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SPM(75)3

COPY NO 55

22 January 1975

CABINET

SECURITY POLICY AND METHODS COMMITTEE

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UNITED STATES FREEDOM OF INFORMATION ACT 1974

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Memorandum by the Security Service

1. The passing by Congress in November 1974 of an Act, amending the Freedom of Information Act 1967, has implications for the protection of British classified information provided to the US Government or its agents. The amendment will come into force on or about 19 February 1975.
2. The object of the United States Freedom of Information Act 1967 was to identify official information which might be made available, upon application, to members of the public, and to make arrangements for it to be examined subject to certain exceptions. One of these exceptions is relevant to British information in American hands. In paragraph (b)(1) of the Act matters that were specifically required by Executive Order to be kept secret 'in the interest of the national defence or foreign policy' were exempted from the provisions of the Act. In Executive Order No. 11652 it was ruled that classified information or material furnished by foreign governments or national organisations and held by the United States on the

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understanding that it was kept in confidence would continue to be exempt from declassification and therefore would be excluded from the provisions of the 1967 Act.

3. The Act, which has been cited in the United Kingdom as evidence that 'open government' exists in the US gave rise to increasing dissatisfaction. The US press reflected the view that the Act was too restrictive and that it was difficult for bona fide researchers to obtain access to numbers of documents which did not appear to merit classification. In 1973 a Congresswoman was denied access to atomic energy information and took the matter to the Supreme Court, which found against her on the ground that the court could not question the classification of documents by a proper authority. Subsequently an Act amending the Freedom of Information Act 1967 was passed in November 1974. The President had earlier vetoed certain provisions of the amending Act but his veto was overruled by Congress.

4. The most important provision is the amendment to paragraph (b)(1), whereby the paragraph now reads as follows:-

"The section does not apply to matters that are  
(A) specifically authorised under criteria established by an Executive order to be kept secret in the interest of national defence or foreign policy and (B) are in fact properly classified pursuant to such Executive order".

Consequently the courts may now inquire in camera whether matters which are specifically authorised under Executive Order to be kept secret in the interest of national defence

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and foreign policy are in fact properly classified. According to the Explanatory Statement to the 1974 Act "Before the court orders in camera inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law". It is not known whether the appellant can be present at hearings in camera to submit arguments about the propriety of classifications.

5. Other provisions of significance are:-

- a. Any application by a member of the public for official records will normally be met within 10 days; if this application is not met the applicant has a right to appeal to the head of the department or agency, and if this is not successful there is a right to judicial review;
- b. 'any reasonably segregable portion of a record' shall be provided to applicants after the deletion of parts that are exempt;
- c. an annual report is to be made to certain Officers of Congress which will set out the reasons why information was denied to applicants. It is not known whether such reports are published.

6. The provisions of the 1974 Act will affect the safeguarding of British classified information ~~or material~~ provided to the Americans. While it is not possible to forecast how the Act will work in practice there is apprehension in the US as to how the courts will interpret the new law. The

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1974 Act specifically permits the court to investigate the classification of documents under any Executive Order (including No. 11652). The court can therefore look at all relevant paragraphs of this Order and question the action taken under it. For example in Section 4(c) of 11652 classified information supplied by a foreign government shall be assigned a classification which assumes a "degree of protection equivalent to that required by the Government ... which furnished the information". It is arguable that the court might require evidence in camera of the practice of the foreign government concerned. The difficulty about relying on 11652 is that no part of it seems likely to prevent the matter getting as far as the court and that may prove to be too far for the full protection of the information. In some matters the very fact that British sources have supplied information at all may be embarrassing.

7. Where UK classified information is contained in non-attributable form in a US classified document, it might be difficult to prove a case for its exemption from court inspection. In such a situation it would be open to the court to question the classification of the US document and, if the court decided that the document did not merit classification, to order its declassification and release to the applicant.

8. The JIC discussed at its meetings on 9 and 16 January 1975 the implications of the 1974 Act, noting that it posed a serious threat to the security of United Kingdom intelligence in US hands. The JIC instructed its Secretary to draw the attention of the Secretary of the SPMC to the desirability

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of a study of the implications of the new legislation and of the measures (including possible approaches to the US) which might be taken to reduce the risk of unauthorised disclosure. The object of such approaches should be to seek the cooperation of the US Government in safe-guarding British classified information ~~and material~~ provided to the US Government or its agents by whatever means seem most appropriate to the FCO in consultation with the US Government, possibly by amendments to the legislation or by Executive Order (if constitutionally effective).

## Recommendations

9. The Committee is invited:-
  - a. to draw to the attention of the FCO the implications of the United States Freedom of Information Act 1974 for the protection of British classified information in US hands;
  - b. to invite the FCO to make approaches at a high level to the United States Government with a view to seeking their cooperation in safe-guarding British classified information by whatever means seem most appropriate to the FCO in consultation with the US Government, possibly by amendments to the legislation or by Executive Order.

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SECURITY POLICY AND METHODS COMMITTEE

UNITED STATES FREEDOM OF INFORMATION ACT 1974

Note by the Secretaries

1. At their meeting on 16 January, the Joint Intelligence Committee instructed their Secretary to make known to us their view that the SPMC should consider the effects of the United States Freedom of Information Act 1974 upon the security of United Kingdom information and the measures (including possible approaches to the United States) which might be taken to reduce any new risks: the Chairman of the JIC stressed that, because the new legislation was to take effect on 19 February 1975, time was of the essence.
2. As a basis for the SPMC's consideration of this question, the Security Service have now circulated a memorandum, SPM(75) 3. Unless we are informed to the contrary (Cabinet Office, Ext 132) by noon on Tuesday, 28 January, we shall assume that the Committee -
  - a. approves the recommendations in paragraph 9 of SPM(75) 3; and
  - b. invites the Security Service, in consultation with the Foreign and Commonwealth Office and other Departments closely involved, to bring the question before the Committee again at the earliest appropriate moment in the light of the United States response to the approaches to be made by the Foreign and Commonwealth Office in pursuit of the recommendation in sub-paragraph 9b. of SPM(75) 3.

Signed J M MOSS  
L F RIDGEWELL  
P A EVANS

Cabinet Office  
22 January 1975