File

Duty Clerk.

70 WHITEHALL, LONDON SW1A 2AS

01-233 8319

From the Secretary of the Cabinet and Head of the Home Civil Service

Sir Robert Armstrong GCB CVO

Ref. A084/273

24 January 1984

25 JAN 1984

I expect you will have seen the press reports about Miss Sarah Tisdall who has been charged at Bow Street Magistrates Court with an offence under section 2 of the Official Secrets Act. In accordance with normal procedure I am writing to seek your views about a possible reference to the Security Commission before advising the Prime Minister.

The facts of the case are briefly as follows. On 21 October The Guardian newspaper published detailed information about the delivery of cruise missiles at Greenham Common and the arrangements for their security on arrival. It seemed clear that the newspaper had got its story as a result of a comprehensive leak of information contained in two minutes, which were classified SECRET, from the Secretary of State for Defence to the Prime Minister, and in accordance with our normal procedures, we put in hand an interdepartmental investigation. Subsequently, on 31 October, The Guardian published in full the text of one of those minutes. As it seemed that they had a copy in their possession, the Treasury Solicitor wrote to the editor asking for its return. Through their own solicitors, Lovell, White & King, The Guardian confirmed that they had a copy of the document but, as this had certain markings on it which might assist in the identification of the source of their information, they were prepared to return it only with those markings excised. This was not acceptable to us and legal proceedings were instituted to retrieve it. The Court of Appeal, on 16 December, dismissed an appeal by The Guardian from Mr Justice Scott's order of 15 December that they should return the copy and, while giving leave to appeal to the House of Lords, refused a stay of execution. I enclose a copy of The Times Law report on the case and, if you have not already seen it, I think you will be interested to read particularly Lord Justice Griffiths's remarks.

/ The return

The Rt Hon The Lord Bridge of Harwich

The return of the document did, in fact, enable us to narrow down the area from which the leak had occurred and, at that stage, we called in the police. They were then able to identify the culprit and obtain a confession from her.

Miss Tisdall is a Grade 10 Officer (Clerical Officer equivalent) in the Foreign and Commonwealth Office and she has been working in the Private Office of the Secretary of State. She joined the Foreign and Commonwealth Office in 1980;

As to her motivation for this breach of security and trust, Miss Tisdall has said that she objected first to what she regarded as a lack of effective control by Her Majesty's Government over the cruise missiles at Greenham Common and, second, to what she regarded as an attempt to deceive the public over the reception arrangements for the missiles.

Though this case seems straightforward enough on the face of it, it raises a number of questions of wider application. If before you come to a conclusion about it you would like to discuss it, I should be glad to come over and see you.

ROBERT ARMSTRONG

CLOSED UNDER THE
FREEDOM OF INFORMATION
ACT 2000

From Armstrong 24/1/84

National security requires identification of informant

28

Secretary of State for Defence and Another v Guardian Newspapers Ltd

Before Sir John Donaldson, Master of the Rolls, Lord Justice Griffiths and Lord Justice Slade

[Judgment delivered December 16]

The interests of national security required that the identity of the person who disclosed to *The Guardian* newspaper a memorandum of the Secretary of State for Defence classified "secret" should be established forthwith and accordingly section 10 of the Contempt of Court Act 1981 afforded no defence to the newspaper.

Section 10 of the Contempt of Court Act 1981 provides: "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime".

The Court of Appeal dismissed an appeal by Guardian Newspapers Ltd from Mr Justice Scott's order of December 15 (*The Times*, December 16) that they should return to the plaintiffs, the Secretary of State for Defence and the Attorney General, a photostatic copy of a memorandum prepared by the secretary of state for the Prime Minister.

Leave to appeal to the House of Lords was granted but the court refused a stay of execution.

Lord Rawlinson of Ewell, QC and Mr Peter Prescott for Guardian Newspapers; Mr Simon D. Brown for the plaintiffs.

The MASTER OF THE ROLLS said that the case raised again the extent to which journalists should be allowed to protect their sources of information.

A document entitled "Deliveries of Cruise Missiles to RAF Greenham Common – Parliamentary and Public Statements" was prepared in the Ministry of Defence on or about October 20, 1983. It was classified "secret".

Only seven copies left the ministry. The primary addressee was the Prime Minister.

The next day a photocopy of one of the copies arrived at the news desk of *The Guardian*. No one on the staff knew whence it came or who delivered it. The editor, after inquiries, decided that it was authentic. He also concluded that the national interest would not be damaged by its publication. On October 31 he published it.

On November 11, the Treasury Solicitor wrote to the editor asking him to deliver up the document. On November 17 *The Guardian's* solicitors replied saying that certain markings on the document might disclose, or assist in the identification of, the source of the information to *The Guardian*, although the editor did not know the source and that in accordance with the well established convention of journalism which had statutory force by section 10 of the Contempt of Court Act 1981 he was not prepared to take any step which might lead to the disclosure.

The reply stated that the editor was only concerned to protect his source and was prepared to hand over the document with the markings excised. That was unacceptable and proceedings were begun on November 22.

The principal establishment officer of the Ministry of Defence had sworn that the fact that a document marked "secret" addressed by the Secretary of State for Defence to the Prime Minister had found its way into the possession of a national newspaper was of the gravest importance to the continued maintenance of national security.

It represented a threat to the United Kingdom's relations with her allies who could not be expected to continue to trust her Majesty's Government with secret information which might be liable to unauthorized disclosure and the identity of the person or persons who disclosed the information had to be established for the preservation of national security.

The editor of *The Guardian* in an affidavit in reply spoke of the thought given as to whether it was proper to publish the document and said that *The Guardian* would never publish anything which in the editor's opinion would damage national security.

Whether or not the editor acted in the public interest in publishing the document was not the issue. The secretary of state's concern was quite different. It was that a servant of the Crown who handled classified documents had decided for himself whether classified information should be disseminated to the public. If he could do it on one occasion he might do it on others when the safety of the state would truly be imperilled.

The responsibility for deciding what should or should not be published was that of the government of the day and not that of individual civil servants or editors. It was not the publication of the document which formed the basis of the secretary of state's complaint, but the fact that a copy got into unauthorized hands.

The Crown's case before the judge was very simple. The original document was Crown property and Crown copyright. Any copy of that document was an infringing copy and by the combined effect of sections 2, 4, 18 and 39 of the Copyright Act 1956, the Crown had the same rights in respect of the copy in *The Guardian's* possession as it would have in respect of the original. Accordingly it was entitled to an order requiring *The Guardian*, who relied on section 10 of the Contempt of Court Act 1981, to deliver up the copy.

The judge held that secion 10 of the 1981 Act was not intended to interfere with proprietary rights. He went on to say that if it had been necessary for the Crown to rely upon the exceptions to section 10 he would have refused to make an order at the present stage leaving it to the Crown to establish by evidence called at the trial the actions to which the exceptions applied.

Both parties appealed. *The Guardian* now challenged the Crown's right of property and the judge's construction of the effect of section 10 of the 1981 Act.

The Crown challenged the judge's view that it could not rely upon the exceptions to section 10 in the absence of a full trial.

The matter should be approached from a different point of view. Prior to the 1981 Act it was the practice of the courts to have regard to the conscientious objections of priests, doctors, journalists and others to breaches of undertakings of confidentiality. The courts had to balance competing public interests.

Section 10 of the 1981 Act varied its discretion or practice to the extent that, unless the exceptional circumstances were established to its satisfaction, the court was bound to refuse to require any person to disclose the source of information contained in a publication. The section did not however remove the court's discretion outside that category.

There was a very high degree of probability that the original document was copied using Crown facilities and Crown materials. If that was right, the copy document in possession of *The Guardian* was Crown property.

If contrary to all probability, the original copy was removed from Crown premises and copied using private apparatus, the copy was an infringing copy.

His Lordship could see no grounds for thinking that the original markings which had now been obliterated were not put on by a servant of the Crown in the course of his official duties. Disclosure of the document was needed in order to identify the servant of the Crown who in breach of his statutory duty had copied the document and supplied the copy to *The Guardian*: see *Norwich Pharmacal Co v Customs and Excise Commissioners* ([1974] AC 133).

The real issue in the case was whether the section 10 exception or its common law equivalent was made out. His Lordship did not consider that there was a triable issue which could not or should not be resolved in interlocutory proceedings.

The Crown's case was that it had in its employment a servant or servants who had access to classified information and who were prepared, for reasons which seemed good to them to betray the trust which was reposed in them.

The responsibility for treating what information was to be treated as classified and what should be released to the public domain was that of ministers who were answerable to the nation in Parliament.

It was fully established that the exceptions to section 10 applied. The Crown was entitled to discovery as an aid to pursuing its rights against its dishonest servant: see the *Norwich Pharmical* case and *British Steel Corporation v Granada Television Ltd* ([1981] AC 1096).

Refusal to order delivery up would wholly frustrate those rights and would be contrary to the interests of justice. Furthermore the Crown was threatend with further acts which could constitute very serious breaches of the Official Secrets Acts. The appeal should be dismissed.

LORD JUSTICE GRIFFITHS, agreeing, said that *prima facie* the circumstances pointed towards the copyright covering the entire contents of the document.

His Lordship would not construe section 10 of the 1981 Act narrowly. In such a situation the court had a discretion as to whether it should order delivery up of the document to the plaintiff.

If the only purpose for claiming the document was to discover the source that provided it, the opening words of the section directed the court not to exercise its discretion in favour of the plaintiff unless the case fell within one of the exceptions.

The press had always attached the greatest importance to their ability to protect their sources of information. If they were not able to do so they believed that many of their sources would dry up and that that would seriously interfere with their effectiveness.

Parliament by enacting section 10 had clearly recognized the importance that attached to the ability of the press to protect their sources. No harm could be seen in giving a wide construction to the opening words of the section in view of the later exceptions.

Prima facie, his Lordship would have held that the defendants were entitled to be protected by section 10. However in the particular circumstances he had no doubt that *The Guardian* should be ordered to hand over the document forthwith. It was clearly established that it was necessary in the interests of national security that the source from which the document came should be identified.

To take an unauthorized copy of such a document which was marked "secret" and put it into circulation was the clearest breach of security procedures and of the Official Secrets Act.

The threat to national security lay in the fact that someone probably in a senior position and with access to highly classified material could not be trusted. So long as he was unidentified he presented a very serious threat to our national security. The success of security procedures depended in large measure on the trustworthiness of those who operated them and had access to classified material.

His Lordship regarded it as a matter of urgency that every possible step should be taken to identify the untrustworthy person and remove him from a position in which he had access to classified material.

LORD JUSTICE SLADE, agreeing, said that the order of Mr Justice Scott, being a mandatory order for delivery on an interlocutory motion, the first inquiry must be as to the Crown's rights in respect of the document.

The Crown's evidence established a strong *prima facie* right to be treated as the owner by virtue of section 18 (1) of the Copyright Act 1956.

Mr Prescott submitted that the rights of copyright did not extend to that part of the document which was covered by identification marks, and that if the matter went to trial a severance of that part might be required; see *Warne & Co v Seebohm* ((1888) 39 Ch D 73) and *Nichols Advanced Vehicle Systems Inc v Rees Oliver* ((1979) RPC 127,141). However the facts of those two cases were far removed from the facts of the present case, and his Lordship was not persuaded that there was any substance in the point, which was not argued below.

Section 3 of the Torts (Interference with Goods) Act 1977, gave the court a discretion to award damages, instead of ordering delivery up of the document, but as the judge had pointed out the document was of no intrinsic value and to deprive the Crown of the remedy of delivery would deprive it of any effective remedy at all. If section 10 of the 1981 Act were disregarded the Crown would, at trial, obtain an order for delivery of

2/2 →

Financial Times Saturday December 17

Guardian hands over document

MR PETER PRESTON, editor of The Guardian, has handed over to government lawyers a secret document on cruise nuclear missiles which had been leaked to the newspaper.

Three Appeal Court judges yesterday ruled that national security required that the highly placed government official who passed on the memorandum, which was later published, should be traced and removed urgently.

Lord Justice Griffiths said: "So long as he is unidentified he remains a serious threat to our national security.

The court rejected a plea by The Guardian that it was entitled to protect its anonymous source from being identified by markings on the document.

Mr Preston said he was "very disappointed" at the outcome and was considering an appeal to the House of Lords.

TIMES SATURDAY DECEMBER 17

CAVEAT TALPA

The first impulse of journalists over the affair of the Ministry of Defence leak is of respect and fellow-feeling towards *The Guardian*. If the secret memorandum about the arrival of cruise missiles in Britain had fallen into our hands instead of theirs, we would have used the information therein. Disclosure of items of public interest, is the business of the press, subject to the overriding requirements of justice and national security. It is agreed that the latter was not directly threatened by the information in the leaked paper. If challenged to disclose the identity of the source of a confidential report, the instinct and usually the duty of a journalist is to say nothing and take the consequences, which may in the last resort include imprisonment for contempt. *The Guardian* clearly acted from the best of motives and from an exacting view of the duty of the media. But in the circumstances of this case, it seems to us that the decision (which proves to have been an expensive one) was mistaken.

The hearing was a test case for a clause in the Contempt of Court Act 1981 which gave statutory force to a longstanding convention that journalists should not normally be required to disclose their sources unwillingly. This convention had been overthrown by the House of Lords in a case where British Steel had demanded that Granada TV should say who had given it information, used in a broadcast, which cast a decidedly unflattering light on the company's management. Even when required to by the Lords, Granada rightly refused to expose its informant to dismissal and possible action for damages. BSC eventually dropped its demand. The new law took away the right of courts to require disclosure in such cases; only "the interests of justice or national security or . . . the prevention of disorder or crime" could justify an order to disclose.

The document itself let fall no secrets likely to be of assistance to enemies of the state, but its circulation within the Ministry was very restricted, and the leak implies that one of a small number of individuals with access to exceedingly sensitive material was prepared to commit a breach of trust. It was reasonable for the Appeal Court to find that this had significant implications for national security, that it was the threat of a threat.

The press thrives on notional breaches of trust by its informants, while regarding itself as bound to commit no breaches of trust against them. Many confidences pass every day between the press and people in business or government, and it is very much in the public interest that they should. Ministers are among the readiest to take advantage of these informal contacts, which depend on the maintenance of trust. But the information received by *The Guardian* was in the distinct though growing category of material sent anonymously. The recipient's obligations towards an informant who does not trust him with his identity can hardly be of the same kind as those in a genuine confidential relationship. No explicit or implicit contract exists, and it is almost quixotic to act as if it did.

In the normal way, the recipient would not even be in a position to unmask his informant – if he is, it is only by his informant's oversight. But on this occasion the Ministry hopes that the leaked photocopy may reproduce marks identifying which original copy it was taken from. A photocopy of copyright information is technically the property of the copyright holder, and so the High Court felt obliged to order its return, unmutilated, regardless of the terms of the 1981 Act. Surreptitious leakers will no doubt take account of the implications of this in future, and the flow of unsigned communications to Fleet Street is likely to be channelled into re-typed copies. The protection to confidential journalism embodied in the 1981 Act remains substantially unaffected. If it proves to be inadequate when tested, then the legitimate functions of the media, and the services that they can render to society, would be gravely impaired. But we can cross that bridge if we come to it. Meanwhile, let the mole beware.

---

the document intact in its present state.

The Guardian submitted, in effect, that Mr Justice Scott acted in contravention of section 10 by requiring *The Guardian* to disclose the source of its information, and that the Crown had failed to establish any matters taking the case outside the ambit of the section.

The present case differed in two significant respects from *British Steel Corporation v Granada Television Ltd* the precursor of the 1981 Act, in that, first, the name of the relevant source was known to Granada, and second the relevant documents had been handed over by the time the appeal was heard, so that no question of proprietary remedies arose. The order appealed from was simply to make and serve an affidavit setting forth the relevant name or names.

His Lordship felt some doubts whether section 10 had any relevance at all to the present facts; it was at least arguable that Parliament did not intend thereby to interfere with the rights of owners to recover documents under the general law, even if delivery up of the property in question might incidentally disclose a source of published information.

A pointer in the opposite direction might be that delivery of a document having no intrinsic value other than as a means of identifying the source would at least seem to offend against the spirit of the section.

On the other hand there was force in Mr Brown's submission that the section was merely to place restrictions on an order for disclosure by oral evidence or affidavit, such having been the type of order sought in the *British Steel* case.

In the present case *The Guardian*'s editor had stated "*The Guardian* does not know and has no means of finding out who the source is." There was no certainty that the effect of the order sought by the Crown would in fact involve disclosure of *The Guardian*'s source of information, since that depended entirely on whether the partially blacked out markings would lead to that source.

It was at least arguable that a publisher praying section 10 in aid must satisfy the court by affirmative evidence that the effect of the order would and not merely might reveal the source.

His Lordship in any event was satisfied that delivery of the document was necessary in the interests of national security. It was common ground that its publication did not jeopardize national security, but that was not the relevant point.

What was relevant was that the person responsible for the leak must have betrayed his trust, and while it appeared in the present case that no security risk had been involved, the court must take judicial notice of the fact that a future leakage of many other secret documents from the Ministry of Defence might gravely prejudice national security if published.

His Lordship also considered that disclosure was necessary in the interests of justice. *The Guardian* would suffer no damage, and could not be criticized on the ground of failure to take adequate steps to protect the confidentiality of its unknown source. Whereas if the Crown were compelled to wait until trial it could well suffer irreparable damage through the further activities of the unknown informant.

Thus to deny the remedy sought would be a significant denial of justice, and the balance of convenience was overwhelmingly in favour of an order being made. The appeal should therefore be dismissed.

Solicitors: Lovell, White & King: Treasury Solicitor.

9

2/3