ECHR, art. 10(2).

105. *Id.*

106. *Dink v. Turkey*, App. Nos. 2668/07, 6102/08, 30079/08, 7072/09, & 7124/09, paras. 106-139 (Eur. Ct. H. R. 2010) (Chamber Judgment (not final)), available at [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3262169-3640194#{"itemid":\["003-3262169-3640194"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3262169-3640194#{); *Özgür Gündem v. Turkey*, App. No. 23144/93, paras. 42–46 (Eur. Ct. H. R. 2000), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58508>; *Fuentes Bobo v. Spain*, App. No. 39293/98, (Eur. Ct. H. R. 2000), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-63608>. The positive obligations of the state are at their zenith when the expression at issue involves issues of public interest and concern, particularly on social and political matters. *Fatullayev v. Azerbaijan*, App. No. 40984/07, para. 102 (Eur. Ct. H. R. 2010) (Judgment (Merits and Just Satisfaction)), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98401?{"itemid":\["001-98401"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98401?{).

107. *Observer & Guardian v. United Kingdom*, App. No. 13585/88, (Eur. Ct. H. R. 1991), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdoc number":\["695582"\],"itemid":\["001-57705"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{).

108. *Sunday Times*, *supra* note 8.

109. *Observer & Guardian*, para. 9; *Sunday Times*, para. 9.

110. *Observer & Guardian*, para. 11; *Sunday Times*, para. 11.

as “an account of alleged illegal activities by the Security Service.”¹¹¹ By mid-1984, part of the material in Wright’s manuscript had already been published in the United Kingdom in other books and television interviews.¹¹² In 1985, the U.K. Attorney General unsuccessfully sought to restrain publication of *Spycatcher* in Australia.¹¹³ While the Australian proceedings were pending, however, short articles appeared in two U.K. newspapers—the *Observer* and *The Guardian*—which reported on the forthcoming hearing in Australia and gave details of some of the contents of *Spycatcher*, including allegations of improper conduct on the part of MI5 officers.¹¹⁴ The U.K. Attorney General instituted proceedings for breach of confidence against both newspapers in England,¹¹⁵ obtaining *ex parte* interim injunctions restraining the papers from any further publication of *Spycatcher* material,¹¹⁶ injunctions that were upheld by the Court of Appeals with minor modifications.¹¹⁷

In April 1987, a major summary of certain allegations in *Spycatcher*, allegedly based on a copy of the manuscript, appeared in numerous publications, both in the U.K. and abroad,¹¹⁸ and in July, the book was published in the United States.¹¹⁹ Also in July 1987, the U.K. newspaper *The Sunday Times*, which had purchased British serial-

111. *Id.* Specifically, Wright asserted that “MI5 conducted unlawful activities calculated to undermine the 1974–1979 Labour Government, burgled and ‘bugged’ the embassies of allied and hostile countries and planned and participated in other unlawful and covert activities at home and abroad, and that Sir Roger Hollis, who led MI5 during the latter part of Mr. Wright’s employment, was a Soviet agent.” *Id.*

112. *Id.* para. 12.

113. Attorney-General (U.K.) v Heinemann Publishers Austl. Pty. Ltd. (1988) 165 CLR 30 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/1988/25.html>. The High Court of Australia decided in favor of Wright and his publishers on the basis that the United Kingdom sought to indirectly enforce Wright’s obligations under the U.K. Official Secrets Act. The High Court declared that “the principle of law renders unenforceable actions . . . to enforce the governmental interests of a foreign state,” *id.* para. 39, even where the foreign government is a close ally, *id.* para. 37, and enforcement “was supported by the Australian Government as being in the Australian public interest,” *id.* para. 7.

114. *Sunday Times*, para. 14.

115. *Observer & Guardian*, para. 15. The government submitted affidavits stating “that the publication of any narrative based on information available to Mr. Wright as a member of the Security Service would cause unquantifiable damage, both to the service itself and to its officers and other persons identified, by reason of the disclosures involved,” it would “undermine the confidence that friendly countries and other organizations and persons had in the Security Service,” and it would further “create a risk of other employees or former employees of that service seeking to publish similar information.” *Id.* para. 16.

116. *Id.* para. 17.

117. *Id.* para. 19.

118. *Id.* paras. 22–23.

119. *Id.* para. 28.

ization rights from Wright's publishers, began publishing extracts from *Spycatcher*.¹²⁰ The Attorney General immediately commenced proceedings against *The Sunday Times* for contempt of court,¹²¹ obtaining a temporary injunction restraining publication of further extracts,¹²² and in October instituted further proceedings for breach of confidence.¹²³ The injunctions remained in force until October 13, 1988, when, at the conclusion of the proceedings on the merits, the House of Lords rejected the Attorney General's claims for permanent injunctions against the *Observer*, *The Guardian* and *The Sunday Times*.¹²⁴

b. House of Lords Decision

In its decision on the merits of the Attorney General's actions against the applicants, the Appellate Committee of the House of Lords held that, "since the world-wide publication of *Spycatcher* had destroyed any secrecy as to its contents," "continuation of the injunctions was not necessary," and "should be discharged."¹²⁵ The House of Lords further held that the *Observer* and *The Guardian* articles "had not contained information damaging to the public interest," "the *Observer* and *The Guardian* were not in breach of their duty of confidentiality when they published [those] articles," and "the Crown would not have been entitled to a permanent injunction against both newspapers."¹²⁶ However, the House of Lords found that "*The Sunday Times* was in breach of its duty of confidence in publishing its first serialised extract from *Spycatcher* on 12 July 1987," and therefore, "*The Sunday Times* was liable to account for the profits resulting from that breach."¹²⁷ Lastly, observing that "the information in *Spycatcher* was now in the public domain and no longer confidential," the House of Lords held that, "no injunction should be granted against the *Observer* and *The Guardian* restraining them from reporting on the contents of

120. *Sunday Times*, para. 27.

121. *Id.* para. 27.

122. *Id.* para. 32. The Vice-Chancellor granted the temporary injunction to restrain publication, while he considered the application by the *Observer* and *The Guardian* for discharge of the injunctions against them, since they effectively bound *The Sunday Times* as well. *Id.* In a split decision, the House of Lords held that the injunctions against the *Observer* and *The Guardian* should continue until the commencement of the substantive trial in the breach of confidence actions. *Id.* para. 35.

123. *Id.* para. 39.

124. *Id.* para. 42.

125. *Id.* para. 42.

126. *Sunday Times*, para. 42.

127. *Id.* The House of Lords reasoned that *The Sunday Times* "was not protected by either the defence of prior publication or disclosure of iniquity," concluding "that imminent publication of the book in the United States did not amount to a justification." *Id.*

the book,” or against “*The Sunday Times* to restrain serialising of further extracts from the book.”¹²⁸

c. The ECtHR Decisions

The *Observer* and *The Guardian* brought an application before the ECtHR, alleging that the interlocutory injunctions against them had constituted an unjustified interference with their freedom of expression, as guaranteed by Article 10 of the ECHR.

In respect of the temporary injunctions imposed on the applicants for the period from July 11, 1986 to July 30, 1987, the ECtHR held that there had been an interference with the applicants' Article 10 rights. Nevertheless, the Court found that the restrictions during this period fell within the exception under Article 10(2). The restrictions were “prescribed by law,”¹²⁹ and according to the Court, had the legitimate aim under Article 10(2) of “maintaining the authority of the judiciary” by protecting “the rights of litigants” in the substantive trial, as well as the “aim of protecting national security.”¹³⁰ Lastly, the ECtHR examined whether restrictions were “proportionate to the legitimate aim pursued,” and whether reasons to justify them were both “relevant and sufficient,”¹³¹ holding that the restrictions were indeed “necessary in a democratic society.”¹³² The restrictions were relevant given “credible evidence” that publication during this period would “be detrimental to the Security Service,” and refusal of the interlocutory injunctions “would effectively deprive the Attorney General, if successful on the merits, of his right to be granted a permanent injunction.”¹³³ The restrictions were also “sufficient” where the English courts had identified conflicting public interests in preventing and allowing disclosure, and “resolved” that conflict “by a careful weighing of the relevant considerations on either side.”¹³⁴ Finally, the injunctions did not prevent the applicants from engaging in “an independent inquiry” into the operation of the Security Service, and although lasting for “slightly more than a year,” the contents related to “events that had occurred several years previously [and] could not really be classi-

128. *Id.*

129. *Observer & Guardian*, para. 54.

130. *Id.* paras. 55–56. The ECtHR recognized that “considerations of national security featured prominently in all the judgments delivered by the English courts in this case,” although noting comments by the English courts “that the precise nature of the national security considerations involved varied over the course of time.” *Id.* para. 56.

131. *Id.* para. 59(d).

132. *Id.* para. 65.

133. *Id.* para. 62.

134. *Id.* para. 63.

fied as urgent.”¹³⁵ The restrictions therefore were “proportionate” to the legitimate aims pursued.¹³⁶

In respect of the period from July 30, 1987 to October 13, 1988, however, the ECtHR held that the temporary injunctions had violated Article 10,¹³⁷ finding that “the interference complained of was no longer ‘necessary in a democratic society’ after July 30, 1987.”¹³⁸

The Court observed that, although “the further publication of *Spycatcher* material could have been prejudicial to the trial of the Attorney General’s claims for permanent injunctions . . . it does not constitute a ‘sufficient’ reason for the purposes of Article 10 (art. 10).”¹³⁹ The confidentiality of the material had been destroyed as a result of the publication of *Spycatcher* in the United States—“irrespective of whether any further disclosures were made by [the *Observer* and *The Guardian*]”—and thus, “the interest in maintaining the confidentiality of that material had . . . ceased to exist by 30 July 1987.”¹⁴⁰ Neither were the interests of national security relied on by the United Kingdom “sufficient.”¹⁴¹ Although the restrictions were initially sought “to preserve the secret character of information that ought to be kept secret,” by July 30, 1987, “the information had lost that character,” and “the purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service.”¹⁴² “Above all,” the ECtHR held, “continuation of the restrictions after July 1987 prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern.”¹⁴³

In *The Sunday Times* case, the Court was again faced with an evolving situation—“a curious metamorphosis,” it explained—because the information at issue entered into the public domain during the course of litigation.¹⁴⁴ The publication of *Spycatcher* in the United States compelled the United Kingdom to shift from its original position that the injunctions were justified by the need “to preserve the secret character of [national security] information” to the position that they were justified by “the promotion of the efficiency and reputation of

135. *Id.* para. 64.

136. *Id.* para. 65.

137. *Id.* para. 46.

138. *Id.* para. 70.

139. *Id.* para. 68.

140. *Id.*

141. *Id.* para. 69.

142. *Id.*

143. *Id.*

144. *Sunday Times*, para. 55.

the Security Service.”¹⁴⁵ The Court again concluded that this latter motive was not “sufficient” to justify the injunctions.¹⁴⁶ Thus—for the same reasons applied to the injunctions against the *Observer* and *The Guardian* from July 30, 1987 to October 13, 1988¹⁴⁷—the interference with the Article 10 rights of *The Sunday Times* was “no longer ‘necessary in a democratic society.’”¹⁴⁸

3. FURTHER ATTEMPTS TO RESTRAIN DISCLOSURES BY THE MEDIA: *VERENIGING WEEKBLAD BLUF! V. NETHERLANDS*

In *Vereniging Weekblad Bluf! v. Netherlands*,¹⁴⁹ the ECtHR held that the Netherlands had breached its obligations under Article 10 of the ECHR by removing from circulation all copies of a journal issue that published a six-year-old “confidential” government report. The ECtHR recognized that, unlike the situation in *Sunday Times v. United Kingdom (No. 2)*, here the information in the report could not be obtained by other means.¹⁵⁰

The applicant was an Amsterdam-based association which at the material time published the weekly magazine *Bluf!*.¹⁵¹ In the spring of 1987, the applicant obtained an internal quarterly report by the Netherlands’ Internal Security Service, Binnenlandse Veiligheidsdienst (the “BVD”), describing the BVD’s activities.¹⁵² Dated 1981 and labeled “confidential,” the report demonstrated that the BVD had, at the time, been monitoring the Dutch Communist Party and the Anti-Nuclear-Power Movement.¹⁵³ On April 29, 1987, the applicant sought to publish the report as a supplement to that date’s issue of *Bluf!*.¹⁵⁴ Before the journal could be published, however, the BVD informed the public prosecutor that its dissemination would likely to infringe the state’s Criminal Code (*Wetboek van Strafrecht*).¹⁵⁵ A preliminary judicial investigation was ordered that same day; the association’s

145. *Id.*

146. *Id.*

147. *Observer & Guardian*, paras. 66–70.

148. *Id.* para. 70.

149. *Vereniging Weekblad Bluf! v. Netherlands*, App 16616/90 (Eur. Ct. H.R. 1995), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?{"dmdoc number":\["695792"\],"itemid":\["001-57915"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?{).

150. *Id.* para. 38.

151. *Id.* para. 7.

152. *Id.* para. 8.

153. *Id.*

154. *Id.*

155. *Id.* para. 9. The director of the BVD recognized that “the various contributions taken separately do not (or do not any longer) contain any State secrets,” but nevertheless suggested that “taken together and read in conjunction” they “amount to information whose confidentiality is necessary in the interests of the State or its allies.” *Id.*

premises were searched; all copies of the *Bluf!* issue, including the supplement, were seized; and three people were arrested—although released shortly thereafter.¹⁵⁶ Despite this, during the evening of April 29, the staff of the association reprinted the issue and circulated it throughout Amsterdam the following day.¹⁵⁷

Finding no basis on which to continue the investigation, the presiding judge ordered that it be closed a few days later.¹⁵⁸ Nevertheless, the Review Division of the Amsterdam Regional Court dismissed an application by the association seeking to have the confiscated copies returned for timely distribution to subscribers, finding that “it was not ‘highly unlikely’ that in the criminal proceedings an order would be made for the periodical’s withdrawal from circulation.”¹⁵⁹ The Supreme Court dismissed appeals on all grounds.¹⁶⁰ The Review Division also dismissed a second application by the association challenging the lawfulness of the seizure under Article 10 of the ECHR.¹⁶¹

On March 25, 1988, the public prosecutor sought a court order that the issue of *Bluf!* be withdrawn from circulation,¹⁶² which the court permitted. Finding that the seized items were “designed to commit the offence set out in Article 98 and/or Article 98a” of the Criminal Code¹⁶³—provisions criminalizing the intentional and unauthorized communication of state secrets¹⁶⁴—the court concluded that “the unsupervised possession of them was contrary to the law and the public interest,” and the measure was justified under Article 10 of the ECHR “on the grounds of maintaining ‘national security.’”¹⁶⁵ Dismissing an appeal by the association, the Supreme Court held that seizure and withdrawal from circulation was appropriate “even though neither the applicant association nor any other person had had to answer for their actions in the criminal proceedings,” and the fact that the issue had been reprinted and distributed “did not necessarily have the consequence that secrecy should not be preserved.”¹⁶⁶ The court further found that, “the court below had clearly shown that what was in

156. *Id.* para. 10.

157. *Id.* para. 11.

158. *Id.* para. 12.

159. *Id.* para. 13.

160. *Id.* para. 14.

161. *Id.* para. 15 (the association also argued, unsuccessfully, that “as the judicial investigation had been terminated, the measure had ceased to be justified.”). *Id.*

162. *Id.* para. 16.

163. *Id.* para. 17.

164. *Id.* para. 20.

165. *Id.* para. 17.

166. *Id.* para. 18.

issue in the instant case was information whose secrecy was necessary in the interests of the State.”¹⁶⁷

The ECtHR concluded that the compelled withdrawal from circulation of the issue of *Bluf!* constituted a violation of Article 10 of the ECHR.¹⁶⁸ It was not disputed that “the impugned measures amounted to interferences by a public authority in the applicant association’s exercise of its freedom to impart information and ideas.”¹⁶⁹ However, the Netherlands claimed that the interferences were permitted under Article 10, as “prescribed by law,” pursuing a legitimate aim under Article 10, and “necessary in a democratic society.”¹⁷⁰

The ECtHR accepted the Netherlands’ argument that that the interferences were “prescribed by law,” where “*Bluf!* imparted information whose secrecy was necessary in the interests of the State,” an offence under the Criminal Code.¹⁷¹ Likewise, the Court agreed that “the interferences were unquestionably designed to protect national security, a legitimate aim under Article 10.”¹⁷²

However, regarding the third limb, the ECtHR found that the removal from circulation “was not necessary in a democratic society” to achieve the aim of national security.¹⁷³ The Court observed that the report was “six years old at the time of the seizure,” “it was of a fairly general nature,” and it “was marked simply ‘Confidential,’ which represents a low degree of secrecy.”¹⁷⁴ In particular, the ECtHR underscored the public nature of the information, where “the information in question had already been widely distributed when the journal was withdrawn from circulation,”¹⁷⁵ and “[t]hat being so, the protection of the information as a State secret was no longer justified.”¹⁷⁶ The withdrawal from circulation “no longer appeared necessary to achieve the legitimate aim pursued,”¹⁷⁷ and therefore, the measure violated Article 10.

167. *Id.*

168. *Id.* para. 23.

169. *Id.* para. 27.

170. *Id.* para. 28.

171. *Id.* para. 29.

172. *Id.* para. 36.

173. *Id.* para. 46. The ECtHR recognized that while an institution such as the BVD “must enjoy a high degree of protection” from disclosure, it nevertheless remained “open to question whether the information in the report was sufficiently sensitive to justify preventing its distribution.” *Id.* paras. 40-41.

174. *Id.* para. 41.

175. *Id.* para. 43.

176. *Id.* para. 45.

177. *Id.* The ECtHR did “not consider that it must determine whether the seizure carried out on 29 April 1987, taken alone, could be regarded as ‘necessary.’” *Id.* para. 42.

Although the ECtHR commented, without further explanation, that “[i]t would have been quite possible . . . to prosecute the offenders,”¹⁷⁸ it has continued to vigorously enforce the protections afforded under Article 10 of the ECHR in connection with disclosures in the public interest of sensitive government information.

4. PERMISSIBILITY OF SANCTIONS FOR DISCLOSURES BY GOVERNMENT EMPLOYEES: *GUJA V. MOLDOVA*

In a decision issued several years after *Bluf!*, the ECtHR examined the permissibility of imposing sanctions on government employees who disseminate information without authorization, under Article 10 of the ECHR.

In *Guja v. Moldova*,¹⁷⁹ the Grand Chamber of the Court confirmed that Article 10 protects the disclosure in the public interest of secret internal information by a government employee. The ECtHR recognized that “[t]he interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.”¹⁸⁰ The case concerned the former Head of the Press Department of the Moldovan Prosecutor General’s Office who leaked two letters to the press and was subsequently dismissed for failing to first notify his superiors in accordance with internal policies.¹⁸¹ The letters revealed that a senior politician had exercised undue pressure on the Public Prosecutor’s Office. The applicant, Iacob Guja, believed he had acted in line with the President’s anti-corruption drive and with the intention of creating a positive image of the Office. On appeal from Guja’s civil action against the Prosecutor General’s Office, which had been denied, the court held that, given the particular circumstances of the case—pressure by a high-ranking politician on pending criminal cases—the penalty of dismissal for external reporting to a newspaper “was not ‘necessary in a democratic society.’”¹⁸²

The ECtHR described as a “balancing exercise” the determination of whether a state restriction is reconcilable with freedom of expression as protected by Article 10.¹⁸³ The Court explained that, “[i]n de-

178. *Id.* para. 45.

179. *Guja v. Moldova*, App. 14277/04 (Eur. Ct. H.R. 2008), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85016#{"itemid":\["001-85016"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85016#{).

180. *Id.* para. 74.

181. See *Guja v. Moldova*, ARTICLE 19 (Mar. 21, 2003), available at <http://www.article19.org/resources.php/resource/2440/en/guja-v.-moldova>.

182. *Guja v. Moldova*, para. 97.

183. *Id.* para. 75.

termining the proportionality of an interference with a civil servant's freedom of expression in such a case the Court must also have regard to a number of other factors."¹⁸⁴ Specifically:

- The first factor to be considered is “whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover.”¹⁸⁵ The Court recognized that “[i]n the light of [a civil servant’s] duty of discretion . . . disclosure should be made in the first place to the person’s superior or other competent authority or body.”¹⁸⁶ It is only where such a course of action is “clearly impracticable” that internal or classified government information may, “as a last resort,” be legitimately disclosed to the public.¹⁸⁷
- Secondly, courts should give regard to “the public interest involved in the disclosed information,” taking into account the limited scope under Article 10(2) of the ECHR “for restrictions on debate on questions of public interest.”¹⁸⁸ The Court explained that an effective democratic system requires “close scrutiny” of a government’s acts and omissions, which encompasses oversight “not only of the legislative and judicial authorities but also of the media and public opinion.”¹⁸⁹
- The third factor is “the authenticity of the information disclosed.”¹⁹⁰ In this regard, “[i]t is open to the competent state authorities” to formulate appropriate measures for addressing “defamatory accusations devoid of foundation or formulated in bad faith.”¹⁹¹ Thus, individuals who elect to disclose sensitive information “must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable.”¹⁹²
- “On the other side of the scales,” the Court will consider “the damage, if any, suffered by the public authority as a result of the dis-

184. *Id.* para. 74.

185. *Id.* para. 73.

186. *Id.*

187. *Id.*

188. *Id.* para. 74.

189. *Id.*

190. *Id.* para. 75.

191. *Id.*

192. *Id.*

closure.”¹⁹³ This may involve an assessment of “the subject-matter of the disclosure,”¹⁹⁴ such as the type of national security interest to which the information relates, and any harm, or threat of harm, to that interest affected by disclosure. The Court must determine “whether such damage outweighed the interest of the public in having the information revealed.”¹⁹⁵

- The “motive behind the actions of the reporting employee” may also be relevant.¹⁹⁶ Disclosure must not be the product of “personal grievance or a personal antagonism or the expectation of personal advantage”; rather, the individual must be acting in “good faith and in the belief that the information was true, that it was in the public interest to disclose [the information].”¹⁹⁷
- Finally, “attentive analysis of the penalty imposed on the applicant and its consequences” is necessary, to evaluate “the proportionality of the interference in relation to the legitimate aim pursued.”¹⁹⁸

The ECtHR conceded that disclosure may have “strong negative effects on public confidence in the independence” of the Prosecutor General’s Office.¹⁹⁹ Nevertheless, the public interest in revealing “improper conduct by a high-ranking politician and the Government’s attitude towards police brutality” was considered so important in a democratic society that it outweighed the interest in maintaining confidence in a State institution.²⁰⁰ Moreover, there was no “effective alternative channel to make the disclosure,”²⁰¹ the letters were undisputedly genuine,²⁰² and dismissal, “the heaviest sanction possible,” had been imposed.²⁰³ Finding that the interference with the applicant’s right to freedom of expression therefore was not “necessary in a democratic society,” the ECtHR held that there had indeed been a violation of Article 10 of the Convention.²⁰⁴

The fact that the Court reached this outcome despite Guja’s duty of discretion to his employer, a duty inapplicable to a journalist, demon-

193. *Id.* para. 76.

194. *Id.* para. 76.

195. *Id.*

196. *Id.* para. 77.

197. *Id.*

198. *Id.* para. 78.

199. *Id.* paras. 90–91.

200. *Id.* paras. 85–88.

201. *Id.* paras. 80–84.

202. *Id.* para. 89.

203. *Id.* para. 95.

204. *Id.* para. 97.

strates the significance the Court places on good faith dissemination of information—even national security information—in the public interest.

D. Denmark

With a view to striking an equitable balance between national security concerns and the disclosure of confidential information in the public interest, Denmark has codified a public interest defense to crimes associated with the publication of state secrets. This legislative protection has been rigorously implemented by the Danish judiciary, as demonstrated in the unsuccessful prosecution of journalists Jesper Larsen, Michael Bjerre, and Niels Lunde.

1. CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSION

Denmark provides robust protection for freedom of speech and freedom of the press—rights that are firmly embedded in the Danish Constitution. Section 77 of the Constitutional Act of Denmark states that “[a]ny person shall be at liberty to publish his ideas in print, in writing, and in speech, subject to his being held responsible in a court of law. Censorship and other preventive measures shall never again be introduced.”²⁰⁵

2. RIGHT OF ACCESS TO INFORMATION

There are two principal statutes providing express rights of access to documents maintained by government bodies.²⁰⁶ Under the Danish Access to Public Administration Files Act, which governs requests by any person for access to documents received or issued by a public administration authority, “the right of access applies to all documents relating to the matter in question,”²⁰⁷ subject to certain exceptions.²⁰⁸ For example, certain documents may not be subject to a right of access

205. Danmarks Riges Grundlov [The Constitutional Act of Denmark], 1953 ch. 8, § 77 (Den.), available at <http://www.eu-oplysningen.dk/upload/application/pdf/0172b719/Constitution%20of%20Denmark.pdf>.

206. “Offentlighedsløven” [Danish Access to Public Administration Files Act] Dec. 19, 1985 [Act No. 572/1985] (Den.) [hereinafter DAPAF], available at http://www.retsinfo.dk/_GETDOCI/_ACCN/A19850057230-REGL (in Danish) or <http://legislationline.org/documents/action/popup/id/6833> (in English); and “Forvaltningsloven” [Danish Public Administration Act] Dec. 19, 1985 [Act No. 571/1985] (Den.) [hereinafter DPAA], available at http://www.retsinfo.dk/_GETDOCI/_ACCN/A19850057130-REGL (in Danish) or <http://legislationline.org/documents/action/popup/id/6832> (in English). See also ORG. FOR SEC. AND CO-OPERATION IN EUR., ACCESS TO INFO BY THE MEDIA IN THE OSCE REGION: COUNTRY REPORTS 117 (2008), [hereinafter OSCE Report], available at <http://www.osce.org/fom/24893>. The section on Denmark in the OSCE Report was prepared and submitted by the Government of Denmark. *Id.*

207. OSCE Report at 117 (citing DAPAF § 5(1)).

208. *Id.* (citing DAPAF §§ 7–14).

“because of their sensitive nature,”²⁰⁹ while the right of access to information concerning specified subject matter may be limited, “if the need for protection is essential.”²¹⁰

Similarly, the Danish Public Administration Act, which governs rights of access to documents for parties to a matter in which a decision has or will be made by a public administration authority, recognizes a general right of public access, subject again to certain exceptions.²¹¹ Documents that are exempt under the statute include materials concerning criminal proceedings,²¹² an authority’s internal case material,²¹³ and “other particularly sensitive types of documents,” listed under the law.²¹⁴ In addition, certain enumerated information relating to “sensitive subject matter” is exempt, provided that “the considerations for limiting access decisively outweigh the interests of the involved party.”²¹⁵ However, aside from criminal proceedings, there remains a “duty to disclose factual information contained in the exempt document which is important to the making of a decision.”²¹⁶

The right to public access that flows from the foregoing legislation applies equally to foreigners and Danish citizens,²¹⁷ and does not distinguish between the media and private individuals.²¹⁸

3. PROHIBITIONS ON THE UNAUTHORIZED DISCLOSURE OF STATE SECRETS

The Public Administration Act provides that

any person acting within the public administration is bound by professional secrecy [under] Section 152 and Sections 152c-152f of the Danish Criminal Code, whenever information is designated as confidential by statute or other legally binding provision or when-

209. *Id.* (citing DAPAF § 10).

210. *Id.* (citing DAPAF § 13(1)).

211. *Id.* at 118 (citing DPAA § 10(1)).

212. *Id.* (citing DPAA § 9(3)).

213. *Id.* (citing DPAA § 12(1)).

214. *Id.* (referencing DPAA § 14(1)).

215. *Id.* (referencing DPAA § 15(1)).

216. *Id.* (citing DPAA §§ 12(2), 14(2)).

217. The Access to Public Administration Files Act permits “any person” the right to “demand to be apprised of documents received or issued by an administration authority in the course of its activity.” OSCE Report at 118 (citing DAPAF § 4(1)). The Public Administration Act permits “any party to a matter in which a decision has or will be made by an administration authority” the right to “demand to be apprised of the documents of the matter.” *Id.* (citing DAPAF § 4(1) and DPAA §9(1)).

218. “However . . . Section 4(1) of the Access to Public Administration Files Act provides that an administration authority may grant wider access to documents unless this is not allowed under the rules on secrecy etc. This rule is according to practice of particular relevance to journalists and media organizations.” *Id.* at 118.

ever it is otherwise necessary to keep the information secret to protect material public or private interests, including in particular . . . 1) the security of the State and the defence of the realm[; and] 2) Danish foreign policy and Danish external economic interests²¹⁹

In addition, under section 152(1) of the Danish Criminal Code (*Straffeloven*),²²⁰ any current or former public official “who unlawfully passes on or exploits confidential information” obtained by him or her in connection with their office or function, “shall be liable to a fine or to imprisonment for any term not exceeding six months.”²²¹

Private individuals are not subject to the statutory rules on professional secrecy.²²² However, although the media are permitted to “publish information which originates from unauthorised disclosure,” such immunity may be revoked where “the information is strictly private or confidential because of its importance to the safety of the state or to the protection of the state defence.”²²³

4. THE CODIFIED PUBLIC INTEREST DEFENSE TO THE DISCLOSURE OF STATE SECRETS AND *DENMARK V. LARSEN*

To safeguard disclosures on matters of public concern, the Danish Criminal Code contains an express public interest defense, which can be invoked to avoid sanction if a person is charged with disseminating confidential information. Section 152e of the Code states, “The provisions of sections 152–152d [penalizing publication of state secrets] do not include cases where the person . . . is acting in the legitimate exercise of obvious public interest or for his own or others’ best interests.”²²⁴

Danish courts actively enforce the public interest defense to prevent prosecution for publishing confidential information where there is a clear public interest supporting disclosure. In 2006, charges were brought against the Editor-in-Chief of the *Berlingske Tidende*, Niels Lunde, and journalists Michael Bjerre and Jesper Larsen, for publishing state secrets in two 2004 articles.²²⁵ The articles disclosed classi-

219. *Id.* at 120 (citing DPAA § 27(1)).

220. *Straffeloven* [STRFL] [Criminal Code] §152(1) (Den.) [hereinafter Danish Criminal Code], available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=133530#K15> (in Danish).

221. OSCE Report at 120.

222. “Private individuals are not subject to the rules of the Public Administration Act, nor the Access to Public Administration Files Act. As a principal rule, they are therefore not subject either to the rules on professional secrecy.” *Id.* at 119.

223. *Id.* at 120 (citing Danish Criminal Code § 152d (2), (3)).

224. Danish Criminal Code § 152e.

225. *Københavns Byret* [Copenhagen City Court] [12/4/2006], No. SS.24.13764/2006 (Den.) (2006) *Anklagemyndigheden* [Prosecution] v. *Larsen* [hereinafter *Denmark v.*

fied intelligence reports that questioned the existence of weapons of mass destruction in Iraq.²²⁶ In December of that year, the Copenhagen City Court unanimously acquitted Lunde, Bjerre, and Larsen.²²⁷

The question before the court was whether the defendants' dissemination of confidential information could be characterized as "unjust," or whether it was clear that the defendants acted "in the legitimate exercise of obvious public interest or for his own or others' best interests," consistent with section 152e of the Danish Criminal Code.²²⁸ The court held that the relevant provisions of the Criminal Code must be read in light of the free expression protections established by Article 10 of the ECHR and by the jurisprudence of the ECtHR.²²⁹ In so doing, the court balanced several factors, including (1) the national security interest to which the information relates, (2) the degree of actual harm to that interest caused by unauthorized disclosure, and (3) the significance of the public interest in knowing the information and facilitating debate on the issues raised.

During these proceedings, the Government underscored the harm to national security flowing from the newspaper articles, arguing that publication of names of specific foreign partners posed a serious risk to the Defense Intelligence's ability to receive information from partners in the future.²³⁰ The court rejected this position, noting that there was no indication that the leak had in fact caused a real strain on relationships with partners.²³¹ Moreover, several former foreign ministers and academics supported the defendants' statement that, at the time of publication, there was a significant public interest in knowing the basis for the political decision for Denmark's participation in the military action in Iraq.²³² The court also found persuasive the witnesses' opinion that the articles had a significant impact on this debate and the understanding of the intelligence service's role.²³³ In balancing the foregoing considerations, the court held that the "considerable public interest" surrounding the decision by Denmark to take part in

Larsen], available at <http://www.update.dk/cfje/Lovbasen.nsf/ID/LB04929560> (in Danish). See also *Denmark*, U.S. DEP'T OF STATE (Mar. 6, 2007) [hereinafter U.S. State Dep't Summary], <http://www.state.gov/j/drl/rls/hrrpt/2006/78809.htm> (examination of Freedom of Speech and Press in Denmark).

226. See U.S. State Dep't Summary.

227. *Id.*

228. See *Denmark v. Larsen*.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

the Iraq war, “outweighed the government’s fears for its intelligence operations.”²³⁴ The court concluded that the defendants acted in justified preservation of the interest of the general public at the time it decided to publish classified information.²³⁵

E. United Kingdom

Although the domestic law of the United Kingdom is generally considered weak in its protections for speech and expression, the country’s Human Rights Act of 1998 incorporates the European Convention on Human Rights into domestic law,²³⁶ thereby requiring secrecy legislation in the U.K.—including the country’s Official Secrets Act 1989 (“OSA”)²³⁷—to be interpreted consistently with Article 10 of the ECHR.²³⁸ Although the government has invoked the OSA with regard to the publications of national security reporters and authors, recent investigations and prosecutions have been abandoned prior to judicial review of the validity of proposed or actual charges.

1. THE HUMAN RIGHTS ACT AND ARTICLE 10 OF THE ECHR

The United Kingdom does not have one single constitutional document. Instead, guarantees for fundamental rights—such as the right to free expression—are embodied in a range of written documents. For example, the European Convention on Human Rights has been incorporated into U.K. law through the Human Rights Act of 1998, which requires, *inter alia*, that the domestic courts follow the decisions of the European Court of Human Rights when “determining a question which has arisen in connection with a Convention right,”²³⁹ including Article 10,²⁴⁰ and that any statutory offenses implicating Convention rights “must be read and given effect in a way which is compatible with Convention rights.”²⁴¹

Moreover, the Crown Prosecution Service (“CPS”) is bound by the principles of the ECHR in determining whether to move forward with

234. *Danes Acquitted Over Iraq Secrets*, BBC News (Dec. 4, 2006), <http://news.bbc.co.uk/2/hi/europe/6206848.stm>.

235. See *Denmark v. Larsen*; see also U.S. State Dep’t Summary.

236. Human Rights Act, 1998, c. 42, §§ 2–3 (U.K.) [hereinafter Human Rights Act], available at <http://www.legislation.gov.uk/ukpga/1998/42/contents>.

237. Official Secrets Act, 1989, c. 6 (U.K.) [hereinafter Official Secrets Act 1989], available at <http://www.legislation.gov.uk/ukpga/1989/6/contents>.

238. See Section III.C.1, *supra*.

239. Human Rights Act, § 2(1).

240. See Section III.C.1, *supra* (describing the free expression rights guaranteed by Article 10 of the ECHR).

241. Human Rights Act, § 3(1).

any prosecution.²⁴² In a statement to the Leveson Inquiry—the commission established to investigate the culture, ethics, and practices of the press in the aftermath of the phone-hacking scandals involving the *News of the World* and other British print media²⁴³—CPS Director Keir Starmer affirmed that “section 3 of the *Human Rights Act* 1998 requires all statutory offences which engage Convention rights to be read and given effect in a way which is compatible with those rights.”²⁴⁴ Because the common law and the Human Rights Act of 1998 recognize and protect the right to receive and convey information in the United Kingdom, he stated, any interference with those rights must be “necessary and proportionate.”²⁴⁵

2. FREEDOM OF INFORMATION ACT

The United Kingdom has enacted right of access laws, including the Freedom of Information Act,²⁴⁶ which provide a general right to request and receive information held by public authorities,²⁴⁷ subject to express exemptions.²⁴⁸ Sections 23 and 24 provide exemptions from disclosure where the information “was directly or indirectly supplied to the public authority by” bodies dealing with security matters or where “required for the purpose of safeguarding national security.”²⁴⁹ These national security exemptions are “based on the effect that disclosure would have, not on the content or source of the information,” and “[i]nformation is not automatically exempt because it relates to national security matters.”²⁵⁰

242. CROWN PROSECUTION SERVICE, CODE FOR CROWN PROSECUTORS § 2.6 (2013) [hereinafter CPS CODE FOR CROWN PROSECUTORS], available at http://www.cps.gov.uk/publications/docs/code2013english_v2.pdf; see also *Human Rights and Criminal Prosecutions: General Principles*, CROWN PROSECUTION SERVICE, http://www.cps.gov.uk/legal/h_to_k/human_rights_and_criminal_prosecutions_general_principles/ (last visited June 9, 2013).

243. *About the Inquiry*, LEVESON INQUIRY, <http://www.levesoninquiry.org.uk/about/> (last visited June 9, 2013).

244. *Written Statement of Keir Starmer, QC, CPS Dir. of Pub. Prosecutions* ¶ 22 (Feb. 8, 2012) THE LEVESON INQUIRY: CULTURE, PRACTICE & ETHICS OF THE PRESS [hereinafter *Leveson Inquiry Statement*], available at <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Keir-Starmer-QC.pdf> (Statement Dated Feb. 7, 2012).

245. *Id.* ¶ 14.

246. Freedom of Information Act, 2000, c. 36 (U.K.) [hereinafter Freedom of Information Act], available at <http://www.legislation.gov.uk/ukpga/2000/36/contents>.

247. *Id.* § 1(1).

248. *Id.* §§ 21–44.

249. *Id.* §§ 23(1), (3), 24(1).

250. INFORMATION COMMISSIONER’S OFFICE, FREEDOM OF INFORMATION ACT: SECTION 24: THE NATIONAL SECURITY EXEMPTION 2 (June 1, 2009) (U.K.), available at http://www.ico.org.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/s24_national_security_v1_fop098.pdf.

Information is also exempt from public access rights where disclosure “would, or would be likely to, prejudice” the “defence of the British Islands or of any colony, or . . . the capability, effectiveness or security of any relevant forces”;²⁵¹ the United Kingdom’s “[i]nternational relations”;²⁵² or “relations between any administration in the United Kingdom and any other such administration.”²⁵³

3. THE OFFICIAL SECRETS ACT 1989

The Official Secrets Act 1989 is the key statute prohibiting the unauthorized disclosure of government information in the United Kingdom. Section 5 of the OSA expressly criminalizes so-called “secondary disclosures,” that is, the publication by journalists or members of the public of protected information received from government employees in contravention of the law.²⁵⁴ While this section is subject to actual and objective harm tests, there is no express public interest defense. It provides that a secondary discloser “is guilty of an offence” if he or she receives protected information, including information relating to “security or intelligence, defence or international relations,”²⁵⁵ “without lawful authority” from a government representative²⁵⁶ and then discloses that information “without lawful authority knowing, or having reasonable cause to believe, that it is protected against disclosure”²⁵⁷ where “the disclosure by him is damaging” and he or she “kn[ew], or ha[d] reasonable cause to believe, that it would be damaging.”²⁵⁸

4. LIMITS ON THE DISCRETION OF THE CROWN PROSECUTION SERVICE

Prosecutions pursued by the Crown Prosecution Service are restricted by administrative guidelines imposing a public interest analysis that examines the propriety of any proceeding charging an individual with violating secrecy and data protection laws. The Code for Crown Prosecutors explicitly obligates prosecutors to “swiftly stop cases . . . where the public interest clearly does not require a prosecution.”²⁵⁹

251. Freedom of Information Act, § 26(1).

252. *Id.* § 27.

253. *Id.* § 28(1).

254. *Official Secrets Act 1989*, § 5.

255. *Id.* § 5(5)(a).

256. *Id.* § 5(1)(a)(i), (iii).

257. *Id.* § 5(2).

258. *Id.* § 5(3).

259. CPS CODE FOR CROWN PROSECUTORS § 3.3.

A determination to prosecute must pass the two-step process embodied in the CPS's "Full Code Test."²⁶⁰ First, at the Evidential Stage, the CPS must determine whether there is sufficient evidence to provide a "realistic prospect of conviction."²⁶¹ Second, the case passes to the Public Interest Stage, where the prosecutor must determine "whether a prosecution is required in the public interest."²⁶² Alternately stated, the case should not proceed where "there are public interest factors tending against prosecution which outweigh those tending in favour."²⁶³ These factors include the seriousness of the offense, the suspect's level of involvement, the impact of the alleged crime, the proportionality of prosecution as a response, and whether there are sources of information to be protected.²⁶⁴ Each case must be considered on its own facts and merits²⁶⁵ and should involve an "overall assessment of the public interest."²⁶⁶

CPS Director Starmer confirmed to the Leveson Inquiry that the CPS engaged in a public interest analysis in reaching the decision not to prosecute either a Home Office civil servant or a Member of Parliament for leaking confidential government information to a national newspaper.²⁶⁷ In that decision, CPS acknowledged that Article 10 of the ECHR strongly protects the "right of everyone to receive and impart information and ideas without interference."²⁶⁸ While acknowledging that the right is not absolute, CPS stated that "any criminal proceedings which restrict the ability of the press to publish information and ideas on matters of public interest calls for the closest scrutiny."²⁶⁹

The CPS is in the process of drafting a policy that would provide guidance regarding the prosecution of journalists engaged in news-gathering, recognizing that "the law affords a wide measure of protection to journalists where a publication is in the public interest."²⁷⁰ Ac-

260. *Id.* § 4.1.

261. *Id.* § 4.4.

262. *Id.* § 4.7.

263. *Id.* § 4.8.

264. *Id.* § 4.12.

265. *Id.* § 4.10.

266. *Id.* § 4.9.

267. *Leveson Inquiry Statement*, ¶ 16; see also *Decision on Prosecution—Mr. Christopher Galley & Mr. Damian Green MP*, CROWN PROSECUTION SERV. (Apr. 16, 2009), available at http://www.cps.gov.uk/news/articles/decision_on_prosecution_-_mr_christopher_galley_and_mr_damian_green_mp/.

268. *Leveson Inquiry Statement*, Ex. KS3 at 5 (Decision on Prosecution (Apr. 16, 2009)), available at <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Exhibit-KS3.pdf>.

269. *Id.*

270. *Leveson Inquiry Statement*, ¶¶ 11, 15, 31.

ording to Director Starmer, the draft policy would likely “bring together and reflect more clearly existing CPS policy and guidance” and would be subject to a consultation period.²⁷¹

5. ABORTED INVESTIGATIONS AND PROSECUTIONS OF
NEWSGATHERING ACTIVITIES UNDER THE OFFICIAL
SECRETS ACT 1989

Despite these substantive and procedural hurdles, prosecutions against journalists and authors have been commenced in recent years—although none has been successful. For example, former *Sunday Times* reporter Tony Geraghty was arrested in December 1998 for the alleged violation of section five of the OSA, which criminalizes the unauthorized disclosure of protected government information; he was thereafter charged for having published a book that highlighted extensive British surveillance of the residents of Northern Ireland.²⁷² A year later, a new attorney general elected to drop the charges.²⁷³ Additionally, an editor of *The Sunday Times*, Liam Clarke, was detained and threatened with prosecution in 1999 for articles that included allegations of wrongdoing by an undercover military unit operating in Northern Ireland, and a volunteer researcher for a comedy program, Julie-Ann Davies, was arrested in 2000 and questioned regarding her communications with an exiled former MI5 officer.²⁷⁴ Neither was ever charged with wrongdoing.²⁷⁵

F. Inter-American Court of Human Rights

Across the Atlantic, the Inter-American Court of Human Rights, in its interpretation and application of the right to freedom of thought and expression guaranteed by the American Convention on Human Rights, has recognized both a broad public right of access to information that includes information related to military activities and limits on the

271. *Id.* ¶ 31.

272. ARTICLE 19 & LIBERTY, SECRETS, SPIES, AND WHISTLEBLOWERS: FREEDOM OF EXPRESSION IN THE UK § 4.3 (2000) (“ARTICLE 19 AND LIBERTY”), available at <http://www.article19.org/data/files/pdfs/publications/secrets-spies-and-whistleblowers.pdf>; Tony Geraghty, *Writers: Guilty Until Found Innocent*, THE NEW STATESMAN (Oct. 16, 2000), <http://www.newstatesman.com/node/138786>.

273. *Id.*

274. ARTICLE 19 AND LIBERTY § 4.3; *Student Arrested Over Shayler Link*, GUARDIAN (Mar. 7, 2000), <http://www.theguardian.co.uk/politics/2000/mar/07/freedomofinformation.uk>.

275. For a discussion of the *Spycatcher* cases, in which the U.K. Attorney General sought to enjoin the publication, by various media entities, of information provided by a former State Security officer, see Section II.C.2., which describes the proceedings in the English courts as well as the judgments ultimately issued by the ECtHR.

criminal prosecutions for expression touching upon matters of national security.²⁷⁶

1. ARTICLE 13 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

Article 13.1 of the Convention broadly guarantees the right to free expression. It provides that “[e]veryone has the right to freedom of thought and expression,”²⁷⁷ and explains that “[t]his right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”²⁷⁸

2. THE RIGHT TO INFORMATION

In *Claude-Reyes v. Chile*, the Inter-American Court first established that Article 13 embodies a public right of access to state-held information.²⁷⁹ This case arose from a records request filed with the Chilean Foreign Investment Committee, which sought information about the Rio Condor Project, a “forestry exploitation project that caused considerable public debate owing to its potential environmental impact.”²⁸⁰ The request was denied in part, which denial was upheld by the Chilean Supreme Court, and the matter eventually reached the Inter-American Court of Human Rights.²⁸¹

In its judgment, the Inter-American Court reconfirmed that “the right to freedom of thought and expression includes . . . ‘the right and freedom to seek, receive and impart information and ideas of all kinds,’” which is viewed as a “positive right.”²⁸² From this foundation, the court expressly recognized:

Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions

276. International advocacy organizations have recognized the Inter-American system as a “global leader” in the area of access law, given the broad guarantees provided by the American Convention for the right to seek and receive information. See *Amicus Curiae Submission in the Case of Gomes Lund v. Brazil of Amici Curiae Open Society Justice Initiative, et al.*, OPEN SOC’Y FOUNDS. (June 2010), available at <http://www.opensocietyfoundations.org/sites/default/files/araguaia-amicus-english-20100601.pdf>.

277. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, art. 13(1), O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

278. *Id.*

279. *Claude-Reyes v. Chile*, *supra* note 8.

280. *Id.* para. 73; see also *Claude-Reyes v. Chile*, Amicus Curiae Brief of Open Society Justice Initiative, *et al.* as Amici Curiae ¶ 10, OPEN SOC’Y FOUNDS. (Mar. 28, 2006), available at http://www.opensocietyfoundations.org/sites/default/files/b_amicus_20050221.pdf (articulating concerns about the project’s impact on the area’s fragile ecosystems).

281. *Claude-Reyes*, ¶¶ 1–2, 57(31).

282. *Id.* ¶ 76.

permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case.²⁸³

In this, the court held that democratic societies are “governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible” and the burden rests on the state to demonstrate that any information withheld fits into Article 13’s “limited system of exceptions.”²⁸⁴ Alternately stated, the state is under a positive obligation to either provide the information requested or, if it restricts access on a basis permitted by the Convention, provide a response that justifies the restriction.²⁸⁵

The court set out a three-part test for evaluating the legitimacy of restrictions on access rights. First, any restriction must be “expressly established by law” to ensure that it is not employed “at the discretion of public authorities.”²⁸⁶ Second, the restriction must correspond to a purpose identified in Article 13.2, which limits permissible restrictions to those that are “necessary to ensure ‘respect for the rights or reputations of others’ or ‘the protection of national security, public order, or public health or morals.’”²⁸⁷ Third, the restriction must be “necessary in a democratic society” and designed “to satisfy a compelling public interest.”²⁸⁸ To fulfill this requirement, “the restriction must be proportionate to the [justifying] interest” as well as “appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right.”²⁸⁹

283. *Id.* ¶ 77.

284. *Id.* ¶¶ 92–93.

285. *Id.* ¶¶ 77, 92–93. In recognizing this right, the court noted the “regional consensus” as to “the importance of access to public information and the need to protect it,” *id.* ¶ 78, a consensus reflected in resolutions issued by the General Assembly of the Organization of American States, the provisions of the Inter-American Democratic Charter, and the provisions of the Nueva Leon Charter, *id.* ¶¶ 78–80. A concise overview of the right to information in Latin America can be found in *The Latin American Approach to Transparency and Access to Information*, ELLA (May 2012), available at http://ella.practicalaction.org/sites/default/files/120424_GOV_TraAccInf_GUIDE.pdf.

286. *Claude-Reyes*, ¶¶ 58(f), 89.

287. *Id.* ¶ 90 (quoting Article 13.2).

288. *Id.* ¶ 91.

289. *Id.* In this case, the court concluded that the denial of access failed the very first prong of this test, as it was not “based on law,” that is, at the relevant time, “there was no legislation in Chile that regulated the issue of restrictions to access to State-held information.” *Id.* ¶ 94.

Therefore, in *Gomes Lund v. Brazil*, the Inter-American Court struck down, as incompatible with the Convention, a 1979 Brazilian law granting amnesty for offenses committed during Brazil's military dictatorship.²⁹⁰ One aspect of this case involved the denial by the government of access to information and records regarding military operations in the 1970s against a leftist movement known as *Guerrilla do Araguaia*, access requested by the family members of those killed during the operations in support of judicial proceedings alleging human rights violations by the former regime.²⁹¹

The court reaffirmed that the right to seek, receive, and impart ideas of all kinds is encompassed in Article 13's guarantees for freedom of thought and expression,²⁹² and that the state governments have a positive obligation to provide requested information under their control,²⁹³ subject only to limited exceptions.²⁹⁴ The right to access to information includes the right to know the truth, seen here as the right of "the next of kin of the victims of gross human rights violations . . . to know the truth . . . in cases of enforced disappearance."²⁹⁵

Moreover, given the positive obligation of the state, the court determined that "authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information."²⁹⁶

Because Article 13 prohibits a state from withholding information—even classified military information and documents—pertaining to human rights violations, the Inter-American Court specifically held that those provisions of the Brazilian amnesty law "that prevent the investigation . . . of serious human rights violations are not compatible with the American Convention, lack legal effect, and cannot continue as obstacles for the investigation of the facts" underlying human rights abuses.²⁹⁷

290. *Gomes-Lund v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 11.552, ¶ 1 (Nov. 24, 2010) [hereinafter *Gomes-Lund v. Brazil*], available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf.

291. *Id.* ¶¶ 1–2.

292. *Id.* ¶¶ 196, 228, 230.

293. *Id.* ¶¶ 197, 228.

294. *Id.* ¶¶ 199, 229.

295. *Id.* ¶¶ 200–01.

296. *Id.* ¶ 202 (further concluding that, "when it comes to the investigation of punishable facts, the decision to qualify the information as secretive or to refuse to hand it over cannot stem solely from a State organ whose members are charged with committing the wrongful acts. In the same sense, the final decision on the existence of the requested documentation cannot be left to its discretion").

297. *Id.* ¶ 325(3).

3. LIMITS ON CRIMINAL PROSECUTIONS FOR EXPRESSION RELATED TO NATIONAL SECURITY

Although the Inter-American Court has not yet been confronted with any case in which a journalist has been charged for, or enjoined from, publication on national security matters,²⁹⁸ in *Palamara-Iribarne v. Chile*,²⁹⁹ it invalidated the criminal convictions³⁰⁰ of a retired Chilean Navy officer who attempted to publish a book allegedly disclosing “secret or confidential information without prior written authorization from the relevant authorities”³⁰¹ and who held a press conference where he “criticized the actions taken by the Office of the Naval Prosecutor in the proceedings against him.”³⁰²

In March 1993, the Deputy Naval Prosecutor issued a seizure order and entered the home of Humberto Palamara-Iribarne, where 874 copies of his book were seized.³⁰³ For unauthorized publication of the book, the retired officer thereafter “was prosecuted for two counts of disobedience and correspondingly convicted.”³⁰⁴

On application to the Inter-American Court, the Inter-American Commission on Human Rights alleged that that the acts of searching the officer’s home, seizing copies of the book and related materials, and banning future publication were “incompatible with Article 13.”³⁰⁵ Representatives for Palamara-Iribarne further argued that the charges and conviction for disobedience and breach of military duties, “constituted a direct attempt to prevent the publication of the book.”³⁰⁶ The representatives urged that “[e]ven ‘if the argument by the State were to be accepted’ regarding the determination of subsequent liability to protect national security, the book written by Mr. Palamara-Iribarne did not reveal any military secrets, nor did it affect national secur-

298. *Special Rapporteurship for Freedom of Expression, Decisions and Judgments of the Inter-American Court*, Org. of Am. States, http://www.oas.org/en/iachr/expression/jurisprudence/si_decisions_court.asp (last visited June 17, 2013).

299. *Palamara-Iribarne v. Chile*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 135 (Nov. 22, 2005) [hereinafter *Palamara-Iribarne*], available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf.

300. *Id.* ¶ 269(12).

301. *Id.* ¶ 66(e).

302. *Id.* ¶ 63(72).

303. *Id.* ¶ 63(20).

304. *Id.* ¶ 2. In addition, Palamara-Iribarne was charged with “contempt of authority” for the statements he made at the press conference, and a guilty verdict was returned. *Id.*

305. *Id.* ¶ 64(a). The Commission further asserted that the conviction for contempt of authority “grounded on his criticism of public officials conduct,” also violated Article 13, because it “‘constitutes an imposition of subsequent liability on the exercise of the freedom of expression that is unnecessary’ in a democratic society.” *Id.* ¶ 64(c).

306. *Id.* ¶ 65(c).

ity.”³⁰⁷ In response, the Government of Chile claimed that Palamara-Iribarne “was not subject to prior censorship, but to subsequent liability, which is explicitly provided by law” and “grounded on the urgent need to ensure protection of national security.”³⁰⁸ It further asserted that, as a Navy officer, Palamara-Iribarne “was not allowed to disclose secret or confidential information without prior written authorization from the relevant authorities,” and the publication was banned as a result of “the author’s negligence to request authorization for publication in a timely manner.”³⁰⁹

The Court concluded that the officer’s freedom of thought and expression under Article 13 had been violated.³¹⁰ The Court considered it “logical” that Palamara-Iribarne’s “training and professional and military experience helped him write the book and that it does not entail *per se* an abuse of his right to freedom of thought and expression.”³¹¹ In addition, the “duty of confidentiality” owed by “employees or officers of an institution,” is “not applicable to information related to the institution or the duties performed by it that is already in the public domain,” and therefore, the content of the duty “w[as] not . . . examined insofar as it has been established that Mr. Palamara-Iribarne used information from ‘open sources.’”³¹² The Court therefore held that the “measures adopted by the State to prevent the distribution of the book”³¹³—including “instituting [criminal] proceedings against Mr. Palamara-Iribarne for disobedience and breach of military duties,” prohibiting “Palamara-Iribarne from publishing his book,” and “seiz[ing] the copies thereof”³¹⁴—“constituted acts of prior censorship that are incompatible with the parameters” of Article 13 of the American Convention.³¹⁵

307. *Id.* ¶ 65(b).

308. *Id.* ¶ 66(b).

309. *Id.* ¶ 66(e).

310. *Id.* ¶ 78.

311. *Id.* ¶ 76. The court explained that “[a]ny interpretation to the contrary would prevent individuals from using their education or professional training to enrich the expression of their ideas and opinion.” *Id.*

312. *Id.* ¶ 77.

313. *Id.* ¶ 78.

314. *Id.* ¶ 70.

315. *Id.* ¶ 78. This court also held that the contempt charges stemming from the statements made at the press conference violated Article 13; specifically, the Court found that the comments concerned a matter of public interest—the conduct of the naval prosecutor and the criminal military proceedings involving Palamara-Iribarne, *id.* ¶ 82—and that the related charges and potential sanctions “were disproportionate to the criticism leveled at government institutions and their members, thus suppressing debate, which is essential for the functioning of a truly democratic system, and unnecessarily restricting the right to freedom of thought and expression.” *Id.* ¶ 88.

G. United States

Freedom of expression enjoys robust protection under the U.S. Constitution and statutory law. It is well established that the First Amendment to the federal constitution protects the dissemination of sensitive government information in the public interest. And U.S. courts repeatedly have expressed doubts that the prosecution of a member of the press or any private individual for publishing protected government information would be constitutionally permissible, in a general recognition that “[a] statutory scheme that purports to criminalize such activity, without both specifying and cabining its reach, would be unlikely to survive a constitutional challenge.”³¹⁶ Thus, although unsettled—because the U.S. government has not attempted to pursue the prosecution of a journalist under any such law—there likely exists an extraordinary threshold that the government must overcome to pursue a constitutionally-valid prosecution of a member of the media for the publication of state secrets in the public interest.³¹⁷

1. THE FIRST AMENDMENT AND THE PENTAGON PAPERS CASE

The First Amendment to the Constitution of the United States provides that “Congress shall make no law . . . abridging the freedom of speech or of the press.”³¹⁸ Pursuant to this constitutional right, the U.S. Supreme Court, in *New York Times Co. v. Sullivan*, condemned the Sedition Act of 1798³¹⁹—a law having the practical effect of criminalizing criticism of the government during times of unrest—as unconstitutional, effectively discrediting the notion that the government may prosecute its detractors on national security grounds.³²⁰ However,

316. Lee Levine, Nathan Siegel, & Jeanette Bead, *Handcuffing the Press: First Amendment Limitations on the Reach of Criminal Statutes as Applied to the Media*, 55 N.Y.L. SCH. L. REV. 1015, 1036 (2011). This would be the case, “whether it is analyzed under the First Amendment-based requirement that even a statute that has an incidental impact on protected speech must be ‘narrowly tailored to serve a significant governmental interest’; under the First Amendment-based ‘overbreadth’ doctrine; or under the Fifth Amendment, which ‘prohibits punishment pursuant to a statute so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’” *Id.* at 1036–37 (footnotes omitted).

317. *Id.*

318. U.S. CONST. amend. I, § 1.

319. Sedition Act of 1798, 1 Stat. 596, § 2 (making it a crime, punishable by a \$5,000 fine and five years in prison, “if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States”).

320. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . a broad consensus that the Act, because of the restraint it im-

it was not until 1971, in the Pentagon Papers Case,³²¹ that the right of the government to restrain the press from publishing state secrets was tested in the Supreme Court. The federal government sought to enjoin two newspapers from publishing the contents of a classified historical study of the United States' involvement in the Vietnam War, claiming that the exposure would threaten the government's ability to conduct that war and would endanger American lives.³²² A split majority rejected the government's position, holding that "[a]ny system of prior restraints of expression comes to this Court bearing a 'heavy presumption against its constitutional validity.'"³²³

A separate concurring opinion by Justice Hugo Black explained that, "[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions or prior restraints."³²⁴ Recognizing that "[t]he word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment," Justice Black concluded:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.³²⁵

posed upon criticism of government and public officials, was inconsistent with the First Amendment" (footnote omitted)). For an overview of the potential liability of journalists for receiving and reporting information that may endanger national security in the United States, and the historical backdrop against which this has played out, see Lee Levine & Julia Atcherley, *The First Amendment and National Security*, in NATIONAL SECURITY LAW IN THE NEWS: A GUIDE FOR JOURNALISTS, SCHOLARS AND POLICY-MAKERS 13–24 (Paul Rosensweig et al. eds., 2012).

321. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

322. *Id.* at 718 (government arguing that "[t]here are other parts of the Constitution that grant powers and responsibilities to the Executive, and . . . the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States." (alterations in original) (citations and internal quotation marks omitted)).

323. *Id.* at 714 (Black J. & Douglas J., concurring) (citation omitted) (unsigned opinion speaking for six of the nine justices).

324. *Id.* at 717 ("Only a free and unrestrained press can effectively expose deception in government.").

325. *Id.* at 719-20.

In the wake of *New York Times Co. v. Sullivan* and the Pentagon Papers Case, the freedom of the press to report on sensitive national security information is firmly established in the United States.

2. RIGHT OF ACCESS TO INFORMATION

State and federal jurisdictions in the United States have enacted statutes establishing the right of members of the public, including the media, to request and receive government information. The federal Freedom of Information Act (“FOIA”) provides that every government agency must make all of its records available for public inspection,³²⁶ unless a record falls within one of the Act’s nine exemptions.³²⁷ One exemption is classified information—“matters that are . . . specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy”—but only to the extent the records “are in fact properly classified.”³²⁸

For the exemption to apply, the government must demonstrate both that it properly classified the information procedurally and that there is “a logical connection” between public access to the information and some likely harm to national security.³²⁹ To satisfy this burden, the government must identify the potential harm to national security with “reasonable specificity” through declarations and other admissible evidence.³³⁰ While courts “accord substantial weight to an agency’s” submissions, they have an independent responsibility to “review *de novo* the agency’s use of a FOIA exemption to withhold documents.”³³¹ In determining whether a FOIA exemption applies, the court considers “whether on the whole record the [a]gency’s judgment

326. 5 U.S.C. § 552(a)(3)(A).

327. 5 U.S.C. § 552(b)(1)-(9).

328. 5 U.S.C. § 552(b)(1). Various federal statutes provide the U.S. government authority to classify national security information, and regulate the access to such information. *See, e.g.*, 50 U.S.C. § 426 (definition of “classified information”); 50 U.S.C. § 435 (authority for “Executive order[s] or regulation[s] . . . govern[ing] access to classified information”).

329. *McDonnell v. United States*, 4 F.3d 1227, 1243 (3d Cir. 1993) (citation omitted); *see also* *Abbotts v. Nuclear Regulatory Comm’n*, 766 F.2d 604, 606 (D.C. Cir. 1985).

330. *Amnesty Int’l USA v. C.I.A.*, 728 F. Supp. 2d 479, 517 (S.D.N.Y. 2010). “The requirement of reasonable specificity . . . forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court.” *Id.* (internal citations and quotations omitted). *See also* *Rosenfeld v. U.S. DOJ*, 57 F.3d 803, 807 (9th Cir. 1995).

331. *American Civil Liberties Union v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013). *See also* *Coldiron v. U.S. DOJ*, 310 F. Supp. 2d 44, 53 (D.D.C. 2004) (“No matter how much a court defers to an agency, its review is not vacuous.”) (internal citations and quotation marks omitted).

objectively survives the test of reasonableness, good faith, specificity, and plausibility.”³³²

3. THE ESPIONAGE ACT OF 1917, *UNITED STATES V. MORISON*,
AND *UNITED STATES V. ROSEN*

Despite the broad protection afforded the press under the First Amendment and relevant Supreme Court jurisprudence, some have asserted that certain provisions of the Espionage Act of 1917, in theory, could give rise to criminal liability for the publication by the press of state secrets. Section 793(d) of the Act prohibits anyone lawfully having possession of any document, writing, or photograph, among other tangible materials, or any other information “relating to the national defense”—which “the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation”—from “willfully” communicating or transmitting it to anyone not entitled to receive it.³³³ Section 793(e) prohibits the unauthorized possession, retention (and failure to return) or communication of documents or, other tangible materials, or any other information “relating to the national defense”—again, when the recipient has reason to believe that the document or information could be used to the injury of the United States or to the advantage of any foreign nation.³³⁴

In the 1988 decision of *United States v. Morison*,³³⁵ the U.S. Fourth Circuit Court of Appeals reflected on whether a member of the press may be prosecuted under the Espionage Act for disseminating national security-related information. Former naval intelligence employee Samuel Loring Morison was convicted under the Act for the unauthorized possession of satellite secured photographs of Soviet naval preparations and for the transmittal of those photographs to the British publication *Jane’s Defence Weekly*.³³⁶ On appeal, the Fourth Circuit affirmed the conviction, holding that sections 793(d) and (e) of the Act prohibit the willful communication of information “to a person not entitled to receive it”³³⁷ and that the press was not entitled “to receive” the classified photographs.³³⁸ However, charges were never

332. *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (construing Exemption 3).

333. Espionage Act of 1917, 18 U.S.C. § 793(d).

334. *Id.* § 793(e).

335. 844 F.2d 1057 (4th Cir. 1988).

336. *Id.* at 1060.

337. *Id.* at 1065–66 (“It seems abundantly clear from [the] legislative history that sections 793(d) and (e) . . . were intended to criminalize the disclosure to anyone ‘not entitled to receive it.’”).

338. *Id.* at 1078 (“the decisive point is that . . . *Jane’s Defence Weekly*, the ones to whom the defendant transmitted the secret material in this case, did not have a

brought against journalists with *Jane's Defence Weekly*, and two of the three judges on the appellate panel questioned whether such a prosecution would be constitutional, observing that "Morison as a source would raise newsgathering rights on behalf of press organizations that are not being, and probably could not be, prosecuted under the espionage statute"³³⁹ and that Morison's conviction should not be understood as "threatening the vital newsgathering functions of the press."³⁴⁰

In *United States v. Rosen*,³⁴¹ apparently for the first time, the government sought to impose criminal liability on private citizens for receiving and communicating information acquired from an individual who may have unlawfully obtained or disclosed the information. Private lobbyists, Steven J. Rosen and Keith Weissman, were indicted by a federal grand jury and charged under sections 793(d) and (e) of the Espionage Act with conspiring unlawfully to receive classified information from a government official, and with transmitting that information to the press and other third parties.

Rosen and Weissman argued that prosecution under the Act for receiving classified information from a source and publishing it violated the First Amendment. The federal trial judge ruled that the prosecution of an ordinary citizen who was not a public official was permitted under the Espionage Act and was not wholly inconsistent with the First Amendment.³⁴² Nevertheless, the judge held that the statute must be "narrowly and sensibly tailored to serve the government's legitimate interest in protecting the national security" in order to survive First Amendment scrutiny.³⁴³ As a result, a prosecution under the Espionage Act required the government to demonstrate

1. "that the information relates to the nation's military activities, intelligence gathering or foreign policy" and is "closely held" by the government;
2. that disclosure of the information "could cause injury to the nation's security";
3. that the defendant's violation of the statute was willful, i.e., he or she "knew the nature of the information, knew that the person

"Secret" clearance and were thus, to the knowledge of the defendant, not qualified to receive the information.").

339. *Id.* at 1081 (Wilkinson, J., concurring).

340. *Id.* at 1086 (Phillips, J., concurring).

341. 445 F. Supp. 2d 602 (E.D. Va. 2006), *aff'd*, 557 F.3d 192 (4th Cir. 2009). This case is often called the AIPAC prosecution, as the defendants were former employees of the American Israel Public Affairs Committee.

342. *Id.* at 643.

343. *Id.*

- with whom they were communicating was not entitled to the information, and knew that such communication was illegal, but proceeded nonetheless”; and
4. where the information is intangible, as opposed to in physical form, that the defendant demonstrated “bad faith,” i.e., “the defendant had a reason to believe that the disclosure of the information could harm the United States or aid a foreign nation.”³⁴⁴

The government abandoned its prosecution of Rosen and Weissman, effectively conceding that it could not meet the heightened intent requirement the court had imposed.³⁴⁵

Thus, although not yet tested in the courts, First Amendment-based principles well-established in U.S. law “suggest that, at a minimum, the solicitation, receipt, and publication of information by the press can constitutionally be deemed to violate such statutes only if their scope is cabined, by legislative amendment or judicial decision, in material ways.”³⁴⁶ Specifically, legal commenters have concluded

[A]t a minimum, the application of such statutes to the press . . . can survive First Amendment scrutiny only if construed to require that (1) the press conduct at issue be unrelated to communicative acts involving the transmission of information, or (2) the defendant evince some bad-faith purpose other than and beyond the intent to obtain information for the purpose of reporting it to the public.³⁴⁷

Any broader interpretation would run afoul of the constitutional protections that “the Supreme Court has recognized on several occasions” as applying to a “range of press conduct that involves ‘soliciting, inquiring, requesting, and persuading’ sources ‘to engage in the unauthorized and unlawful disclosure of information.’”³⁴⁸

H. The Johannesburg Principles on National Security, Freedom of Expression, and Access to Information

The Johannesburg Principles³⁴⁹ were adopted in 1995 by a group of experts in international law and human rights convened by the interna-

344. *Id.*

345. Levine et al., *supra* note 320, at 1016.

346. *Id.* at 1036.

347. *Id.*

348. *Id.* (citing *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 64 (Ct. App. 1986)).

349. JOHANNESBURG PRINCIPLES, *supra* note 13.

tional advocacy organization Article 19 and the Centre for Applied Legal Studies of the University of the Witwatersrand.³⁵⁰

Drawing on international and regional law, applicable standards, and evolving state practice, the Johannesburg Principles address the extent to which governments may legitimately suppress freedom of expression and access to information in order to safeguard national security. The Principles “set a high standard of respect for freedom of expression, confining claims based on national security to what States can legitimately justify.”³⁵¹ Thus, while recognizing that restrictions on the right to seek, receive, and disclose information are permitted in certain circumstances, the Principles conclude that national security cannot not be a catchall category for prohibiting access to information.

1. RELEVANT PRINCIPLES

Under the Johannesburg Principles, “the public interest in knowing the information shall be a primary consideration” in all laws touching on rights to access and disclose information.³⁵² They expressly cite a number of illegitimate grounds for claiming a national security interest, such as protecting the government from embarrassment and entrenching a particular ideology.³⁵³

Punishment for disseminating information is prohibited in cases where disclosure does not result in actual harm or likelihood thereof, or where the overall public interest is served by disclosure.³⁵⁴ Moreover, where a state seeks to justify a restriction on the disclosure of information “on grounds of national security,” the government

- “must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest”;³⁵⁵
- must establish that the restriction is “necessary to protect a legitimate national security interest,” by evidencing that

350. For more on the Johannesburg Principles, see Toby Mendel, JOHANNESBURG PRINCIPLES: OVERVIEW AND IMPLEMENTATION (2003), available at <http://www.article19.org/pdfs/publications/jo-burg-principles-overview.pdf>; Sandra Coliver, *Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information* in SECRECY AND LIBERTY: NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION (The Hague: Martinus Nijhoff Pubs. 1999), available at <http://www.right2info.org/resources/publications/CommentaryontheJohannesburgPrinciples.pdf>; ARTICLE 19, MEMORANDUM ON MOLDOVA’S DRAFT LAW ON STATE SECRETS 14–15 (2008), available at <http://www.article19.org/data/files/pdfs/analysis/moldovamemorandum-on-moldova-s-draft-law-on-state-secrets.pdf>.

351. Mendel, *supra* note 350, at 1.

352. JOHANNESBURG PRINCIPLES, *supra* note 13, at 11 (Principle 13).

353. *Id.* at 8 (Principle 2).

354. *Id.* at 11–12 (Principle 15).

355. *Id.* at 8 (Principle 1.2).

- the information “poses a serious threat to a legitimate national security interest”;
- “the restriction imposed is the least restrictive means possible for protecting that interest”; and
- “the restriction is compatible with democratic principles.”³⁵⁶

The Principles acknowledge that, even where effective freedom of information legislation is in place, there may still be situations where disclosure is refused and it is only through an unauthorized leak that important information—such as exposure of government corruption or wrongdoing—may become public. Thus, prohibitions on prosecution extend not only to situations where the media publishes classified information, but also to protect the civil servant responsible for the primary disclosure to the media.

2. WIDESPREAD RECOGNITION OF THE JOHANNESBURG PRINCIPLES

The Johannesburg Principles have been “widely endorsed by international law scholars and UN experts,”³⁵⁷ and referenced by courts around the world.³⁵⁸ They have been relied upon by “judges, lawyers, civil society actors, academics, journalists and others, all in the name of freedom of expression.”³⁵⁹ The core conclusion of the Principles—that no person may be punished for the disclosure of information on national security grounds if “the public interest in knowing the information outweighs the harm from disclosure”³⁶⁰—has been endorsed by the UN Special Rapporteur, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur in a Joint Declaration on Freedom of Information and Secrecy Legislation.³⁶¹

I. Council of Europe

Through committee and parliamentary assembly resolutions and recommendations, the Council of Europe has repeatedly recognized

356. *Id.* (Principle 1.3).

357. Coliver, *supra* note 350, at 7.

358. *See, e.g.*, Gamini Athukoral “Sirikotha” v. Attorney-General, 5 May 1997, S.D. Nos. 1–15/97 (Supreme Court of Sri Lanka); *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (House of Lords) *cited in* Mendel, *supra* note 350, at 7.

359. Mendel, *supra* note 350, at 1.

360. JOHANNESBURG PRINCIPLES, *supra* note 13, at 11–12 (Principle 15).

361. Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (2004), *available at* <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&IID=1>. *See also* Mendel, *supra* note 350, at 7–8.

the importance of protecting and encouraging public access to sensitive government information.

On October 6, 2010, the Council of Europe's Committee on Culture, Science, and Education unanimously adopted a Draft Recommendation advocating protection for public interest disclosures based in free expression rights:

Inssofar as Article 10 of the Convention protects the right of the public to be informed on matters of public concern, anyone who has knowledge or information about facts of public concern should be able to either post it confidentially on third-party media, including Internet networks, or submit it confidentially to journalists.³⁶²

This followed the position taken by the Council of Europe Parliamentary Assembly, through the adoption of Resolution 1729,³⁶³ that member states should enact comprehensive legislation protecting whistleblowers who speak up in the public interest. The Assembly also recommended that the CoE Committee of Ministers "look into ways and means of enhancing the protection of . . . journalists, who expose corruption, human rights violations, environmental destruction or other abuses of public authority, in all Council of Europe member states."³⁶⁴

Endorsing the need for a public interest override in legislation governing access to government information, the Council of Europe has taken a formal position that the existence of "an overriding public interest in disclosure" prevails over other concerns, including potential risks to national security.³⁶⁵

Previously, the Committee of Ministers of the Council of Europe recognized the threat to the press in times of crisis, adopting Guidelines related to balancing the freedom of expression and national se-

362. Eur. Consult. Ass., *The Protection of Journalists' Sources*, Doc. No. 12443 ¶ 8 (2010), available at <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=12811&lang=EN>.

363. Eur. Parl. Ass., *Protection of "Whistle-Blowers,"* Res. No. 1729 (Apr. 29, 2010), available at <http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta10/eres1729.htm>.

364. Eur. Parl. Ass., *Fair Trial Issues in Criminal Cases Concerning Espionage or Divulging State Secrets*, Recomm. No. 1792, § 1.2 (Apr. 19, 2007), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1792.htm>.

365. See Convention on Access to Official Documents, art. 3(2), Nov. 27, 2008, CETS No.: 205, available at <http://conventions.coe.int/Treaty/en/Treaties/html/205.htm>. Article 3 of the Convention on Access to Official Documents states that, "unless there is an overriding public interest in disclosure," *id.*, art. 3(2), "[a]ccess to information contained in an official document may be refused if its disclosure would or would be likely to harm" interests including "national security, defence and international relations," *id.*, art. 3(1)(a), and "public safety," *id.*, art. 3(1)(b).

curity interests. The Guidelines urged member states to “protect the right of journalists not to disclose their sources of information” and not require journalists “to hand over information or material . . . gathered in the context of covering crisis situations nor should such material be liable to seizure for use in legal proceedings.”³⁶⁶

Emphasizing the practical and effective implementation of Article 10 of the ECHR, relevant ECtHR jurisprudence, and other Council of Europe texts, the Guidelines state, “There is no need to amend these standards or to elaborate new ones. Instead, we should focus on the practical problems linked to their implementation. At the very least, national governments and parliaments should incorporate these standards into their national regulatory frameworks and implement them rigorously.”³⁶⁷

Observing the importance of investigative journalism on matters of public concern, the guidelines also incorporate a warning from the Committee that crisis situations, such as wars and terrorist attacks, may tempt governments to unduly restrict these rights of media professionals.³⁶⁸

J. International Convention on Civil and Political Rights

Article 19 of the International Convention on Civil and Political Rights (“ICCPR”)³⁶⁹ guarantees the right to freedom of expression, which encompasses the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”³⁷⁰ The ICCPR states these rights are “subject to certain restrictions, but

366. Eur. Consult. Ass., *Guidelines of the Comm. of Ministers of the Council of Eur. on Protecting Freedom of Expression and Information in Times of Crisis*, ¶¶ 13–14 (2007) [hereinafter 2007 Committee of Ministers Guidelines], available at <https://wcd.coe.int/ViewDoc.jsp?id=1188493>. The text is an extension and complement to the Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on July 11, 2002. See also COUNCIL OF EUROPE, FREEDOM OF EXPRESSION IN TIME OF CRISIS: GUIDELINES OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE (2008) [hereinafter 2008 Committee of Ministers Guidelines], available at <http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/coe/coe-guidelines-crisis-en.pdf> (containing the 26 September 2007 guidelines, as well as a Preface to the guidelines by the Rt. Hon. Terry Davis, Sec’y Gen. of the Council of Europe).

367. 2008 Committee of Ministers Guidelines, *supra* note 366, at 5–6 (Preface).

368. 2007 Committee of Ministers Guidelines, *supra* note 366, ¶¶ 1, 3, 17–19.

369. International Convention on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR], available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>. Some 167 States are party to the ICCPR as at June 2013. See Status, International Convention on Civil and Political Rights, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-4&chapter=4&lang=en.

370. ICCPR, *supra* note 369, art. 19, ¶ 2.

these shall only be such as are provided by law and are necessary . . . [f]or respect of the rights or reputations of others [or] [f]or the protection of national security or of public order or of public health or morals.”³⁷¹ The General Comments on Article 19 prepared by the Human Rights Committee, Office of the United Nations High Commissioner for Human Rights,³⁷² are instructive in understanding the intended implementation of this provision, and what qualifies as compliance.

When a state party invokes a legitimate ground for restriction of freedom of expression, such as public welfare or national security, that State “must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”³⁷³ Constraints on the dissemination of information must be directly related and narrowly tailored to the specific need upon which they are predicated, that is, “[r]estrictions must not be overbroad.”³⁷⁴ The Committee provides further guidance in this respect, requiring that restrictive measures “conform to the principle of proportionality,” and be both “appropriate” and “the least intrusive instrument” for achieving their protective function.³⁷⁵ The form of expression at issue is also relevant, with greater protection afforded to matters of public debate.³⁷⁶

Finally, when a state party imposes restrictions on the exercise of freedom of expression, “these may not put in jeopardy the right itself.”³⁷⁷ State parties should avoid state secrets laws that disregard the potential public interest in disclosing confidential government information in a particular case, or adopting catch-all provisions that risk encompassing unrelated, legitimate forms of expression. Thus, the Committee cautions against overly restrictive domestic secrecy legislation; such provisions must be “crafted and applied in a manner that conforms to the strict requirements of paragraph 3 [of Article 19].”³⁷⁸

371. *Id.*, art. 19, ¶ 3.

372. Human Rights Committee, General Comment No. 34 (on Article 19), 102nd Sess., U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter General Comment No. 34], available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

373. *See id.* ¶ 35.

374. *Id.* ¶¶ 22, 34.

375. *Id.* ¶ 34.

376. *Id.*

377. *Id.* ¶ 21. *See also* ICCPR, *supra* note 369, art. 5, ¶ 1 (“nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”).

378. General Comment No. 34, *supra* note 372, ¶ 30.

Any restriction on expression or the dissemination of information constitutes a serious curtailment of human rights, which is amplified in the context of disclosures on matters of public concern. Thus, under the framework of the ICCPR, state secrecy laws should be narrowly tailored to the protection of national security, and proportionate to that aim, taking into account any potential public interests favoring disclosure.

K. African Charter on Human and Peoples' Rights

The Organization of African Unity, now the African Union, adopted the African Charter on Human and Peoples' Rights in 1981. Also called the Banjul Charter, this instrument was created to protect an array of individual and community rights and freedoms across the African continent. The Charter has been ratified by 53 member states of the African Union.³⁷⁹

Article 9 of the Charter protects the individual's right to receive and disseminate information, providing that "[e]very individual shall have the right to receive information" and "shall have the right to express and disseminate his opinions within the law."³⁸⁰

The Charter established the African Commission on Human and Peoples' Rights, which is charged with interpreting the Charter and protecting and promoting human and peoples' rights.³⁸¹ In order to address "in a holistic and comprehensive manner the major threats to freedom of expression and information" in Africa and to "serve as a benchmark to evaluate states['] compliance with Article 9" of the Charter,³⁸² the Commission adopted the Declaration of Principles on Freedom of Expression in Africa.³⁸³

379. *Ratification Table: African Charter on Human & Peoples' Rights*, AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS, <http://www.achpr.org/instruments/achpr/ratification/> (last visited June 12, 2013).

380. Org. of Afr. Unity, *African Charter on Human & Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (adopted June 27, 1981), available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf. The Charter entered into force Oct. 21, 1986.

381. See *About ACHPR*, AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS, <http://www.achpr.org/about/> (last visited June 12, 2013). The Commission was inaugurated in 1987. *Id.*

382. ARTICLE 19, IMPLEMENTING FREEDOM OF EXPRESSION: A CHECKLIST FOR THE IMPLEMENTATION OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION IN AFRICA vi (2006), available at <http://www.article19.org/data/files/pdfs/tools/africa-foe-checklist.pdf>.

383. Afr. Comm'n on Human & Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, Res. 62(XXXII)02 (Oct. 23, 2002) [hereinafter *Declaration of Principles*], available at http://www.achpr.org/files/sessions/32nd/resolutions/62/achpr32_freedom_of_expression_eng.pdf.

The Declaration contains express protections for freedom of information that specifically recognize a right of information stemming from the principle that public bodies hold information “not for themselves but as custodians of the public good.”³⁸⁴ The Declaration further provides that

- the right to information “shall be guaranteed by law”;
- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society”; and
- “secrecy laws shall be amended as necessary to comply with freedom of information principles.”³⁸⁵

III. Recognition of Substantial Free Expression-Based Restrictions on the Prosecution of Journalists under State Secrets Laws

As the forgoing discussion demonstrates, in the international community, principles of free expression are widely recognized as imposing significant constraints on the validity of any prosecution of a journalist for obtaining, possessing, or publishing protected state information in violation of a state secrets or similar law. The jurisprudence surveyed evidences that the constraints emanate from four primary limitations. As such, despite the weighty interests in protecting public security and deterring the unauthorized dissemination of information believed to be detrimental to such security, when the state secrets law is applied to newsgathering activities, that law must, at a minimum, be circumscribed in the following ways:³⁸⁶

First, the law may not be vague, but must expressly and clearly define the scope of information that is protected, such that the zone of risk for criminal sanction is plainly delineated and the terms of the law are sufficiently specific to prevent arbitrary or discriminatory enforcement.

384. Declaration of Principles, *supra* note 383, § IV.1, 2 (“everyone has the right to access information held by public bodies”).

385. *Id.* § IV.2.

386. These restrictions apply equally to provisions that would allow the prosecution of a journalist for aiding and abetting, conspiring, or inducing a violation of a state secrets law.

Second, the law may not be overly broad in its terms or application, but must be narrowly tailored to prohibit only that conduct necessary to accomplish its objective.

Third, the law must incorporate a *mens rea* element or a full public interest defense. Any fault element contained in the law should reflect a subjective intent requirement, that is, should obligate the state to prove that the journalist's actual purpose was something other than obtaining the information to share it with the general public. Alternately, the law should contain a public interest defense applicable to all provisions of the law that prohibits the imposition of any sanction on one who establishes that he or she acted in furtherance of the public interest with regard to information disclosed.

Fourth, the law must incorporate an actual harm test, obliging the government to prove that the information is confidential in nature and that either its receipt or publication by the journalist caused an actual and substantial breach in the secrecy and security of the state. This requirement may be addressed in part by the inclusion of a public domain defense, which prohibits the imposition of any sanction where the information at issue had already lost its confidential character because it was publicly available at the time of it was received or published by the journalist.

Taken together, these restrictions impose formidable obstacles to drafting a state secrets law that would comport with the international principles of free expression at stake in this context.³⁸⁷ Therefore, as this area of the law develops—and as courts, legislatures, and international bodies examine the validity of applying existing state secrets laws to the work of national security reporters—it is likely that the leakage provisions of such laws either will be invalidated as in violation of fundamental free expression rights or substantially limited in their permissible scope. Moreover, because the prosecution of members of the press under state secrets laws is incompatible with free expression principles under all but the most extreme circumstances, the invocation of such laws to investigate, but not charge, a journalist, or to press charges but dismiss the case prior to judicial scrutiny, may well constitute an independent violation of free expression rights.

387. Indeed, the consensus of the international experts convened in preparation of the Tshwane Principles was nearly absolute, concluding that a “person who is not a public servant may not be sanctioned for the receipt, possession, or disclosure to the public of classified information,” unless that person engaged in “other crimes, such as burglary or blackmail, committed in the course of seeking or obtaining the information.” See THE TSHWANE PRINCIPLES, *supra* note 14 (Principle 47).

