

**IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS**

UNITED STATES,

Appellee

v.

Private First Class (E-3)
CHELSEA MANNING,
United States Army

Appellant

BRIEF SUBMITTED BY AMICUS
CURIAE, THE OPEN SOCIETY
JUSTICE INITIATIVE,
IN SUPPORT OF APPELLANT

Docket No. ARMY 20130739

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I.

INTEREST OF AMICUS CURIAE

The Open Society Justice Initiative ("the Justice Initiative") uses law to protect and empower people around the world, supporting the values and work of the Open Society Foundations. Through litigation, advocacy, research, and technical assistance, we secure legal remedies for human rights abuses, and promote effective enforcement of the rule of law. The Justice Initiative has extensive expertise concerning international law and practice in the area of national security. In particular, we facilitated the drafting by 22 academic centres and organizations around the world of the Tshwane Principles on National Security and the Right to Information,¹ which were developed in order to provide guidance to those engaged in drafting, revising, or implementing laws or provisions relating to the state's authority to withhold information on national security grounds and to punish the disclosure of such information. They are based on international and national law, standards, good practices, and the writings of experts. Issued in June 2013, they have already been widely

¹ The Justice Initiative commissioned and analysed more than 2 dozen papers and held 14 meetings around the world, at which we consulted more than 500 government officials, security professionals, intergovernmental representatives, academics, and civil society experts from over 70 countries. For the text of the Principles, endorsements and supporting research see <http://www.right2info.org/exceptions-to-access/national-security/global-principles>.

endorsed, including by the European Parliament, the Parliamentary Assembly of the Council of Europe, and key inter-governmental experts.²

II. SUMMARY OF THE ARGUMENT

The U.S. Supreme Court and lower courts have long referenced international law and the law and practice of other countries in assessing whether a penalty for a crime is unduly harsh. The Justice Initiative has researched the laws and case-law of more than 30 countries, including the U.S.'s closest allies, concerning penalties for unauthorized disclosures. This research shows that in at least 12 countries, penalties for the unauthorized public disclosure of national security information are limited to five or fewer years' imprisonment absent proof of espionage, treason, delivery to a foreign state, or intent to prejudice the country's security or defense. The laws of most other countries surveyed provide for maximum penalties of up to 10 years' imprisonment, except for Canada's law, which authorizes penalties of up to 14 years but includes a public interest defense. Recent cases, including for multiple disclosures that caused grave harm, have resulted in penalties of less than 10 years where the state did not prove that the defendant intended to harm the security of the state. Moreover,

² *Id.*

international law recognizes that high public interest in unauthorized disclosures, even if they cause some harm to national interests, should be considered as a factor that mitigates the penalty. Although many of the documents that Manning disclosed were of no or little public interest, many others clearly were. The public interest value of some of the disclosures justifies mitigation of the sentence and reinforces a finding that Manning's overall motive was to advance the public interest.

Accordingly, we respectfully request that this honorable Court take into consideration that the sentence imposed upon PFC Manning by the trial court is far higher than the penalties that our closest allies would consider proportionate in light of the evidence regarding her motive and intent, and the public interest value of some of the disclosures.

III.

THIS COURT SHOULD TAKE INTO CONSIDERATION INTERNATIONAL AND COMPARATIVE LAW AND PRACTICE IN ASSESSING WHETHER THE PENALTY OF 35 YEARS' IMPRISONMENT IS CRUEL AND UNUSUAL.

Over the past 50 years, U.S. courts' jurisprudence on what constitutes cruel and unusual punishment under the Eighth Amendment has reflected "evolving standards of decency" in a "civilized" society. The standards are not frozen in time, and U.S. courts have consistently looked to international law as

well as to the relevant national law of countries that face challenges similar to those confronting the United States in determining the appropriateness of penalties.

In *Thompson v Oklahoma*, 487 U.S. 815, 830 (1988), the Supreme Court noted the practices of other countries in holding that the punishment of death by shooting did not violate the Eighth Amendment. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court, in ruling the death penalty cruel and unusual punishment for crimes committed by mentally disabled offenders, referenced the disapproval "within the world community" of the death penalty in such circumstances. *Id.* at 316 n. 21. In 2005, in striking down the death penalty for fifteen-year olds, the Court characterized international authority as "instructive for [the Court's] interpretation" of the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 575 (2005). In 2010, the Court again recognized the value of "the judgment of the world's nations," citing foreign laws and practice that prohibit life without parole for juveniles as evidence that "demonstrates that the Court's rationale has respected reasoning to support it." *Graham v. Florida*, 560 U.S. 48, 80 (2010).

IV.

IN COUNTRIES THAT ARE THE MAIN ALLIES OF THE UNITED STATES, A SOLDIER WHO COMMITTED THE ACTS OF WHICH MANNING WAS FOUND GUILTY WOULD HAVE RECEIVED A FAR LESSER PENALTY THAN 35 YEARS' IMPRISONMENT.

The Justice Initiative has researched the laws and jurisprudence of more than 30 countries and has gathered information from experienced lawyers about the penalties that a soldier who committed the acts of which Manning was found guilty, with the intent and motive that she displayed, would likely have received in their countries. The countries surveyed include eight of the U.S.'s closest allies: Australia, Canada, New Zealand, and the United Kingdom, which together with the US comprise the "Five Eyes," and with which the U.S. shares nearly all of its signals intelligence; as well as Israel, France, Germany, and Spain. The names and relevant credentials of the experts consulted are included as Appendix A. An overview of the relevant penalties is set out below, along with summaries of case-law most relevant to Manning's case from Israel, Canada, and the U.K. Excerpts of the legislation and summaries of the case-law of all 30 countries are set forth in Appendix B.

A. Overview of Penalties

In at least 12 countries, penalties for the unauthorized public disclosure of national security information are limited to five or fewer years' imprisonment, unless the state proves

that there is espionage, treason, delivery to a foreign country, or intent to prejudice the country's security or defense. This is the case in key allies including Australia and the U.K. (2 years), as well as New Zealand and Slovenia (3 years), Panama and Spain (4 years), Colombia and Norway (4.5 years), and Belgium, Mexico, Paraguay and Poland (5 years).³

The laws of most other countries surveyed provide for maximum penalties of up to 10 years' imprisonment. These include France (7 years), and Germany and Israel (10 years). The laws of countries that contain more severe penalties often contain restrictions or safeguards: for example, Canada's law sets forth a maximum penalty of 14 years, but also includes an express public interest defense, and other legal principles ensure that even multiple counts would be unlikely to result in a penalty of much more than 14 years. Recent cases from the U.S.'s close allies, including for multiple disclosures that caused grave harm, resulted in penalties of less than 10 years, except where the Government proved intent to harm the security of the state.

B. Israeli Law

Leaks do occur in Israel, but there have been only a few prosecutions, in part because it is rare for Israeli courts to order a reporter to disclose his or her sources. The case most

³ See Appendix B for excerpts of the relevant laws.

similar to the Manning case is that of Anat Kamm.⁴ While a soldier with the Israel Defense Force (IDF) central command, aged 20 years, she copied 2,000 documents from her commander's computer to a CD. After leaving the IDF, she leaked the documents to an Israeli reporter, Uri Blau. Blau published articles stating that the documents proved that "the IDF approved assassinations in the West Bank even when it could have been possible to arrest the targets instead, and that top-ranking army officers authorized the killings in advance, in writing, even if innocent bystanders would be killed as well."⁵ Legal scholars opined that the documents showed that the IDF had intentionally violated a 2006 decision of Israel's Supreme Court.

Yuval Diskin, chief of the Israeli intelligence service Shin Bet said, more than 16 months after the initial disclosure, that some of the documents were "super classified;" still "had the potential to cause grave damage to state security;" and, should they end up in enemy hands, "would effectively endanger the

⁴ See Kamm's indictment (translated into English) at <https://reider.wordpress.com/2010/04/08/rolling-anat-kamm-thread-indictment-english/>; and Asher Zeiger, *Court reduces sentence of ex-soldier who leaked classified documents to reporter*, The Times of Israel, Dec. 31, 2012, <http://www.timesofisrael.com/court-reduces-sentence-of-ex-soldier-who-leaked-classified-documents-to-haaretz-reporter/>.

⁵ Uri Blau, *IDF ignoring High Court on West Bank assassinations*, Haaretz, Nov. 26, 2008.

lives of IDF soldiers and Israeli civilians.”⁶ Kamm was indicted for aggravated espionage with intent to harm the security of the state under Article 113(b) of the Penal Code of 1977, which carries a maximum penalty of life in prison. She confessed to the possession and transfer of classified documents in violation of Article 113(c), and unauthorized transferring of secret information in violation of Article 113A, each of which crimes carries a maximum penalty of 15 years; and the crime of aggravated espionage was dropped. She was sentenced to 4.5 years in prison. On appeal, the Supreme Court of Israel reduced the sentence to 3.5 years, reasoning that the trial court had not given proper weight to the following circumstances:

- her admission of guilt and expression of regret;
- her cooperation with authorities and her return of documents that the authorities had not been able to locate;
- her young age; and
- the absence of any prior offenses.

One of the justices in the majority noted that ideological crimes are dangerous because they are based on a sense that "the end justifies the means,"⁷ but that this is not as condemnable as

⁶ Ynet reporters, *Journalist accused of leaking secret IDF documents*, Ynetnews, April 8, 2010.

⁷ *State of Israel v. Anat Kamm* (2010), District Court of Tel Aviv Jaffa, <https://reider.wordpress.com/2010/04/08/rolling-anat-kamm-thread-indictment-english/>. Summary of the case and translation of quotes from the Supreme Court decision were

other motives, such as acting for personal profit. Kamm's motives were not "Anti-Israeli" but rather sprung from an interest in exposing wrong-doing in the military. The other justice in the majority noted that the disclosure was to an Israeli journalist rather than a foreign agent and that the motive was to serve the public interest.

The cases of Kamm and Manning can be distinguished on the facts from that of Mordechai Vanunu, an Israeli former nuclear technician who revealed details of Israel's nuclear weapons program to the press in 1986, and received an 18-year sentence. Israel's nuclear capability lies at the heart of Israel's national security, and is its most closely guarded secret. Vanunu was found guilty of three crimes including intent to aid the enemy in time of war (Penal Code Art. 99), which carries a maximum penalty of death. The contrast between his case and Manning's is highlighted by the findings of the Supreme Court when upholding his conviction and sentence: Vanunu was not motivated by an altruistic motive and was not contrite; he disclosed the secrets in order to harm the nuclear project; and "the extreme severity [of the disclosure] is self-evident... the harm caused by the appellant's crime is multi-faceted and has

supplied by Roy Peled, a Constitutional and Administrative Law Professor at the Striks Law School in Rishon LeZion, Israel.

long-term implications." Nonetheless, even such a convicted "traitor" was sentenced to only 18 years' in prison.

Applying the reasoning of the above cases, Manning likely would not have received a sentence of much more than the 3.5 years' to which Kamm was sentenced. Like Kamm, Manning admitted guilt, expressed regret, was young when she made the disclosures, had an altruistic motive to serve the public interest, and had no prior offenses. Her disclosures were found to have caused harm, but arguably no more than did Kamm's. Certainly, her disclosures caused nowhere near the harm that the Israeli military and court considered Vanunu to have caused.

C. Canadian Law

The crime in Canada which most closely fits with the acts for which Manning was found guilty is Section 14(1) of the *Security of Information Act (SOIA)*,⁸ which provides: "Every person permanently bound to secrecy commits an offense who, intentionally and without authority, communicates or confirms special operational information." Special operational information is defined in section 8(1) to include "information that the Government of Canada is taking measures to safeguard that reveals, or from which may be inferred," the content of military plans, the objects of covert operations, the identity

⁸ *Security of Information Act*, R.S.C. 1985, c O-5 (Can.) [SOIA].

of covert agents, and intelligence gathering techniques employed by the government.

Upon conviction, defendants are liable to a term of imprisonment of not more than 14 years.⁹ Generally, sentences under the *Criminal Code* are not ordered to be served consecutively where "there is a reasonably close nexus between the offenses in time and place as part of one continuing criminal operation or transaction".¹⁰ Even if sentences are ordered to be served consecutively, there are limits on the duration of the sentence. The *Criminal Code* states that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh".¹¹ In *R. v. Johnson*, the Court of Appeal for Ontario held that a sentence may be unduly long or harsh if "the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offenses involved, or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his record and prospects".¹²

⁹ SOIA, sec. 14(2) reads: "Every person who commits an offence under subsection (1) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years."

¹⁰ Clayton Ruby, Gerald Chan & Nader Hasan, *Sentencing*, 8ed (Markham) at 544 [Ruby] citing *Hatch*, [1979] N.S.J. No. 520 at p. 113 (NSCA); *Criminal Code*, sec. 718.3(4)(b)(i).

¹¹ *Criminal Code*, R.S.C. 1985, C-46 (Can), sec. 718.2(c).

¹² *R. v. Johnson* (2003), 2 S.C.R. 357, 2003 SCC 46 (Supreme Court of Canada), at para. 17, citing to Clayton Ruby, *Sentencing*, 4th ed (Toronto: Butterworths, 1994), at 44-45.

The *SOIA* has "never been used to charge a person who disclosed information to the press".¹³ The first and only person sentenced under the *SOIA*, passed shortly after the September 11 terrorist attacks, was a Canadian navy officer, Jeffrey Delisle, who sold sensitive information to the Russian government.¹⁴ He was arrested and pled guilty to two offenses under section 16(1) of the *SOIA*, which carries a maximum penalty of life imprisonment, for communicating safeguarded information to a foreign entity with intent "to increase the capacity of a foreign entity ... to harm Canadian interests" or is "reckless as to whether the communication of the information is likely to increase the capacity of a foreign entity ... to harm Canadian interests," (sec. 16(1)(b)) and one offense of breach of trust under sec. 122 of the *Criminal Code*.¹⁵ Military experts who testified at the sentencing hearing said the officer's actions caused "exceptionally grave" harm to the country,¹⁶ and that allies had threatened to withhold intelligence from Canada

¹³ Mark Friedman, "Edward Snowden: Hero or Traitor? Considering the Implications for Canadian National Security and Whistleblower Law" 24 *Dal J Leg Stud* 1, 10 (2015).

¹⁴ Jane Taber, *Canadian spy Jeffrey Delisle gets 20 years for selling secrets to Russia*, The Globe and Mail, Feb. 8, 2013; *R. v. Delisle* (2012), NSPC 114 (Provincial Court of Nova Scotia).

¹⁵ Department of Justice, "Pre-Sentence Report", *Queen v. Jeffrey Paul Delisle*, 28 December 2012 at 2.

¹⁶ Jane Taber, *Canadian spy Jeffrey Delisle gets 20 years for selling secrets to Russia*, The Globe and Mail, Feb 8, 2013.

unless it tightened security procedures.¹⁷ In February 2013, Delisle was sentenced to terms of 20 years, 9 years, and 5 years, to be served concurrently.¹⁸

There are at least two reasons to believe that Manning's sentence of 35 years would, in Canada, be found to be "unduly long or harsh" and that she likely would have received a sentence of less than 14 years. First, the offenses under which Manning would have likely been prosecuted carry a maximum penalty of 14 years' imprisonment. Typically, in Canada, even when a defendant is convicted of multiple offenses, the aggregate sentence will not be more than the maximum sentence for the most serious crime, and may be less especially where the offender is young and has no prior criminal record.¹⁹ Second, Jeffrey Delisle, who was found to have delivered classified information to Russia with intent to increase Russia's capacity "to harm Canadian interests," and in exchange for money, was sentenced to only 20 years.

D. United Kingdom Law

The closest crime under United Kingdom (U.K.) law to the crimes of which Manning was convicted is "Disclosure of

¹⁷ Eric Martyn, *Canadian officer who spied for Russia jailed for 20 years*, Reuters, February 8, 2013.

¹⁸ *Id.*

¹⁹ Paul Schabas, memo dated April 25, 2016, on file with the Justice Initiative; and *R v Johnson*, *supra* note 12.

information useful to an enemy," punishable by up to 2 years' imprisonment. Section 17(1) of the Armed Forces Act 2006 reads:

A person subject to service law commits an offence if—
a) without lawful authority, he discloses information that would or might be useful to an enemy; and
b) he knows or has reasonable cause to believe that the information would or might be useful to an enemy.

The most similar civilian crime is set forth in section 1 of the Official Secrets Act 1989, and carries the same maximum penalty of 2 years' imprisonment (see sec. 10 of the 1989 Act). Section 1 provides:

A person who is or has been (a) a member of the security and intelligence services ... is guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force.

The 1911 Act includes a more serious offense, Section 1(c), which is punishable by 14 years in prison. But that section requires proof of a purpose "prejudicial to the safety or interests of the State," which Manning has not been shown to have possessed.

In the U.K., there have been no convictions under the 1911 or 1920 acts since passage of the 1989 Act. The heaviest sentence meted out pursuant to the 1989 Act was in the case of Navy petty officer Steven Hayden who, in 1998, sold significant security and intelligence information to a newspaper concerning a plot by

Saddam Hussein to launch anthrax attacks in the U.K. He was sentenced to 12 months in jail. Closer to Manning's offenses were those committed by David Shayler, a former MI5 member who gave a newspaper 28 security and intelligence files on a variety of topics, including on Libyan links with the IRA, Soviet funding of the Communist party of Great Britain, agents' names, and other highly sensitive information.²⁰ He was sentenced to six months and was released after serving seven weeks. The judge criticized Shayler for having "taken it upon himself to decide what he thought was in the public interest."²¹

Manning also arguably could be found guilty of committing an offense under section 2(1)(a) of the Computer Misuse Act 1990, which carries a maximum penalty of five years' imprisonment.²²

E. Australian Law

In Australia, the two offenses most similar to the crimes of which PFC Manning was convicted are section 79(3) of the Crimes Act 1914 (Cth), which prohibits the communication by a public servant, including a member of the Armed Forces, of an

²⁰ *Regina v. Shayler* (2001), 2001/02869/S4 (Supreme Court of Judicature, Court of Appeal, United Kingdom).

²¹ House of Commons Library, Briefing Paper No. CBP07422, the Official Secrets Acts and Official Secrecy (Dec 17, 2015), at p. 22.

²² See Appendix B for relevant statutory language. Note that sec. 3ZA of the Computer Misuse Act, which carries a maximum penalty of life imprisonment, was enacted only in 2015, and thus could not have been applied to Manning even if she had been found to have had the requisite intent to cause "serious damage" to national security.

"official secret" to any person not authorized to have access to the secret; and section 58(1) of the Defense Force Discipline Act, which makes it a crime for a defense member or civilian to disclose information without authorization where the disclosure "is likely to be prejudicial to the security or defense of Australia." Both offenses are punishable by a maximum of two years' imprisonment.

The case most pertinent to PFC Manning's case is *R v. Lappas*, 152 ACTR 7 (Court of Appeal of the Supreme Court of the Australian Capital Territory, 2003). The defendant, an intelligence analyst with the Defense Intelligence Organization (DIO), was the first person convicted for espionage in Australia. (*Id.* at para 115.) He had given top secret reports on two occasions to a prostitute in order for her to sell them to a foreign power, as payment for her services. The foreign power was not interested and the defendant eventually reported himself to the DIO. The trial court sentenced him to 12 months for one charge of espionage in violation of section 78(1)(b), -- unauthorized disclosure "for a purpose intended to be prejudicial to the safety or defense of the Commonwealth" -- which carried a maximum penalty of seven years and is no longer in force; and three months for disclosure of official secrets in violation of section 79, the sentences to be served concurrently. (*Id.* at para. 57.) The state appealed, claiming

that the sentence was grossly inadequate. The Court of Appeal of the Supreme Court of the Australian Capital Territory (the highest court of ACT) resentenced the defendant to two years for the espionage charge and six months for the official secrets charge, to be served in part concurrently, for a total of 27 months, with the defendant to be eligible for parole after six months.

The court's reasoning was supplied by a joint opinion of two of the court's three judges. On the one hand, the documents were labelled top secret, signifying that compromise of the information could cause "exceptionally grave damage" to national security. (*Id.* at para. 60.) Moreover, the defendant had written on one document the names of two of the DIO's confidential sources. (*Id.* at para. 70.) The annotations formed "a particularly reprehensible act ... calculated to place in jeopardy not merely the interests of the Commonwealth, but also the safety and well-being of the persons named." (*Id.* at para. 130.) The two judges concluded that it "is difficult to imagine many more serious examples of this crime." (*Id.* at para. 130.) Nonetheless, the judges gave great weight to the finding that the defendant's "moral culpability ... was significantly diminished by the mental illness that he was suffering at the time." (*Id.* at para. 116.) The trial judge had accepted the view of two of three psychiatrists who had testified that, at the

time of the offenses, the defendant was suffering from "a depressive illness ... which substantially affected his reasoning and judgment." (*Id.* at para. 89.) The court reasoned:

It is an accepted principle of sentencing that general deterrence will often be given very little weight in the case of an offender suffering from a mental disorder or abnormality. That is because such an offender is not the appropriate medium for making an example to others.

Id. at para. 126.

Similarly, PFC Manning's troubled mental state should be taken into consideration, recognizing the limited general deterrent effect that can be served by an onerous penalty imposed on a young and troubled offender, especially one with no prior criminal record.

V.

IN ASSESSING THE APPROPRIATENESS OF A PENALTY FOR UNAUTHORIZED DISCLOSURE OF DOCUMENTS, COURTS IN OTHER COUNTRIES, FOLLOWING INTERNATIONAL LAW, LOOK TO THE PUBLIC INTEREST VALUE OF THE DOCUMENTS.

A. International law recognizes that high public interest in disclosures may serve to mitigate punishment and in some circumstances may serve as a complete defense where the public interest in disclosure outweighs the harm of disclosure.

The European Court of Human Rights, the top court of the Council of Europe (comprised of 47 member states representing more than 820 million people), has repeatedly affirmed that penalties for disclosure of classified or otherwise sensitive information were unnecessary and therefore violated the right to

impart information where the information was of public interest and efforts to seek remedies through official channels for the wrongdoing revealed by the disclosures either had failed or would have been ineffective. In 2008, in *Guja v. Moldova*, the Grand Chamber of the European Court, comprised of 17 of the Court's 47 judges, reviewed the dismissal of the head of the press department of the prosecutor general's office for sending to a newspaper copies of letters received from public officials applying undue influence on the prosecutor's office to drop criminal proceedings against some police officers. The Grand Chamber, in finding a violation of the right to freedom of expression and information, noted that while "the duty of loyalty and reserve assumes special significance" for civil servants in a democratic society as "the public has a right to expect that they will help and not hinder the democratically elected government,"²³ these duties are not absolute. The Court concluded that "the interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence."²⁴

A second case, *Bucur v. Romania* (2013), concerned the disclosure by a telecommunications analyst in one of Romania's military intelligence units of "top secret" information about

²³ *Guja v. Moldova*, Eur. Ct. H.R., App. No. 14277/04, Judgment of Feb. 12, 2008, para. 71.

²⁴ *Id.*

“irregular” surveillance. The European Court found that the general interest in the disclosure of information revealing irregular surveillance authorized by high-ranking officials was so important in a democratic society that it prevailed over the interest in maintaining public confidence in the intelligence agency.²⁵ For this and other reasons, the Court ruled that divulging the information directly to the public had been justifiable, and that the criminal prosecution and two-year prison sentence violated the public servant’s right to communicate information.²⁶

In both cases, the Court considered the following factors: the availability of any effective, alternative remedies; the public’s interest in the information; the actual harm caused by the disclosure weighed against the public interest in the information’s release; the reasonableness of the public official’s belief in the accuracy and importance of the information; and the severity of the penalty.

B. Several countries apply a public interest test in deciding the appropriate penalty for an unauthorized disclosure.

Several countries recognize a limitation on the prosecution of unauthorized disclosure of classified information in the public interest similar to that identified by the European

²⁵ *Bucur v. Romania*, Eur. Ct. H.R., App. No. 40238/02, Judgment of Jan. 8, 2013, paras. 115, 120.

²⁶ *Id.*, para. 120.

Court.²⁷ For instance, the Canadian Security of Information Act makes it an offense, punishable by up to 14 years in prison, to improperly communicate special operational information, but provides a public interest defense where a public servant discloses illegal activity, considering virtually the same factors as does the European Court.²⁸

Danish criminal law provides a public interest defense for publication of state secrets where the person is acting in "the legitimate exercise of obvious public interest."²⁹ In the leading case on the public interest defense, *Denmark v. Jesper Larsen, Michael Bjerre and Niels Lunde*, Copenhagen City Court, Case No. SS 24.13764/2006, Dec. 4, 2006, two journalists and their editor were charged with publishing state secrets as a result of 2004 articles concerning classified intelligence reports that questioned the existence of weapons of mass destruction in Iraq.³⁰ The Copenhagen City Court unanimously acquitted all three, concluding that each had acted "in the

²⁷ See Appendix B.

²⁸ SOIA, secs. 14 and 15.

²⁹ Criminal Code (Denmark), Section 152(e) (2010).

³⁰ Kasper Krogh, *Klar frifindelse af Berlingske i FE-sagen* (Clear Acquittal of Berlingske in Defence Intelligence Service Case), Berlingske, Dec. 5, 2006, <http://www.b.dk/danmark/klar-frifindelse-af-berlingske-i-fe-sagen> (detailed discussion of the ruling including quotations translated into English by the Justice Initiative). See also U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, "Denmark", March 6, 2007, <http://www.state.gov/j/drl/rls/hrrpt/2006/78809.htm>.

legitimate exercise of obvious public interest or for his own or others' best interests," consistent with Penal Code § 152(e).

The Court held that the relevant provisions of the Penal Code should be read in light of the free speech jurisprudence of the European Court of Human Rights. In so doing, the court balanced several factors, including (1) the national security interest to which the information related, (2) the degree of actual harm to that interest caused by the unauthorized disclosure, and (3) the significance of the public interest in knowing the information and facilitating debate on the issues raised. Despite the government's claim that publication of names of specific foreign partners posed a serious risk that countries would limit the intelligence they would share with Denmark in the future, the court found that there was no indication that the leak had in fact caused a real strain on relationships with partners. Moreover, the court found persuasive the opinions of several witnesses that the articles had a significant impact on public debate concerning the basis for the Danish Government's decision to participate in the military action in Iraq and the understanding of the intelligence service's role. In balancing the foregoing considerations, the court held that the "considerable public interest" surrounding the decision by Denmark to take part in the Iraq war "outweighed the government's fears for its intelligence operations."

C. International law does not require a public servant to first try to use official channels before disclosing information to the public.

International law does not require a public servant to first use official channels before disclosing publicly if the attempted use of any such channels would likely be ineffective. For instance, the Parliamentary Assembly of the Council of Europe has asserted that there should be protections from penalty for public disclosures "where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistleblower."³¹

VI.

SOME OF MANNING'S DISCLOSURES WERE OF HIGH PUBLIC INTEREST.

Although many of the documents that Manning disclosed were of no or little public interest, others clearly were. To be of high public interest, the disclosures do not have to constitute decisive evidence that the U.S. or others committed war crimes or other grave violations of law. Documents can be of high public interest if they provide significant evidence of war crimes or other violations of law; reveal clear misrepresentations to the public by government officials; or provide significant information about important matters of

³¹ Parliamentary Assembly of the Council of Europe, Res. 1729 (2010), paras. 6.1.2, 6.2.3.

public debate.³² International law recognizes that, while courts hold ultimate responsibility to determine the public interest in information, and to weigh that interest against other competing interests, widespread media coverage provides an important indicator of what constitutes a "matter of public interest."³³

The Afghan war logs disclosed by Manning contain considerable information of high public interest that had not previously been disclosed. The editors in chief of *Der Spiegel*, *The New York Times* and *The Guardian* were "unanimous in their belief that there is a justified public interest in the material."³⁴

Secretary of State John Kerry, then Chair of the Senate Foreign Relations Committee said:

However illegally these documents came to light, they raise serious questions about the reality of America's policy toward Pakistan and Afghanistan... Those policies are at a critical stage, and these documents may very well underscore the stakes and make the calibrations needed to get the policy right more urgent.³⁵

³² Parliamentary Assembly of the Council of Europe, Res. 1954 (2013), para. 9.5.

³³ See e.g., *Stoll v. Switzerland*, Eur. Ct. H.R., App. No. 69698/01, Judgment of Dec. 10, 2007 (Grand Chamber of the European Court ruled that a leaked diplomatic paper "concerned matters of public interest," citing as evidence that the matter "had been widely reported in the Swiss media"); *Couderc & Hachette Filipacchi Associés v. France*, Eur. Ct. H.R., App. No. 40454/07, Judgment of Nov. 10, 2015); and *Fressoz & Roire v France*, Eur. Ct. H.R., App. No. 29183/95, Judgment of Jan. 21, 1999.

³⁴ Matthias Gebauer; John Goetz; Hans Hoyng; Susanne Koelbl; Rosenbach, Marcel Schmitz, Gregor Peter, *Explosive Leaks Provide Image of War from Those Fighting It*, *Der Spiegel*, July 25, 2010, <http://www.spiegel.de/international/world/0,1518,708314,00.html>.

³⁵ Jeremy Scahill, *Wikileaks and War Crimes*, *The Nation*, Aug. 6,

According to mainstream media, the logs revealed that hundreds of civilians were wounded or killed by coalition forces in several instances that had not been properly recorded, or recorded at all. For instance, David Leigh, Investigations Editor of *The Guardian* stated:

[W]hat I had not seen reported properly before [the Wikileaks disclosures] was incident after incident, day after day, in which troopers in patrols or on convoys just shot drivers or motorcyclists or passersby, because they were frightened that they might be suicide bombers. And so, if they didn't give way to a convoy or they got too close, they just blasted them with machine guns.³⁶

Moreover, the Guardian reported that the Afghan war logs "**for the first time**, ... reveal details of deadly missions by TF [Task Force] 373 and other units hunting down ... targets that were previously hidden behind a screen of misinformation."³⁷ The lack of adequate accountability mechanisms for alleged misconduct by coalition forces was confirmed by a United Nations special investigator, Professor Philip Alston of New York University, who went to Afghanistan in May 2008 to investigate rumors of extrajudicial killings.³⁸

2010.

³⁶ Amy Goodman, *interview with Guardian editor David Leigh on Aghan War Logs*, Democracy Now, July 27, 2010; Declan Walsh, *Afghanistan war logs: How US marines sanitised record of bloodbath*, *The Guardian*, July 26, 2010.

³⁷ Nick Davies, *Afghanistan war logs: Task Force 373 - special forces hunting top Taliban*, *The Guardian*, July 25, 2010 (emphasis added).

³⁸ *Id.*

A significant number of documents describe unreported or misleadingly reported friendly fire incidents between Afghan police and army forces, coalition forces, and the U.S. military.³⁹

The documents also revealed that contractors for the U.S. Department of Defense had hired local male child prostitutes.⁴⁰

The Iraq war logs released on October 22, 2010, contained such significant new evidence of possible war crimes and human rights violations that U.N. High Commissioner for Human Rights Navi Pillay called on the U.S. and Iraqi authorities to "take necessary measures to investigate all allegations made in these reports and to bring to justice those responsible for unlawful killings, summary executions, torture and other serious human rights abuses."⁴¹ The files indicated that U.S. authorities knew about widespread torture and ill-treatment of detainees by Iraqi forces, yet transferred thousands to Iraqi custody between early

³⁹ Davies, Nick and David Leigh, *Afghanistan war logs: Massive leak of secret files exposes truth of occupation*, July 25, 2010, <http://www.theguardian.com/world/2010/jul/25/afghanistan-war-logs-military-leaks>.

⁴⁰ Jason Linkins, *WikiLeaks Reveals That Military Contractors Have Not Lost Their Taste for Child Prostitutes*, Huffington Post, Dec. 12, 2010, http://www.huffingtonpost.com/2010/12/08/wikileaks-reveals-that-mi_n_793816.html.

⁴¹ Reuters, *WikiLeaks files should prompt Iraq abuse probe: U.N.*, Oct. 22, 2010, <http://www.reuters.com/article/us-wikileaks-iraq-un-idUSTRE69P46320101026>.

2009 and July 2010,⁴² in violation of U.S. obligations under the U.N. Convention against Torture⁴³ and other treaties. An order known as "Frago 242" issued in June 2004, barred coalition troops from investigating any violations committed by Iraqi troops against other Iraqis.⁴⁴

The files also include information on many undisclosed instances in which U.S. forces killed civilians at checkpoints and during operations.⁴⁵ Moreover, according to the independent monitor group, Iraq Body Count, the documents detailed the deaths of 15,000 more Iraqi civilians than the U.S. military had previously reported.⁴⁶

The Iraqi war logs were widely claimed to have played a significant role in President Obama's decision not to extend the deployment of U.S. soldiers in Iraq.⁴⁷ Whether or not one agrees

⁴² *Id.*

⁴³ Art. 3 of U.N. Convention against Torture prohibits a state party from transferring a detainee to another country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." The U.S. ratified the Convention against Torture in 1994. See "Ratification of 18 international human rights treaties", United Nations Office of the High Commissioner, <http://indicators.ohchr.org/>.

⁴⁴ Amy Goodman, *Wikileaks Iraq war logs expose US-backed Iraqi torture, 15,000 more civilian deaths, and contractors run amok*, *Democracy Now!*, Oct. 25, 2010.

⁴⁵ Michael Weissenstein and Raphael G. Satter, *Iraq war leaks: No U.S. investigation of many abuses*, *Associated Press*, Oct. 22, 2010.

⁴⁶ *Id.*

⁴⁷ *E.g.*, Chase Madar, *Seven Myths About Bradley Manning*, *The Nation Magazine*, June 3, 2013; Martin Chulov, *Iraq war logs: media reaction around the world*, *The Guardian*, Oct. 28, 2010;

with the wisdom of that decision, that the disclosures influenced public opinion to such an extent on a crucial policy matter is strong evidence of their public interest value.

Conclusion

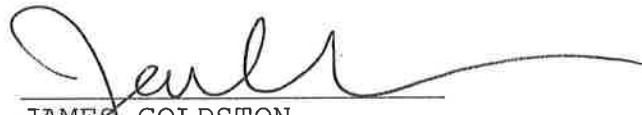
As set out above, the Justice Initiative's review of the laws and jurisprudence of over 30 countries shows that most countries have a maximum penalty of 10 years or less for the acts of which Manning was convicted; and that several of the U.S.'s closest allies provide in their laws for a maximum penalty of no more than 5 years. Moreover, the aggregate sentence for multiple offenses will generally not be much higher than the maximum sentence for the most serious crime, and may be less where there are mitigating circumstances.

In determining the appropriate sentence, courts tend to consider whether the motive was public-spirited or instead for personal profit, together with factors such as the age, mental health, and prior record of the offender, and any expression of regret. Courts often also consider the public interest value of the documents disclosed.

Eric Schmitt and Helene Cooper, *Leak May Hurt Efforts to Build War Support*, *New York Times*, July 26, 2010 (discussing the impact of the disclosures on Congressional and public support for the Afghanistan war).


We respectfully request this Court to consider these factors in PFC Manning's case and accordingly bring her sentence into line with the penalties given by the U.S.'s closest military and intelligence-sharing allies.

Date: May 17, 2016



JAMES GOLDSTON
Executive Director,
Open Society Justice Initiative

Date: May 17, 2016



SANDRA COLIVER
Senior Legal Officer,
Open Society Justice Initiative

Counsel for Amicus Curiae

Certificate of Service

I certify that a copy of the foregoing was sent via FedEx priority overnight to Mr. Squires, Clerk of Court, U.S. Army Court of Criminal Appeals at 9275 Gunston Road, Fort Belvoir, VA 22060-5546 on the 17 day of May 2016.

Date: May 17, 2016



JAMES GOLDSTON
Executive Director,
Open Society Justice Initiative

Date: May 17, 2016



SANDRA COLIVER
Senior Legal Officer,
Open Society Justice Initiative

Counsel for Amicus Curiae

**APPENDIX A:
LIST OF EXPERTS WHO CONTRIBUTED RESEARCH FOR
THE AMICUS CURIAE BRIEF OF
THE JUSTICE INITIATIVE**

ARGENTINA

Ignacio Bollier, an Argentine Lawyer, is a member of the Security Policies and Institutional Violence Team of CELS (Center for Legal and Social Studies), based in Buenos Aires. He served as Senior Advisor to the Undersecretary for Police Affairs in the National Ministry of Security (2011-13), where he developed and implemented policies aimed at strengthening civilian control of federal police forces. He also worked for the Ministry of National Defense (2010).

AUSTRALIA

Rick Snell, Associate Professor, Deputy Dean & Deputy Head of School, Faculty of Law, University of Tasmania, Australia, is highly regarded as an international authority on Freedom of Information law and one of Australia's leading law teachers. He has published extensively on open government (especially FOI), including a number of comparative works, and has successfully supervised PhD students in the areas of Open Government, FOI and Open Data.

Hannah Moore is a final year law student at the University of Tasmania in Australia. She is in the midst of a major research project on "Australia and the Five Eyes: A Comparative Review of Intelligence Classification Processes and Transparency." She has received several awards for academic performance, is on the Dean's Roll of Excellence, served on the editorial board of the Tasmanian Law Review, and has contributed to other bodies of research focusing on social justice.

BELGIUM

Frankie Schram is a member, and former secretary, of the Federal Commission on Access to and Reuse of Administrative Documents; a member and former secretary of the Federal Appeal Commission on Access to Environmental Information in Belgium; and member of the Flemish Supervising Commission of electronic administrative data-exchange. He is also visiting professor at the Public Management Institute of the Faculty of Social Science of the KU Leuven and at the Faculty of Political and Social Science at the Faculty of Law of the University of Antwerp. He was for several

years the president of the group of experts on access to official documents of the Council of Europe.

CANADA

Paul Schabas, a partner based in Toronto with the firm of Blake, Cassels & Graydon LLP (Blakes), is a senior trial and appellate counsel. He has developed a reputation as one of Canada's leading constitutional and media lawyers, and has argued many seminal cases before the Supreme Court of Canada. He is a fellow of the American College of Trial Lawyers and the International Academy of Trial Lawyers, and an adjunct professor at the University of Toronto. He is serving his third term as an elected benchler of the Law Society of Upper Canada, the governing body for Ontario's 50,000 lawyers. He chairs the Law Foundation of Ontario and is a director of the Canadian Civil Liberties Association.

CHILE

Juan Pablo Olmedo is the chief advisor to the Bicameral Commission on Transparency of the Chilean Congress. A lawyer with 20 years of professional experience in Chile and Latin America, he led and participated in the development and implementation of Law No. 20.285 on Access to Public Information and Transparency in Chile, which came into effect in 2009. He served as the first President of Chile's Transparency Council (the access to information oversight and enforcement body), responsible for setting up this new state body.

COLOMBIA

Emmanuel Vargas, with the Foundation for Press Freedom in Bogota, previously worked for the Ministry of the Interior.

CZECH REPUBLIC

Eliska Waldova (Cisarova) worked for for more than five years for the Czech Section of Transparency International and at the Open Society Foundation in Prague. She managed projects dedicated to promoting anti-corruption measures in the public administration. One of her areas of specialization is the development of appropriate mechanisms for whistleblowing.

DENMARK

Amanda Jacobsen is a Research Fellow at the University of Copenhagen, Faculty of Law, where she is completing her PhD dissertation on secrecy in the U.S. national security context. She is licensed to practice law in the U.S. Before coming to the University, she worked in private practice in Washington, D.C., primarily in government contract litigation, and also worked as a legal researcher for the Office of the Prosecutor at the U.N. International Criminal Tribunal for Rwanda.

EUROPEAN LAW

Dirk Voorhoof is one of Europe's leading free expression legal experts. He has been a professor at Ghent and Copenhagen universities, and in the Media Law Advocates Program at the University of Oxford. He practiced law at the Brussels Bar, and served as a member of the Federal Commission for Access to Administrative Documents (1994-2005), the Flemish Media Council (2005-2012) and the Flemish Regulator for the Media (2006-2016). He is a member of the Committee of Experts on Internet Intermediaries (MSI-NET) of the Council of Europe; and Columbia University's Global Freedom of Expression Experts Network.

FRANCE

Bertrand Warusfel is a Professor at University of Lille II in Paris, where he teaches European Intellectual Property and Ecommerce Law. He is a member of the Scientific Council of the Institute of Intellectual Property Research Centre, the French Group of International Association for the Protection of Intellectual Property, and the Association of European Patent Practitioners. He is also a member of the Scientific Committee Papers Security, on the editorial board of the journal Intellectual Properties, and the Director of the Association of Science-Po. He is the former Scientific Director of the Centre for Security and Defense Research (Faculty of Law of Paris V) and a former member of the committee drafting the French directory of international relations.

Jean-Philippe Foegle is a Ph.D. candidate and research assistant at the Center for Research on Fundamental Rights at the University of Paris Ouest-Nanterre La Défense. In 2015 he co-organized a conference with the Sorbonne on "Whistleblowing and Human Rights."

GERMANY

Dieter Deiseroth retired in September 2015 from his position as judge of the Federal Administrative Court after 32 years as a judge. During his 14 years with the Federal Administrative Court, he served on the chambers for Military Complaints Regulations and the Military Disciplinary Code. He has published widely on administrative, constitutional and international law issues. He was one of the co-authors of a leading commentary on Germany's Basic Law. He obtained his doctorate in law in 1985 from the University of Giessen.

Ulf Buermeyer is a judge of the Berlin District Court. He co-edits the on-line magazine *HRR-Strafrecht.de*, which includes a case-law database with the complete criminal law of Germany's Federal Court of Justice and selected judgments and decisions of the Federal Constitutional Court, the European Court of Human Rights, and the European Court of Justice. He is a Fellow of the Centre for Internet and Human Rights at the European University in Frankfurt. His specializations include constitutional and criminal law. In 2015 he received his doctorate from the Johann Wolfgang Goethe University. During a sabbatical, he completed the LL.M program at Columbia.

GUATEMALA

Silvio Gramajo has held several positions in Guatemala related to transparency and secrecy, including as Executive Secretary of the Transparency Commission under Guatemala's Vice President (2010-2011); and Advisor to the National Security Council, under the Presidency of Guatemala on implementation of the Access to Information Law, especially concerning the criteria for classification and disclosure of information (2009-2010). He has served since 1994 as an Instructor of Communication at the Rafael Landivar University, a Jesuit institution and Guatemala's leading university. He received his Ph.D. in Social Research and Political Science in 2009 from the Facultad Latinoamericana de Ciencias Sociales (FLACSO) in Mexico City.

ISRAEL

Roy Peled is a Constitutional and Administrative Law Professor at the Striks Law School, College of Management, in Rishon LeZion, the largest college in Israel, and an adjunct Law Professor at the Hebrew University in Jerusalem.

ITALY

Arianna Vendaschi is an Associate Professor of Comparative Public Law at the University of Bocconi, Faculty of Law. She was previously a researcher in Comparative Public Law and is currently a member of the Regional Board of Electoral Guarantors - Lombardia, Corte d'Appello di Milano. She is also a member of the Faculty Board of the PhD in International Law and Economics.

MEXICO

Ana Ruelas, a lawyer with a Masters Degree in Public Administration and Public Policy, serves as Regional Director for Mexico and Central America of Article 19, the International Campaign for Freedom of Expression and Information, based in Mexico City. She has worked for human rights organizations in Mexico and Peru for the past six years, including in the Freedom of Information (FOI) Section of Mexico's National Human Rights Commission.

David Mora, an officer with the FOI Program of Article 19 based in Mexico City, has worked for human rights organizations in Mexico for the last 4 years. He studied international relations at the Universidad Externado de Colombia.

MOLDOVA

Victor Munteanu is the Law Program Director of the Soros Foundation in Moldova.

NETHERLANDS

Daniel Simons, a Dutch lawyer, is Legal Officer for Freedom of Assembly, Information and Expression at the Open Society Justice Initiative. He has worked on legal issues affecting civil society and the media for the past 11 years, both at Article 19, a London-based NGO, and at Greenpeace International in Amsterdam. He obtained his law degree from the University of Amsterdam and his LL.M. from Columbia University. He is the author of numerous analyses of laws and submissions in the area of freedom of expression and access to information.

Wouter Hins is an Associate Professor of Constitutional and Administrative Law at the University of Amsterdam and a Professor by special appointment of Media Law at Leiden University. He is a member of the complaints committees of the Dutch Media Authority, the Dutch Public Broadcasting Service,

and the Ministry of Health, Welfare and Sport, and is also editor of the journal Mediaforum. He received his doctorate from the University of Amsterdam in 1991.

NEW ZEALAND

Felix Geiringer, an experienced barrister with Terrace Chambers, has handled a number of leading appeals, including several high profile cases before the New Zealand Supreme Court. He also has qualified in England and Wales as a barrister and a solicitor.

Andrew Ecclestone is a specialist in freedom of information (FOI) laws, with 10 years' experience in the U.K. working for civil society and government, and 10 years' experience in New Zealand, including as a Senior Investigator for the Ombudsmen who investigate and resolves FOI complaints. He has provided technical expertise for the World Bank Institute and USAID, among other organizations, in countries including Mexico, Indonesia, Cambodia and Bangladesh. He represented the U.K. Government in meetings at the Council of Europe that led to Recommendation 2002(2) on Access to Official Documents.

POLAND

Irmína Pachó is the head of the Strategic Litigation Program and the Observatory of CIA Activities in the Territory of Poland programs operated by the Helsinki Foundation for Human Rights in Warsaw, Poland. She is also a lawyer and a participant of the doctoral studies program in the Institute of Legal Studies of the Polish Academy of Sciences. She has her degrees from the Cardinal Stefan Wyszyński University in Warsaw (magister iuris, 2009) and the British Law Centre (under the aegis of Cambridge and Warsaw Universities, 2009).

ROMANIA

The Association for the Defense of Human Rights in Romania - the Helsinki Committee (APADOR-CH) is a non-governmental, not-for-profit organization, established in 1990. APADOR-CH's Mission is to take action for the protection of human rights and the establishment of equilibrium when they are in danger or infringed upon. See more at: <http://www.apador.org/en/despre-apador-ch/#sthash.1jevKF6Z.dpuf>.

RUSSIA

Ivan Pavlov, JD, PhD, is the Founder and Chairman of the Freedom of Information Foundation, Russia's largest NGO dealing with FOI rights and governmental openness. Pavlov has authored more than 70 analytical publications on access to official information and governmental openness, and served as an adviser in the drafting and promotion of Russia's FOI Act. He was appointed to serve as an expert for the Russian governmental working group on Open Government. A qualified attorney, he has participated as legal counsel in a number of high profile cases on FOI, state secrets, and access to state historical archives.

SERBIA

Marko Milosevic is a senior advisor in the office of Serbia's Commissioner for Information of Public Importance and Personal Data Protection. He worked at the Belgrade Center for Security Policy for 10 years (2006-2015). He has written widely, in English and Serbian on issues of national security, private security, multinational operations, new wars, transparency in the security sector, and the defense industry in the Western Balkans and worldwide.

SLOVENIA

Rosana Lemut Strle has a Master degree in Law and works with the Information Commissioner of the Republic of Slovenia, as Deputy Information Commissioner. Her professional work focuses on personal data protection and access to public information. Previously, she worked as a director at the Health Insurance Institute of Slovenia. She is the author of numerous articles on protection of personal data and is active as a lecturer.

SPAIN

Fernando Flores Giménez is Professor of Constitutional Law at the University of Valencia in Spain. From 2010-2012, he was the General Director of Institutional Relations at the Ministry of Defense. He was also previously the Main Advisor to the Cabinet of the Spanish Government Vice-presidency, as well as the Chief of Cabinet of the Justice Secretary of State for the Ministry of Justice. He has diplomas from both the Center of Political and Constitutional Studies and the Center of Higher Studies of the Defense in Spain and is the author and editor of several books and academic papers on topics related to constitutional law, justice and human rights.

Susana Sánchez Ferro is Professor of Constitutional Law at the Autonomous University of Madrid. She is an expert on the right of citizens to access government security information. She has written a monograph on state secrets published by the Center for Constitutional Studies, in addition to several articles on the tensions between national security and civil liberties. She served as consultant to the European Parliament in a study on the subject of parliamentary scrutiny of intelligence, and has been a Fellow of the Fulbright Commission.

SWEDEN

Iain Cameron is Professor of Public International Law at Uppsala University. He has been a member of the Council of Europe Commission on Democracy through Law since 2005. He has also been a Rapporteur for the journal *European Public Law* (1995-2009) and Expert in Commission of Inquiry into UN and EU Sanctions. He is the author of several books including *An Introduction to the European Convention on Human Rights* (2011), *International Criminal Law from a Swedish Perspective* (2011), and *National Security and the European Convention on Human Rights* (2000).

UNITED KINGDOM

Toby Cadman, a British barrister with the chambers of 9 Bedford Row, is an international law specialist with extensive experience in the fields of public international law, war crimes, human rights, terrorism and extradition law. He has appeared before the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Crimes Tribunal Bangladesh, the European Court of Human Rights, the Bosnian War Crimes Chamber, and the U.N. Human Rights Committee. He is a member of the International Criminal Bureau in The Hague. He has provided extensive advice and training to judges, prosecutors and defense lawyers throughout the Balkans and Southeast Asia.

Gill Phillips has served since 2009 as the Director of Editorial Legal Services at Guardian News and Media. Previously, she served as Head of Litigation at Times Newspapers Limited (2000-2009); Senior Lecturer at the College of Law, specializing in civil and criminal litigation (1997-2000); Legal Advisor for News International (1996-1997); and Assistant Solicitor at the BBC (1987 to 1996). Her areas of expertise include libel, disclosure of sources, breach of confidence and the Official Secrets Act.

APPENDIX B

PENALTIES FOR UNAUTHORIZED DISCLOSURE: COMPARATIVE LAW AND PRACTICE

May 2016

Open Society Justice Initiative¹

In many countries, the penalties for the unauthorized public disclosure of national security information are limited to five or fewer years' imprisonment in the absence of proof of espionage, treason, delivery to a foreign state, or intent to prejudice the country's security or defense. This is the case in Australia and the U.K. (2 years), New Zealand and Slovenia (3 years), Panama and Spain (4 years), Colombia and Norway (4.5 years), and Belgium, Mexico, Paraguay and Poland (5 years).

The laws of several other countries provide for maximum penalties of up to 10 years' imprisonment. These include France (7 years), and Germany and Israel (10 years). However, recent cases, including for multiple disclosures that caused grave harm, have resulted in penalties of less than 10 years in most cases. Canada has a maximum penalty of 14 years, but also includes an express public interest defense, and even multiple counts would be unlikely to result in a penalty of much more than 14 years. The most similar German case resulted in a penalty of eight years, including for two counts of treason and five counts of passive bribery; the most similar case in Israel resulted in a sentence of 3.5 years' imprisonment for giving a reporter 2,000 files that included information that put Israeli soldiers and civilians at grave risk.

A [survey of the laws and practices of 20 European countries²](#) found that in at least 11 countries, a disclosure of classified information to the public would not result in any penalty in the absence of a showing of harm. Nine countries - Colombia, Czech Republic, Italy, Moldova, the Netherlands, Norway, Romania, Spain, and Sweden - require the government to prove either actual or probable harm in order for any penalty to be imposed (although the "actual harm" requirement does not apply to members of the military in Colombia). An additional three countries - Denmark, France, and Hungary - allow the lack of harm to be raised as a defense or mitigating circumstance.

The below chart summarizes the law of 32 democratic states from around the world based on a reading of relevant statutes, as confirmed by one or more experts from the country concerned.

State	Maximum penalty for unauthorized disclosure (where no espionage or disclosure to a foreign state)	Prosecutions
Argentina ³	<p>1- 10 years for disclosure of national security related secrets; increased to 2-15 years for public servants (under the national security law).⁴</p> <p>Or 1-6 years for unauthorized disclosure (given different applicable laws), or 3-10 years for soldiers, and other applicable provisions reserved for public servants (under the criminal code).⁵</p> <p>Fine for disclosure of other secrets which could harm third parties. <u>Public interest defense available.</u>⁶</p>	
Australia ⁷	<p>Up to 2 years for unauthorized disclosure of "official secrets" obtained in the course of public service.⁸</p> <p>It is a defense if the communication of official secrets was "<u>in the interests of the Commonwealth</u>"⁹</p> <p>Up to 7 years if with intent to prejudice the security or defense of the Commonwealth.¹⁰</p> <p>For defense members or defense civilians, up to 2 years imprisonment for disclosure that is likely to be prejudicial to the security or defense of Australia; only defense is that the person did not know nor could reasonably have been expected to know that the information was likely to prejudice Australia's security or defense.¹¹</p>	<p>2.5 years maximum sentence in past decade: 2003 conviction of defense intelligence employee for passing classified documents to be sold to foreign government (27 months); 2008 conviction of customs intelligence staff for disclosing threat assessments and security reports to media (9 months).¹²</p>
Belgium ¹³	Up to 5 years for disclosure. ¹⁴	No prosecutions for unauthorized disclosures in past 20 years.
Bolivia ¹⁵	Up to 8 years for disclosure by a public servant.	

Canada	<p>Up to 14 years for disclosure of "special operational information."</p> <p>"No person is guilty of ... [this] offense if the person establishes that he or she acted in the public interest.¹⁶ Even if defendant cannot meet statutory requirements of the defense, the fact that disclosures were made in public interest serves as mitigating factor in sentencing.</p> <p>Crimes sharing a "reasonably close nexus" will generally be sentenced concurrently. Where consecutive, the combined sentence should not be unduly long or harsh, which could happen if "the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offenses involved" or is "not in keeping with his record and prospects".² S.C.R. 357, 2003 SCC 46 (Supreme Court of Canada).</p>	<p>The 1985 law has never been used to charge a person who disclosed info to the press.</p> <p>Only person sentenced under the law was a navy officer who sold info to Russians - 20 years for having caused "exceptionally grave harm" with intent to benefit a foreign entity, or reckless disregard of the possibility. <i>R v. Delisle</i> (2012), NSPC 114.</p>
Chile ¹⁷	<p>Undefined prison term for disclosure by public servant resulting in actual and "serious" harm.</p> <p>Administrative penalties (suspension of employment and/or fine) for unauthorized disclosure by public servants; increased fine if obtained economic benefit.¹⁸</p>	
Colombia ¹⁹	<p>1 1/3 - 4 1/2 years in prison for unauthorized disclosure of secrets by public servants but only if results in harm; otherwise administrative penalties only.²⁰</p> <p>5-8 years for disclosure by members of the military.²¹</p> <p>Note: Journalists are not obliged to protect the confidentiality of government information, including explicitly information related to intelligence.²²</p>	
Czech Republic ²³	<p>5-12 years for disclosure of top secret information or unauthorized disclosure during state of emergency.²⁴</p> <p>2-8 years for other unauthorized disclosures.²⁵</p> <p>Up to 3 years imprisonment if negligent unauthorized disclosure.²⁶</p>	<p>1 prosecution for unauthorized disclosure in the past 20 years; no convictions.</p>

Denmark 27	<p>Up to 12 years imprisonment for disclosure of certain designated national security information²⁸; 3 years if resulting from negligence.²⁹</p> <p>Up to 6 months for disclosure by a public servant³⁰; or for up to 2 years if for personal gain or "aggravating circumstances."³¹</p> <p><u>An explicit exception exists for acts in the public interest.</u>³²</p>	<p>Intelligence officer sentenced to 4 months imprisonment for disclosure to journalists of classified intelligence reports about lack of weapons of mass destruction in Iraq. Two journalists and editor prosecuted and acquitted of related charges on basis of public interest defense.³³ (<u>Denmark v. Larsen, et al.</u>, Copenhagen City Court, Case No. SS 24.13764/2006, Dec. 4, 2006) No other known prosecutions in past 20 years.</p>
Ecuador 34	<p>6-9 years for disclosure by public servants. 3-6 years for disclosure by others.³⁵</p>	
France 36	<p>7 years for unauthorized disclosure by a public servant; 3 years if negligent.³⁷</p> <p>5 years for unauthorized disclosure by a private person.³⁸</p> <p>Attempted unauthorized disclosure subject to same penalties.³⁹</p>	<p>Public servants have been charged for unauthorized disclosures.</p>
Germany 40	<p>1-10 years for "especially serious cases" of disclosure, including public servants; up to 5 years for other disclosures. Offenses require "intent to cause damage" and "creat[ion of] danger of serious prejudice to the external security"; attempt punishable.⁴¹</p> <p>5 years for breach of official secrets confidentiality duties, or disclosure by public servant; 3 years for violation of other confidentiality duty; 1 year for negligent disclosure by public servant. All offenses require action to "cause[] a danger to important public interests".⁴²</p>	<p>Only 2 known cases resulted in prison. More relevant one: Federal intel agent Marcus R. had 100s of classified docs including some top secret setting out the German secret service's counterespionage strategy & list of German agents abroad; had contacted a Russian agent to sell them - in 2016, sentenced to 8 years for 2 counts of treason & 5 counts of passive bribery.</p>

Guatemala ⁴³	5-8 years for disclosure by public servants or others with a duty of confidentiality. ⁴⁴ Up to 5 years for disclosure of national security information. ⁴⁵	
Italy ⁴⁶	At least 5 years for disclosure of state secrets; 6 months-2 years if negligence. ⁴⁷ At least 3 years for disclosure of classified information; 6 months-2 years if negligence. ⁴⁸	No record of convictions for unauthorized disclosures.
Mexico ⁴⁹	1-5 years for disclosure by public servants, where harm is caused. ⁵⁰	
Moldova ⁵¹	4 years for disclosure by public servant. 3-7 years if "action result[ed] in severe consequences." ⁵²	Public personnel have been charged for unauthorized disclosures.
The Netherlands ⁵³	Up to 6 years for unauthorized disclosure. ⁵⁴	Few prosecutions for unauthorized disclosures in past 20 years and few convictions.
New Zealand	3 years for a public servant who knowingly or recklessly communicates any official information knowing that such communication or delivery is likely to prejudice the security or defense of New Zealand. ⁵⁵	
Norway ⁵⁶	1 ½-4 ½ years for disclosure by public servants. 1-3 years for disclosure by private persons. Limited to fine if negligent unauthorized disclosure. ⁵⁷	No prosecutions for unauthorized disclosures in past 20 years.
Panama ⁵⁸	4 years for disclosure. ⁵⁹ 6 months-1 year for disclosure by public servants. ⁶⁰	
Paraguay ⁶¹	Up to 5 years for disclosure; requires "expos[ure of] the Republic to the risk of serious harm to its external security." Attempt also punishable. Separate provisions for negligent disclosures and public servants. ⁶² 1-2 years for disclosure of Council of National Defense information, increased to 2-4 years if member of Council or took part in deliberations. ⁶³	

Peru ⁶⁴	<p>5-15 years for disclosure. Limited to 4 years if negligent. 10-15 years if for profit or improper motive.⁶⁵</p> <p>5-10 years for disclosure or reproduction of information concerning National Defense System, or 6-12 years if makes available to third parties, with additional penalties of disqualification from public employment for public servants.⁶⁶</p>	
Poland ⁶⁷	<p>3 months-5 years for disclosure of "secret" or "confidential" information; intent required.⁶⁸</p> <p>Up to 3 years if public official discloses "restricted" or "confidential" information or information obtained in the official capacity; harm required.⁶⁹ Up to 1 year if unintentional.⁷⁰</p>	Public personnel have been charged for unauthorized disclosures.
Russia ⁷¹	<p>Up to 4 years for disclosure of State secrets by public servants. 3-7 years if with "grave consequences."⁷²</p> <p>Up to 8 years if aggravating circumstances (information obtained through theft, fraud, blackmail, coercion, threats of violence or other unlawful means).⁷³</p> <p>No penalties for private persons.</p>	In the past decade, 11 prosecutions of public servants, resulting in 10 convicted and sentenced for terms ranging from 4 to 15 years for the public disclosure of information.
Serbia ⁷⁴	<p>1-10 years for disclosure of state secret. 6 months-5 years if negligent.⁷⁵</p> <p>6 months - 5 years for disclosure by public official of official secret. 1-8 years for disclosure by public official of official secret, if "committed for gain or in respect of particularly confidential information or for publishing or use abroad." Up to 3 for if negligent.⁷⁶</p>	Public personnel have been charged for unauthorized disclosures, but rarely.
Slovenia ⁷⁷	<p>Up to 3 years for disclosure [in violation of duties to protect classified information].⁷⁸ Limited to 1 year if disclosure was result of negligence.⁷⁹</p> <p>Up to 5 years if disclosure was motivated by greed or with the intent to publish "abroad."⁸⁰</p>	Public personnel have been charged for unauthorized disclosures.

Spain ⁸¹	<p>Up to 4 years for disclosure.⁸²</p> <p>3-10 years for soldiers who disclose national security related information "without any intention to benefit a foreign power," or 1-6 years if not "legally classified." 5-20 years if committed during wartime.⁸³ Penalties are higher if the information known as a result of position, or there was public disclosure.⁸⁴ Up to three years if by negligence, or up to 6 years if during wartime.⁸⁵</p> <p>12 yrs for treason - disclosing info classified as reserved or secret, "liable to damage national security ... in order to favour a foreign power or association".⁸⁶</p>	<p>No convictions for unauthorized public disclosure since 1978 Constitution.⁸⁷</p> <p>In 1987, a sub-lieutenant was sentenced to 4 years for revealing information to an agent of the USSR intelligence services.⁸⁸</p> <p>In 2010, Spanish court sentenced an agent of the National Intelligence Center to 9 years imprisonment for taking classified information from the National Intelligence Center to sell to the Russians.⁸⁹</p>
Sweden ⁹⁰	<p>Up to 2 years for unauthorized dealing of secret information.</p> <p>Up to 4 years for "gross unauthorized dealing with secret information, including public servants, assistance to a foreign power."⁹¹</p> <p>Up to 6 months for disclosure out of negligence, 2 years if during wartime.⁹²</p> <p>Up to 1 year for disclosure of confidential information by public servants; fine for disclosure out of negligence; "[i]n petty cases, however, punishment shall not be imposed."⁹³</p>	<p>A few prosecutions for unauthorized disclosures in the past 20 years. No convictions.</p>

<p>United Kingdom⁹⁴</p>	<p>Up to 2 years for unauthorized disclosure by public servants,⁹⁵ and other persons who have accessed information through unauthorized disclosures.⁹⁶</p> <p>In case of private persons and public servants not in the security or intelligence services, offense requires disclosure to be "damaging."⁹⁷</p> <p>Official Secrets Act 1911 as amended by 1920 Act provides for maximum penalty of 14 years where discloser has <i>reason to believe that information disclosed could be used to injury of UK or to advantage of any foreign nation.</i></p>	<p>10 prosecutions since 1989 enactment of Official Secrets Act. In three, the charges were dropped. In one, a jury found the public servant not guilty; in another, a public servant was required to pay a small fine. Five resulted in custodial sentences, the maximum of which was 1 year. A former MI5 member who disclosed state secrets to the media was sentenced to 6 months and was released after 7 weeks. <i>R v. Shayler</i> [2001].</p>
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¹ This chart was compiled by the Open Society Justice Initiative based on information supplied by the experts listed in Appendix B.

² Amanda Jacobsen, *National Security and the Right to Information in Europe*, 2013 (survey of the University of Copenhagen, in collaboration with the Open Society Justice Initiative), <http://www.right2info.org/resources/publications/national-security-page/national-security-expert-papers/jacobsen-nat-sec-and-rti-in-europe>.

³ Criminal Code, Law 11.179 (Argentina), 1984, at <http://www1.infojus.gov.ar/legislacion/ley-nacional-11179-codigo-penal.htm;jsessionid=1sgpkt0wmpw4m6wea0ourke0q?0>, Arts. 153-57, 222-23. Law No. 13.985, Crimes against the security of the nation, (Argentina), 1950, modified by Laws 16.648 & 24.198, at http://www.infojus.gov.ar/index.php?kk_seccion=documento®istro=LEYNAC&docid=LEY%2520C%2520013985%25201950%252009%252027, Arts. 2-3.

⁴ Law No. 13.985, Crimes against the security of the nation (Argentina), Art. 2 ("It will be punished with imprisonment of 1 to 10 years for anyone to procure, search for, disclose, remit or use news, documents, information or objects of political, social, military or economic nature that must remain secret for the protection of security, defence or foreign relations of the Nation."), Art. 3 ("It will be punished with imprisonment for 2 to 15 years for anyone to [procure, search for, disclose, remit or use news, documents, information or objects of political, social, military or economic nature that must remain secret for the protection of security, defence or foreign relations of the Nation] using his employment, function, state or mission.").

⁵ Criminal Code (Argentina), Art. 222 ("Shall be punished with imprisonment of 1 to 6 years, the person who discloses political, industrial, technological or military secrets related to security, defence measures or foreign relations of the Nation...If the disclosure or retention of the information was committed by a soldier, in the exercise of his functions, the minimum penalty will increase to 3 years and the maximum penalty will increase to 10 years."), Art. 223 ("Shall be punished with imprisonment of one month to one year and disqualification from public service for double the time, the person who from negligence makes known the secrets referenced in the previous article, those which he is in possession by virtue of employment or office."). See also *Id.*, Art. 157 ("Shall be punished with imprisonment of one 1 month to 2 years and disqualification of 1 to 4 years, the public official who reveals facts, acts, documents or data, which by law must be secret."); Art. 156 ("Shall be punished with a fine ... and disqualification from public employment, if applicable, for 6 months to 3 years, the person who has notice, by virtue of their status, office, employment, profession or art, of a secret of which the disclosure can cause damage, and discloses it without just cause.").

⁶ *Id.*, Art. 155 ("He shall be punished by a fine ... he who is in possession of [information], not intended to be public, publishes this information improperly, if the act causes or could cause harm to others. He is exempt from criminal liability if he acted with the clear intent to protect a public interest."). See also *Id.*, Art. 153, 153bis (penalty of 1 month to 1 year if accesses private communications and publishes them; if public servant, subject to extended period of disqualification for public service).

⁷ Crimes Act (Australia), 1914 (as of 2013), at <http://www.comlaw.gov.au/Details/C2013C00369>, Secs. 70 and 79. Criminal Code Act (Australia), 2002, at <http://www.comlaw.gov.au/Details/C2005C00496>, Sec. 91.1 (espionage – crimes require proof of “intent to prejudice the security or defence of the Commonwealth”).

⁸ Crimes Act, *supra*, Sec. 70 (“Disclosure of information by Commonwealth officers: (1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorised to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, shall be guilty of an offence. (2) [Offence also for former Commonwealth officers.] Penalty: Imprisonment for 2 years.”); Sec. 79(1) (defining prescribed information); Sec. 79(2) (“If a person communicates ... prescribed information, to a person, other than: (a) a person to whom he or she is authorised to communicate it; or (b) a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his or her duty to communicate it; or permits a person, other than a person referred to in paragraph (a) or (b), to have access to it, he or she shall be guilty of an offence. Penalty: Imprisonment for 2 years.”).

⁹ Sec. 79(2) (b) contains an exception that allows the communication of an official secret to a person not authorized to receive it if disclosure is “in the interests of the Commonwealth”

¹⁰ Sec 79(3) provides for up to 7 years imprisonment for “communication or retention of an official secret to an unauthorized person or a failure to comply with a directive regarding the retention or disposal” of such item with “intent to prejudice the security or defence of the Commonwealth or a part of the Queen's dominions”.

¹¹ [Defence Force Discipline Act 1982 \(Cth\)](#), s 58(1): A defence member or defence civilian is guilty of this crime if he or she discloses information and there is no lawful authority for the disclosure and the disclosure is likely to be prejudicial to the security or defence of Australia. Strict liability applies to the requirement that the disclosure be likely to prejudice the security or defence of Australia. The only defence to this crime is that the person did not know nor could reasonably have been expected to know that the information was likely to prejudice the security or defence of Australia. This offence is punishable by 2 years’ imprisonment.

¹² *R v Lappas* [2003] 152 ACTR 7. *Kessing v. R*, [2008] NSWCCA 310. See also *R v Scerba* (No 2) [2015] ACTSC 359 (12 months sentence for DOD employee who downloaded classified sensitive doc and posted several pages on a website – not possible to know whether any specific harm was suffered but risk was “real”).

¹³ Criminal Code (Belgium), 1987, available at <http://legislationline.org/documents/section/criminal-codes>, Arts. 118-20.

¹⁴ *Id.*, Art. 119 (“Whoever knowingly delivered or transmitted ... to a person not authorised to have received or known of it, objects, plans, papers, documents or information ... shall be punished with incarceration of 6 months to 5 years and a fine... He shall be subjected to the same penalty if,

without authorization from the competent authority, he reproduced, published or disclosed, in whole or in part, by whatever means, ... information...").

¹⁵ Decree Law 10426 (Bolivia), 1972, at http://www.oas.org/juridico/MLA/sp/bol/sp_bol-int-text-cp.html, Arts. 111, 115. Military Criminal Code (Bolivia), 2002, at [http://www.icacbba.com.bo/documentos/45 CODIGO%20PENAL%20MILITAR.pdf](http://www.icacbba.com.bo/documentos/45_CODIGO%20PENAL%20MILITAR.pdf), Arts. 56, 58.

¹⁶ Security of Information Act (SOIA) s 15 reads: "(1) No person is guilty of an offence under section 13 or 14 if the person establishes that he or she acted in the public interest. (2) Subject to subsection (4), a person acts in the public interest if: (a) the person acts 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; and (b) the public interest in the disclosure outweighs the public interest in non-disclosure."

¹⁷ Criminal Code (Chile), Law 20653 of 1984, at <http://www.leychile.cl/Navegar?idNorma=1984>, Arts. 118, 119, 246, 247bis. Military Code (Chile), 1944 (as of 30 December 2010), Arts. 245, 255-57, at <http://www.leychile.cl/Navegar?idNorma=18914>.

¹⁸ Criminal Code (Chile), Art. 246 ("A public employee who reveals secrets which he knows by virtue of his job or unduly delivers or copies papers within his control that should not be disclosed, shall incur the penalties of suspension of employment in its minimum to medium degrees or a fine ... , or both together. If the disclosure or release results in serious harm to the public good, the penalties shall be imprisonment in any degree and a fine... The penalties prescribed in the preceding paragraphs shall apply, as appropriate, to the employee who improperly facilitates in any way the knowledge of documents, acts or papers which he controls and which are to be published."); Art. 247bis ("A public employee who, using specifically protected information or secrets, who has knowledge by reason of his job, obtains an economic benefit for oneself or for another, shall be punished with the imprisonment identified in previous article and a fine to three times the profit made.").

¹⁹ Criminal Code (Colombia), 2000, at http://www.secretariasenado.gov.co/senado/basedoc/ley/2000/ley_0599_2000.htm 1, Arts. 163, 418. Law No. 1621, Law of Intelligence and Counter-Intelligence (Colombia), 2013, at <http://wsp.presidencia.gov.co/Normativa/Leyes/Documents/2013/LEY%201621%20DEL%2017%20DE%20ABRIL%20DE%202013.pdf>, Arts. 33, 38, 39. Military Criminal Code (Colombia), 2010, at http://www.justiciamilitar.gov.co/irj/go/km/docs/JPM/Documentos/NORMATIVIDAD/ley_1407_2010_n_cod_penal_mil.pdf, Art. 130.

²⁰ Criminal Code (Colombia), Art. 418. ("Disclosure of secrets. The public servant that improperly makes known a document or news that should be kept secret or confidential, will be subjected to a fine and loss of employment. If the conduct results in harm, the penalty will be 16 to 54 months in prison, a fine ... and disqualification from the exercise of public rights and functions for 80 months."). Art. 418. ("Disclosure of secrets. The public servant that improperly makes known a document or news that should be kept

secret or confidential, will be subjected to a fine and loss of employment. If the conduct results in harm, the penalty will be 16 to 54 months in prison, a fine ... and disqualification from the exercise of public rights and functions for 80 months."). See also *Id.*, Art. 419 ("Use of information classified as secret or confidential [by public servant is subject to administrative penalties]"). Law No. 1621 (Colombia), Art. 38 ("Those [public servants] who improperly disclose, provide, leak, market, use or allow someone to use confidential information or documents, will be subject to misconduct, without prejudice to the criminal actions available.")

²¹ Military Criminal Code (Colombia), Art. 130.

²² Law No. 1621 (Colombia), Art. 33(4) ("The obligation of confidentiality [binding in relation to intelligence and counter-intelligence organisms] does not bind journalists or media when they exercise their journalistic function of government monitoring, in the context of journalist self-regulation and constitutional jurisprudence, as they are in any case obligated to protect the confidentiality of their sources."). See also Sentence C-540/12, Constitutional Court (Colombia), at <http://www.corteconstitucional.gov.co/relatoria/2012/c-540-12.htm> ("in general terms the reserve or secrecy of a public document ... (iii) covers public servants, not journalists and, in principle, doesn't authorize the State to impede the publication of information in the press...").

²³ Criminal Code (Czech Republic), 2009 (as of 2012), at <http://www.zakonycr.cz/seznamy/040-2009-sb-zakon-trestni-zakonik.html>, Arts. 316-318.

²⁴ *Id.*, Art. 317 (3) ("A term of imprisonment of from 5 to 12 years shall be imposed on an offender: (a) if his act is stipulated in sub-provision (1) and concerns an official secret related to securing the defence capability of the Republic and classified in a special Act as 'strictly secret', or (b) if such act is committed during a state defence emergency.").

²⁵ *Id.*, Art. 317 (2)(a) (2-8 years "on an offender: (a) who intentionally divulges to an unauthorized person an official secret classified in a special Act as 'strictly secret' or 'secret'...").

²⁶ *Id.*, Art. 318 ("Whoever through negligence causes disclosure of an official secret classified in a special Act as 'strictly secret' or 'secret' or 'confidential' shall be sentenced to a term of imprisonment of up to 3 years, or to prohibition from a specific activity or a pecuniary penalty.").

²⁷ Criminal Code (Denmark), 2008, Arts. 107, 109, 152, at <https://www.retsinformation.dk/Forms/R0710.aspx?id=142912#Kap13>.

²⁸ *Id.*, Sec. 109(1) ("Anyone who discloses or passes on notification of the state's secret operations, deliberations or decisions in cases concerning national security or the state's rights in relation to foreign states, or that concern significant socio-economic foreign relations interests, shall be punished by imprisonment for up to 12 years.").

²⁹ *Id.*, Sec. 109(2) (fine or up to three years imprisonment).

³⁰ *Id.*, Sec. 152(1) ("Any person who is exercising or who has exercised a public office or function, and who unlawfully passes on or exploits confidential information, which he has obtained in connection with his office or function, shall be liable to a fine or to imprisonment for any term not exceeding six months."). *Id.*, Sec. 152(d)(3) ("The same penalty is imposed on any person who, without having participated in the act,

unlawfully discloses information that is confidential for reasons of national security or defence of the realm.").

³¹ *Id.*, Sec. 152(2) ("Where the offence in paragraph 1 is committed with the intent to procure gain for the perpetrator or others, or in case of otherwise aggravating circumstances, the penalty may increase to imprisonment for any term up to 2 years. As especially aggravating circumstances are considered in particular cases where the disclosure or use is made in a manner as to cause significant damage to others or pose a particular threat thereof.").

³² *Id.*, Sec. 152 e(2) ("The provisions of Sections 152-152d of this Act do not apply in cases where the person in question ... is acting in the legitimate exercise of obvious public interest or for his own or others' best interests.").

³³ Reporters without Borders, *Three Berlingske Tidende Journalists Acquitted of State Security Charges*, 4 December 2006, at <http://en.rsfsf.org/denmark-three-berlingske-tidende-04-12-2006,19991.html>.

³⁴ Criminal Code (Ecuador), 1971, at http://www.oas.org/juridico/MLA/sp/ecu/sp_ecu-int-text-cp.pdf, Arts. 117, 202.

³⁵ *Id.*, Art. 202 ("The fraudulent disclosure or use of protected information, as well as commercial or trade secrets, will be punished with imprisonment ordinary imprisonment of 3 to 6 years and a fine ... If the fraudulent disclosure or use is made by the person or persons responsible for the custody or legitimate use of the information, they will be punished with imprisonment of 6 to 9 years and a fine ...").

³⁶ Criminal Code (France), 1995 (as of 7 April 2013), Arts. 411-6, 411-7, 413-10, 413-11, 413-12, at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719>.

³⁷ *Id.*, Art. 413-10 (7 years and a fine for "duplication, as well as to the communication to the public or to an unauthorized person, by any person holding such a confidential information because of his position ... of any information ... which is a national defence secret. The same penalties apply to the holder who permits the ... removal, duplication or revelation of any [such] information ... Where the holder has behaved negligently or recklessly, the offence is punished by 3 years' imprisonment and a fine ...").

³⁸ *Id.*, Art. 413-11(3) (5 years imprisonment and a fine for "any person not covered by article 413-10 who: ... (3) brings to the knowledge of the public or of an unauthorized person [of information which is in the nature of a national defence secret]...").

³⁹ *Id.*, Art. 413-12.

⁴⁰ Criminal Code (Germany), 1998 (as of 2 October 2009), at <http://www.gesetze-im-internet.de/stgb/BJNR001270871.html>, Sec. 94- 96, 353b.

⁴¹ *Id.*, Sec. 95 ("Disclosure of state secrets with intent to cause damage: (1) Whosoever allows a state secret which has been kept secret by an official authority or at its behest to come to the attention of an unauthorized person or become known to the public, and thereby creates the danger of serious prejudice to the external security of the Federal Republic of Germany, shall be liable to imprisonment from 6 months to 5 years unless

the offence is punishable under section 94. (2) The attempt shall be punishable. (3) In especially serious cases the penalty shall be imprisonment from 1 to 10 years.”). See *Id.*, Sec. 94(2) (defining “especially serious cases”).

⁴² *Id.*, Sec. 353b (“(1) Whosoever unlawfully discloses a secret which has been confided or become known to him in his capacity as (i) a public official; (ii) a person entrusted with special public service functions; or (iii) a person who exercises duties or powers under the laws on staff representation, and thereby causes a danger to important public interests, shall be liable to imprisonment not exceeding five years or a fine. If by the offence the offender has negligently caused a danger to important public interests he shall be liable to imprisonment not exceeding one year or a fine. (2) Whosoever other than in cases under subsection (1) above unlawfully allows an object or information to come to the attention of another or makes it publicly known (i) which he is obliged to keep secret on the basis of a resolution of a legislative body of the Federation or a state or one of their committees; or (ii) which he has been formally put under an obligation to keep secret by another official agency under notice of criminal liability for a violation of the duty of secrecy, and thereby causes a danger to important public interests shall be liable to imprisonment not exceeding three years or a fine. (3) The attempt shall be punishable. (4) The offence may only be prosecuted upon authorisation.”).

⁴³ Criminal Code (Guatemala), Decree No. 17, 1973, at http://www.oas.org/dil/esp/Codigo_Penal_Guatemala.pdf, Arts. 366, 368-70. Military criminal code (Guatemala), at <http://biblio.juridicas.unam.mx/libros/5/2048/9.pdf>, Art. 36. Law on Access to Public Information (Guatemala), 2008, at <http://www.congreso.gob.gt/manager./images/BDF3BF91-FB41-6C68-C020-622221C9C64C.pdf>, Art. 67.

⁴⁴ Law on Access to Public Information (Guatemala), Art. 67 (“The public servant, official or employee who discloses or facilitates the disclosure of information of which he has knowledge by virtue of his employment and which is confidential or classified pursuant to the Guatemalan law or the Constitution, will be sanctioned with imprisonment of 5-8 years and disqualification from public service for double the imposed penalty and a fine...”).

⁴⁵ Criminal Code (Guatemala), Art. 366. (“Whoever, in any way, divulges secrets concerning national security, and communicating or publishing documents, drawings, plans or other information related to material, fortifications or military operations, shall be punished with imprisonment from 2-5 years and a fine...”).

⁴⁶ Criminal Code (Italy), 2012 (as of 3 June 2013), at <http://www.altalex.com/index.php?idnot=36653>, Arts. 257, 258, 261, 262.

⁴⁷ *Id.*, Art. 261.

⁴⁸ *Id.*, Art. 262.

⁴⁹ Federal Criminal Code (Mexico), 1931 (as of 7 June 2013), at <http://www.diputados.gob.mx/LeyesBiblio/pdf/9.pdf>, Arts. 123, 127, 128, 210, 211. Code of Military Justice (Mexico), 1933 (as of 9 April 2012), at <http://www.diputados.gob.mx/LeyesBiblio/pdf/4.pdf>, Arts. 203, 206.

⁵⁰ *Id.*, Art. 210 ("A penalty of 30 to 200 days of community service will be imposed on anyone who, without just cause and causing harm to someone without their consent, reveals any secret or classified communication of which the person has knowledge by virtue of his employment or position."); Art. 211 ("The penalty will be of 1 to 5 years, a fine ... and the suspension of his position where applicable, of two months to a year, when the punishable disclosure has been made by a person who provides professional or technical services or by a public official or employee or when the secret revealed or published is of industrial nature.").

⁵¹ Criminal Code (Moldova), 2009, at <http://lex.justice.md/index.php?action=view&view=doc&id=331268>, Arts. 337-338, 344.

⁵² *Id.*, Art. 344 ("Disclosure of state secrets: (1) The disclosure of information that constitutes a state secret by a person to whom such information was entrusted or that became known in connection with his/her official position or professional duties ... shall be punished by a fine ... or by imprisonment for up to 4 years, in both cases with the deprivation of the right to hold certain positions or to practice certain activities for up to 5 years. (2) The same action resulting in severe consequences shall be punished by imprisonment for 3 to 7 years with the deprivation of the right to hold certain positions or to practice certain activities for 2 to 5 years.").

⁵³ Criminal Code (the Netherlands), 1881 (as of 16 July 2013), at http://wetten.overheid.nl/BWBR0001854/TweedeBoek/Titell/Artikel98/geldigheidsdatum_16-07-2013, Art. 98.

⁵⁴ *Id.*, Art. 98(1) ("He who intentionally distributes or makes information available to a person or body not authorised to know information of which secrecy is commanded in the interests of the State or its allies, an object from which such information is derived, or such data, shall, if he knows or should have reasonable grounds to suspect that this concerns such information, such object, or such data, be subject to punishment of up to 6 years imprisonment or a fine..."). See also *Id.*, Art. 98b ("He whose negligence has caused information ... as defined in Article 98, becoming public or known to an unauthorized person, can be punished by imprisonment up to a year or a fine...").

⁵⁵ Crimes Act 1961 (NZ), sec 78A(1): "Every one is liable to imprisonment for a term not exceeding 3 years who, being a person who owes allegiance to the Sovereign in right of New Zealand, within or outside New Zealand, (a) knowingly or recklessly, and with knowledge that he or she is acting without proper authority, communicates any official information or delivers any object to any other person knowing that such communication or delivery is likely to prejudice the security or defence of New Zealand ..."
<http://legislation.govt.nz/act/public/1961/0043/latest/DLM328528.html>.

⁵⁶ General Civil Criminal Code (the Kingdom of Norway), 1902 (as of 1 July 2013), at <http://www.lovdata.no/all/nl-19020522-010.html>, Sec. 90, 91.

⁵⁷ *Id.*, Sec. 90 ("Any person who unlawfully causes the disclosure of anything that should have been kept secret in the interests of national security, or who aids and abets thereto, shall be liable to imprisonment for a term not exceeding three years, but for not less than one year and not more than 10 years if the secret is betrayed to another state or considerable danger is

caused. If the offender has acted negligently, a fine shall be imposed. If the secret was confided to the offender in his official capacity, the aforesaid custodial penalties may be increased by up to 50 per cent.”).

⁵⁸ Law 14 (Panama), 2007, at http://www.oas.org/juridico/mla/sp/pan/sp_pan-int-text-cp.pdf, Arts. 427-31.

⁵⁹ *Id.*, Art. 428 (“Whoever reveals confidential information of restricted access, declared as such under legal provisions concerning the security of the State, shall be punished by imprisonment of 2 to 4 years.”);

⁶⁰ *Id.*, Art. 430 (“Anyone guilty of revealing secrets that they hold by virtue of his office or a formal contract, or allows anyone else access to them, shall be punished with imprisonment from six months to a year or the equivalent in fines or arrest weekends.”)

⁶¹ Criminal Code (Paraguay), Law 1970, 1997, at <http://www.mre.gov.py/v1/Adjuntos/Privacidad/Ley1160.pdf>, Arts. 282-85, Law of National Defence and Internal Security (Paraguay), 1999, Art. 28, at http://www.presidencia.gov.py/marco_legal/MINISTERIOS/03Defensa/ley_1337-1999.pdf. Military criminal code (Paraguay), 1980, at [http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/cb85f2028142a0cdc12570530044190f/\\$FILE/Ley_843_1980.pdf](http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/cb85f2028142a0cdc12570530044190f/$FILE/Ley_843_1980.pdf), Arts. 78-80.

⁶² *Id.*, Art. 283. (“Disclosure of state secrets. (1) A person who makes accessible to another or publicly discloses a State secret that should be kept by a government entity or under the arrangement of such, and thereby exposes the Republic to the risk of serious harm to its external security, shall be punished by imprisonment of up to 5 years, unless the previous article [treason] is not applicable. (2) In these cases, the attempted offence shall also be punished.”). See also *Id.*, Art. 284. (“Less serious cases of disclosure. (1) A person who makes accessible to another a State secret mentioned in this article or who discloses it publicly, and negligently causes the risk of serious harm to the external security of the Republic, shall be punished with imprisonment of up to 5 years or a fine. (2) A person who by his function or mandate had access to state secrets and negligently makes accessible to an unauthorized person, thereby causing the risk of serious harm to the external security of the Republic, shall be punished imprisonment of up to 3 years or a fine.”).

⁶³ Law of National Defence and Internal Security (Paraguay), Art. 28.

⁶⁴ Criminal Code (Peru), Legislative Decree No. 635, 1991 (as of August 2013), at

[http://spij.minjus.gob.pe/CLP/contenidos.dll/demo/coleccion00000.htm/tomo00006.htm/sumilla00011.htm?f=templates\\$fn=document-frame.htm\\$3.0#JD_salas1315](http://spij.minjus.gob.pe/CLP/contenidos.dll/demo/coleccion00000.htm/tomo00006.htm/sumilla00011.htm?f=templates$fn=document-frame.htm$3.0#JD_salas1315), Arts. 207A, 207C, 330-331A.

⁶⁵ *Id.*, Art. 330 (Disclosure of national secrets) (“Whoever discloses or makes accessible to a foreign state or its agents or the public, secrets required by the interest of the Republic, shall be punished by imprisonment for not less than 5 nor more than 15 years. If the agent acts for profit or any other improper motive, the penalty shall be not less than 10 years. When the agent acts negligently, the penalty shall be not more than four years.”).

⁶⁶ *Id.*, Art. 331A (“Whoever in whatever way discloses, reproduces, displays, disseminates or makes accessible in whole or in part, the content of

information and/or secret activities of the National Defence System, shall be punished by imprisonment for not less than 5 nor more than 10 years and disqualification of public employment [under the relevant article]. Whoever provides or makes available to third parties, without proper authorization, information and/or activities referenced in the preceding paragraph, shall be punished by imprisonment for not less than 6 nor more than 12 years and disqualification from public employment [under the relevant article]."

⁶⁷ Criminal Code (Poland), 1997 (as of 1 June 2012), at <http://prawo.legeo.pl/prawo/kodeks-karny-z-dnia-6-czerwca-1997-r/>, Arts. 265, 266.

⁶⁸ *Id.*, Art. 265(1) ("Whoever discloses or, in violation of the law, uses information which constitutes a state secret shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.").

⁶⁹ *Id.*, Art. 266(2) ("A public official who discloses "restricted" or "confidential" information or information that he obtained in the official capacity, to an unauthorized person, and the disclosure of the information could cause harm to a legally protected interest, shall be punishable by imprisonment up to 3 years").

⁷⁰ *Id.*, Art. 265(3) ("Whoever unintentionally discloses [a state secret], with which he has become acquainted in the performance of his official function or authorisation delegated to him shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.").

⁷¹ Criminal Code (Russia), 1996 (as of 29 June 2013), at <http://www.russian-criminal-code.com/PartII/SectionX/Chapter29.html>, <http://www.ug-kodeks.ru/>. Arts. 275, 276, 283.

⁷² *Id.*, Art. 283(1), (2) ("Disclosure of information comprising a state secret, by a person to whom it has been entrusted or to whom it has become known through his office or work, if this information has become the property of other persons, in the absence of the characteristic features of high treason, shall be punishable by arrest for a term of 4-6 months, or by deprivation of liberty for up to 4 years, with disqualification to hold specified offices or to engage in specified activities for a term of up to 3 years, or without such disqualification. The same deed, which involved through negligence grave consequences, shall be punishable by deprivation of liberty for a term of 3-7 years, with disqualification to hold specified offices or to engage in specified activities for a term of up to 3 years.").

⁷³ *Id.*, Art. 283.1(1) and (2).

⁷⁴ Criminal Code (Serbia), 2005 (as of 2009), at <http://www.propisinet.me/PDF/Krivicni%20zakonik.pdf>, Arts. 315, 316, 389.

⁷⁵ *Id.*, Art. 316 ("(1) Whoever without authorisation discloses, hands over or makes available to another, information or documents that are entrusted to him or that he acquired otherwise and that represent a state secret, shall be punished by imprisonment of 1 to 10 years. (2) Whoever discloses to another person information or documents that he knows are a state secret, and which he unlawfully acquired, shall be punished by imprisonment up to five years. ... (4) If the offence specified in paragraph 1 is committed from negligence, the offender shall be punished by imprisonment of six months to five years.").

⁷⁶ *Id.*, Art. 389(2), (3), (4) ("(2) Whoever discloses to another person information or documents that he knows are a state secret, and which he unlawfully acquired, shall be punished by imprisonment from six months up to five years. (3) If the offence specified in paragraph 1 of this Article is committed during a direct threat of war, state of war or state of emergency, or has resulted in compromising security, economic or military power of Serbia or SaM, the offender shall be punished by imprisonment of three to fifteen years. (4) If the offence specified in paragraph 1 is committed from negligence, the offender shall be punished by imprisonment of six months to five years.").

⁷⁷ Criminal Code (Slovenia), 2008, (as of 14 June 2012), at <http://www.wipo.int/wipolex/en/details.jsp?id=6074> or <http://www.uradni-list.si/1/objava.jsp?urlid=201250&stevilka=2065>, Arts. 260, 358.

⁷⁸ *Id.*, Art. 260(1) ("An official or any other person who, in non-compliance with his duties to protect classified information, communicates or conveys information designated as classified information to another person, or otherwise provides him with access to such information or with the possibility of collecting such information in order to convey the same to an unauthorized person, shall be sentenced to imprisonment for not more than 3 years.").

⁷⁹ *Id.*, Art. 260(4). ("(4) If the offence under paragraph 1 of this Article has been committed through negligence, the perpetrator shall be sentenced to imprisonment for not more than one year.").

⁸⁰ *Id.*, Art. 260(3). ("(3) If the offence from paragraph 1 of this Article has been committed out of greed or with a view to publishing or using the information concerned abroad, the perpetrator shall be sentenced to imprisonment for not more than five years").

⁸¹ Criminal Code (Spain), 1995 (as of 2011), at <http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>, Arts. 584, 598.

Military Criminal Code (Spain), [YEAR], at <http://www.boe.es/buscar/act.php?id=BOE-A-1985-25779>, Arts. 50, 52, 55. See also Decision 1094/2010, Supreme Court (Spain), 10 December 2010, Criminal Section.

⁸² Criminal Code (Spain), Art. 598 ("Procure, disclose, distort or render useless confidential or secret information. A person who, without the intent of favoring a foreign power, procures, discloses, distorts, or renders useless information legally classified as confidential or secret, related to national security or national defence or related to the technical means or systems used by the Armed Forces or the industries or military interest, shall be punished with imprisonment of one to four years.").

⁸³ Military Criminal Code (Spain), Art. 53.

⁸⁴ *Id.*, Art. 54 (Sentences will be imposed from within "the greater half of its scope when one of the following circumstances occurs: (1) That the subject held or had knowledge of the information due to his charge or post. (2) That the disclosure was made publicly or through a method of communication that ensured its dissemination.").

⁸⁵ *Id.*, Art. 56.

⁸⁶ Art. 584 of Penal Code "(Treason): A Spaniard who, in order to favor a foreign power, association or international organization, obtains, forges, deactivates or discloses information classified as reserved or secret,

liable to damage national security or national defense, shall be punished, as a traitor, with a sentence of imprisonment from six to twelve years."

⁸⁷ Communication with Susana Sanchez, August 2013, on file with author.

⁸⁸ Communication with Susana Sanchez, August 2013, on file with author.

⁸⁹ Judgment 1094/2010, Supreme Court, 2nd panel (Spain), 10 December 2010.

Communication with Susana Sanchez, August 2013, on file with author.

⁹⁰ Criminal Code (Sweden), 1962 (as of 4 July 2013), at

<http://www.notisum.se/rnp/sls/lag/19620700.HTM>, Ch. 19, Sec. 5-9; Ch. 20, Sec. 3.

⁹¹ *Id.*

⁹² *Id.*, Ch. 19, Sec. 9 ("A person who through gross carelessness transmits, gives or reveals information described in Section 7 shall be sentenced to a fine or imprisonment for at most six months or, if the Realm was at war, to a fine or imprisonment for at most two years").

⁹³ *Id.*, Ch. 20, Sec. 3 ("A person who discloses information which he is duty-bound by Law or other statutory instrument or by order or provision issued under a Law or statutory instrument to keep secret, or if he unlawfully makes use of such secret, he shall, if the act is not otherwise specially subject to punishment, be sentenced for breach of professional confidentiality to a fine or imprisonment for at most one year. A person who through carelessness commits an act described in the first paragraph shall be sentenced to a fine. In petty cases, however, punishment shall not be imposed").

⁹⁴ Official Secrets Act (United Kingdom), 1989 (as of August 2013), Sec. 8, 10, at <http://www.legislation.gov.uk/ukpga/1989/6/contents>, as amended by Criminal Justice Act (United Kingdom), 2003, at <http://www.legislation.gov.uk/ukpga/2003/44/schedule/26/paragraph/39/prospective>. Official Secrets Act (United Kingdom), 1911 (as of August 2013), Sec. 1, at <http://www.legislation.gov.uk/ukpga/Geo5/1-2/28/contents>.

⁹⁵ *Id.*, Sec. 1(1) ("A person who is or has been—(a) a member of the security and intelligence services; or (b) a person notified that he is subject to the provisions of this subsection, is guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force."); Sec. 1(3) ("A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he makes a damaging disclosure of any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as such but otherwise than as mentioned in subsection (1) above"); 2(1) (offence for public servants to "without lawful authority" make "a damaging disclosure ... relating to defence"); Sec. 3(1) (offence for public servants to "without lawful authority" make "a damaging disclosure ... relating to international relations"); Sec. 10(1) (offences other than 8(1), 8(4), 8(5) subject to penalties of up to 2 years imprisonment and/or fine on conviction on indictment; or up to 6 months imprisonment and/or fine on summary conviction).

⁹⁶ *Id.*, Sec. 5(2) ("Information resulting from unauthorized disclosures or entrusted in confidence... (2) ...[T]he person into whose possession the

information, document or article has come is guilty of an offence if he discloses it without lawful authority knowing, or having reasonable cause to believe, that it is protected against disclosure by the foregoing provisions of this Act and that it has come into his possession as mentioned in subsection (1) above [disclosed by a public servant lawfully or unlawfully]."); 8(6) ("A person is guilty of an offence if he discloses any official information, document or other article which can be used for the purpose of obtaining access to any information, document or other article protected against disclosure...").

⁹⁷ *Id.*, Sec. 5(3) ("[A] person does not commit an offence under subsection (2) above unless—(a) the disclosure by him is damaging; and (b) he makes it knowing or having reasonable cause to believe, that it would be damaging; and the question of whether a disclosure is damaging shall be determined for the purposes of this subsection as it would be in relation to a disclosure of that information, document or article by a Crown servant"); Sec. 1(4) ("For the purposes of subsection (3) above a disclosure is damaging if—(a) it causes damage to the work of, or of any part of, the security and intelligence services; or (b) it is of information or a document or other article which is such that its unauthorized disclosure would be likely to cause such damage or which falls within a class or description of information, documents or articles the unauthorized disclosure of which would be likely to have that effect."); Sec. 2(2) (damaging disclosure defined related to defence); Sec. 3(2) (damaging disclosure defined related to international relations).