Moles, Bugs, Whistleblowers: Spycatcher In The 21st Century

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Law360, New York (September 28, 2016, 11:53 AM EDT) -- A disenchanted ex-spy, living in exile, denounces the intelligence agency that once employed him, accusing it of illegal wiretapping, cover-ups and worse. His "whistleblowing" spawns books, documentaries and movies. His detractors, including the government he once served, brand him a scoundrel and a traitor.

Although this resembles current events, it happened in the mid-1980s. He was Peter Wright, a former official of MI5 (the U.K.'s internal security service); his book was titled "Spycatcher."

The Initial Suppression and Eventual Publication of Peter Wright's "Spycatcher"

The "Spycatcher" saga originated with several post-war scandals within the British intelligence community. Most notably, three senior British officials, Donald McLean, Guy Burgess and later Harold "Kim" Philby, were unmasked during the 1950s and 1960s as Soviet double agents (or "moles"). A "fourth" mole, the art historian Sir Anthony Blunt, was revealed in 1979 — amid great national scandal, since, until his treachery was revealed, he had been "Keeper of the Queen's Pictures" at Buckingham Palace.

Peter Wright, who retired from MI5 in the early 1970s, had earlier conducted a top secret internal investigation into these and other "moles" in British intelligence. He considered Soviet penetration had been worse than imagined, but others did not agree with him. He left MI5 feeling unappreciated and ignored.[1] He was also angry over a pay dispute — MI5 had apparently refused to pay him what he felt was his full pension entitlement.

In 1981, Wright was a confidential source for journalist Chapman Pincher's 1981 book "Their Trade is Treachery," exploring the theory that there was another traitor (a "fifth man") within British ranks. Then, after Wright had given a BBC TV interview on the subject, a Sydney-based publisher invited him to write a "candid autobiography" about his career. The result was a memoir, "Spycatcher," scheduled for publication in both the U.K. and Australia.

"Spycatcher" traced Wright's career in MI5, starting in the 1940s as a technical/surveillance consultant, rising to senior levels over the next two decades. While it described MI5's controversial wiretapping practices, the more scathing sections described Wright's role in investigating Soviet penetration after the McLean/Burgess defections. As well as excoriating his superiors for failing to expose Philby, he advanced the claim (which to this day remains unverified) that there was a "fifth man," in the form of Sir Roger Hollis,

the former head of MI5 — Wright's direct boss.

The novelty of "Spycatcher" was that it offered an insider's view. Margaret Thatcher's government reacted by trying to stop its publication. It obtained court injunctions in England, restraining attempts to serialize "Spycatcher" in the London newspapers. The U.K. government then instructed lawyers in Australia, who obtained a preliminary injunction from the Supreme Court of New South Wales (Equity Division) against publication of "Spycatcher" in Australia in mid-1985.

Then followed one of the more celebrated Sydney trials of the 1980s. As plaintiff, the U.K. government argued that, in writing "Spycatcher," Wright should be enjoined from revealing confidential information obtained in the course of his past service. Wright's defense team — led by the ambitious Sydney lawyer Malcolm Turnbull — did not seriously contest that Wright had flouted the U.K.'s official secrets legislation, but observed that the statute lacked force of law in Australia. They stressed that "Spycatcher" said nothing new — the Hollis allegations had been published before — and that the U.K. government had tolerated publication of "Their Trade is Treachery" in 1983. Turnbull made great use of the media, portraying Wright as a whistleblower seeking to expose incompetence and illegality within British Intelligence. Turnbull also capitalized on the spectacle of a foreign government trying to use the local courts to "gag" publication. The fact that it was the British government (Australia's former colonial power) hardly required emphasis.

In March 1987, the Australian trial judge, Justice Phillip Powell, ruled against the U.K. government on virtually every issue. There was no breach of contract, because Crown employees had no contractual rights. And although Wright was subject to an equitable duty of confidentiality to the U.K. government (binding him not to disclose secret material obtained by him during his service), the Australian court still would not enjoin publication of information that, as here, was either nonmaterial or already in the public domain (via "Their Trade is Treachery" and other works). Subject only to the U.K. government's rights of appeal, therefore, "Spycatcher" was cleared for publication.

Critically, at this juncture (mid-1987), "Spycatcher" was released in the United States. It sold extremely well in North America — and did particularly well at airports, where U.K. travelers were able to buy it and take it home, thus bypassing the domestic ban.

In September 1987, the New South Wales Court of Appeal dismissed the U.K.'s appeal.[2] Of the two appellate judges in the majority, one (Michael Kirby) agreed with the trial judge's assessment that the book's key contents were stale or had already been disclosed; the other one (Michael McHugh) considered that the Australian courts should abstain from hearing any case that raises political questions. Weeks later, the High Court of Australia refused to grant a further interim injunction. The book then hit Australian bookshelves and sold extremely well.

Next, in late 1987, the U.K. brought proceedings in Wellington, New Zealand, this time to stop Dominion newspaper from publishing excerpts of "Spycatcher." The High Court of New Zealand declined such relief,[3] leading to an appeal to the New Zealand Court of Appeal. Affirming the denial of the injunction, New Zealand's most senior appellate judge, Sir Robin Cooke, noted that "Spycatcher" had already been disseminated widely, including in Canada, the United States, Australia and Ireland, with numerous copies "brought into England by travelers or otherwise imported."[4] The book was "freely available in Europe and ha[d] been published behind what were described as the Iron and Bamboo curtains."[5] Since "the general nature of the main allegations in Spycatcher [was] known throughout the world," the book was "in the international public domain," and it would be "not far short of absurd" to "try to stop further dissemination in New Zealand."[6]

The coup de grace came in late 1988. Although the U.K. courts had previously enjoined local publication of "Spycatcher," in October 1988 the U.K.'s highest court, the House of

Lords, recognized that "Spycatcher" had already been widely disseminated and that further injunctions would serve no purpose. The publication battle was over.

Reliability of Leaked Data — "Spycatcher," WikiLeaks and the Future

The "Spycatcher" saga showed that, by the late 1980s, information was capable of circulating reasonably freely (at least in the Western world), such that one government's efforts to block the inflow of data from other countries were, after a few months, ultimately futile. Today, "months" have turned to "nanoseconds" — "leaked" data can be posted online and accessed virtually instantaneously, as illustrated by the WikiLeaks "cable" episode that began in late 2010. In that instance, the WikiLeaks website was able to obtain, and later publish, large amounts of data that purported to be copies of U.S. diplomatic cable traffic, dating from the 1960s onwards. An individual United States military officer, armed with a CD burner, was said to be the source of at least some of this data.

Given the ubiquitous and decentralized nature of the internet, it would have been extremely difficult for authorities to mount a worldwide litigation campaign to block dissemination by WikiLeaks of the purported cable traffic, a la "Spycatcher." Within the United States itself, governmental efforts to muzzle publication may have faced First Amendment issues (of the type that stymied the Nixon administration's attempts in 1971 to suppress publication of the Pentagon Papers, and which probably influenced the U.K. decision not to sue in the United States to block publication of "Spycatcher" in 1987).

The WikiLeaks cables were cited as an evidentiary source by an international arbitration tribunal hearing various expropriation claims against Russia relating to the "Yukos" company.[7] The claimants introduced WikiLeaks copies of U.S. cable traffic into the record, consisting of various interviews and communications occurring in 2007 between the U.S. Embassy and the Moscow office of a large accounting firm (which had served as auditor to Yukos). It appears that the parties viewed the reproduced cables from 2007 as as containing "'candid' and 'unguarded'" view of the accounting firm[8] — and the Tribunal cited them at several points as it recited the chronology of Yukos' demise.[9]

An attempt was made to use WikiLeaks cables as a substantive evidentiary source in the arbitration, ConocoPhillips Petrozuata BV v. Venezuela. In this action, currently pending before the World Bank's International Centre for Settlement of Investment Disputes, various Dutch-incorporated affiliates of ConocoPhillips, the former holders of oil development rights and related assets in the Orinoco, have claimed damages against Venezuela for expropriation of those rights/assets. In September 2013, a majority of the ICSID tribunal held that the Chavez Government of Venezuela indeed had unlawfully expropriated these claimants' investments, in a manner that violated their rights under the Netherlands-Venezuela bilateral investment treaty. Among other things, the tribunal majority held that, in the period during and immediately following the seizure, Venezuela had failed to pay, or offer "prompt" compensation on the basis of fair market value, as required by that treaty.[10]

Requesting that the ICSID tribunal majority "reconsider" its decision, Venezuela's counsel claimed that, contrary to the arbitrators' finding, the Chavez government actually had been prepared to "negotiate" with the claimants and to "discuss" payment at "fair market value."[11] In support of this assertion, Venezuela's counsel cited from the WikiLeaks website, which, they claimed, reproduced a series of 2008 cables from the United States ambassador in Caracas. These cables, they claimed, reported on what the embassy had been told by ConocoPhillips representatives concerning the status of their negotiations with the government — and included a statement that the government had "moved away from using book value as the standard for compensation and has agreed on a fair market methodology with discount rates for computing the compensation for the expropriated

assets."[12] Venezuela's counsel stated that, although they "[did] not endorse everything reported in these cables," claimed that this excerpt showed that the government actually had been prepared to negotiate compensation "in good faith."[13] Some months later, the arbitrator appointed by Venezuela accepted this submission, holding that the WikiLeaks "revelations" offered a "flagrant refutation" of the majority's decision on liability.[14] The ConocoPhillips majority, however, rejected Venezuela's submission on the grounds that its 2013 decision remained final and binding, and not susceptible to motions for "reconsideration."[15] The provenance, authenticity and reliability of the WikiLeaks version of the U.S. cable thus did not arise for adjudication.

The content of "leaked" government information remains potentially problematic. In Spycatcher, the point never arose, because both sides stipulated, solely for the purposes of deciding whether to enjoin publication, that the content of "Spycatcher," and Wright's allegations, should be assumed to be true. The admissibility or reliability of his claims were never tested (and his key allegation about a "fifth man" was never endorsed by any court).

In the case of WikiLeaks, from a strict evidentiary perspective, the website itself (whose sources often remain shrouded in secrecy) is hearsay — it merely purports to be posting documents supplied to it from these parties. Even assuming the contents of the cables to be authentic and complete, a diplomatic cable itself often consists of rolled-up or secondhand data, mixed with opinion. There are also potential questions about whether the cables themselves were or remain privileged, whether they were illegally obtained, and if so, whether this affects their admissibility. It is thus possible that future cases dealing with "leaked" government data might present even more complex issues of provenance and reliability, including whether data has been manipulated and/or presented out of context.

"Leaking" and the Question of "Illegally Obtained" Information

At the time of "Spycatcher," many perceived Peter Wright sympathetically: as a patriot seeking to expose security threats, and the failure of the "establishment" to uncover them.[16] Likewise, in the case of WikiLeaks (and even in the case of Edward Snowden), there are those who can discern a moral justification for disclosure. The ethics of "leaking," however, are rarely straightforward, and becomes even more fraught when the information concerned is the result of either "hacking" or illegal surveillance by another state.

Three arbitration cases illustrate the complexity of this issue:

1. In the 2005 case of Methanex v. United States, a North American Free Trade Agreement arbitral tribunal was called upon to decide whether the state of California's environmental regulations (in particular a ban on MTBE/methyl tertiary butyl ether) had violated the investment treaty rights of a Canadian company. In support of these claims, the Canadian company sought to rely on documents concerning campaign donations to the former Californian governor. It turned out that these documents had been obtained through "dumpster diving," i.e., accessing the waste papers of a private business. The three person tribunal unanimously found that documents obtained by the claimant through illegal means were inadmissible:

> just as it would be wrong for the USA to ex hypothesi to misuse its intelligence assets to spy on [the investor/claimant] (and its witnesses) and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for [the investor/claimant] to introduce evidential materials obtained by [the investor/claimant] unlawfully.[17]

2. During a Permanent Court of Arbitration claim by East Timor against Australia concerning maritime boundaries and related rights in the "Timor Gap" (a body of water

between the two countries), the East Timor side alleged that a 2002 treaty between the countries was tainted by misconduct during the negotiations. Specifically, East Timor cited testimony from an unnamed former member of the Australian Secret Intelligence Service ("ASIS") known as "Witness K," who claimed to have been part of an "ASIS operation to insert listening devices in the government offices of the fledgling nation" during negotiations in the early 2000s.[18] After this testimony emerged, the home of "Witness K" was raided by Australian police investigating possible violations of Australian law that precluded disclosure of ASIS operations.[19] In addition, the offices of an Australian lawyer, acting as counsel for East Timor in the pending arbitration, were raided – sparking an successful application by East Timor to the International Court of Justice for protective measures to restrain the use of materials obtained during this raid.[20] The ICJ decision did not directly address the status of "Witness K"; meanwhile, attempts are being made to resolve the dispute through conciliation.

3. Even more recently, in the case of Caratube v. Kazakhstan, a treaty claim of expropriation was brought against Kazakhstan by a company owned by various Lebanese businesspeople. While the dispute was pending, the Kazakh government fell victim to a "hack" (by unknown sources) that led to the online publication of numerous government documents, including emails between the government and its own external arbitration counsel concerning the arbitration. The claimants sought to use these documents in evidence. In an order issued in 2015, the ICSID tribunal held that, notwithstanding the need to deter cybercrime, it would allow introduction of "nonprivileged" leaked documents in the "public domain" because "[i]gnoring such information would risk leading to an award that is artificial and factually wrong when considered in light of the publicly available information,"[21] At the same time, (communications between the government and its counsel) would remain inadmissible, because even though they had been published online; in the Tribunal's view, the government's legal privilege in those documents had not been waived as a result of the "hack."[22]

These cases represent a small sampling of disputes over the last decade involving government data. And of course, the broader question of "hacking" of private individual or corporate data raises an array of criminal and civil law issues beyond the scope of the present article.[23]

The Changing Times

Looking at recent experience with "leaked" information, it is now clear that the "Spycatcher" case, and the debate surrounding it, occurred within a relatively simpler framework. During the Cold War, the Soviet bloc countries were not a major source of data flow (to put it mildly). Information, to the extent it came from purported "whistleblowers" like Wright, was filtered through publishers, newspaper editors or network TV producers, who, while independent from the government, largely considered themselves responsible journalists, and thus could and did impose meaningful ethical and editorial restraints on what reached the public. In today's "multipolar" world, not only has the Internet stripped away those filters, but the alignment of states, and the behavior and capabilities of security agencies, have radically shifted since the days of Peter Wright. For better or worse, in our lifetimes we are likely to see many more cases involving "leaked" government information, motivated by any number of factors. If the Spycatcher case does not yet seem like a quaint relic, it soon will.

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[1] Worse, Wright also felt that the alleged "mole," Sir Roger Hollis, had been "patronizing" towards him. Peter Wright, Spycatcher: The Candid Autobiography of a Senior Intelligence Officer 339 (1987).

[2] Attorney-General (UK) v. Heinemann Publishers Australia Pty Ltd [1987] 10 NSWLR 86, 128 (NSW Court of Appeal) (Austl.).

[3] Attorney-General (UK) v. Wellington Newspapers Ltd. [1988] 1 NZLR 129 (HC) (NZ).

[4] Attorney-General (UK) v. Wellington Newspapers Ltd. [1988] 1 NZLR 163, 165 (Ct. App. NZ)

[5] Id.

[6] Id.

[7] Veteran Petroleum (Cyprus) Ltd. v. Russia, PCA No. 228, Final Award (UNCITRAL 2014). This award, finding Russia liable for expropriation of Yukos assets, has since been annulled by a first instance court in The Netherlands. At the time of writing, an appeal from that decision is reportedly pending.

[8] Id. ¶ 1189 (quoting arguments of the parties).

[9] See id. ¶¶ 1199-1203.

[10] ConocoPhillips Petrozuata B.V. v. Venezuela, No. ARB/07/30, Decision on Jurisdiction and Merits ¶¶ 361-62 (ICSID Sept. 3, 2013). The author has no involvement in the ConocoPhillips case, but has represented other entities with expropriation claims against Venezuela.

[11] ConocoPhillips Petrozuata B.V. v. Venezuela, No. ARB/07/30, Sept. 8, 2013 Submission by Venezuela's Counsel at 5 (quoting the WikiLeaks purported version of an April 4, 2008 U.S. diplomatic cable).

[12] Id.

[13] Id.

[14] ConocoPhillips Petrozuata B.V. v. Venezuela, No. ARB/07/30, Dissenting Opinion of Professor Georges Abi-Saab on First Request for Reconsideration ¶ 24 (ICSID Mar. 10, 2014).

[15] ConocoPhillips Petrozuata B.V. v. Venezuela, No. ARB/07/30, Decision of the Majority on First Request for Reconsideration ¶¶ 22-23 (ICSID Mar. 10, 2014). The arbitrator originally appointed by Venezuela (Professor Abi Saab) withdrew from the case in 2015 and was replaced by a new arbitrator, Professor Andreas Bucher, appointed by ICSID. After the tribunal was thus reconstituted, a second reconsideration request was considered, but denied by majority in 2016. ConocoPhillips Petrozuata B.V. v. Venezuela, No. ARB/07/30, Decision on Second Request for Reconsideration ¶¶ 24-27, 38 (ICSID Feb. 9, 2016). Dissenting, the newly-appointed arbitrator would have been prepared to reconsider the liability decision in light of the WikiLeaks cables. See ConocoPhillips Petrozuata B.V. v. Venezuela, No. ARB/07/30, Dissenting Opinion of Professor Andreas Bucher on Second Request for Reconsideration ¶¶ 38, 80 (ICSID Feb. 9, 2016).

[16] Peter Wright died in 1995, but his lawyer, Malcolm Turnbull – who championed full publication – remains active, and was recently (albeit narrowly) elected Prime Minister of Australia. As head of Australia's government, he oversees Australia's security agencies, thus transforming this former antagonist into a member of the current Western intelligence "establishment."

[17] Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, pt. II, ch. I, ¶ 54 (UNCITRAL Aug. 3, 2005) (emphasis added).

[18] "Timor spy scandal: Former ASIS officer facing prosecution," Sydney Morning Herald, June 22, 2015, available at: http://www.smh.com.au/national/timor-spy-scandal-former-asis-officer-facing-prosecution-20150621-ghtp17.html.

[19] See id.

[20] Case Concerning Questions Related to the Seizure and Detentino of Certain Documents and Data (Timor-Leste v. Australia), Order on the Request for the Indication of Provisional Measures (ICJ, Mar. 3, 2014) at 18, available at http://www.icj-cij.org/docket/files/156/18078.pdf.

[21] Caratube International Oil Co. v. Kazakhstan, No. ARB/13/13, Decision on Production of Documents (ICSID July 27, 2015), as summarized in "Tribunal rules on admissibility of hacked Kazakh emails," Global Arbitration Review (Sept. 22, 2015) available at http://globalarbitrationreview.com/article/1034787/tribunal-rules-on-admissibility-of-hacked-kazakh-emails.

[22] Id.

[23] For one aspect, see "Paranoids Have Enemies Too: Wiretapping and Other Clandestine Information-Gathering Techniques in International Arbitration," Mealey's International Arbitration Report (Sept. 2008).
