

# **The Limitations of Confidentiality in Governments**

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## Introduction

The requirement of confidentiality in regards to certain government issues is one of the most well-known forms of confidentiality. Modern international relations require modern countries to keep certain issues out of the public eye by keeping materials confidential.<sup>(1)</sup> Throughout history, the practice of confidentiality within and between international governments has fluctuated in times of war and peace, and has been contingent on the strength of individual diplomatic relationships between nation states. What is treated as confidential, and how it is protected has shifted with the shifting of borders and national sovereignties, as well as models of government over time.

What is understood by the term ‘confidentiality’ when it is applied to government practice is that most governments require the hiding or censorship of particular types of information from the public. Although most governments make a claim of transparent dealings and allow varying degrees of public access to parliament and legislative records, in order to function effectively, all governments also retain the right, particularly in cases of military applications, to label information as secret or confidential and to protect it so the general public is not allowed access to it. The quality, type and quantity of the information that will be defined as confidential may vary from one country to another, and what might be treated as confidential material at a certain time, may not be so treated in another. Moreover, often confidentiality laws have an expiry date; in the interests of the public’s access to information, the classification of documents as sensitive expires over a period of time, and they become part of the public record

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(1) Administrators and Executives prefer to call it confidentiality; on the other hand, the public and journalists prefer to call it secrecy.

when their sensitive nature has ‘worn off’; ‘Government secrecy in democracies is a result of a deliberate act on the part of those who govern to keep the governed from knowing something at a given point in time’.<sup>(1)</sup>

Authoritarian governments tend to retain more discretion over what material they treat as confidential. Administrators or executives granted the power can decide that certain information is confidential, and prevent the public from access, relying on an informal code of conduct. Countries with less unilateral power structures control the flow of information in more democratic and legal way by enacting laws, and classifying in public and accountable ways which types of information are considered confidential.<sup>(2)</sup>

### **The characteristics of confidential information**

In this regard this research will start by answering the question, what is government confidentiality? It may further the analysis of the question to distinguish three categories of information whose confidentiality is important to effective government. The first has to do with the process of decision-making, the second includes those matters that can affect the integrity of the state. The third category covers the international relationships between states. Therefore the question that has arisen is whether this means that all the papers that are involved fall within the class of government confidence because they forms part of a process that must be confidential. According to the Bahraini law of protection of states confidential information Article 3<sup>(3)</sup> has classified such informa-

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(1) F. Carl, ‘Government propaganda is by and large identical to government secrecy; the pathology of politics’, New York: Harper & Row, 1972, p 175 - 209.

(2) For example; the Official Secrets Act 1911 was passed when the UK was under military threat from Germany during the Agadir Crisis.

(3) See Bahraini law of protection of states confidential information 2014, Article 3

tion into three categories: (1) highly confidential, (2) confidential, (3) restricted.

The grounds for this classification are how harmful is the disclosure of such information to the country, where disclosure will result in very dangerous harm to the country, or it will cause harm without specifying what is the nature of such harm, or where the disclosure will cause limited harm to the country or to its interests. This ground as to whether the disclosure would or would not cause an injury that would be serious for the state, which means it not such information should not be confidential. To answer this question, we need to answer another question which is: who decides what paper or information falls into the protected category. Should it be the responsibility of the ministers to do so, or the CEOs of the companies owned by the government (50%) and above<sup>(1)</sup>.

The complex facts and considerations that are relevant to the decision are placed in a separate background paper. It deals with facts and considerations not with opinions or proposals. It is not, therefore, regarded as a government confidence, as stated, the government paper may be confidential for reasons that relate to its particular substance which leads to the second category – information that relates to the integrity of the country. The concern here relates to matters of information about the state's integrity such as defence, national security and international relations. Also it may include specific financial information at certain times.

The third category of confidential government information embraces a variety of classes of documents whose disclosure, while not harmful to the decision-making process or the integrity of the state, could injure a variety of individual or sectional inter-

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(1) Ibid, Article 1

ests, including certain interests of government such as contractual arrangements of the development of negotiating positions. This third category would also encompass information relating to police and other investigations, matters before the courts, legal advice, communications between governments and private individuals, and commercial information of importance for particular individuals.

### **What is government confidentiality?**

Government confidentiality that is regulated by legislation tends to be defined as applying to certain categories of information. Government confidentiality laws divide sensitive material into categories of national security secrets, military secrets, material affecting diplomatic and international relations that must be kept secret, and nuclear secrecy. The disclosure of any information touching these matters, or attempting to access documents defined as confidential can be considered a criminal offence.<sup>1</sup>

### **The classifications of documents**

This is very crucial question: who has the power to decide what is to be considered confidential and what is not? In all countries, government officers carry the responsibility of deciding what is confidential or secret, but the essential question is, whether everything that is given the label 'confidential' by a government label ought truly to be defined so. Liberal opinion often asserts that certain issues the general public should know about are concealed by governments in their own political interests alone, without the justification of some greater national interest.

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(1) Atomic Energy Act 1946.

Therefore, the person who is responsible for classifying the documents and labelling them as falling within one certain category or another, should be part of a system in which the people who impose the mark of confidentiality are satisfied that the reasons do fit under one of the established categories. The mark should indicate what is the reason for its imposition, in other words, there should be different marks for the different categories carrying the reasons for such classification.

All of this may sound very technical, but it is fundamental to the translation of agreed principles into effective operation. The success in solving these problems will determine, to a large degree, the success of a more open system and the reduction of disputes about its application.

The imposition of appropriate marks of classification must be taken as a serious responsibility by all officers, ministers, CEOs or any other responsible person who deals with documents that require protection and especially by senior officers. The current tendency is to over classify, to play it safe. With new and clear rules accurate classification rather than safe classification should be as “accountable” as other elements of administration.

### **Governmental justification of secrecy**

No matter how it is defined, confidentiality consists of a body in power retaining secrets from its citizens. The main reasons given by governments usually consist of justifying the confidentiality, firstly, as an attempt to protect the citizen, secondly to protect the democratic institutions and, thirdly, to protect the nation’s participation in or position with the community of nations.<sup>(1)</sup> One

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(1) See R. T. Reagan, ‘Keeping government secrets: A pocket guide for judges on the state secrets privilege, the classified information procedures act and court security officers’, Federal Judicial Centre, 2007 available at: [www.fjc.gov/public/pdf.nsf/lookup/secrets1.pdf/\\$file/secrets1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/secrets1.pdf/$file/secrets1.pdf)

essential reason cited by governments for keeping some information secret is to protect national integrity and sovereignty from enemies.<sup>1</sup> However, another opinion would be that governments keep secrets for the purpose of protecting specific, and less ethically sound, hidden agendas.<sup>(2)</sup>

‘Just as individuals require privacy, states require a degree of secrecy in order to function: the question facing the democratic states is where to draw the line between what information should be kept secret in order to safeguard security and what information should be made freely available to the demos’.<sup>(3)</sup>

Maintaining levels of confidentiality is very important for international surveillance and intelligence, as intelligence agents can be treated as spies if they are captured, and diplomacy requires secrecy while negotiating nations bargain with the knowledge that is their power. Less ethically, some governments maintain confidentiality over illegitimate incidents or conceal knowledge in international relations to avoid criticism and to control public opinion. In such incidents, stringent confidentiality is coupled with powerful propaganda or misinformation, as in the case of North Korea.<sup>(4)</sup>

Even in more democratic governments, national security requires a certain level of confidentiality.<sup>(5)</sup> Although it is couched

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(1) Ibid

(2) Ibid

(3) See A. Rogers, ‘Security and Power in the British State; a History of the Official Secrets Act’, Pluto Press, London, 1997, p1.

(4) A. Westin, ‘Privacy and Freedom’, New York, Atheneum, 1967, page 7.

(5) Some British researchers used to gain information about the UK from the United States; for example Charles Medawar, the Director of Social Audit, reveals that he was able to get information about British companies from Washington. See J. Michael, ‘The Politics of Secrecy’, Penguin Books, 1982, p 9. However, much more information (quality and quantity) has been classified as confidential in the United States, since the September 11th attacks.

passively as being necessary in order to protect the public from harm, confidentiality has also proved essential to the successful development, implementation and completion of military actions, diplomatic plans and intelligence missions. Broad secrecy that covers technological advances can also be related to the protecting of key export or military technologies.

Confidentiality is also essential to the effective conduct of developing diplomatic negotiations; the secret diplomacy that preceded President Nixon's trip to China in 1972 was essential to the specific outcome of those ongoing negotiations.<sup>(1)</sup>

National security is one of the state's most potent justifications for harsh laws governing confidentiality. To threaten national security is to undermine the sovereignty over territory that governments maintain. To be branded a 'traitor' is the most serious crime an individual can commit; in the UK it still carries the death penalty. The problem faced in the forum of public opinion and international law is that the calculations of national security are always subjectively political. No overarching 'objective' or legal definition of national security exists.<sup>(2)</sup>

### **Minimal censorship is better**

The UK has one of the most extensive systems for controlling the flow of official information to the public of any western democracy.<sup>(3)</sup> For the last century, it has been a criminal offence to reveal official information without authority. Over 100 statutes prohibit disclosure of information of all kinds.<sup>(4)</sup> A powerful and persistent culture of secrecy reflects a basic assumption that

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(1) J. Michael, 'The Politics of Secrecy', Penguin Books, 1982, p 9.

(2) Ibid.

(3) Ibid.

(4) Ibid.

good government is a self-contained and closed government. This can be seen as a paternalistic attitude to the public on the part of the government; suggesting that the public should only be allowed to know what the government determines they should know.<sup>(1)</sup>

The majority of publications in this field have criticised governments for the rapid expansion of categories of information which have been classified as confidential and through which the public has been prevented from knowing the details of events that might otherwise be seen as important, particularly where it pertains to human rights. The state secret defence has been raised more frequently these years especially after the attacks of September 11th 2001 that began the 'War on Terror'; government initiatives aimed at preventing similar terrorist attacks in a response to the fear that these were part of a concerted attempt on the part of radical Islamic activists to destroy democratic society. 'Every government has an interest in concealment; every public in greater access to information.'<sup>(2)</sup>

Professor Goldfarb states in his objection to this trend that, 'Government records are the public's records. If the public cannot scrutinize government policies by checking government records, democratic society is endangered.'<sup>(3)</sup> In the Franks Committee report, the trend towards indiscriminate government confidentiality

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(1) In the late nineteenth century, the number of newspapers and readers grew. This created demand for more information, and the problem of how to keep information away from the general public and the press began to preoccupy Whitehall. The response of ministers and civil servants was to create a strong statutory framework that would enforce secrecy and replace the previously accepted common code of conduct among the elite. See C.Ponting, 'Secrecy in Britain', Basil Blackwell, 1990 p2.

(2)S. Bok, 'Secrets: on the Ethics of Concealment and Revelation', 1982, pp 48 - 56.

(3)R. Goldfarb, 'In Confidence; When to Protect Secrecy and When to Require Disclosure', Yale University Press, New Haven & London, 2009, p 57.

laws is described as a disturbing one: 'The leading characteristic is its catch-all quality. It catches all official documents and information. It makes no distinction of kind, and no distinction of degree. All information which a Crown servant learns in the course of his duty is "official" for the purpose of section two, whatever its nature, whatever its importance, whatever its original source. A blanket is thrown over everything: nothing escapes.<sup>(1)</sup> The fear is that governments will use information selectively, releasing only that information which is to their credit or underlines the credibility of their openness, and that this reduces the requirement of accountability to a meaningless incantation.'<sup>(2)</sup>

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(1) Franks Committee Report, Comnd 5104, Para. 17, 1972.

(2) Robertson. K. G, ' Public Secrets; A study in the development of government secrecy', The Macmillan Press, 1stedn, 1982, p 11.

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