

THE TOBACCO INDUSTRY DOCUMENTS

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INTRODUCTION

There is a temptation when dealing with long-secret tobacco industry documents to turn any presentation or publication into a list of the greatest hits of the quotes. I will try not to do that here. Rather than simply present to you what the tobacco documents say, I want to focus more on what they mean to the control of tobacco and the tobacco industry. I want to look at collectively how these revelations are reshaping tobacco control. And I want to touch upon how they can inject the necessary information and political fortitude into our societies to more effectively deal with this issue.

A. Uncovering the Documents

When the American state of Minnesota settled a lawsuit against several major tobacco companies in 1998, they demanded that the millions of tobacco industry documents obtained during that litigation be placed in publicly-accessible depositories for ten years. At the last moment the industry acceded to this demand and a new world opened up. Tobacco control was fundamentally transformed.

This transformation is ongoing. It is also patchy both in space and time. Though all regions of the world will ultimately benefit from these documents, some countries have leapt onto them with vigour while others have remained in the background, at least publicly. And because one revelation often yields a flood of others, or stimulates a host of new policy or litigation developments, we are likely to move through periods of fits and starts where incremental changes give way to fundamental shifts followed by a return to slow progress waiting for some new exposure to jolt the system into action once again.

As you can imagine, the tobacco companies have sought to impede the use of their documents. Some of the companies, most notably British American Tobacco, sought to delay any public access for as long as possible and, after that, create difficult access conditions. All of the cigarette companies have assiduously removed privileged documents such as discussions between the tobacco company and its solicitors. Some companies even planned for this by involving their lawyers in scientific programs for the avowed purpose of creating a claim of privilege.

Moreover, it now appears that for many sensitive issues the tobacco companies attempted not to create a paper record in the first place:

"... in future, please do not distribute such sensitive matters beyond myself and do not name interested parties. Ideally, all such communication should be oral and only personal hand-written notes maintained. I recognize the practical problems, but the down-side risk is very considerable."

Internal BAT memo
08 March 1990
BAT Bates No. 301659640

Yet, despite all this, the 40-plus million pages in the two depositories have become our jewel, one that is improving our understanding of just about every aspect of tobacco, the tobacco industry and how best to do something about it.

B. Two Distinct Depositories

Though Minnesota settled its lawsuit with a large number of individual tobacco companies, in practical terms two depositories emerged: one in St. Paul, Minnesota for Philip Morris, R.J. Reynolds and several others; and one in Guildford, UK, for British American Tobacco. They are very different collections and operate on quite different terms.

Regarding access, the BAT depository just outside of London is much more restrictive. One can only view documents on-site during rather short opening hours. There are very extensive delays – sometimes as long as 7 months – between requesting the photocopy of a document and its production. The Minnesota depository, by comparison, is much more accessible. Almost the entire public collection can be viewed online through tobacco company sites and increasingly of late, through sites run by health groups.

Despite the significant access problems at Guildford, from the health community's perspective it is the more valuable resource, and certainly so for the majority of the countries in the world where BAT has a significant presence. The reasons are basically two-fold. First, BAT is the most international of all the world's tobacco companies and has a broader, prominent distribution around the world than Philip Morris, a company more heavily dependant on a few major markets.

Second, unique amongst the defendant tobacco companies BAT chose a "bury them with paper" approach during the Minnesota discovery. Further, they attempted to reduce the effectiveness of searching the collection by organising the depository by file rather than by individual document. Both efforts have backfired on BAT. The other tobacco companies, equally intent on meeting the legal requirement for disclosure but seeking to reduce the usefulness of this disclosure, responded very narrowly to the discovery questions and then filed the material by document, though essentially shuffling them up before sending them off to the depository.

Viewed today, BAT's approach seems to have been terribly short-sighted. However, things were quite different in 1994 when BAT began to dump all this seemingly irrelevant information onto the Minnesota plaintiffs. The early 1990s were still a time

when tobacco companies habitually won their lawsuits and BAT's lawyers failed to see the winds shifting. They didn't then know about or appreciate the ramifications of the a few thousand pages of their documents that were leaked to the health lobby by Merrell Williams, a paralegal working BAT's American subsidiary. They didn't see that those initial revelations would shift the balance in American tobacco litigation and, four years later, force BAT to settle the Minnesota case on terms where the documents would become public.

BAT's lawyers apparently also didn't foresee coming technological advances: that optical character recognition would grow rapidly and help people parse through the mountains of paper to find the hidden jewels; or that the internet would expand exponentially and make the documents affordably accessible to people around the world.

Most important of all, BAT simply didn't know what was in all the documents they were using as cover. They saw their value in that they were for the most part not anything relevant to Minnesota. They didn't see that their real value was in what they revealed about the industry around the world.

TRANSFORMING TOBACCO CONTROL

A. Ending the 'Glimmer of Hope' Strategy

The industry's documents cast new light on an old story by detailing the extraordinary lengths to which the cigarette companies sometimes went to achieve their objectives. One of these is what I'll call the industry's 'glimmer of hope' strategy. This began in 1952 when several tobacco companies plotted a defensive strategy to counter the emerging public knowledge of the dangers of their products. As is now well known, asserting that their primary interest was in the health of their consumers, the companies promised to spare no expense to study the issue, but they also steadfastly maintained that that cigarettes had not yet been proven to cause cancer etc. Over time, as the scientific evidence mounted and credible medical authorities pronounced on tobacco's effects, this evolved into a strategy where the industry maintained that there was no medical consensus, that not all scientists agreed that their products killed smokers. This was widely viewed as legal posturing, which was in part true, but something else was also driving this.

These increasingly untenable assertions were viewed as helpful by the health community in many countries because they undermined the credibility of the tobacco industry in the eyes of the public and public policy makers. In some respects it made our job easier. The documents show that the industry understood this and felt it was an acceptable price to pay in order to provide the guilt-ridden smoker, someone searching for a tenuous thread to latch onto, something to believe in. A glimmer of hope.

This too was widely suspected by the health community. Indeed, at times it seems that researchers studying cognitive dissonance would have had to dream up this sort of tobacco industry charade had the cigarette companies not beat them to it.

But now we have a helpful shortcut. Rather than argue endlessly with the industry over addiction, disease causation etc., the documents let us simply juxtapose the public denials of the cigarette companies with their private admissions as contained within once secret, internal documents.

“I do not believe that nicotine is addictive.”

Thomas Sandefur, B&W Chairman and CEO
Testimony before a USA Congressional Subcommittee
14 April 1994

“Nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms.”

Addison Yeaman, B&W General Counsel
internal B&W memo
17 July 1963
UCSF Document 1802.05

Of course, this is not the end of the issue. The industry will simply shift gears and make a half-admission, and repeat that over and over again to a receptive audience wanting there to be something to seize onto to rationalise their behaviour. If they succeed with this, however, this is no longer a consequence of health advocates being beaten because the playing field isn't level. This is the result of all of us, now armed with sufficient evidence, still unfortunately doing an inadequate of getting our message across.

B. Refining Our Understanding of Tobacco Science

As suggested by Addison Yeaman's 1963 admission on addiction, privately tobacco industry scientists often were and likely still are decades ahead of the outside scientists in understanding the mechanics and chemistry of smoking, and the impact of cigarettes on population groups.

The industry's documents are informative on this front for several reasons. First is the specifics. I'm a lawyer, and many others are far better qualified to address the details, but it seems to me that proceeding with scientific research without a thorough canvass of the industry's documents is tantamount to neglecting to read the scientific journals in one's field.

Second, the general tenor or orientation of the industry scientific investigation helps point us in the right direction. The industry's research priorities ought to be given serious consideration as to whether they should be included in our priorities. This of course impacts upon funding allocations, desirable legislative interventions and onward planning of lobbying.

Third is strategic. In science, as elsewhere in tobacco company documents, occasionally one sees individuals desirous of making a more honest, positive change in stance than the company's standard line permits. Almost inevitably they are

thwarted. These frustrated people possibly can be of immense value to health authorities, and the documents help us identify them.

C. The Internal Workings of the Tobacco Industry

Efforts to reduce the problems caused by tobacco will be inadequate, and will be burdened with false starts and poorly-oriented efforts, if we do not have a firm understanding of the cigarette companies, including how the companies view the world. And at present there is no better source for this than the industry's own documents.

1. A Perverse View of the World

Examples of the tobacco industry's peculiar, often perverse view of the world abound in the documents. For instance, while Muslims view Ramadan as an opportunity to demonstrate their religious devotion, British American Tobacco viewed it as a marketing opportunity. A 1995 document called the "Ramadan Lights Creative Brief," found within BAT's documents, suggests that BAT's American subsidiary, Brown & Williamson, planned to use the fasting obligations of Ramadan as a tool to encourage smokers to shift to the so-called "light" cigarettes.

"The Holy Month of Ramadan is a time of fasting ... [s]moking during daylight hours is banned ... [t]his being the case it is reasonable to assume that ... a Lights/ULT [ultra low tar] brand may be more acceptable to consumers than at normal times. This coupled with a desire to lead a healthier life may provide an opportunity to get smokers to switch."

Internal BAT document
undated
BAT Bates No. 303646119

In addition to teaching us new things about the mindset of the tobacco companies, very often the documents confirm what had long been suspected. For instance, contrary to what the cigarette companies would have governments believe, the documents show that the industry's voluntary restraints were indeed artfully crafted to do exactly what health groups had always stated: forestall more effective legislative restrictions.

"An industry code will be written [for Pakistan] ... so that it can be used as both a lobbying lever and an argument against not introducing formal legislation."

Philip Morris internal document
1994
PM Bates No. 2504024765

"... [C]omplete the removal of roadside [billboards] on the Dubai-Abu Dhabi road and capitalise on this minimum concession as an example of voluntary self-regulation by the industry."

Philip Morris internal memo
12 August 1992
PM Bates No. 2501052285

2. Science as Public Relations

The greatest single contribution of the tobacco industry documents may be in exposing the extensive, ongoing effort by the cigarette companies to twist science so that it supports a political objective. This is turning the role of scientific investigation on its head. This is science in the pursuit of public relations, not science in the pursuit of truth.

The documents show this charade operating in just about all areas of scientific investigation. However, attempts to bend science to remove secondhand smoke as the industry's Achilles heel probably was the area most vigorously pursued in the last couple of decades. This was especially so in Asia.

"[T]he direction we are headed [on ETS] will be to deflect this issue, to redefine it, to broaden it, to demonstrate ... that we are contributing to the solution rather than the problem."

Tobacco Institute (of USA) internal report
10 April 1985
TI Bates No. 0013710

The recruitment of Asian scientists to front for the industry on environmental tobacco smoke issues was but one part of a worldwide effort operating on every continent. The so-called "ETS consultants project" was largely run not by scientists but by longtime tobacco industry law firm in the United States, Covington and Burling. The objective, as described in a BAT document, was to "keep the controversy alive." This was a carefully orchestrated scam. The industry identified, trained, then used what were claimed to be independent scientists to advance their positions. It was a massive effort.

(It is interesting to contrast the ETS consultants project with more confidential science related to ETS and cigarette design that going on concurrently within the tobacco companies. This too is captured in the documents. Much of this effort was aimed at reducing side-stream smoke, a major component of ETS. Failing that, research was undertaken into reducing the *perception* of ETS by reducing the sight and smell of side-stream smoke even if harmful, odourless constituents remained.)

Asian scientists were always critical to the ETS consultants project. With Asia rapidly ascending in importance as a market, preventing effective tobacco control from taking hold in the region was a very high priority. And local scientists were preferred in the effort to derail smoking restrictions because they were thought to be more persuasive with decision-makers. As one tobacco company put it, local scientists have local political contacts.

The cigarette companies manufactured this ruse because they lack credibility on the issue of secondhand smoke. This is something the cigarette companies frequently and

frankly acknowledge amongst themselves in the documents. When the tobacco industry organized and educated 'consultant' scientists; when the industry set up purportedly independent organizations like the Centre for Indoor Air Research or the consulting firm Association for Research on Indoor Air; and when the industry created allegedly objective academic journals like *Indoor Air Quality*, it was all just a effort to cloak its opinions with the modicum of credibility others offered.

"We have as consultants the past, present and future presidents of the Asian Association of Occupational Health, a very influential health organisation in the region. These consultants have provided us with many opportunities to carry out seminars etc. under the auspices of the AAGH."

BAT internal memo
08 January 1990
BAT Bates No. 401686682

The documents leave no doubt that across a wide swath of Asia the cigarette companies and their solicitors were pulling the strings behind a large stable of scientists who presented themselves as being independent. The goal of all this was two-fold: to help win in litigation and to help thwart health legislation.

"One key objective of the project has been to recruit and educate scientists who then would be available to testify on ETS in legislative, regulatory or litigation proceedings in Asia or elsewhere ..."

Covington and Burling memo
14 February 1990
PM Bates No. 2500048979

3. The Industry's Complex Internal Dynamic

The documents suggest that on some issues the health community has mistaken or over simplified the industry. This has usually been to our detriment.

For instance, in many countries great emphasis has been placed on the industry's interest in young people. Some documents, however, cast a slightly different light on the industry's interest. Rather than simply being interested in chronological age *per se*, they suggest that the industry had a more subtle understanding. Aware that the best time for getting people to start smoking was during the years when they are leading up to and making the psychological transition between adolescence and adulthood, the companies were interested in people in this period of development irrespective of their age. True, most of these would be adolescents in their pre-teen or teenage years, but some would be older than that. And it was the state of mind rather than chronological age that was important to the industry's marketing efforts.

Similarly, the documents suggest that on some issues the companies, indeed, elements within an individual tobacco company, are quite divided in opinion. Certainly there are core issues for which the global multinationals maintain a common stance,

including the central issues of addiction, disease causation, the influence of advertising etc. However, the more we are able to peek inside through the documents, the more we see that the companies, and the industry itself is not monolithic.

The health community has largely failed to capitalise or even identify this. The result has been that opportunities to draw disgruntled people out of the companies, or to exploit divisions within and between companies have been lost. As well, the chance to consider whether in very isolated instances there might be grounds for legitimate discussion with perhaps one company have also been passed over.

D. Expanding Our Expectations

The truth is that in many countries tobacco control has been moribund or close to it. And for most countries with discernable advances, these have usually come incrementally and exceptionally slowly. This has impacted upon the expectations of tobacco control advocates and of governments both in terms of attainable objectives and likely timelines. The documents show that the tobacco companies have come to expect this. Throughout the document collection one sees industry plans, most commonly set out for a five-year period, in which they make reasoned projections as to future legislative developments. I'm sorry to say that their assessments usually have been more accurate than ours.

One superb political operative for BAT in the Middle East was very adept at assessing what the industry could defeat, what it could not, how long the industry could delay, and what it could bog down in implementation after choosing to let a government initiative pass. He was paid an handsomely, but it was money well spent.

But now, exposure of the tobacco industry's documents has the potential to change all that. Excellent information is available on marketing and political manipulation in countries around the world, especially in Asia and Africa. One can't help but shake up the system with revelations such as this one with the Thai health minister meeting secretly with the tobacco companies, showing the industry legislative proposals even before they went to his Cabinet colleagues, and promising not to do anything to harm the industry.

"Last night we had an appointment with the Minister at 9:30 p.m. However, when we got there, too many press people were around so the occasion was not ripe for a meaningful meeting. [Thai Health Minister] Boonpan [Kwaewattana] ... asked us to come back this morning which we gladly obliged.

"Boonpan reiterated that he had all the intention to help the industry because of his long relationship with Khun Khan's father. (Khun Khan is the distributor of RJR.)"

The documents hold out the tools, and provide us with a challenge to move public opinion along and boldly attack this problem. They offer a new vista, one from where we can see what can be done rather than just what has been done.

E. Altering Our Approach to Tobacco Control

For a long time – far too long – the common approach to tobacco control has been to provide health information to consumers and, possibly, limit the more egregious manners in which the cigarette companies entice new smokers. Nowhere has this alone proven adequate. Despite this many countries, including those held out as paragons of tobacco control, continue down this rather limited path making improvements over the years: health warnings get bigger and a bit more blunt; restrictions on promotion branch out from overt advertising into sponsorship.

However, with millions of documents exposing the insides of major tobacco companies, we now have the ammunition not only to do the old stuff better, but to do entirely new things as well. I want to touch on just two: financial malfeasance and front groups.

1. Attacking Financial Malfeasance

The documents capture the industry misbehaving on a wide variety of fronts, not just marketing, science and politics. Many of these provide avenues for effectively confronting the cigarette companies.

Most tobacco control has focused on the physical effects of smoking and the promotional activities of the industry. These are important but they don't tell the whole story. Economic malfeasance both in the form of massive smuggling of cigarettes and price fixing are well-established in the document collection. These activities were integral to the everyday operations of major multinational tobacco companies:

“Both legal and transit importing would be required to properly – and profitably – develop the brand.”

Internal BAT memo
BAT Bates No. 203472755

The documents show that transit – to use one of the industry's common euphemisms for its smuggling – was central to cigarette company operations in many countries. It's easy to understand how a tobacco company might strategically use smuggling to open a market (as has occurred in Vietnam, and just recently in Iran), or to force a governmental policy change, usually a tax reduction (as occurred in Canada). In these instances the contraband is artfully used to bolster the company's legal business. However, even this ethically questionable behaviour gets turned on its head where, as in Bangladesh and elsewhere, a small amount of legal product is used to support the much larger illegal business the company is running:

“Legal imports [of BAT brands] would attract high enough duty to make them difficult to sell, but there is an indication that ‘legal’ imports could hide large scale transit activity.”

Internal BAT correspondence
26 May 1993
BAT Bates No. 400657565

Many industry documents implicate the tobacco companies in price fixing around the world. They show that senior BAT, Philip Morris and RJR executives regularly met to methodically fix prices in many brands in many countries, and that they fixed prices in both the illegal and legal markets!

“I confirm that there will be a further meeting on Friday 16th February at the Hilton Hotel Geneva – a room to be booked by R.J.R. ... Apart from minor misdemeanours every-one observed the general price increase in Saudi so I think that we can be fairly assumed that the same will occur in the Gulf ... In our own case I believe that whatever is decided we should stick to the letter of the agreement – even though it will be purely oral!”

Internal BAT memo
09 February 1990
BAT Bates No. 301577870

“PM/RJR/RPE are advocating market entry at 40 Baht in order to demonstrate that the legal business will be minimal, GT [contraband] will continue and therefore revenue lost. The belief is that the Thais will then reduce the Duty.”

Internal BAT memo
03 December 1990
BAT Bates No. 300028568

And just as with smuggling, where the questionable activities were incorporated deep into the business practices of the company, so too for price fixing. In discussing key strategies a business plan for BAT’s marketing department lists price fixing as a company policy. It is not just someone in middle management run amok:

“Implement regular prices increases, on an industry basis whenever possible ...”

BAT document
April 1991
BAT Bates No. 500057835

Hypocrisy is glowingly evident in all of this. World-over, the cigarette companies oppose regulation saying that competitive market pressures ensure an efficient market, one creating incentives to offer consumers innovative products with reduced risks year. Meanwhile, at the very moment they are trumpeting competition as the safeguard of the public good, the tobacco manufacturers are agreeing amongst themselves to fix the market, to ensure that the market will be anything but competitive.

While of direct importance in their own right – after all, huge sums in duties are being avoided, and health policy is being adroitly sidestepped – both smuggling and price fixing may ultimately prove most beneficial by elevating tobacco control to the level of criminal prosecution. With the industry’s own documents setting out a convincing trail of evidence, the fullest disclosure of all may come from industry executives, accustomed to very comfortable lives, being willing to speak expansively on their company’s activities in an effort to fend off incarceration.

Moreover, almost by definition smuggling and often price fixing involve cross-border activities, so they provide a natural location for garnering support for international control of the tobacco industry as is being negotiated under the auspices of WHO.

2. Outing the Front Groups

As touched upon earlier, understanding that they lacked credibility with the general public, the media, and policy makers, some time ago the tobacco industry began to create front groups that could speak on its behalf without any stated tie to the industry. This is very different from seeking out those with whom the cigarette companies might have common cause on certain issues – say, libertarian groups or some publishers on freedom of expression issues – and seeking to have them all speak in unison. That is fair game. That is what much legitimate lobby is all about: creating coalitions. Front groups, by comparison, are designed to mislead.

At its most basic, there are just two types of front groups: (i) those one might expect to share some opinions with the cigarette manufacturers, even if it is not known that the tobacco companies are controlling things from behind the scenes; and (ii) those with no apparent tie to the industry.

The International Tobacco Growers’ Association is a leading example of a group that obviously would be expected to share some views with the manufacturers but, if independent, would differ on others. It does not. The documents show that it is a front group from the ground up with cigarette manufacturers, not tobacco growers, controlling the budget and the positions taken. Of course, what appears to be a farmers’ group will receive much greater public sympathy than global cigarette manufacturers.

“[The cigarette] manufacturers, through INFOTAB, would be able to ‘control’ the primary funding of the organisation, and would thus be able to ensure that it stuck to politics ... The ITGA

could 'front' for our third world lobby activities at WHO and gain support from nations hostile to [tobacco multinationals]."

Internal BAT document
11 October 1988,
BAT Bates No. 502555357

The latter group, those with no ostensible link to the industry, are particularly valuable. If the industry can remain entirely hidden while controlling what they do, the game plan usually is for this group to attempt to demonstrate their *bona fides* by publicly taking a position on one issue that the cigarette companies would not, but on the essential issue under discussion stick to the industry position.

F. Correcting the Financial Imbalance

Compared to the tobacco companies and its allies, tobacco control has always been exceedingly poorly funded both within government and within the broader health community. This has been a major though not insurmountable obstacle. It has forced innovation. It has meant that tobacco control advocates could not go toe-to-toe with the tobacco industry in forums where money buys a voice. But it probably has also reduced our efficacy.

The interest the tobacco documents creates has, in some countries, begun to chip away at the longstanding imbalance between the financial resources of the cigarette companies and those of its opponents. There are three means by which this is occurring. First, the successful litigation that gave rise to the documents and related political developments in the United States has both directly injected money into tobacco control in that country and convinced other governments around the world to step up their tobacco control activities.

Second, directly using some of the new revelations, litigation against the tobacco industry has commenced involving countries in North and South America, Europe and the Middle East. This knock-on litigation has the potential of generating new monies for tobacco control.

Third, the documentary revelations are helping build support for the WHO-sponsored Framework Convention on Tobacco Control. And the FCTC can only ever be globally successful if there is a sharing of financial resources between the parties combating the common problem formed by the tobacco companies.

THE NEXT ROUND

Finally, let me end by briefly addressing the future and consider the documents still to come.

Minnesota really has set the benchmark. At least with respect to public litigants, it will be difficult to explain why information obtained in future litigation did not enter the public realm as Minnesota's did. In many countries, the politician who fails to follow Minnesota's lead will quickly be labeled as having capitulated; someone

conspiring to keep information from the public. So, it's likely that Minnesota collection will not be the last major group of documents to enter circulation.

Of course the industry is aware of this as well. Moreover, they've already been stung by many of the disclosures that have come to light to date – and this with only about 10% of the collection having seen a competent review so far. They will be eager to avoid a repeat.

The stage is thus set for an interesting time ahead. Each side is making preparations. Health groups, both within and outside of government, are improving their document handling abilities and at very least, ensuring that their operating capacity is scaleable upwards to accept the next batch of tens of millions of documents. Infrastructure created to deal with Minnesota will not have to be created from scratch. Litigants are planning their discovery, knowing, for instance, that in many instances computer hard disks are likely to yield more new information than file folders full of paper.

And in tobacco companies all over the world, executives will be wearing out the delete button on their computers. But, as before, they won't get it all and the cycle will continue.