



National Library of Canada
Collections Development Branch

Canadian Theses on
Microfiche Service

Bibliothèque nationale du Canada
Direction du développement des collections

Service des thèses canadiennes
sur microfiche

NOTICE

The quality of this microfiche is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us a poor photocopy.

Previously copyrighted materials (journal articles, published tests, etc.) are not filmed.

Reproduction in full or in part of this film is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30. Please read the authorization forms which accompany this thesis.

**THIS DISSERTATION
HAS BEEN MICROFILMED
EXACTLY AS RECEIVED**

AVIS

La qualité de cette microfiche dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de mauvaise qualité.

Les documents qui font déjà l'objet d'un droit d'auteur (articles de revue, examens publiés, etc.) ne sont pas microfilmés.

La reproduction, même partielle, de ce microfilm est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30. Veuillez prendre connaissance des formules d'autorisation qui accompagnent cette thèse.

**LA THÈSE A ÉTÉ
MICROFILMÉE TELLE QUE
NOUS L'AVONS REÇUE**

THESIS SUBMITTED TO THE SCHOOL OF GRADUATE STUDIES
AS PARTIAL FULFILLMENT OF THE REQUIREMENTS
OF THE DEGREE OF LL.M.

FREEDOM OF INFORMATION:
AN APPRAISAL OF PROPOSED LEGISLATION

BY
ELIZABETH BARCLAY

THESIS SUPERVISOR: PROFESSOR EDWARD RATUSHNY
FACULTY OF LAW

SUBMITTED APRIL, 1981

© Elizabeth Barclay, Ottawa, Canada, 1981

TABLE OF CONTENTS

PREFACE	1
ARGUMENTS FOR AND AGAINST ACCESS	5
FREEDOM OF INFORMATION IN OTHER JURISDICTIONS	19
(1) SWEDEN	19
(2) UNITED STATES	22
(3) AUSTRALIA	27
(4) UNITED KINGDOM	29
(5) NOVA SCOTIA	30
(6) NEW BRUNSWICK	32
(7) ONTARIO	33
(8) OTHERS	34
(9) SUMMARY	35
EXEMPTIONS	36
(1) GENERAL	36
(2) CROWN PRIVILEGES	40
(3) CABINET RECORDS	47
(4) POLICY ADVICE	49
(5) NATIONAL SECURITY AND RELATED MATTERS	60
(6) LAW ENFORCEMENT	81
(7) PERSONAL PRIVACY	88
(8) COMMERCIAL AND FINANCIAL INFORMATION	95
(9) STATUTORY EXEMPTIONS	105

TABLE OF CONTENTS

(CONTINUED)

SCOPE AND PROCEDURE	109
(1) SCOPE	109
(2) INDICES AND MANUALS	113
(3) DEADLINES AND FEES	123
(4) REVIEW	130
(5) DISCIPLINARY PROCEEDINGS AND PENALTIES	135
(6) REPORTS	136
PRIVACY LEGISLATION	139
(1) CANADIAN HUMAN RIGHTS ACT, PART IV	139
(2) PRIVACY ACT (BILL C-43)	143
(3) AMERICAN PRIVACY ACT 1974	154
(4) RELATIONSHIP BETWEEN THE PRIVACY ACT AND THE FREEDOM OF INFORMATION ACT	169
CONCLUSION	174

PREFACE

The principle has long been that all information held by the government is secret unless the government decides to release it.¹ If access to such information is requested, no reason need be given for denial of the request. There is no pattern to the reasons for secrecy that are given by various government departments, and something that is deemed secret by one department could easily be made public by another. In general, it would not be possible to compel production by way of mandamus because of the difficulties of establishing standing and a statutory duty to produce.²

The reverse principle, practised in countries such as Sweden and the United States, is that all government information should be released unless the government can make a good case for keeping it secret. Demands for freer access to government information in Canada are not new. As long ago as 1965, Professor D.C. Rowat published his landmark paper attacking the principle of administrative secrecy in Canada, "How Much Administrative Secrecy?"³ New Democratic Member of Parliament Barry Mather

-
1. With the recent exception of certain personal information, as provided in Part IV of the Canadian Human Rights Act; see infra, Chapter V, Section (1)
 2. Most statutes are either silent with regard to disclosure or expressly stipulate non-disclosure. It would be impossible for an individual seeking public information in which he is not involved to show a "special interest [in the subject matter of the suit] ... over and above that of the general public" or an injury "different in kind and quality from injuries suffered by the general public". D. Mullan, R. Franson quoted in

introduced a private member's bill on government administrative disclosure every year from 1965 to 1970, as did Progressive Conservative Member Gerald Baldwin from 1969 to 1974. On March 15, 1973 a Cabinet Directive was issued which required all departments and agencies to provide information to Members of Parliament except where the information fell within the scope of sixteen enumerated exemptions, but the Opposition and the news media considered it too vague, too broad and too restrictive. In June, 1973 another Cabinet Directive confirmed the "thirty-year rule" in effect since May, 1969.⁴ Gerald Baldwin's 1974 Bill (C-225) was referred to the Standing Joint Committee on Regulations and Other Statutory Instruments. In February, 1976 Parliament adopted unanimously the Committee's report approving in principle the concept of freedom of information legislation. In September of 1976, the Canadian Bar Association approved a resolution:

that access to information legislation be enacted by the Parliament of Canada and all provincial legislatures in Canada creating a statutory right of persons to obtain access to information held by all governments or their agencies, subject only to a limited list of narrowly defined exceptions, with any refusal to provide such information and any unreasonable delay or costs subject to review and enforcement by the courts on the merits with the burden of proof on the government.

T. Murray Rankin, *Freedom of Information in Canada: Will the doors stay shut?* (C.B.A., 1977), at p. 9

3. (1965), 31 *Canadian Journal of Economics and Political Science* 479

4. See infra, Chapter III, Section (5)

In June 1977 the Government produced a Green Paper, Legislation on Public Access to Government Documents, outlining possible courses of action, but it was condemned for the "paucity of its analysis, the blurring of its stated options, and the misrepresentation of the goals and practices of freedom of information legislation...".⁵

In June 1978 the Standing Joint Committee tabled another report before Parliament, which outlined a framework for freedom of information legislation, embracing the key principles recommended by the Canadian Bar Association before the Committee, including the need for independent judicial review. The Conservative Government introduced Bill C-15 in October 1979, but the fall of the Government prevented passage. The succeeding Liberal Government introduced Bill C-43, a revised version, in July 1980, and this Bill passed second reading and was referred to the Justice and Legal Affairs Committee on January 29, 1981.

This thesis proposes that public access to government-held information is desirable, and that Bill C-43, although it possesses some commendable features, falls short of providing effective access to government-held information. On the positive side, the legislation abolishes the doctrine of Crown privilege; provides limited judicial review of denials of access; provides a mechanism for third parties who have supplied information to the

5. Rankin, op. cit., footnote 2, at p. 133

government, or who would be adversely affected by disclosure of certain information, to make their views known in order to allow a balancing of interests; and expands access by individuals to information about themselves. Among its defects are the limits placed on judicial review in key areas; an unnecessary exemption relating to federal-provincial negotiations; the failure to reform the classification system and the Official Secrets Act; an unnecessarily broad exemption relating to law enforcement; inadequate provision for the balancing of competing interests with regard to personal information; the failure to delineate clearly the relationship between the access legislation and other secrecy provisions; procedural barriers to access; and inadequate controls on the collection and use of personal information. These issues will be examined by comparing the provisions of Bill C-43 with other proposals for legislation, as well as with similar legislation in other jurisdictions.

CHAPTER I

ARGUMENTS FOR AND AGAINST ACCESS

The lack of public access to government information is said to have "contributed to the developing lack of trust between the people of Canada and the government ... [leading] to what can be termed a crisis of confidence".⁶ Some public servants apparently view the State as an entity unto itself, under no obligation to furnish information to the public. Under a somewhat propagandistic model of information management, bland or selective information is cosmetically packaged for dissemination to a passive audience. Democratic freedom is threatened by an amorphous administrative state which people feel little hope of influencing, by a system in which many of the decision-makers are anonymous, and by a bureaucracy that lacks sufficient accountability, either directly or indirectly, to the public.⁷

Advocates of freedom of information legislation argue that it is a fundamental "political right of the people of Canada to be informed by their government concerning the public business that they may protect and preserve the democratic principles of the constitution".⁸ In other words, access to government information

6. CBA President, A. Boyd Ferris, Feb. 9, 1977, quoted in Rankin, op. cit., footnote 2, at p. 130

7. John McMillan, Freedom of Information in Australia: Issue Closed, (1977), 8 Federal Law Review 379, at p. 385

can promote effective accountability, since the public's judgment of the choices taken by government depends on knowing the information and options available to the decision-makers. Those most affected will be able to supply relevant information and correct inaccurate information. Public confidence would be maintained by making decisions in such a way that all those affected believe them to be fairly made and based on complete information.⁹ On the other hand, while openness may increase informational input into decision-making, it seems likely that it will also slow down the process, and if a broader range of interests becomes directly concerned, it may become even more difficult to reach decisions acceptable to all interested parties.¹⁰ Nevertheless, accountability should be as important as administrative convenience in a democracy.

Access to government information would also make it

-
8. Preamble to draft Freedom of Information Act 1979, prepared and released by Gerald Baldwin, M.P., Aug. 23, 1979; see also report of B.C. Prov. Council of CBA (1977): fundamental rather than procedural right "because without this right, our other fundamental rights lose much of their meaning"; but see Smiley, quoted in Murray Rankin, Freedom of Information: Two Research Publications, (1979), 5 Canadian Public Policy 413, at p. 414; not a "human right", but at most a "highly-preferred human claim", and to the extent that many of the arguments derive from the United States and its philosophical basis in Lockean notions of popular sovereignty, the issues have to be reformulated for the parliamentary context.
 9. Robert Franson, Access to Information: Independent Administrative Agencies, (L.R.C.C., 1979), at pp. 5-8
 10. Robert J. Williams, Official Secrets and Open Government: A Reappraisal, (1979), 50 Political Quarterly 100, at p. 104

easier for scholars and other interested citizens to study the workings of government and conduct research. The government has become perhaps the most important single institutional repository of information about our society and its political, economic, social and environmental problems. In some areas, the government is virtually the only significant source of information. Since such information is developed at public expense, it can be argued that it ought to be publicly available whenever possible.¹¹

~~One of the arguments frequently made in countries with~~ Westminster-type Parliaments against adopting the type of freedom of information legislation found in the United States or Sweden involves the alleged erosion of the doctrine of ministerial responsibility,¹² which Geoffrey Marshall describes this way:¹³

Ministers, as the Crown's servants, carry on the executive government of the country. They accept legal responsibility for the use made of the royal prerogative and for the advice which they give to the Crown. They are politically accountable to the House of Commons both collectively and individually. They must by convention resign if defeated in the Commons on an important policy issue. A Minister as head of a department should resign if he is found to be at fault in the running of it or if important errors are made by civil servants under his control which are of such a kind that they imply inadequate supervision by the Minister.

11. John Roberts, *Legislation on Public Access to Government Documents* (1977) (hereinafter cited as Green Paper), at p. 3

12. E.g., *ibid.*, at pp. 2, 4-5; for a classic early exposition of opposing views on open government in a Westminster-type system, see Gordon Robertson, *Official Responsibility, Private Conscience, and Public Information*, *Transactions of the Royal Society of Canada, Series IV, Vol. X* (1972) 149 and reply by Gordon Fairweather, *Why the sacred cow should die and the public should see more*, *The Globe and Mail*, Sept. 9, 1972, p. 7

In the United States, the concept of ministerial responsibility does not exist. Because of the separation of powers between the executive and legislative branches of government, Cabinet members do not answer to the legislature on a day-to-day basis for the administration of their departments or for government policy as a whole. In Sweden, Ministers are collectively responsible to Parliament, but with few exceptions they are not individually responsible for the conduct of administration in their respective policy fields, which is in the hands of a large number of autonomous administrative boards, where most public servants are employed. These constitutional differences are often cited by critics who claim that the forms of open government found in Sweden and in the United States are therefore unsuitable for Parliamentary governments of the Westminster type.

There is, however, a tendency to exaggerate the efficacy of the traditional arrangements. In practice, Parliament has little control over a majority government. The growth in importance of the prerogative powers has also strengthened the executive branch, to the detriment of Parliament. In the sense of being subject to sanction, a Minister is answerable only to his party colleagues. There is a tendency to debate any error or abuse in administration in the context of an Opposition challenge to the Government rather than in reference to the error or abuse disclosed. Advocates of open

13. Rankin, op. cit., footnote 8, at p. 415

government believe that Parliament needs to have more information about government decisions in order to hold it to account. Frank Walker, the Attorney-General for New South Wales, has argued persuasively that a minister's dependence on senior advisors, his ability to be "selective" and to distort answers in the House, the reality of party solidarity, and the inability of Members to get sufficient information to ask intelligent questions in the House all indicate that meaningful freedom of information legislation would actually increase a minister's accountability to Parliament. Although the legislation would narrow ministerial discretion, the minister would still be responsible for ensuring that the Act was carried out with respect to documents emanating from his department and deciding in the first instance the applicability of certain exemptions.

14

The doctrine of ministerial responsibility has been considered especially significant with regard to the review process. If decisions on the applicability of exemptions to requested material, taken by a minister or in his name, were subject to mandatory reversal by some review mechanism with power to require release of documents, it was felt that the exercise of ministerial responsibility could be eroded. The issue of ministerial responsibility is not in question when the court reviews the use of a class exemption, i.e., an exemption drafted by reference to

15

14. Quoted in Rankin, op. cit., footnote 8, at p. 416

15. Green Paper, footnote 11, at p. 5

a definite category of exemptable documents, such as Cabinet documents; or reviews an exemption expressed in terms of an interest other than a public interest for which a minister is accountable to Parliament. If the court can substitute its own judgment for the minister's decision as to the possibility of injury to national defence, for example, it is said that the minister will be accountable to Parliament for consequences flowing from a final decision that the legislation prevented him from taking. The Cabinet Discussion Paper released with Bill C-43 examined various ways to reconcile ministerial responsibility with the legislation. If there were a complete denial of review, it might lead to concern that ministers were using a non-reviewable exemption to prevent release of information that ought to be released. There could be review by the Information Commissioner to ensure that there were no arbitrary denials, but the final decision on disclosure would remain with the minister. Finally, there was the option adopted in Bill C-43 - a two-tier system, even for public policy exemptions, except that instead of making a complete review as to whether the specified injury would occur, the Court would make a determination only as to whether it was "reasonable" for the minister concerned to come to that conclusion. If it found that he had not acted reasonably, it could order release of the documents so refused. 16

Against these arguments, it can be urged that there is

16. Francis Fox, Access to Information Legislation (Cabinet Discussion Paper, 1980), at pp. 20-21

no legal impediment to Parliament's enactment of legislation that would contravene the convention of ministerial responsibility. As noted above, some aspects of accountability to Parliament may even be enhanced. Moreover, a minister's responsibility to Parliament does not imply that the courts have no role to play in checking executive action. Whenever a court declares that an administrative decision by a minister was wrongly taken - whether such judicial intervention is justified by reference to jurisdiction, vires, natural justice, or even "reasonableness" - the court is in effect restricting executive power.

The courts are the natural forum for decisions on the exercise of constitutional or civil rights, and in freedom of information legislation a new citizens' right is created. Without a truly independent review process to examine documents and apply only the statutory criteria, any system of access to government information becomes meaningless and self-serving. Only the judiciary has the legitimacy necessary to override executive determinations with respect to national security documents. In Conway v. Rimmer,¹⁷ the House of Lords did not hesitate in concluding that the courts, not the Executive, must make the final decision concerning production of government documents.¹⁸ The assertion by ministers that no judge can be properly made aware of all factors to consider in

17. [1968] A.C. 910 (H.L.)

18. See infra, Chapter III, Section (2)

a freedom of information decision is based on one of two assumptions: either that the evidence or arguments that the minister can advance to support non-disclosure is so insubstantial or ephemeral that he could never hope to persuade an independent person of its worth; or that a judge lacks the intelligence or capacity to understand the evidence or arguments and to give it the appropriate weight. ¹⁹ Either assumption is totally untenable.

Related to the doctrine of ministerial responsibility is the convention of the anonymity and political neutrality of the public service. A code of ethics has developed embracing anonymity, discretion, conformity and conservatism, to ensure that the public service operates as an extension of the minister's will and can serve any government. The lines of accountability and responsibility are exclusively towards the minister; the public service is answerable to ministers, as ministers are to Parliament. It is argued that decision-makers need expert advice, given fully and frankly, but that no public servant can offer advice fully and frankly if he knows that his views may be made public and distorted by the "prism of partisanship". ²⁰ Individual public servants who signed reports, memoranda or letters subsequently released to the public might become the subject of public comment and would be ²¹ unable to respond. As well, it is feared that advice in such

19. Rankin, *op. cit.*, footnote 2, at pp. 120-128; but see J.M. Evans, Comment (Public Interest Immunity and State Papers), (1980), 58 Canadian Bar Review 360 on considerations involved

20. Green Paper, footnote 11, at p. 2

21. In the United States, the names of individuals who signed reports are removed.

documents might be construed in the media and in Parliament as embarrassing to the minister or his party, even though such advice did not represent government policy. Ministers might try to avoid the embarrassment of a difference between advice and the final decision by surrounding themselves with political appointees or yes-men. On the other hand, the disclosure of recommendations made within the framework of existing government policy might cripple the ability of ministers of a new government of a different party to enter into relations of full mutual confidence with senior public servants.²²

Some critics, however, have urged greater answerability to the legislature and public on the part of senior public servants, since the "centre of gravity" has shifted to them from Cabinet Ministers, who must increasingly defer to their expertise, with the growth and complexity of government activity.²³ An elitist attitude is sometimes found in senior bureaucrats, who consider themselves custodians of the public interest because of their unique knowledge and experience, and resent attempts by outsiders²⁴ to disturb their traditional and familiar procedures. Nevertheless, even in the absence of anonymity, the deep-rooted integrity and

22. Green Paper, footnote 11, at p. 4

23. Rankin, op. cit., footnote 2, at p. 113; Kenneth Kernaghan, Freedom of Information and Ministerial Responsibility, (Commission on Freedom of Information and Individual Privacy, Ont., 1978), at p. 28; McMillan, op. cit., footnote 7, at p. 396

24. Williams, op. cit., footnote 10, at p. 103; McMillan, op. cit.,

professionalism of the senior public service should prompt it to continue providing objective advice.

In any case, most of the feared ill effects of disclosure on policy advice can be avoided by separating documents, as provided in the system established for Cabinet documents in 1977. Factual information and policy options were to be contained in a discussion paper, which could be released when the Cabinet's decision had been announced, while the recommendations of public servants and political considerations were to be kept separate. In practice, few discussion papers were released.²⁵

Another argument against freedom of information legislation involves the high administrative costs that would supposedly result.²⁶ It is difficult to determine how real such fears are. Some sources insist that such legislation exacts a heavy cost, both in financial terms and in lost time for officials. On the basis of American figures, the Green Paper estimated the cost to departments at about 10.5 million dollars, plus 800,000 to 900,000 dollars for the central co-ordinating unit and another 800,000 dollars for the Information Commissioner. On the other hand, figures cited by

footnote 7, at p. 396; Harold C. Relyea, The provision of government information: the federal Freedom of Information Act experience, (1977), 20 Canadian Public Administration 317, at pp. 320-322 ("Hobbesian bureaucrat")

25. See discussion of policy advice exemption, infra, Chapter III, Section (4)
26. Green Paper, footnote 11, at pp. 26-27; John H. Shenefield, (Associate Attorney-General), Amending the Freedom of Information Act: A Sneak Preview (March, 1980), at pp. 9-10

Professor Franson and the Canadian Bar Association estimate the cost at less than two million dollars.²⁷ The Green Paper appears to have disregarded all of the agencies that reported small or negligible costs. Average costs per request vary from figures in the tens of dollars to figures in the hundreds. As well, costs include activities such as discovery that would be carried on anyway. While administration of the amended Freedom of Information Act with strict time limits has been costly for some agencies,²⁸ high costs can be attributed to an unusual volume of requests (in the case of the C.I.A. and F.B.I.), the necessity of hiring and training new staff, and the inadequate allocation of resources in the past. Initial costs will probably be far higher than those incurred in more normal or routine operations in years to come. Another factor may be the use of upper-level staff in administration of the Act when lower-level staff could have been effectively used. In some agencies, for instance, the Freedom of Information Act unit may only deny requests, and grants of access can be made only by the head of the agency, who undoubtedly has other demands on his²⁹ time.

27. Franson, op. cit., footnote 9, at pp. 59-60; Freedom of Information in Canada: A Model Bill (CBA, 1979) (hereinafter cited as CBA Model Bill), at pp. 14-15

28. But the costs of handling requests under both the Freedom of Information Act and the Privacy Act are far less than one per cent of total departmental budgets. Donald C. Rowat, Freedom of Information: The American Experience, (1978), 58 Canadian Forum (September) 10, at p. 12

29. Relyea, op. cit., footnote 24, at pp. 335-339

29a

Apart from the question of ministerial responsibility, judicial review has also been criticized on the basis of costs to litigants and the addition to the court's caseload. The Green Paper estimated the average cost to the applicant of litigating an appeal under the American litigation as ten thousand dollars, but this has been disputed as much too high.³⁰ In the United States, experience gained in handling a number of cases and the development of standard forms and precedents have already substantially reduced the cost per case, a trend that may be expected to continue. The Information Commissioner's role as an informal mediator should reduce resort to the court. As a number of the more controversial exemptions are judicially interpreted, applicants and department officials will be guided by such decisions, and the number of appeals should decrease.^{30a} When an appeal does reach the court, the American legislation provides that the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred³¹ in any case where the complainant has substantially prevailed.

29a See supra, pp. 7-12

30. Rankin, op. cit., footnote 2, at pp. 146-147; CBA Model Bill, footnote 27, at p. 15

30a CBA Model Bill, footnote 27, at p. 15

31. Also section 19 of CBA Model Bill, footnote 27. Cf. section 47 of Bill C-15, section 54 of Bill C-43; costs in discretion of Court, shall follow the event unless the Court orders otherwise, but costs to applicant, even if not successful, if case has raised an important new principle. A number of citizen-aid organizations, such as the Freedom of Information Clearinghouse and the Project on National Security and Civil Liberties (latter headed by Morton Halperin, a former deputy assistant secretary of the Dept. of Defense) and "store-front" legal firms have sprung

Most American courts do not find Freedom of Information Act cases burdensome. It is true that all Canadian cases will be in the Federal Court instead of being spread throughout the system, but the Court will soon gain special expertise in the area, as has happened in the District of Columbia Court which has special jurisdiction.

To sum up, although open government may sometimes make decision-making more difficult, it is important to government accountability for the public to have more information about the way government operates. Freer access to government information can also play an important role in historical or other research. Despite the constitutional differences in Sweden and the United States, freedom of information legislation is not incompatible with a Westminster-type system of government.³² It may even enhance ministerial accountability to Parliament. There should be full judicial review except in those areas that involve "political judgment in its most classic form".^{32a} Without independent review, any legislation would be neither credible nor effective. Although there may be advantages to increasing public service accountability, the most practical solution to the feared ill effects of disclosure

up in Washington, which take on cases for citizens, pay the costs if they lose and collect costs at the full legal rate if they win. Rowat, op. cit., footnote 28, at pp. 11-12

32. This was the conclusion of the Senate Constitutional and Legal Committee in Australia in its 1979 Report. See infra, Chapter II, Section (3)

32a CBA brief to Commons Committee, Mar., 1981 National, April 1981, p. 2
See infra, p. 46

is the separation of factual material from advice and opinions. It seems probable that the cost of implementing freedom of information legislation would not be disproportionate to the benefits that would result, although there may be initial difficulties, as in the case of requests under Part IV of the Canadian Human Rights Act.³³

33. See infra, Chapter V, Section (1)

CHAPTER II

FREEDOM OF INFORMATION IN OTHER JURISDICTIONS

(1) SWEDEN

Sweden has had freedom of information legislation favourable to open government since the eighteenth century. The current legislation is the 1949 Freedom of the Press Act, which forms part of the Swedish constitution. Chapter 2, article 1 provides: "to further free exchange of opinion and general enlightenment, every Swedish citizen shall have free access to official documents ...".³⁴ The Act allows restrictions on access that are necessary on account of:³⁵

- (1) the security of the state or its relations to other states of international organizations;
- (2) the state's central financial, monetary or currency policy;
- (3) the activities of public authorities for inspection, control or supervision in other cases;
- (4) the activities to prevent or suppress crime;
- (5) the economic interests in public activities;
- (6) the protection of the personal or economic circumstances of the individual; or
- (7) the protection of species of animals or plants.

34. This includes not only natural persons enjoying Swedish citizenship, but also Swedish legal persons under civil law. For all practical purposes foreigners in fact have the same rights. Sigvard Holstad, Sweden, in Administrative Secrecy in Developed Countries (Edited by Donald C. Rowat)(1979), at p. 33

35. Ibid., at p. 37

It is further provided that "the specific cases in which official documents are to be kept secret ... shall be closely defined in special legislation", which is the 1937 Law on Curtailment of the Right to Demand Official Documents. Except for the categories of foreign affairs and national defence, it lists exceptions in narrow and limiting detail.³⁶ By virtue of forty-two sections covering about 250 categories of documents which may be withheld, restrictions on access are greater than are generally believed.³⁷

Swedish citizens identify documents they want from public registers describing official files, although these registers cover only a fraction of all documents produced in offices of the Swedish government.³⁸ Registers are normally public even though they contain entries concerning secret documents. Otherwise, the public would be unaware of the existence of secret documents and would be unable to submit the question of access to such documents to the competent authorities.³⁹ Requestors may inspect documents or obtain copies. If information is not exempt, it must be produced "immediately or as soon as possible". There is no obligation to release a document

36. Donald C. Rowat, Comparative Survey, in Administrative Secrecy in Developed Countries (Edited by Donald C. Rowat)(1979), at p. 3

37. Kernaghan, op. cit., footnote 23, at p. 32

38. Green Paper, footnote 11, at p. 20

39. Holstad, op. cit., footnote 34, at p. 44

that is not "official" (in the keeping of an authority and received or drawn up by an authority) or an official document that is secret because of its contents. A document is to be considered as drawn up when it has been dispatched or, if it is to be used only within the authority, when the case or matter to which the document belongs has been finally settled. Memoranda made within an authority exclusively for the presentation or preparation of a case or matter acquire the character of official documents only if they are filed with other documents in the case or matter. Notes that contain factual information of importance for the decision, e.g., notes of what someone has said during a conversation with an official of an authority, must be kept and filed with other documents in the matter. As amended in 1978, the Freedom of the Press Act makes clear that documents exchanged between officials of separate authorities for unofficial consultations are not "official".⁴⁰

If a request is refused, the requestor may appeal to the public servant's superiors, to an Ombudsman or to the Supreme Administrative Court. Refusals by the Government, Parliament, parliamentary commissioners or Ombudsmen, however, cannot be appealed.⁴¹ The possibility of disciplinary action, censure or prosecution inclines⁴² public servants to disclose promptly and liberally.

40. Holstad, op. cit., footnote 34, at pp. 35-37

41. Ibid., at p. 47

42. Kernaghan, op. cit., footnote 23, at pp. 31-33

(2) UNITED STATES

In 1966, after a decade of study originally prompted by a concern for freedom of the press, the United States Congress passed the Freedom of Information Act.⁴³ The Act was created in response to the failure of section 3 of the Administrative Procedure Act of 1946 to provide effective access to government information. Section 3 exempted government functions "requiring secrecy in the public interest" and adjudicatory final opinions and orders "required for good cause to be held confidential". It was drafted in such a way that agencies were allowed to substitute their own interests for those of the public,⁴⁴ and public access was governed by a "need to know" policy ("persons properly and directly concerned"). The legislation also failed to provide a judicial remedy for wrongful withholding of information.⁴⁵

In 1960 Jacob Scher, special counsel with the House Special Subcommittee on Government Information, began drafting a records access model bill. The basic element was the establishment of a statutory presumption that government documents should be accessible to the public with only minor specific exceptions, limited to: (1) matters specifically exempted by statute; (2) matters exempted by executive order for reasons of national security; and (3) those areas disclosure of which would be a clearly unwarranted invasion

43. 5 U.S.C. Section 552 (1970)

44. According to the Senate Report, it was used to cover up mistakes and irregularities. Tommy E. Furby, *The Freedom of Information Act: A Survey of Litigation Under the Exemptions*, (1977), 48 Mississippi Law Journal 784, at pp. 784-785

45. Ibid.

of privacy. Any person denied access was given the right to judicial⁴⁶ process for the enforcement of his rights. For various reasons, enactment was delayed, but eventually interest in freedom of information legislation revived, culminating in the 1966 Act.

Documents that must be made available upon citizen request under the Act are: (1) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (2) statements of policy and interpretations adopted by an agency and not published in the Federal Register; (3) administrative staff manuals and instructions to staff that affect a member of the public. Mandatory disclosure provisions do not apply to matters⁴⁷ that are:

- (1) (A) specially authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute ...;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

46. See Harold C. Relyea, Freedom of Information, Privacy, and Official Secrecy: The Evolution of Federal Government Information Policy Concepts, (1980), 7 Social Indicators Research 137, at p. 142

47. See Chapter III infra for discussion of most exemptions

- (6) personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) investigatory records compiled for law enforcement purposes ...;
- (8) contained in or related to examination, operating, or condition report prepared by, on behalf of, or for the use of, an agency responsible for the regulation or supervision of financial institutions; or
- (9) geological and geophysical information, including maps, concerning wells.

The legislation has been severely criticized for poor drafting and political compromise. ⁴⁸ Difficulty in interpretation has been increased by the differences between the House and Senate Reports. In general, the Senate Report is relatively faithful to the literal words of the Act, but the main thrust of the House Report seems to be in the direction of non-disclosure. The 1967 Attorney-General's Memorandum, intended to guide agencies in the implementation of the Act, presented the White House view ⁴⁹ of the statute, relying almost exclusively on the House Report. As a consequence, the courts have repeatedly been called upon to provide the ultimate determination of the meaning of what should have been a relatively straightforward law. This has interfered with the continuity and certainty of the law, and also imposed a

48. Furby, op. cit., footnote 44; Relyea, op. cit., footnote 24

49. See discussion of exemption six, infra, Chapter III, Section (7)

burden on the judicial system and a restriction on public use of the legislation. Some language has been misunderstood even when subjected to judicial interpretation.⁵⁰

Problems in interpretation were exacerbated by a lack of good faith on the part of the executive. Executive branch agencies did not support the proposal and had it forced upon them; the President indicated a lack of sympathy; the Attorney-General's Memorandum interpreting the Act reflected a bias against the true spirit of the law; departments and agencies, in allocating resources for the administration of the Act, failed to take it seriously. In 1972, when the first oversight hearings were held on the legislation by the House Foreign Operations and Government Information Subcommittee, it was concluded: "The efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy ...".⁵¹ During the early years of the legislation, the primary users were not the public or press, but the business community, who had the necessary time, money and legal expertise.

The Freedom of Information Act was extensively amended in 1974 (over a Presidential veto) to correct most of the procedural abuses and to restrict use of exemptions relating to national security and law enforcement,⁵² and again amended in 1976.⁵³ Not all

50. E.g., EPA v. Mink, 410 U.S. 73 (1973); see infra, Chapter III, Section (5)

51. Relyea, op. cit., footnote 24, at p. 327

52. See infra Chapter III, Sections (5) and (6)

of the problems identified in the 1972 and 1973 congressional hearings could be corrected, because of the need for political compromise, but some writers feel that the legislation is working more effectively since public servants have accepted it and allocated more resources to its administration.⁵⁴ In May, 1977 Attorney-General Bell issued new guidelines requiring agencies to release documents, even if they fell under one of the exemptions, where this would not be "demonstrably harmful" to the government or any individual involved. He also warned that in future the Justice Department might decide not to defend the agency in court for refusals to release documents if the Department regarded the documents as harmless. Previously, it almost automatically defended⁵⁵ all refusals.

Nevertheless, the Department of Justice has completed a lengthy study of the Freedom of Information Act with a view to further amendment. It is suggested that there are two areas for reform: streamlining the administration of the Act, and giving further protection to such important interests as law enforcement, national security and individual privacy.⁵⁶

53. See infra Chapter III, Section (9)

54. E.g., Relyea, op. cit., footnote 24, at p. 335

55. Rowat, op. cit., footnote 28, at p. 12

56. Shenefield, op. cit., footnote 26.

(3) AUSTRALIA

Freedom of information legislation has also been an issue in Australia for some time. The then Labour Government, as part of its proclaimed policy of open government, convened an interdepartmental committee to study the adaptation of the American legislation to the Australian constitutional and administrative structure. The Committee reported in 1974. In the following year there was a change of government, and there was also a desire to reassess the 1974 proposals in light of the American amendments, so the Committee was reconvened and it published a lengthier report in December, 1976.⁵⁷ The major theme pervading the report was a concern for the preservation of ministerial responsibility, both collective and individual, and of the political neutrality of the public service. As well, the Report of the Royal Commission on Australian Government Administration (the Coombs Report), also published in 1976, devoted a substantial section to the examination of freedom of information and appended a Minority Report containing a draft Freedom of Information Bill by John McMillan. Although it urged greater openness and access to information about government processes, the Coombs Report concluded that it would be inappropriate to endorse or recommend a specific draft bill.

57. Criticized by McMillan, op. cit., footnote 7

In 1978 the Government introduced a Bill which has yet to be passed. It provided limited judicial review, but a Minister would have power to issue a conclusive ministerial certificate refusing access to documents bearing on national security, defence, international relations, information received in confidence from other governments, Commonwealth-State relations, and Cabinet and Executive Council matters. The Senate Constitutional and Legal Committee, to which the Bill had been referred, tabled its report in November 1979, making 106 recommendations to amend the legislation and improve its operation. It concluded that freedom of information is not incompatible with the Westminster system, but that the range and extent of exemptions in the Bill would significantly reduce the value of the guaranteed right of access, in many respects unjustifiably. The Government's response was unenthusiastic. It referred the report to another interdepartmental committee, where the most important recommendations - restrictions on conclusive ministerial certificates; limitations on exemptions; a mediating role for the Ombudsman - were viewed with considerable hostility. 58

(4) UNITED KINGDOM

As long ago as 1968, the Fulton Committee on the Civil Service proclaimed that the administrative process was surrounded by too much secrecy and that the public interest would be better served if there were a greater amount of openness. In 1970 the Franks Committee was established to inquire into the operation of section 2 of the Official Secrets Act, which imposes criminal sanctions for the unauthorized communication, receipt or retention of secret information.⁵⁹ It recommended that section 2 should be repealed and replaced by an Official Information Act that would limit use of criminal sanctions to unauthorized disclosures relating to defence and internal security, foreign relations, currency and reserves, maintenance of law and order, Cabinet documents, and information given to the government by private individuals or concerns. It failed, however, to respond directly and fully to the Fulton Committee's desire for an inquiry into enhanced public access to government information. More recently, in 1978, the Government produced a White Paper on Official Secrets, but the focus of parliamentary and public interest had shifted from Official Secrets to freedom of information, and the White Paper was "greeted with general derision".⁶⁰ A private member's

59. Similar to section 4 of the Canadian Act; see infra Chapter III, Section (5)

60. Commentary: Official Secrets, (1978), 49 Political Quarterly 397

bill on freedom of information, introduced by Liberal Member Clement Freud, had gone through committee and reached the final report stage when the Labour Government fell. At second reading, it had received unanimous approval. The present Conservative Government has rejected action on Official Secrets or freedom of information.⁶¹

(5) NOVA SCOTIA

The Nova Scotia Freedom of Information Act,⁶² which was passed in 1977, represented a landmark, in that it was the first legislation of its kind in a jurisdiction having a British-style Parliamentary system, but it has been criticized as securing secrecy rather than promoting openness.⁶³ Unlike most other access legislation, the Nova Scotia Act does not begin with the premise that all information should be available. Instead, section 3 states that certain listed categories of information are available upon request, including material relating to the organization of departments; internal procedure, policy and guidelines followed by a department; final decisions of tribunals; personal information

61. Recently the Government upheld the widely criticized "D-notice" (Defence Notice) system. Government officials advise the media of what cannot be published, and editors are then expected to use self-censorship. Although compliance with the D-notices is voluntary, violators are subject to prosecution under the Official Secrets Act. British reject reform of secrecy system, The Citizen, Jan. 8, 1981

62. S.N.S. 1977, c. 10

63. Keith R. Evans, Nova Scotia Freedom of Information Act, 1979 Dalhousie Law Journal 494

pertaining to the person making the request; and instructions to staff relating to, and having an effect upon, a member of the public. Section 4 contains a list of exceptions whereby information that would be classified as being "free" under section 3 can be refused. Unlike the exemptions in the American legislation, the Nova Scotia exemptions are mandatory, i.e., if a document falls within one of the exemptions, access must be denied. The government is not required to provide a catalogue or index of documents on file, which may make it difficult for a requestor to identify precisely the information requested, as required by the Act. It has been suggested that this requirement for precise identification could serve as a residual clause to deny access.⁶⁴ One of the greatest problems with the Act is the appeal procedure. If appeal to the minister concerned is unsuccessful, final appeal lies to the House of Assembly on a motion by a Member of the House. Requestors may object to being forced to ally themselves with a political party. What is worse, there is little hope of success. An appeal will remain on the Order Paper until it is called by the government, and does not even have to be heard. Where there is majority government, the House is controlled by the minister's party. To date, no appeal has succeeded, although publicity may force government concessions.⁶⁵ The present government is committed to replacing the Act, but is said to be awaiting federal action, so that it can draw up complementary legislation.⁶⁶

64. Evans, op. cit., footnote 63, at p. 502

65. As in the case of journalist Parker Barrs Donham. See Their information law a flop, Nova Scotians say, *The Globe and Mail*, June 4, 1980

66. Ibid.

(6) NEW BRUNSWICK

The Right to Information Act⁶⁷ was enacted in 1978. It was regarded as a great improvement over the Nova Scotia Freedom of Information Act, in that it recognised a general right of access ("every person is entitled to request and receive information relating to the public business of the Province") and provided for an independent review procedure. The decision of a minister to deny access to information may be appealed to either the Supreme Court of the province or to the Ombudsman. Once a person has appealed to the Court, he may not refer the matter to the Ombudsman, but if he is not satisfied with the appeal to the Ombudsman, he may then appeal to the Court. The Court has the power to order release of requested information, in whole or in part, but the Ombudsman may only recommend release. One of the major shortcomings of the legislation is the absence of any form of index of government documents. In practice, moreover, the New Brunswick legislation does not appear to be any more effective than the Nova Scotia legislation. On three occasions in the second half of 1980 the New Brunswick Electric Power Commission supplied information only under threat of court action, and always with the proviso that the information was confidential and not to be made public.⁶⁸

67. S.N.B. 1978, c. R-10.3

68. N.B. Liberals press 'favoritism' probe, The Citizen, Dec. 31, 1980

(7) ONTARIO

A Commission on Freedom of Information and Individual Privacy was established in March, 1977 with D. Carleton Williams, former president of the University of Western Ontario as its head. In September, 1980 the Commission presented its report (Public Government for Private People), which contained 141 recommendations for access and privacy legislation. Most of these recommendations, such as those for exemptions and procedure, were similar to the federal proposals. There were some novel ideas, however. There would be a director of fair information practices who could settle disputes, but unlike the Information Commissioner in federal proposals, he would have the power to order disclosure or withholding. Either the Government or the applicant could appeal his order to a fair information practices tribunal appointed by the Government. Judicial review of the tribunal's decisions could be only on points of procedure or law under the Judicial Review Procedures Act. This review process has been criticized as not being independent.⁶⁹ New Democrat critic Donald MacDonald would also prefer to see the Ombudsman oversee the legislation instead of a director of fair information practices.⁷⁰ Significantly, the Government would be liable for monetary damages for infringement of various rights

69. Private and Confidential, (Editorial) The Globe and Mail, Dec. 29, 1980, p. 6

70. Report, legislation plan bring praise, The Globe and Mail, Sept. 19, 1980, p. 4

given in the privacy legislation. A data protection authority would oversee implementation of the privacy law. The Commission also recommended that the Government should not be allowed to deny rights of benefits to persons who refuse to provide their Social Insurance Numbers. The Government could demand the number only if it were required by law or by a regulatory body set up to review privacy legislation. The individual would have to be informed whether disclosure was mandatory or voluntary, what law required disclosure, and what would be done with the number.⁷¹

To date no legislation has been enacted, but in response to the recommendations of the Williams Commission, some of the Government's internal law has been made available in reading rooms or information centres in each ministry where individuals can study and copy documents. The exemptions to the general rule are internal manuals or policy instructions to investigators, inspectors, auditors and negotiators, where such information relates only to enforcement and prosecutorial proceedings. These might also be helpful to the public, however.

(8) OTHERS

Various European countries have recently passed freedom of information legislation - Norway and Denmark in 1970, Finland in 1971, Austria in 1973, France and the Netherlands in 1978. In general, Sweden still remains the most open of the Scandinavian countries.⁷²

71. Cf. U.S. Privacy Act, infra, Chapter V, Section (3)

(9) SUMMARY

Professor Rowat has proposed that a law on public access will not be successful unless it contains three key provisions: it must (1) unequivocally declare that the general principle is to be open access to documents; (2) list narrowly and specifically the types of matter which may legitimately be kept secret; (3) provide a right of appeal to an independent authority, such as the courts or an Ombudsman, or preferably both. It should also require all documents to be listed in registers, so that their existence will be known and so that they can be easily identified and requested.⁷³ The Nova Scotia legislation fails to give a general right of access to government information. The exemptions in most statutes are too broad. By Professor Rowat's standards, even the exemptions in the American legislation, which is often put forward as a model, fall short, leaving more room for official discretion and less room for appeal than those in the Swedish legislation.⁷⁴ The Nova Scotia legislation fails to provide an effective appeal process. All of the legislation discussed, except that in Sweden, fails to provide adequate indexing.

72. Rowat, op. cit., footnote 36, at p. 3

73. Ibid., at p. 25

74. Ibid., at p. 16

CHAPTER III

EXEMPTIONS

(1) GENERAL

Although there is much agreement from one jurisdiction to another that certain types of information should be kept secret, exemptions may be drafted in various ways. "Injury-test" exemptions identify specific public or private interests that must be protected from injury that would result from disclosure. This approach permits the exercise of judgment and the balancing of contending interests, and is therefore more flexible. On the other hand, it is more likely to give rise to disputes between agencies and applicants, as the minister or official is making a subjective assessment as to the likelihood of injury. Focusing on the interests to be protected also results in very vague guidelines that do not provide much assistance to administrators or judges.

"Class" exemptions refer to clearly defined categories of documents or information (e.g., Cabinet documents). Although it is not apparent on their face, class exemptions also aim at protecting public or private interests and at preventing injury. Since the exemptions are based on objective and readily verifiable criteria, they are easier to apply and less likely to give rise to disputes. On the other hand, any class of documents will contain many documents that could be released without harm.

Mixed exemptions use both injury and class tests. They

first define the specific injury to be prevented, complemented by a list of categories of documents that serves to illustrate the type of information disclosure of which might be injurious, and to guide both the agency and the review authority in assessing the likelihood of injury. Alternatively, a mixed exemption might consist of an exempted class or classes of documents with a residual injury clause for the purpose of covering other information not falling within the specified classes. The exemptions in the McMillan Minority Report Bill in Australia first define the classes of documents and the interests that have to be protected by non-disclosure, and then define the classes of documents that should be disclosed and the interests that favour disclosure. In Bill C-15 class tests were used without reference to injury tests only where the class chosen overlapped for the most part with the possible injury caused by release, and where the application of injury tests would require considerable resources for little gain. ⁷⁵

Section 26 of both Bill C-15 and Bill C-43 provides for disclosure of non-exempt portions of records that can reasonably be severed from exemptable portions. Bill C-43 includes records containing material that must be withheld, whereas Bill C-15 mentions only records that the head of the institution "may refuse to disclose". Section 28 of the Canadian Bar Association Model Bill

75. Fox, op. cit., footnote 16, at p. 5

has a similar provision, but also provides that an agency may disclose a record which otherwise could be exempted from disclosure if in the opinion of the head of the agency the public interest in disclosure outweighs the interest in withholding the record, except where release might injure interests outside government, such as personal privacy or commercial or financial information.

Sorting the material by reference to objective criteria, as contained in class exemptions, should not be very difficult. It could become quite complex, however, when the agency has to decide, in respect of each paragraph of a document, whether disclosure would be injurious in a specifically defined way. It has been suggested that severability should be allowed only when a request pertains to a limited number of documents or when only a small part of a document is exemptable, e.g., names or personal identification. 76

The American legislation requires that "reasonably segregable" portions of documents containing exempt material must be released. The Justice Department complains that this requirement has occasionally resulted in the disclosure of "mere gibberish", sometimes intelligible only to persons possessing adequate background information for identifying law enforcement or intelligence sources. It proposes to spell out some of the factors to consider in determining the reasonableness of "segregability", including the "degree of risk" that a person with significant expertise in these

76. Fox, op. cit., footnote 16, at p. 28; Green Paper, footnote 11, at pp. 13-14

subjects will be able to derive exempted information regardless of deletions. The countervailing factor would be the public interest in the release of such portions.⁷⁷

Related to this is the theory that in certain rare circumstances, especially in respect of law enforcement, it may be harmful for an agency even to acknowledge that it has a particular document. Applicants could frame their requests in such a way as to obtain the answer they are seeking simply by learning whether there is a document falling within the terms of their request, whether or not the document is exempted. It is therefore considered important that the legislation provide for such cases. Both Bill C-15 and C-43 contain such provisions. Although the exemption has been criticized as a loophole, the Government argues that there would be effective controls to prevent abuse, since it would be subject to external review, and the exemption would be used rarely.⁷⁸ The principle that the government may refuse even to acknowledge the existence of a document in certain circumstances has also been recognized in the United States.⁷⁹

The suitability of different types of exemption will be considered with respect to the individual exemptions. While there

77. Shenefield, op. cit., footnote 26, at pp. 3-4

78. Fox, op. cit., footnote 16, at p. 17

79. Hayden v. National Security Agency/ Central Security Service, 608 F2d 1381 (D.C. Cir. 1979); cf. Justice Dept. Regulations under U.S. Privacy Act of 1974, see infra, Chapter V, Sections (2) and (3)

may be difficulties with deletions in some circumstances, there must be ~~some~~ concern that restrictions on deletions could be used as an excuse to deny access altogether, where there is no necessity. The same may be said with regard to refusing to acknowledge the existence of a document. Even if full judicial review were available, however, it might be doubted, on the basis of the American experience, whether a court would challenge the government's assertions of harm in such a case.

(2) CROWN PRIVILEGE

At common law, otherwise relevant evidence sought to be introduced in the course of litigation must be excluded by the court if its reception would be contrary to the public interest. Among these privileges are those for solicitor-client and certain family relationships, as well as for the Crown. The State's interest is greatest in areas such as diplomatic communication, military information and Cabinet minutes, and decreases in areas such as interdepartmental correspondence and internal personnel reports. Cases on Crown privilege normally arise when the government is already involved as a litigant or when government files are requested in other contexts. Usually, the claimant demands production and discovery of documents from the Crown, and the Crown resists, invoking the doctrine of Crown privilege.

For many years the case of Duncan v. Cammell Laird ⁸⁰ was accepted for the principle that if the appropriate minister of the

80. [1942] A.C. 624 (H.L.)

Crown swore in an affidavit that the disclosure of the requested document would be contrary to the public interest, the court would, without question, abide by the ministerial decision and not allow production. Such deference to final determination of Crown privilege by the Executive was strongly criticized at the time as an abdication by the courts of their proper function in determining the admissibility of evidence.⁸¹ The public interest test could be satisfied (a) by having regard to the contents of a particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

Perhaps the most important Canadian case on Crown privilege is R. v. Snider.^{81a} This was an appeal from the British Columbia Court of Appeal on a reference under the Constitutional Questions Determination Act, involving production of income tax returns in a criminal proceeding. The Supreme Court sought to distinguish the case from Duncan, noting that Lord Simon had expressly limited the judgment to civil actions. More importantly,

81. Dean Wright, quoted in Rankin, op. cit., footnote 2, at p. 14

81a Re Constitutional Questions Determination Act (B.C.) Regina v. Snider 1954 S.C.R. 479, 1954 4D.L.R. 483 See Rankin, op. cit., footnote 2, at pp. 15-18; S. Linstead, The Law of Crown Privilege in Canada and Elsewhere, (1968-69) 3 Ottawa Law Review 79, at pp. 120-130. In Gagnon v. Quebec Securities Commissioners 1965 Sup. Ct. 73, 50 D.L.R. (2d) 329, the Supreme Court found that a ministerial objection had been taken in invalid form, as the conditions of article 332 of the Code of Civil Procedure had not been complied with. Obiter, the English case of Re Grovenor Hotel, London (No. 2) 1964 3 All E.R. 354 (C.A.) was mentioned with approval as undermining the conclusiveness of a ministerial objection on the ground of public policy.

income tax returns, as a class, are not required on grounds of public policy to be withheld from production. The minister's affidavit cannot be accepted as conclusive where the facts show that no such interest can exist. The judgments of Rand, J. and Estey, J. affirm, however, that where it appears from the affidavit that the documents in question are capable of sustaining such an interest and the minister avers its existence, then the court must accept his decision and cannot inspect the documents.

82
Finally, in Conway v. Rimmer the House of Lords held that documents should be produced for their inspection in camera, and if it was concluded that the possibility of prejudice to the public interest was insufficient to justify retention, disclosure should be ordered. The Court criticized the "class" doctrine, by which complete classes of official reports were withheld merely on the rationale that disclosure would impede the "freedom and candour of communication with and within the public service", while

82. 1968 A.C. 910 (H.L.)



acknowledging that there were certain classes of documents that ought not to be disclosed, including Cabinet minutes and policy-making documents.⁸³ The final decision as to production should rest with the court, however, not with the Executive. The Crown conceded that the court had the power to inspect a document to detect an objection shown (a) not to have been taken in good faith, or (b) to have been actuated by some irrelevant or improper consideration, (c) [to have been] founded upon a false factual premise. The Court also recognized its duty in inspecting documents to separate those portions requiring protection from those portions for which disclosure might be ordered. The principle of judicial adjudication of executive privilege has also been confirmed by the United States Supreme Court in U.S. v. Nixon⁸⁴ and by the High Court of Australia in Sankey v. Whitlam.⁸⁵

83. In the recent case of Burmah Oil Co. Ltd. v. Bank of England [1979] 3 All E.R. 700 (H.L.) the majority of the House of Lords refused disclosure of documents apparently within Lord Reid's immune classes in Conway v. Rimmer, only after in camera inspection to determine whether disclosure was necessary to the case. Lord Wilberforce, dissenting in part, held that the documents fell within a class that the courts will normally allow to be withheld without inspection, and that the plaintiff had not established with the degree of certainty necessary to outweigh the Minister's affidavit that the documents were likely to contain material of clear probative value to relevant issues. See J.M. Evans, Comment, (1980), 58 Canadian Bar Review 360

84. 94 S. Ct. 3090; but Court accepts absolute privilege with respect to national security matters, not tempered by in camera inspection. Rankin, op. cit., footnote 2, at pp. 103-107. There also exists constitutional conflict in that Congress cannot reduce by legislative action in the 1974 amendments any residual Executive power derived from the Constitution.

85. (1978), 21 A.L.R. 505; like Burmah Oil, footnote 83, dealt with documents that belonged to immune classes (Cabinet minutes); New South Wales Government subsequently legislated to overrule.

Section 41 of the Federal Court Act, enacted in 1971, purported to codify the principles of Crown privilege derived from Conway v. Rimmer. Subsection (1) authorizes the Court to examine the documents in question and determine whether

in the circumstances of the case ... the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit [of the minister].

Subsection (2), however, establishes four categories of documents considered to be of the highest importance to the State, i.e., those that

would be injurious to international relations, national defence or security, or to federal-provincial relations, or would disclose a confidence of the Queen's Privy Council for Canada.

A ministerial affidavit claiming any one of these interests is conclusive, and the Court is prohibited either from examining the documents in question or from weighing the public interests involved. By virtue of subsection (2), any jurisdiction that Canadian courts may have derived from Conway v. Rimmer to look behind a minister's affidavit in respect of documents within the four categories listed is expressly removed. If the Canadian Executive should choose to conceal a politically embarrassing document behind the rubric of "national security", the courts would be powerless to inquire further. This distinction is found ironic in view of the responsible manner in which the courts have exercised the authority granted in subsection 41(1).⁸⁶

86. Rankin, op. cit., footnote 2, at pp. 24-30; see also Fox, op. cit., footnote 16, at pp. 28-30

The Law Reform Commission of Canada in its 1975 draft Evidence Code (section 43) recommended that a judge should have power to weigh in camera the competing interests in preserving the confidentiality of information disclosure of which would be harmful, and in the proper administration of justice. Being impartial with respect to the matter, he would be in a better position to weigh the competing interests than the government. ^{86a} Restrictions or conditions could also be placed on disclosure of such confidential government information. ^{86b} In the case of a "state secret", a party or the Crown could ask the judge to refer the claim of confidentiality to the Chief Justice of Canada, who would designate a Supreme Court Justice to determine the matter.

^{86a} Report on Evidence (L.R.C.C., 1975), at p. 82

^{86b} Defined in the section as "confidential government information that relates to national defence or security, the international relations of Canada, federal-provincial relations, or matters of confidence of the Queen's Privy Council for Canada"

The first and second exemptions in the Green Paper were taken verbatim from subsection 41(2) of the Federal Court Act. The Paper contended that "it might seem appropriate" to maintain blanket protection for ministerial documents, and even to extend protection by ministerial affidavit to other exemptions, but this was criticized as destroying any chance of realistic legislation.⁸⁷

Bill C-15 provided that the Federal Court or the superior court of the province would have the power to order disclosure of information despite a ministerial objection, if it concluded that the public interest in disclosure outweighed in importance the public interest specified by the minister as a reason for refusing production.

Out of a concern for ministerial responsibility,⁸⁸ Bill C-43 imposes limits on judicial review of exemptions relating to public interests for which ministers are accountable to Parliament - defence, international and federal-provincial affairs, law enforcement and the country's economic interests. The Court can decide only whether the minister had reasonable grounds for refusing access. If he did not, the Court will have the power to reverse the minister's judgment and order release. It was felt that this form of review would provide adequate independent judicial scrutiny without interfering with the doctrine of ministerial responsibility.⁸⁹

87. Rankin, op. cit., footnote 2, at pp. 139-140

88. See supra, pp. 7-12

89. But see infra Section (5): rejection of "reasonableness" standard in U.S.

Australian proposals preserved the doctrine of Crown privilege, giving the minister power to issue a conclusive certificate with respect to documents which in the minister's opinion would prejudice security, defence, international relations, relations between Commonwealth and State governments, or would involve disclosure of information received in confidence from other governments, or deliberations or decisions of Cabinet or the Federal Executive Council. The Administrative Appeals Tribunal (established in 1975 with jurisdiction to review administrative decisions) would have no power to question a certificate, although the High Court would have jurisdiction under section 75 of the Constitution to entertain an action seeking mandamus, prohibition or an injunction against the minister as an officer of the Commonwealth. Apart from the evidentiary and practical problems involved in establishing that the minister was motivated by bad faith or acted for an improper purpose when issuing the certificate, the courts have traditionally been reluctant to question the minister's judgment on such matters. In addition, the High Court could not order disclosure, but could only quash the minister's decision, leaving him free to issue a new certificate. The doctrine is criticized as protecting a range of information legitimately excluded from the coverage of other exemptions. ⁹⁰ The Senate Standing Committee on Constitutional and

90. McMillan, op. cit., footnote 7, at pp. 399-402, 418-419

Legal Affairs recommended in its 1979 Report that with regard to documents refused on the ground of defence, security, international relations or Cabinet secrecy, the Administrative Appeals Tribunal should be able to review only the "threshold" decision in which the document was categorised under one of those headings, without considering whether there was an overwhelming public interest in disclosure. All other areas in which documents could be refused should be fully reviewable by the Tribunal.⁹¹

To sum up, although abolition of Crown privilege is a step in the right direction, judicial review remains limited in the key areas of defence, international and federal-provincial affairs, law enforcement and the country's economic interests. The Canadian Bar Association, in its brief to the Justice and Legal Affairs Committee, has recommended that limited judicial review should be strictly reserved for "those subjects which can truly be said to involve political judgment in its most classic form", i.e., in areas involving injuries to federal-provincial negotiations,⁹² international relations and defence. While it is desirable to have as much review as possible, this is probably the most realistic solution, in view of the constitutional structure in Canada and the apparent reluctance of judges to be involved in "political" decisions.⁹³

92. National, April 1981, p. 2

93. See Colby, *infra*, p. 69; Evans, *op. cit.*, footnote 19 at pp. 367-368 ("self-protective restraint"), 375-376.

(3) CABINET RECORDS

Bill C-43 includes in section 21 an exemption covering proposals to Cabinet, discussion papers presented to Cabinet before the relevant decision is made, agendas of Cabinet recording deliberations and decisions of Cabinet, records used for or reflecting consultation among ministers, records used to brief ministers in relation to matters before Cabinet or consultations among ministers, and draft legislation. This is substantially the same as section 21 of Bill C-15.

It is generally agreed that Cabinet documents should be exempted from disclosure. Professor Rankin argues that the stress on Cabinet policy deliberations throughout the Green Paper sets up a convenient "straw man" that permits the Paper to avoid the real issues.⁹⁴ The Canadian Bar Association Model Bill singles out Cabinet records for special attention, in that it is the only "class" exemption and the only exemption where the agency has no discretion to disclose. The Association has been careful to word the exemption in such a way that it does not extend to documents that have never

94. Rankin, op. cit., footnote 2, at p. 134.

been presented to Cabinet or to a Cabinet Committee, or if prepared for such presentation have not been reviewed or approved by a minister, as the disclosure of such documents could not be said to breach the confidence of the Cabinet. It does extend to documents prepared by officers reporting directly to Cabinet, since these documents will normally have been prepared at the express direction of the Cabinet.⁹⁵ This exemption, like the one for policy advice, does not apply to records more than ten years old, whereas those in Bill C-15 and Bill C-43 do not apply to records more than twenty years old.

The Australian proposals also contain an exemption for deliberations or decisions of Cabinet or of a Committee of Cabinet. Professor McMillan argues that the frankness and candour of views expressed during deliberations should not be affected by disclosure of the decision that is ultimately made, in that the government is supposed to be answerable to Parliament for its decisions and actions. In addition, if Cabinet decisions were excluded from coverage under this exemption, they would still be adequately protected on sensitive matters by other exemptions protecting such interests as defence and economic security. His Minority Report Bill proposes that the Prime Minister be required to establish a Cabinet Register, containing details of each Cabinet decision, its number and the date on which it was made. The Prime Minister would have discretion to withhold

95. CBA Model Bill, footnote 27, at p. 21

the terms of a decision, but not the date or number. Public opinion would ensure that omissions from the Register would be kept to a minimum.⁹⁶

To sum up, it is generally agreed that Cabinet documents should be exempted from disclosure. Although Professor McMillan's arguments seem logical, his proposals are unlikely to be adopted. The main question seems to be on the duration of the exemption. Unless the documents in question qualify for exemption on some other ground, ten years would probably be sufficient.⁹⁷

(4) POLICY ADVICE

The aim of the policy advice exemption is to balance protection for the quality of advice with the growing demand for public scrutiny of and involvement in the policy and decision-making processes.⁹⁸

The communication of some types of information is more likely to be inhibited by the prospect of disclosure than the communication of other types. It has been argued that inhibition is likely to be greatest when the relationship between the information and the declarant's personality is such that disclosure could result in personal ridicule or blame. Criticism of factual mistakes

96. McMillan, op. cit., footnote 7, at pp. 405-406

97. For a discussion of the interests to be protected, see Evans, op. cit., footnote 83, at pp. 366-372

98. See supra, pp. 12-14

is not as direct an attack on the declarant's personality as criticism of his subjective opinions. If the information is also a recommendation for future action or policy, it implies a significant added commitment to the information as an embodiment of personality, because the declarant has assumed at least partial responsibility for the future consequences of his conduct and ideas. Public controversy is sure to be greater when a decision of some kind is expected to be based on the material. In addition, inhibition is more likely where information is "adverse", that is, it may invite criticism of the agency by revealing errors or deficiencies in operations, or it might result in action unfavourable to the agency (such as personnel cutbacks).⁹⁹

Section 22 of Bill C-43 exempts

- (a) advice or recommendations developed by or for a government institution or a Minister of the Crown,
- (b) an account of consultations or deliberations involving officials or employees of a government institution, a Minister of the Crown or the staff of a Minister of the Crown,
- (c) positions or plans developed for the purpose of negotiations carried on by or on behalf of the Government of Canada and considerations relating thereto, or
- (d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation.

if the record came into existence less than twenty years prior to

99. The Freedom of Information Act and the Exemption for Intra-Agency Memoranda, (1973), 86 Harvard Law Review 1047, at pp. 1053-1054

the request. It does not apply to records relating to the exercise of a discretionary power or adjudicative function, or prepared by an outside consultant. Paragraphs (c) and (d) are temporary exemptions designed to promote the "proper functioning of government institutions".¹⁰⁰ Section 22 of Bill C-15 is substantially similar to paragraphs (a) and (b).

The corresponding exemption in the Canadian Bar Association Model Bill (section 22) attaches a detailed list of the types of records that may not be refused under this exemption "unless conditions exist at the time under which the making of a decision or the implementation of a policy would be unreasonably impeded by the disclosure of that record". The list includes facts, statistics and reports or studies concerning the subject matter handled by the agency (e.g., environmental impact studies and product test reports); reports and studies, such as efficiency, feasibility and field reports, as well as final plans or proposals for the reorganization of the agency or the establishment of a new program; reports which are the product of a group, whether within or attached to the agency; interpretations, guidelines and instructions that affect the public; final decisions and any reasons therefor.¹⁰¹ The Government argues

100. Fox, op. cit., footnote 16, at p. 15

101. A decision or order is "final" even though it is subject to appeal or review, but a recommendation from one officer to another would not be "final" unless it was adopted by the officer in making his decision and incorporated by reference into his decision. CBA Model Bill, footnote 27, at pp. 21-23

that since these categories are essentially of a factual nature, they would not fall within the scope of the policy advice exemption. Where facts appear in the same document as opinions and advice, the severability provision comes into play.¹⁰²

It is in fact likely that disclosure of the facts upon which the opinions are based is of more value to the public. Such facts may be unavailable except through the agency. They can also help persons outside the agency evaluate and criticize government policies and operations, and check the accuracy of the information that has been provided to the policy-makers.^{102a}

The Australian proposals contained an exemption for

- (a) matter in the nature of an opinion, advice or recommendation; or
- (b) other matter, reflecting deliberative or policy-making processes.

The McMillan Minority Report Bill proposed a similar exemption but qualified by a list of sixteen categories of documents that would be excluded from the protection of this exemption unless premature disclosure of any of the documents would unreasonably impede the making of a decision or the implementation of policy. Professor McMillan explains that there are two factors common to most of these items: (1) each constitutes a final or formulated expression of the opinion of the individual or group preparing the document, even though a superior official may have authority to alter or reject the advice; (2) each is likely to be plenary,

102. Fox, op. cit., footnote 16, at pp. 14-15; see supra, pp. 37-40

102a. Footnote 99, at pp. 1059-1060

rather than an incomplete statement that would give a distorted
or misleading impression.¹⁰³ At this point disclosure would most
benefit the public and least injure the internal processes of
government.¹⁰⁴

The American Freedom of Information Act has an exemption¹⁰⁵
for

inter-agency or intra-agency memorandums or letters
which would not be available by law to a party
other than an agency in litigation with the agency.

It is potentially the most far-reaching exemption in the Act. On
its face, it can encompass nearly anything that the agency puts into
writing, but its scope is defined by the policy considerations on
which it is based: preventing premature discovery of agency records
that might impede the proper functioning of the administrative
process, and eliminating the inhibition of the free and frank
exchange of opinions and recommendations among government personnel.
Accordingly, the courts have maintained a fact-policy distinction,
permitting non-disclosure of advisory opinions while ordering
disclosure of purely factual material. Another distinction has been
drawn between predecisional memoranda prepared in order to assist
an agency decision-maker in arriving at his decision, which are

103. Cf. subsection 22(3) of C-15 and subsection 20(2) of C-43;
results of product or environmental testing shall not be disclosed
where head believes on reasonable grounds that results are
misleading; but see Heather Mitchell, Information still isn't
quite free, Maclean's, Sept. 15, 1980, 6

104. McMillan, op. cit., footnote 7, at p. 407

105. 5 U.S.C. Section 552 (b)(5) (1970)

exempt from disclosure, and postdecisional memoranda setting forth
the reasons for an agency decision already made, which are not.¹⁰⁶
Material from a document that is exempt under exemption five may
lose its exempted status when it serves as the basis for a
non-exempt decision, but mere reliance on certain documents would
not constitute adoption.¹⁰⁷ The limiting language in the second
part of the exemption ("would not be available ...") has been
interpreted to mean that any written information that would be
discoverable under Federal Rule of Procedure 26 would not be
protected from disclosure. In Rule 26 cases, the courts have
recognized a governmental privilege against discovery of
"intra-governmental documents reflecting advisory opinions,
recommendations, and deliberations comprising part of a process
by which governmental policies are formulated", although a showing
of extraordinary need by the party requesting the information may
overcome a privilege in discovery, but not in Freedom of Information
Act cases. Conversely, since factual and investigatory reports that
do not contain military or state secrets are routinely subject to
discovery under Rule 26, the courts have held that they are not¹⁰⁸
covered by exemption five under the Freedom of Information Act.

106. Otherwise there would be a conflict between exemption five and the general requirement under the Act that final opinions must be disclosed.

107. James M. Gorski, Access to Information? Exemptions From Disclosure Under the Freedom of Information Act and the Privacy Act of 1974, (1976), 13 Willamette Law Journal 135, at pp. 150-151

108. Footnote 99, at pp. 1048-1051

Unlike the corresponding Canadian exemption, the American exemption covers the advice of temporary consultants and outside experts. It has been argued that the advice of interested parties should be made public, as well as the names of all consultants, so that the public will know who is contributing to government decisions, and will have an opportunity to demonstrate any known prejudice on the part of any consultant.¹⁰⁹

With regard to administrative tribunals, American courts have enforced a principle known as "separation of functions", whereby staff members engaged in investigation or prosecution are not permitted to have any contact with tribunal members in a decision-making role concerning a particular case on which they have worked. This may be cumbersome, particularly in small tribunals where the members themselves often engage in investigation, or in tribunals where staff members involved in investigation are directly associated with tribunal members in day-to-day activities. It has been suggested that strict separation of functions would not be workable in Canada.¹¹⁰ The Standing Joint Committee recommended that those portions of staff reports containing opinions, advice or recommendations should remain confidential, while those portions containing factual or statutory material directly relevant should

109. Footnote 99, at pp. 1063-1066

110. Ronald G. Atkey, Freedom of Information: The Problem of Confidentiality in the Administrative Process, (1980), 18 University of Western Ontario Law Review 153, at p. 179

be disclosed, as well as all documents that contain or explain reasons for the tribunal's decision.¹¹¹ Professor Franson suggests that the factual portions should be available to any requestor, unless the particular context of the document requires it to be withheld on some other ground, such as protection of privacy. Advice should be regarded as confidential, in order to protect the agency's interest in obtaining candid staff advice, unless in the particular context of the request the interest of the requestor or the public interest in disclosure becomes paramount.¹¹²

There was an interesting development in the interpretation of exemption five in 1979. The United States Supreme Court in Federal Open Market Committee of the Federal Reserve System v. Merrill¹¹³ in effect created a new category of information protected from disclosure under the Freedom of Information Act. Certain sensitive information may now be protected from disclosure temporarily, creating a middle ground between the two extremes of disclosure and non-disclosure established by the Act.¹¹⁴

The Committee argued that immediate disclosure of monthly monetary policy directives, as ordered by the District of Columbia Court of Appeal, would seriously interfere with the conduct of

111. Atkey, op. cit., footnote 110, at p. 181

112. Franson, op. cit., footnote 9, at pp. 33-34

113. 99 S. Ct. 2800 (1979)

114. Diane Hubel Delehta, Federal Open Market Committee of the Federal Reserve System v. Merrill: Delayed Disclosure to Protect Government Interests Under the Freedom of Information Act, (1980), 2 Detroit College of Law Review 669; see discussion infra

national monetary policy. With two Justices dissenting, the Supreme Court ruled that under (b)(5) the Committee could delay publishing the directives, if they "contain sensitive information not otherwise available, and if immediate release of these Directives would significantly harm the Government's monetary functions or commercial interests". The exemption was found to include a privilege for confidential commercial information pertaining to government contracts, on the basis of Federal Rule of Civil Procedure 26(c)(7), which states that a court may,

for good cause shown, ... [issue a protective order] that a trade secret or other confidential research development, or commercial information not be disclosed or be disclosed only in a designated way.

The Court also found support in the House Report on the Freedom of Information Act and in the House and Senate Committee hearings. The dissent maintained that a proper reading of the legislative history demonstrated that Congress had decided not to protect the policy directives. Moreover, if every reference in the hearings to the danger of disclosing some type of government information were sufficient to create a privilege, the exemption would render the Act meaningless.

The decision has been criticized as expanding the scope of the exemption beyond what Congress had intended. The House Report stated that "memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public". Although the

phrase was intended to limit the scope of the exemption, the Court in Merrill applied the converse reasoning and implied that information will not be disclosed if it is privileged under civil discovery rules. Such reasoning could potentially expand the protection given federal agencies under the Act, because courts have sometimes been misled by the indirect reference to discovery law in (b)(5) into believing that balancing need against harm, which is common in discovery cases, is appropriate in cases under the Freedom of Information Act. Courts prior to Merrill had recognized only two privileges: executive privilege for predecisional documents and a privilege for work done by a party's attorney in preparation for a case. Once the privilege has been granted, such information is permanently protected from disclosure. The confidential commercial information category authorized by Merrill permits non-disclosure only temporarily, on the rationale of protecting the government from being placed at a competitive disadvantage by early disclosure of commercial information. Once the transaction is complete, the danger no longer exists, and the information can then be disclosed without harm. It was argued that by permitting such temporary, non-disclosure, the Court has eroded the disclosure-oriented policy of the Act, and may have opened the way for inclusion under (b)(5) of virtually all civil discovery privileges.

To sum up, although the severability provision should take care of the fact-policy distinction, it might be a good idea,

for the sake of greater certainty, to attach a list similar to the one in the Canadian Bar Association Model Bill. This would prevent officials from withholding information arbitrarily on the argument that it came under the policy advice exemption. Also, as noted in section (1) supra, the government may be reluctant to apply severability where it appears onerous. Concern has already been expressed about the power under subsection 20(2) to withhold results of product or environmental testing where the head of the institution believes, on reasonable grounds, that the results are misleading.¹¹⁵ Any such power should be strictly controlled so that it cannot be abused. Although some Americans seem disturbed by the idea of a temporary exemption, the Canadian Government has included several in Bill C-43, including paragraphs 22(1)(c) and 22(1)(d). It would seem that a truly temporary withholding, where circumstances warrant, would be preferable to a permanent exemption. Both the Canadian Bar Association Model Bill and the McMillan Minority Report Bill provide for withholding where premature disclosure would unreasonably impede the making of a decision or the implementation of policy.

115. Former Consumer Affairs Minister Warren Allmand told the committee studying the Bill that he had been unable to get several departments to release information on consumer goods testing while he was a minister, and he was concerned that departments will use the exemption to withhold such information for "vague and unreasonable reasons". Secretary of State Francis Fox said that he was prepared to consider grounds under which an Information Commissioner or judge could review the test results if a minister refuses to release them. Hill, op. cit., footnote 93; see also Mitchell, op. cit., footnote 103

(5) NATIONAL SECURITY AND RELATED MATTERS

Section 13 of both Bill C-15 and Bill C-43 contains a class exemption for information obtained in confidence from foreign governments and international organizations. Bill C-15 refers to information obtained "under an agreement or arrangement", whereas Bill C-43 is more general, applying to information "obtained from" a foreign government, international organization, or institution thereof. Bill C-43 also sensibly provides for disclosure if the source of the information consents to the disclosure or makes the information public. The provision was criticized for providing too much protection, but the Government defended it by reference to American practice and to the principle that disposition of the information belongs to the foreign source and not to Canada. ¹¹⁶

The Australian proposals also include an exemption for information received in confidence from other governments. Professor McMillan argues, however, that such documents should be protected only to the extent that disclosure would prejudice international relations, probably where the foreign government has gratuitously supplied Australia with confidential information. Where the foreign government has supplied information in the course of negotiations, or in order to extract some advantage or remuneration from Australia, ¹¹⁷ he argues, confidentiality may be a secondary consideration.

116. Fox, op. cit., footnote 16, at p. 6; the U.S. Act contains no such exemption, although the classification system provides that such information shall be so classified as to ensure the degree of protection equivalent to that required by the foreign government E.O. 11,652 4(c); but Canadians and others have obtained information under the U.S. Act that was unavailable from their own governments, leading to the charge that the

Section 13 of Bills C-15 and C-43 also exempts information obtained in confidence from a provincial government, Bill C-43 adding municipal and regional governments. This is justified with arguments similar to those for the foreign information exemption. Persons who want access to information originating with a provincial government should address themselves to that government. ¹¹⁸

Section 14 of Bill C-15 exempts "information the disclosure of which could reasonably be expected to affect adversely federal-provincial negotiations". This exemption was largely misunderstood as covering anything injurious to federal-provincial relations, whereas it attempted to protect only ongoing or scheduled negotiations, and could not have applied once the negotiations were over. ¹¹⁹ In Bill C-43, there was an attempt to clarify the interest to be protected by changing the exemption to "information the disclosure of which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs ...", appending specific examples:

including, without restricting the generality of the foregoing,

- (a) information on federal-provincial consultations or deliberations; and
- (b) information on strategy or tactics adopted by the Government of Canada relating to the conduct of federal-provincial affairs.

United States is a "nation that can't keep secrets". Secrets unsafe in U.S., *The Citizen*, Oct. 8, 1980

117. McMillan, op. cit., footnote 7, at pp. 404-405.

The Canadian Bar Association did not include a separate exemption for records relating to "federal-provincial relations" or the like in its Model Bill, since it was felt that other exemptions should provide adequate protection, and that an exemption in this form would potentially embrace almost every government subject.¹²⁰

The Australian proposals contained an exemption for documents disclosure of which would prejudice Commonwealth-State relations. Like the Canadian Bar Association, Professor McMillan argues that adequate protection would be provided by other exemptions, such as those for Cabinet documents, for documents connected with policy-making, and for confidential information.¹²¹

Section 15 of both Bill C-15 and Bill C-43 contains an exemption for records the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada and allies, or the detection, prevention or suppression of subversive or hostile activities (with slight variations in wording). The weaknesses perceived to be inherent

118. Fox, op. cit., footnote 16, at p. 10

119. Ibid., at p. 11; it seems these days that negotiations are going on in some area almost continuously

120. CBA Model Bill, footnote 27, at p. 23

121. McMillan, op. cit., footnote 7, at p. 405

in a strict injury test¹²² are countered by appending a list of categories of information set out as examples of the type of information public disclosure of which could lead to injury, in order to guide a reviewing body in making an assessment of injury. Both the injury test and the class test would have to be met for¹²³ the exemption to be claimed.

As an alternative the Cabinet Discussion Paper considered a class exemption or deeming disclosure of information in the listed categories to cause the stated injury. A comprehensive class exemption of this kind would provide maximum protection, but would likely cover material that could be released without harm to the public interest. On the other hand, even broad classes might not be comprehensive enough to cover all the information requiring protection. This could be remedied by adding to the list of objective classes a residual injury test, as the McDonald Commission in its First Report recommended for security and intelligence¹²⁴ information.

Section 23 of the Canadian Bar Association Model Bill refers to "national defence and international relations" rather than to "national security" since the latter term is imprecise, and to the extent that it would embrace domestic police functions

122. See supra, p. 36

123. Fox, op. cit., footnote 16, at p. 6

124. Ibid., at p. 7

is adequately covered by the law enforcement exemption in section 24. Because there is no necessary relationship between the degree of damage caused by disclosure at any given time and the length of time during which the danger could continue, all records exempt under this section may be withheld for ten years. After ten years the record is, in effect, declassified for the purposes of this Act unless it qualifies for the extension in subsection 23(2), which applies to (i) records submitted in confidence by a foreign government, (ii) records containing exceptionally sensitive information, or (iii) records which would endanger someone's life or physical safety if disclosed. The onus is on the government to show that disclosure could reasonably be expected to cause damage to the national defence or international relations, or that a record qualifies for an extension under one of the headings in subsection 23(2).¹²⁵

In the United States it has been recognized that "it is the constitutional duty of the Executive ... to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense".¹²⁶ Exemption (b) (1) of the Freedom of Information Act represents an implicit Congressional recognition of the Executive's authority to classify certain information that it deems vital to withhold in the interests

125. CBA Model Bill, footnote 27, at pp. 23-24

126. New York Times Co. v. United States, 403 U.S. 713 (1971), at pp. 729-730, quoted in National Security and the Amended Freedom of Information Act, (1976), 85 Yale Law Journal 401

of national security. As originally worded, the exemption applied to matters¹²⁷

specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.

In EPA v. Mink,¹²⁸ the majority of the Supreme Court held that the only fact that needed to be proved was that the requested document did in fact bear a classification stamp in accordance with the procedural requirements of Executive Order 10,501.¹²⁹ It was found that the legislative intent was to defer to the Executive Order, and the substantive adequacy of classifications would not be subject to judicial review. The exemption did not authorize or permit in camera inspection of contested documents to see whether any non-secret components could be separated and disclosed. Under the terms of the Executive Order each document in a file was to receive a classification "at least as high as the most highly classified document therein". If one document in the file was classified, the entire file was exempt.

In the 1974 amendments to the Freedom of Information Act Congress acted to overrule Mink, giving the courts discretion to examine documents in camera for a de novo determination of classification, with the burden of proof on the Executive to ~~sustain~~ classification;

127. Narrower than "national security" which, however, is used in the Executive Order. Relyea, op. cit., footnote 46, at 149

128. 410 U.S. 73 (1973)

129. Classification system then in effect; see discussion infra

authorizing the courts to disclose "any reasonably segregable portion" of a record after deletion of exempt portions; and rewriting exemption (b)(1). The exemption now permits withholding of only those documents that are

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

The Executive retains the responsibility for stating the criteria by which documents will be classified and the applicable procedures.

To be exempt, however, a document must meet "both procedural and substantive criteria contained in such Executive order".¹³⁰ The 1975 Attorney-General's Memorandum on interpretation explains that such classification must still be proper at the time of the request, and at both initial and appellate stages, i.e., it still conforms with the criteria of the particular category and has not fallen under one of the automatic declassification provisions of the Executive order. The Conference Report affirmed that the executive departments responsible for national defence and foreign policy matters have unique insights into possible adverse effects, and expected that the courts would give substantial weight to an agency's affidavit, but this should not suggest that the evidence of the party seeking disclosure should receive any less substantial weight.¹³¹

130. Senate Report, quoted in Rankin, op. cit., footnote 2, at p. 54

131. Rankin, op. cit., footnote 2, at pp. 59-60

A proposal that judicial review should be limited to a determination of whether the withholding had "a reasonable basis under the criteria of the Executive order" was rejected, because it was argued that the presumption of validity for a classification marking would be overwhelming, and would result in shifting the burden of proof away from the government, in violation of the express language of the Act.¹³² The national security amendments were largely responsible for the Presidential veto. President Ford proposed a reasonableness standard, and in determining the reasonableness of the classification, the courts would consider all attendant evidence before resorting to in camera examination of the document.

One of the stated purposes of the amendments was to rectify widespread classification abuses.¹³³ A government classification expert testified that only half of one per cent of all material classified merited even the lowest classification.¹³⁴ There are three categories of classification abuses. First are classifications that are clearly erroneous, such as classifications of non-sensitive information because of inclusion in otherwise properly classified documents, classifications that have in the

132. Rankin, op. cit., footnote 2, at pp. 57-58; cf. approach to judicial review of public interest exemptions in Bill C-43.

133. Footnote 126, at pp. 419-420; discussion follows

134. Rankin, op. cit., footnote 2, at p. 62

course of time become unjustifiable, or classifications that withhold information clearly not related to the area. These can be effectively remedied by the amended Act. Then there are classifications where a political judgment has been made, such as classifications intended to conceal covert executive policies or to conceal mistakes or wrongdoing, disclosure of which would clearly damage national security. It can be argued that it is preferable to have such decisions made by a political branch of government rather than by the courts.¹³⁵ Finally there is a residual category of abuse consisting of classifications where it is questionable whether disclosure would damage the national security. Congress could assist the courts by adopting more specific criteria for classifications, either by defining more narrowly the substantive areas in which classification may occur, or by requiring a closer relationship between the classification standard and the policies to be protected.¹³⁶ The issue is complicated by constitutional considerations, in that Congress cannot compel statutory disclosure of information protected under Executive Privilege. In any case, executive definitions of policy and executive characterizations of possible harm from unauthorized disclosure are bound to affect interpretation of the criteria.¹³⁷

135. See also Evans, op. cit., footnote 83, at pp. 367-368

136. Footnote 126, at pp. 421-422

137. Ibid., at p. 422

In fact, the amended exemption has not fared much better than the original. In Alfred A. Knopf Inc. v. Colby,¹³⁸ it was held that the requirements of the exemption are satisfied if the information "is classifiable and is shown to have been embodied in a classified document". This standard implies that it need not be "in fact properly classified" and would appear to authorize disclosure only of material that could not reasonably be classified. It was asserted that there is a presumption of regularity that only clear evidence to the contrary could rebut, despite the explicit rejection of a reasonableness standard by Congress.¹³⁹ The court also directed the plaintiffs to the Interagency Classification Review Committee¹⁴⁰ for consideration of the information thought to be declassifiable. The Colby case is said to represent the judiciary's abdication of the responsibility given it by Congress to undertake meaningful review of classification decisions, creating serious doubts about the usefulness of the exemption.¹⁴¹

The application of a national security exemption in Canada is complicated by the state of the classification system. There is no statutory authority, and the entire system derives from

138. 509 F2d 1362 (1975)

139. See supra, p. 67

140. Oversees implementation of the Executive Order and hears appeals on denials of declassification; see infra

141. Rankin, op. cit., footnote 2, at p. 97; footnote 126, at pp. 416-419

Cabinet Directives issued in exercise of the Royal Prerogative. There is no restriction on the number of people who can classify documents, as there is in the United States. Even the Government acknowledges that at present protection for information unrelated to national security can be obtained only by applying national security classifications, which results in greater restriction of access and higher protection costs than necessary.¹⁴² The classification categories are considered vague, especially the "Restricted" category ("when information should not be published or communicated to anyone except for official purposes and is not classified in any of the other categories"), which acts as a "catch-all".¹⁴³ As long ago as the 1969 Report of the Royal Commission on Security, it was recommended that the "Restricted" category should be abolished.¹⁴⁴

Until 1978 the general guideline on the length of applicability of security classifications was Cabinet Directive 46, Transfer of Public Records to the Public Archives and Access to Public Records held by the Public Archives and by Departments, approved in June 1973, embodying the policy in effect since May 1969 to "make available to the public as large a portion of the Public Records of the Canadian Government as might be consistent

142. Green Paper, footnote 11, at p. 14

143. Rankin, op. cit., footnote 2, at p. 37

144. In its 1979 Report the Standing Committee of the Australian Senate also recommended abolition of the "restricted" classification.

145
with the national interest". Access is normally provided to most documents after thirty years as of right, and with permission of both the Dominion Archivist and the appropriate minister, access may be granted to documents less than thirty years old. The directive also created a category of "exempted record", i.e.,

... a public record

- (a) that contains information the release of which
 - (i) would be contrary to law,
 - (ii) is restricted pursuant to an agreement made between the Government of Canada and any other government,
 - (iii) might be considered by any government to be a breach of faith on the part of the Government of Canada,
 - (iv) might embarrass the Government of Canada in its relations with any other government, or
 - (v) might violate the privacy of an individual;
- (b) that relates to security or intelligence; or
- (c) that is a personnel record, except that a personnel record ceases to be an exempted record on the expiration of the period of 90 years from the date of birth of the employee with respect to whom the record is made.

These were not to be transferred to the Public Archives, nor was any record that "in the opinion of the Deputy Head of [a]

145. "National interest" is not defined.

department is or may be necessary for the efficient operation of that department, or ... contains information the disclosure of which, in the opinion of the appropriate Minister, would be prejudicial to the public interest". It will be noted that the final decision rests with the Executive or bureaucracy, and that such records need never be released to the public.

Cabinet Directive 46 was replaced by an Access Directive approved by Cabinet in June 1977 and issued in November 1978. The Access Directive extends the definition of a "public record" by referring specifically to machine-readable records "having long term value". Transfer is no longer linked to access regulations, thus allowing the Public Archives to gain physical possession of material regardless of age or any restriction, aside from a statutory one, that may have been placed on it. A department or agency may choose not to transfer: (1) records containing information that it would be illegal to release; (2) records required by the department in its operation; and (3) records "that the Minister of a department believes contain information whose disclosure would not be in the public interest". Should the Dominion Archivist disagree with a departmental decision to place records in category (2) or (3), he may ultimately appeal to Cabinet. Unlike Cabinet Directive 46, only in the first case is there a definite prohibition.

146. Rankin, op. cit., footnote 2, at pp. 42-43

147. Richard J. Bazillion, Access to Departmental Records, Cabinet Documents, and Ministerial Papers in Canada, (1980), 43 American Archivist 151, at pp. 152-153

It does not appear, however, that access would be substantially easier in most cases, as the thirty-year rule remains in effect. The research community has urged that access legislation should explicitly recognize that the security sensitivity of classified records declines with the passage of time and that they ought to be declassified as soon as possible.¹⁴⁸

It is also felt that a climate of secrecy in the public service is created by the Oath of Secrecy and the "leakage" provisions of the Official Secrets Act.¹⁴⁹ The oath has no basis in law, although there are administrative sanctions. In the absence of clear specifications of "authority" for disclosure, a public servant must face the risk that he will be found to be without authority to disclose if the information proves to be embarrassing. Even more intimidating is the Official Secrets Act, still virtually identical to the corresponding British Act first passed in 1911, which carries a maximum sentence of fourteen years. Although the Act was intended to cover espionage, section 4 is drafted so broadly that it could prohibit communication of any form of official information obtained in confidence from any person holding office under the Crown, and has served to codify the concept of government property in information.¹⁵⁰ Both the Mackenzie Report

148. Jake Knoppers, A Freedom of Information Act and the Future of Social Science Research, (1979), 7 Social Sciences in Canada (No. 4) 9. Executives of the Canadian Historical Society testified before the committee studying Bill C-43 that files previously open to researchers are being removed from the Public Archives because of provisions of the Bill. Files being closed, The Citizen, Mar. 25, 1981

149. R.S.C. 1970, c. 0-3

in Canada and the Franks Committee Report in the United Kingdom¹⁵¹ have recommended substantial reform of the Official Secrets Act. The Government has acknowledged that the "leakage" provisions are at variance with the objectives of Access to Information legislation,¹⁵² and both Bill C-15 and C-43 (section 65 and section 71, respectively) provide that no disclosure of information made in good faith under the legislation could give rise to prosecution.

Maxwell Cohen has proposed a single statute incorporating liberal access to government information with provisions concerning official secrets. It would include a right to information that it was not necessary to keep secret, that would encompass virtually all information after a period of years; criminal law prohibitions on the disclosure of information that it was necessary to keep secret; a classification system to distinguish between the two kinds of information; and an independent body to review the way in which this distinction was applied in practice.¹⁵³

In the United Kingdom, the 1978 White Paper proposed to amend section 2 of their Official Secrets Act (comparable to our section 4) so that unauthorized disclosure and receipt of

150. Franson, op. cit., footnote 9, at p. 53; Rankin, op. cit., footnote 2, at pp. 30-34

151. See supra, p. 29

152. Fox, op. cit., footnote 16, at p. 31

153. Described in Stanley A. Cohen, Freedom of Information and the Official Secrets Act, (1979), 25 McGill Law Journal 99, at pp. 109-110

information would no longer be criminal offences except in regard to explicitly defined categories of information. With some exceptions,¹⁵⁴ it followed the recommendations of the Franks Committee. It was criticized, however, for failing to discuss the espionage provisions of section 1, which is also in need of reform, and for attempting to reform section 2 in isolation from any firm commitment to the principle of open government. The Outer Circle Policy Unit recommended a separate Espionage Act and an Official Information Act that would deal with public access to official information and its protection from improper disclosure.¹⁵⁵

Australian Government proposals did not recommend repeal or amendment of section 70 of the Crimes Act 1914, which is their equivalent of section 2 of the British Official Secrets Act and section 4 of the Canadian Act. Professor McMillan worried that a department head might invoke section 70 as a residual discretion authorising withholding of allegedly sensitive documents not protected by other exemptions.¹⁵⁶ In his Minority Report Bill he proposed restricting criminal penalties as recommended by the Franks Committee.

In the United States, the process of classification was

154. See supra, p. 29

155. Williams, op. cit., footnote 10, at pp. 100-102

156. McMillan, op. cit., footnote 7, at pp. 411-412

significantly revised in 1972 by President Nixon's Executive Order 11,652. There are three categories: Top Secret, Secret and Confidential. "Top Secret" information is ordinarily automatically downgraded to "Secret" two years after the original classification, two years later to "Confidential", and fully declassified six years after that. An officer with "Top Secret" classification authority may exempt from this general declassification schedule certain designated types of sensitive documents (such as cryptographic codes and confidential information furnished by foreign governments). Exempted material is subject to mandatory review ten years after the original classification whenever a request for access is received, provided that the requested document "can be described with sufficient particularity" and can be found with only "a reasonable amount of effort". There is a similar review procedure for documents created before the commencement of the system. Denial of declassification may be appealed to a departmental review committee, and then to the Interagency Classification Review Committee, comprised of representatives of agencies concerned with national security matters, which has power to oversee the implementation of the Order, as well as to hear appeals. All documents are automatically declassified after thirty years unless the head of the agency personally determines in writing that continued classification is necessary. The Order further provides that "to the extent practicable" components of documents requiring different degrees of classification shall be so marked, and portions not

classified shall be likewise identified "in order to facilitate excerpting and other use". As previously noted, the 1974 Freedom of Information Act amendments provide for disclosure of "reasonably segregable portions of a record" after deletion of exempt material.

On June 28, 1978 President Carter issued Executive Order 12,065, entitled National Security Information, which took effect on December 1, 1978. Although it left most of the substantive and procedural criteria of the prior executive order unchanged, there were several important changes.¹⁵⁷ First, it imposes slightly stricter minimum standards of classification. Since the Freedom of Information Act requires only that records be "classified", the minimum standard is the relevant one in litigation under the Act. A document may be classified as "Confidential" if unauthorized disclosure "reasonably could be expected to cause identifiable damage to the national security", whereas the prior order required only "damage to the national security". It has been argued that this language suggests a Presidential intent to limit the availability of classification by requiring a more concrete demonstration of potential damage to national security. The new order also incorporates a provision found in the National Security Council directive implementing the prior order, to the effect that any reasonable doubts should be resolved in favour of declassification, where the

157. Alan S. Madans, Developments Under the Freedom of Information Act - 1979, 1980 Duke Law Journal 139, at pp. 146-149

directive had said "substantial doubt", thus imposing a standard more favourable to the requestor under the Freedom of Information Act. The new order also adds a balancing test: information should be declassified if "the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure". This determination is to be made by an official responsible for processing requests under the Freedom of Information Act or by an official with "Top Secret" classification authority. Section 3 of the order details extensive downgrading and declassification procedures.

In Sweden there are in principle no grades of secrecy, but different types of documents must be kept secret for different periods of time: personal information for seventy years; information affecting national defence and relations to foreign powers for fifty years; information affecting public or private economic interests for twenty years. Reports and notes in the general register of criminals or in a police register may be kept secret for an unlimited period. Questions of access to documents the secrecy of which is of special importance to the safety of the realm are decided by heads of ministries.¹⁵⁸ Since 1978 it has been possible to appeal a minister's decision to the Government.

A person who passes on information with the intention that it shall be published in print or broadcast by radio or

158. Some provisions on the secrecy of documents make it possible for an authority to hand over a secret document if the authority believes that there is no risk of the document being abused. Holstad, op. cit., footnote 34, at p. 40

television cannot be punished even though the information passed on is secret. If, however, that person thereby commits high treason, espionage or some other crime against the security of the realm that is specifically mentioned in the Freedom of the Press Act, he can be prosecuted under ordinary criminal law. The same is true of an official who passes on information by the illicit release of a secret document, or who deliberately sets aside a duty to observe secrecy.¹⁵⁹

Section 18 of both Bill C-15 and Bill C-43 contains an exemption protecting the economic interests of Canada. Section 18 of Bill C-15 is an injury-test exemption, requiring a "substantial adverse effect", followed by a limited number of categories of information as examples. Bill C-43 adds class exemptions for "trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada" and for "scientific or technical information obtained through research by an officer or employee of a government institution", where disclosure could reasonably be expected to deprive the officer or employee of priority of publication. It also attempts to clarify the exemption by reference to the concrete interests being protected: "the financial interests of the Government of Canada or the ability of the Government of Canada to manage the economy of Canada" and the prevention of "undue benefit to any person",¹⁶⁰ followed by a more

159. Holstad, op. cit., footnote 34, at pp. 40, 42, 46

160. This last was covered by paragraph 20(1)(c) of C-15

extensive list of examples.

The Canadian Bar Association in paragraph 26(1)(a) of its Model Bill exempts commercial or financial information related to the economic interests of Canada, provided that a "substantial" adverse effect on the country's "legitimate" economic interests "could reasonably be expected" to result from disclosure. These qualifications are designed to balance legitimate needs for protection with the public interest in releasing information to facilitate public discussion and awareness of economic issues as well as of the policies and practices of those agencies charged with financial, economic or commercial regulation.¹⁶¹ Paragraph 26(1)(b) exempts information where a government agency could reasonably be expected to be exposed "unreasonably" to disadvantage in competitive or commercial activities.

To sum up, information obtained in confidence from foreign governments might be adequately covered by the exemption for records the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs or defence. This would probably make little difference in the amount of information available, however, as other countries are likely to resent the disclosure of any but the most innocuous information. Similarly, Bill C-43 could have dispensed with a separate exemption for information relating to federal-provincial negotiations, as it would be covered by other exemptions. The first steps in this

161. CBA Model Bill, footnote 27, at p. 25

area of international relations and defence should have been a major reform of the classification system, with clearer categories and procedures for declassification as soon as possible, which could then have formed a basis for the exemption. There should also be substantial amendment of the Official Secrets Act, which is long overdue. The amended provisions might even be incorporated in the access legislation.¹⁶² While full judicial review would be desirable, this area may be said to involve "political judgment in its most classic form".¹⁶³ The American experience suggests that courts may be reluctant to challenge the "unique insights" in national security areas possessed by the Executive.

(6) LAW ENFORCEMENT

An exemption in this area must attempt to balance the interests of law enforcement agencies with the countervailing public interest in scrutiny of these agencies. The former consideration involves the protection of law enforcement techniques, investigative procedures, and the sources of evidence used in investigations or prosecutions, while the latter involves protection of the public's ability to examine law enforcement agencies and procedures for effectiveness in enforcement and investigation and the propriety of the methods used.¹⁶⁴

162. See supra, pp. 74-75

163. See supra, p. 46

164. CBA Model Bill, footnote 27, at p. 24

Section 16 of both Bill C-15 and Bill C-43 contains a class exemption for information obtained or prepared in the course of investigations and a residual injury clause to protect against harm to law enforcement efforts from disclosure of other information. The Government maintains that very little information in investigative files would be available under an injury test, and the application of injury tests requires a great deal of time and effort on the part of law enforcement officials, citing the F.B.I. experience in the United States.¹⁶⁵ Another option would be a class test for active investigations and an injury test for files on closed investigations, but care would still have to be taken to protect sources, law enforcement personnel and methods, and closed investigations are not necessarily solved. It was argued that information disclosing illegal actions by law enforcement officers should be disclosed, but the Government feels that it is sufficient that either the Information Commissioner or the Court would be able to disclose to the appropriate authorities information relating to an offence.¹⁶⁶ It may be doubted, however, whether any action would be taken without the pressure of public opinion.

In addition, Bill C-43 includes an exemption for information that could reasonably be expected to be useful for the commission

165. As of the end of April, 1980 4,654 requests were outstanding, representing a backlog of four to six months.

166. Fox, op. cit., footnote 16, at p. 9

of an offence, followed by a few specific examples. It also includes, at the request of the affected provinces, an exemption for information obtained by the R.C.M.P. while performing its role as a provincial police force, when an agreement to exempt such information has been entered into with the province concerned. The position is that such information belongs to the province.

Section 17 exempts information disclosure of which could reasonably be expected to threaten the safety of an individual. This is presumably intended to protect against reprisals persons who have provided information to law enforcement agencies, as well as to protect law enforcement officers.

The Canadian Bar Association Model Bill approaches the problem a little differently. In subsection 24(1), it lists the specific records within the exemption and the interests to be protected: where disclosure could reasonably be expected to interfere with enforcement proceedings or investigations and the parties relating to such proceedings; deprive a person of a fair trial; jeopardize investigations or information-gathering; jeopardize security provisions relating to detention centres, vehicles carrying valuable loads, or burglar alarm systems; reveal a record confiscated by an officer in accordance with an enactment; or jeopardize the life of a law enforcement officer. This is complemented in subsection (2) by a list of records that should routinely be disclosed. Paragraphs (a), (e) and (f) limit the

exemption for disclosure of information on investigations to cases where the investigation has been within legal limits, has been more than a mere routine investigation by a regulatory agency, or where the result of the investigation has not yet been reported to the person or body that was the subject of the investigation. Paragraph (2)(b) qualifies paragraph (1)(b) by stating, in effect, that law enforcement techniques must be lawful. Paragraphs (c) and (d) provide for public knowledge of the general structure of law enforcement agencies and programs and their degree of success. 167

Under the American Freedom of Information Act, (b)(7) originally protected "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency". It was intended to protect investigatory files from premature disclosure, to protect the confidentiality of investigatory procedures and techniques, and to protect confidential sources of information. Although there were conflicting interpretations, the tendency was to exempt almost everything in investigatory files, whether or not it was used or planned for use in any criminal proceeding.

The exemption was accordingly amended in 1974, listing six instances where "investigatory files compiled for law

167. CBA Model Bill, footnote 27, at pp. 24-25

enforcement purposes" ¹⁶⁸ may be withheld. These are where
production would interfere with enforcement proceedings, ¹⁶⁹ deprive
a person of the right to a fair trial or impartial adjudication, ¹⁷⁰
constitute an unwarranted invasion of personal privacy, ¹⁷¹ disclose
the identity of a confidential source of information, ¹⁷² disclose
investigative techniques and procedures, or endanger the life or
physical safety of law enforcement personnel. The initial question
in adjudicating any exemption seven claim is whether the records
are both investigatory and compiled for law enforcement purposes.
For instance, they do not satisfy the requirement if they were
submitted to an agency for other purposes but later used in a law
enforcement investigation. Although interpretations differ on

168. According to the 1974 Attorney-General's Memorandum, law enforcement "includes not merely the detection and punishment of law violation, but also its prevention". Quoted in Gorski, footnote 107, at p. 155

169. Applies only to materials relating to ongoing enforcement proceeding or investigation; upon completion of the proceeding or investigation, the harm ceases to be a barrier to disclosure. Ibid., at p. 156

170. Typically available when requested material would cause prejudicial publicity. Ibid.

171. Similar to (b)(6), but omission of "clearly" lightens the Government's burden of proving invasion. Ibid.

172. According to the 1974 Attorney-General's Memorandum, confidential sources are "paid informants and any person who provides information under an express assurance of confidentiality or in circumstances from which such an assurance could be inferred". Ibid., at p. 157. This could still cause problems if a supplier of inaccurate information is protected from challenge. Franson, op. cit., footnote 9, at p. 51

whether records compiled during improper investigations are exempt, in 1977 the Deputy Attorney-General sent a memorandum to Justice Department officials urging that exemption seven should "not be used to conceal unlawful activities, regardless of the intent with which those activities were conducted. ... Neither the use nor methodology of unlawful investigative techniques or procedures is to be protected by reliance on [exemption seven]."^{172a} The Congressional Report indicates that only information on secret techniques and procedures is protected, not information on commonly known ones such as fingerprinting, interrogation and ballistic tests.

Recently there have been proposals to amend this exemption to curtail the abuse of the Freedom of Information Act as an alternative to normal discovery procedure. Documents compiled in reasonable anticipation of civil or criminal litigation and those associated with settlement negotiation would be subject to withholding until the end of the proceeding, except in the case of requests for the purpose of obtaining information that might lead the requestor to initiate litigation. It is also proposed to limit release of records pertaining to organized crime, terrorism or foreign counter-intelligence and of criminal law enforcement investigative files. Felons might also be precluded from obtaining records under the Act.¹⁷³ Attempts to secure an across-the-board

172a. Madans, op. cit., footnote 157, at p. 165

173. Shenefield, op. cit., footnote 26, at p. 7; in Canada, parole officers concede that less than five per cent of files contain sensitive information, and most could safely be released. Franson, op. cit., footnote 9, at p. 50; cf. section 24 of proposed Privacy Act, see Chapter V, Section (2) infra

exemption from the Act for intelligence agencies have been abandoned, but the Justice Department's proposal for a "much narrower" exemption has been criticized as achieving much the same result.¹⁷⁴ The Director of the C.I.A. would be able to certify information as exempt from disclosure if it falls into one of three "catch-all" categories: (1) information provided by anyone not employed by the U.S. Government, (2) information that would "tend to identify" a source or method, and (3) information from or about technical or scientific intelligence systems. This proposal would allow withholding of material that was not even classified. More important, there would be no judicial review of the Director's certificate. This system seems to resemble the Ministerial certificate system finally abolished in Canadian proposals, and strongly criticized for its retention in Australian proposals.¹⁷⁵

The Australian law enforcement exemption purported to copy the corresponding American exemption, as amended in 1974, but with important differences. It exempts any information obtained from a confidential source, rather than merely information that would identify the source. It fails to make clear that only

174. C.I.A./F.O.I.A., (Editorial) *The Nation*, Apr. 26, 1980, 483

175. See supra, pp. 40-46

information on secret techniques and procedures is to be protected, or that illegal techniques or investigations are not protected. More important, it adds any disclosure that would "otherwise have a substantial adverse effect on law enforcement activities", which could be interpreted very broadly, as law enforcement authorities regard any disclosure as having an adverse effect.¹⁷⁶ The same criticism could be made about paragraph 16(c) of the Canadian Bills ("injurious to law enforcement, the conduct of lawful investigations or the security of penal institutions").

To sum up, the law enforcement exemption in Bill C-43 seems unnecessarily broad, and could result in the exemption of almost everything in investigative files. It would probably be preferable to have something along the lines of the American exemption or the exemption in the Canadian Bar Association Model Bill, which are limited by reference to the interests to be protected. The exemption should also make clear that illegal techniques or investigations are not covered.

(7) PERSONAL PRIVACY

Section 19 of Bill C-15 exempts, on a mandatory basis, all personal information respecting an identifiable individual, with the exception of certain information about public servants,

176. McMillan, op. cit., footnote 7, at pp. 409-410

persons performing services under a contract with the government, and discretionary benefits conferred on individuals by the government. All personal information must therefore be deleted from any document to be released under the statute, which could result in deletions that are not necessary for protecting personal privacy. Section 19 of Bill C-43 incorporates by reference the definition of "personal information" contained in section 3 of the proposed Privacy Act, which is similar to that in Bill C-15. It also provides for disclosure of such personal information if the individual to whom it relates consents to the disclosure, or if the information is publicly available.

177

In answer to the demands of the research community, paragraph 3(2)(j) of the Privacy Act provides that personal information may be disclosed for research or statistical purposes if the head of the government institution is satisfied that the purpose cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and obtains a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual.

Instead of a class exemption, the Canadian Bar Association Model Bill adopts a mixed exemption. Under section 25, private letters and writings, delivered to the Public Archives or the National Library are exempted as a class, except upon any terms for

177. Knoppers, op. cit., footnote 148, at pp. 9-10

disclosure that might be contained in the terms of donation, as are records of Ministerial correspondence that reveal a person's identity or that would properly be withheld under another provision of the Act. Other information is exempted on the basis that disclosure would constitute an unwarranted invasion of personal privacy or would jeopardize a source of information. The type of information covered includes information relating to taxation, social insurance, the census, immigration and naturalization, births and deaths, criminal records, personal health, employment files, and files on job applicants. Contrary to the policy underlying the rest of the Act, that a person should not have to demonstrate any special interest before being allowed access to a record, this section implies a balancing process between the personal interests in privacy and the public interest in disclosure. Any person whose interests would be substantially affected by disclosure of a record that may be subject to exemption under sections 25 or 26 (commercial or financial information) may apply to an agency for an opportunity to be heard prior to disclosure. If the agency nevertheless decides to disclose, the person may apply to the Federal Court for review of the decision.

178

179

178. CBA Model Bill, footnote 27, at p. 25; see exemption six in U.S. Act infra

179. In Sweden, personal information can be released with the consent of the person, or for research, without consent, subject to conditions for use. If a private person considers himself harmed by the release of a document, he cannot have the decision altered, but if he believes that access was granted unlawfully, he can make a complaint to an Ombudsman or to the Chancellor of Justice. Holstad, op. cit., footnote 34

Exemption six under the American Freedom of Information Act exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". Interpretative certainty has been hampered not only by friction between the right to know and the right to privacy, but also by imprecise statutory language and inconsistent legislative history. The 1967 Attorney-General's Memorandum, which relies mainly on the House Report, suggests that the exemption encompasses "all personnel and medical files, and private and personal information contained in other files, which if disclosed would amount to a clearly unwarranted invasion of the privacy of any person ...".¹⁸⁰ The courts, however, have not agreed that medical and personnel files are automatically and absolutely exempt. Various tests have been proposed to define "similar files" but the best is probably "personal information" because it derives support from the Senate Report and gives fuller protection to privacy. The definitional uncertainty has been reduced somewhat because several agencies have begun to specify which of their files are "similar files".¹⁸¹

The basic area of dispute has been whether exemption six empowers government agencies and the courts to balance the right

180. Quoted in Carl Wilkerson, Reconciling The Conflicting Goals Of The Right To Know And The Right To Privacy Under The Freedom Of Information Act, (1977), 25 Chitty's Law Journal 217, at p. 219

181. Ibid., at p. 223

to know, as measured by the need for the particular information requested, against the privacy intrusion created by disclosure. The non-balancing approach tends to insulate government files by protecting them against all but the most minimal privacy invasion. On the other hand, by balancing, a serious privacy invasion could be justified by a strong countervailing public interest in access to the particular information sought.¹⁸² When the Freedom of Information Act was enacted, several provisions were aimed at ending the discretionary balancing that had rendered section 3 of the Administrative Procedure Act ineffective. With respect to exemption six, the Attorney-General's Memorandum relies mainly on the House Report, which conveys the impression that Congress has already weighed the competing interests of privacy and disclosure, but omits the section of the Senate Report that clearly contemplates and in fact mandates a case-by-case balancing by agencies and the courts.

In Robles v. EPA,¹⁸³ "clearly unwarranted invasion of personal privacy" was interpreted as the definitional qualification serving to describe the materials in "similar files", to ensure that they "have the same characteristics of confidentiality that ordinarily attach to information in medical or personnel files".

182. Wilkerson, op. cit., footnote 180, at p. 217; see also 1972 Canadian Task Force on Privacy: "personal information about an individual may [sometimes] be of such vital concern to society that the individual's privacy must be sacrificed", quoted in Franson, op. cit., footnote 9, at p. 47

183. 484 F2d 843 (1973)

The only factor to be considered was the seriousness of the invasion. In the court's view, the "any person" language of (a)(3) precluded balancing of any other test that would grant access to some and deny it to others.

Other courts, however, beginning with the case of Getman v. NLRB,¹⁸⁴ had found that exemption six requires a unique balancing of the right to privacy against the right of the public to be informed. This interpretation was adopted by the Supreme Court in Department of the Air Force v. Rose.¹⁸⁵ The exemption was construed to protect only against a disclosure that would constitute a "clearly unwarranted invasion of privacy" as identified through in camera inspections of the material to delete personal references and other identifying material. The effect of a particular disclosure is estimated not only from the perspective of the general public, but also from the perspective of those with additional knowledge, such as persons acquainted with the individual identified. The Rose Court failed to set any express guidelines for measurement of public interest, but suggested that there should be a need for the information requested. The Getman Court considered the predictable benefits of the intended use of the information, and the availability of alternative means by which the same benefits could be achieved.

184. 450 F2d 670 (D.C. Cir. 1971)

185. 425 U.S. 352 (1976)

The agencies are primarily responsible for the excision process, and if they meticulously remove personally identifying details from records, it will be unnecessary to invoke the balancing test in most cases. The excision process also eliminates "comingling", whereby agencies would mix non-exempt files with exempt files in an effort to subvert disclosure.

One of the shortcomings of the American Act is the lack of notice to the person who is the subject of the information, so that he can make his views known. Paragraph 8(2)(1) of the proposed Canadian Privacy Act permits disclosure of personal information "where, in the opinion of the head of the institution,

- (i) the public interest in disclosure clearly outweighs any invasion of privacy that would result from the disclosure, or
- (ii) disclosure would clearly benefit the individual to whom the information relates.

In the case of such disclosure the head must notify the Privacy Commissioner, who may notify the subject individual. There does not appear to be any mechanism for the individual to make his views known. The onus is on the person seeking disclosure to satisfy the appropriate Minister that the test of greater public interest has been met. Although the provision is intended to be used only in very limited circumstances, notification to the

186. Wilkerson, op. cit., footnote 180, at p. 222

Privacy Commissioner is supposed to serve as a safeguard against abuse, by allowing the Commissioner to criticize unjustified disclosures and assist departments and agencies in developing criteria.¹⁸⁷

To sum up, the protection of personal privacy gives rise to some difficult problems. A class exemption as in Bill C-43 gives the most complete protection, but there seems inadequate provision for the balancing of competing interests and too much discretion in the Minister. There should be provision for the subject individual to make his views known before disclosure, as well as a right to appeal either a refusal to disclose or a decision to disclose.

(8) COMMERCIAL AND FINANCIAL INFORMATION

Section 20 of Bill C-15 closely follows the equivalent exemption of the Canadian Bar Association Model Bill,¹⁸⁸ exempting financial, commercial, scientific or technical information disclosure of which could reasonably be expected to result in information of the same kind no longer being supplied to the government institution; to cause significant prejudice to the

187. Jean Chrétien, Privacy Legislation, (Cabinet Discussion Paper, 1980), at p. 14

188. Paragraphs 26(1)(b)-(d)

competitive position of firms or significant interference with ongoing negotiations; or to result in undue financial loss or gain. Commercial groups would have preferred a class exemption similar to that for personal information, whereby all information furnished to the government in confidence would be exempted. The exemption suffers from the lack of a mechanism whereby parties likely to be affected by disclosure would have an opportunity to inform the government of the probable effect on them of disclosure.¹⁸⁹

In section 20 of Bill C-43 there is an attempt to compromise, by adding exemptions for trade secrets and for information that is treated consistently in a confidential manner by the supplier and removing the loss of future information as a criterion.¹⁹⁰ Section 29 provides for notice to parties likely to be affected by an intended disclosure of information described in section 20, so that they may make representations to the head of the government institution as to why the information should not be disclosed.

The Canadian Bar Association Model Bill, on the other hand, is so concerned about the dangers of corporate secrecy that subsection 26(2) provides for superseding the private interest

189. Fox, op. cit., footnote 16, at p. 13

190. The Consumers' Association of Canada in a brief to the committee studying the Bill expressed concern that third parties were given carte blanche to veto disclosures. It felt that confidentiality claims should be rejected unless it can be proved that direct harm would result from disclosure. Freedom-of-information bill hit, *The Citizen*, Apr. 3, 1981

where there is a clear public interest that would be served by disclosure. This was derived from the McMillan Minority Report Bill in Australia.

Proprietary corporations listed under Schedule D of the Financial Administration Act are not covered under either Bill C-15 or Bill C-43 owing to competitive business considerations. ¹⁹¹ It has been argued, however, that as a general proposition they should be covered, and sensitive commercial information could remain confidential under the general exemption. ¹⁹²

The American Freedom of Information Act exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential". Exemption four can be read as protecting either three categories of information (trade secrets, commercial or financial information, and privileged or confidential information) or two categories (trade secrets and commercial or financial information that is privileged or confidential). The courts have read the provisions both ways. Although there have been various definitions of "trade secret", it has not presented any problem because this part of the exemption is seldom used, and the scope of the other categories is broad enough to include most definitions. "Privileged" as used in the Act is co-extensive with

191. Green Paper, footnote 11, at pp. 23-24

192. Atkey, op. cit., footnote 110, at pp. 159-160

the traditional common law privileges. The interpretation of "confidential", however, has given rise to considerable litigation. Initially, it was interpreted subjectively, as private information that customarily would not be released by the person from whom it was obtained.¹⁹³

The case of National Parks and Conservation Association v. Morton¹⁹⁴ established a new test based on the purpose of the exemption - to protect both the suppliers of information and the agency receiving it. Information should be protected if disclosure would be likely (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. The first alternative prohibits withholding of information obtained by compulsory procedure since no impairment of the government's ability to obtain further information can result.¹⁹⁵ On the other hand, the legislative history of exemption four indicates that it was intended to be applied liberally - according to the Senate Report, to protect "information ... which would customarily not be released to the public by the person from whom it was obtained". The National Parks test is therefore likely to afford less protection for business information than Congress intended when it enacted the exemption.¹⁹⁶

193. Cf. section 20 of Bill C-43

194. 498 F 765 (D.C. Cir 1974)

195. Furby, op. cit., footnote 44, at pp. 800-801; cf. Bill C-15

196. Eileen J. Berkman, The Reverse-FOIA Lawsuit: Routes to Nondisclosure After Chrysler, (1980), 46 Brooklyn Law Review 269, at pp. 288-290

Since the 1974 amendments which impose harsh sanctions for wrongful withholding of requested information, agency officials have been encouraged to favour release of arguably exempt material. Fear of accusations of over-involvement with the industry that it is mandated to regulate may discourage an agency from vigorously asserting a submitter's interest in non-disclosure. Persons requesting information under the Freedom of Information Act often do so for questionable purposes, as a discovery device or as a means of gaining competitive advantage. Private industry accounts for an estimated two-thirds of requests under the Act. As a result, private individuals and organizations are increasingly reluctant to furnish information to the federal government that might be released under the Freedom of Information Act.¹⁹⁷

To protect their interests, submitters have developed the "reverse-FOIA" lawsuit. Most such suits arise when an agency notifies the submitter that disclosure of information has been requested under the Freedom of Information Act. After notification, but before disclosure, the submitter files a reverse-FOIA action seeking to enjoin the agency from disclosing the information. Alternatively, if the agency decides not to disclose, submitters have attempted to intervene as defendants in litigation brought by the requestor to force disclosure, arguing that the agency cannot adequately represent their interests. Submitters have relied

197. Trudy Huskamp Peterson, *After Five Years: An Assessment of the Amended U.S. Freedom of Information Act*, (1980), 43 *American Archivist* 161, at p. 164; Berkman, *op. cit.*, footnote 196, at pp. 293-294

on three legal theories: (1) that the Freedom of Information Act prohibits agencies from disclosing information falling within any of the nine exemptions in the Act (despite the absence of an explicit cause of action); (2) that agencies are prohibited from disclosing submitter-generated business information by the Trade Secrets Act, a criminal statute proscribing the unauthorized release of a wide variety of business information; (3) that disclosure of submitter-generated business information that is either exempt under the Freedom of Information Act or within the scope of the Trade Secrets Act constitutes an abuse of agency discretion subject to judicial review under the Administrative Procedure Act. ¹⁹⁸

In 1979 the Supreme Court considered its first reverse-FOIA case, Chrysler Corporation v. Brown.¹⁹⁹ The Court rejected arguments for a cause of action under the Freedom of Information Act or under the Trade Secrets Act. It found, however, that the agency's decision to disclose was "reviewable agency action" and that, as a person "adversely affected or aggrieved" by such action, Chrysler had standing to seek review under the Administrative Procedure Act. Although "properly promulgated, substantive agency regulations" could serve as "authorization by law" to disclose

198. Daniel Gorham Clement, The Rights of Submitters To Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Lawsuit, (1977), 55 Texas Law Review 587, at pp. 591-633

199. 441 U.S. 281 (1979)

information otherwise protected under the Trade Secrets Act, which was invoked as a standard, the particular regulations on which the agency relied were neither substantive nor properly promulgated. The case was remanded to the lower court for consideration of the issue in light of the decision that the disclosure was not "authorized by law".

It has been argued that the effect of the decision was to narrow the scope of the reverse-FOIA action. If a cause of action had been found under either the Freedom of Information Act or another non-disclosure statute, de novo review would have been available in the district court, in which case the court would be allowed to re-examine documents in order to evaluate the propriety of the agency's decision to disclose. Judicial review under the Administrative Procedure Act's abuse of discretion provision is limited to a review of the record of the agency proceeding. Where clearly defined standards exist, such as the Trade Secrets Act, review on the record is still effective. Where standards by which to examine agency action are unavailable, however, it has been argued that review under the Administrative Procedure Act will be ineffective. Alternative standards will have to be developed. ²⁰⁰

If submitters must rely exclusively on judicial review under the Administrative Procedure Act, the agencies will serve

200. Berkman, op. cit., footnote 196, at pp. 286-287

as the chief forum for adjudication, and they should allow submitters to present their arguments to the maximum extent compatible with the primary Freedom of Information Act policy of full and prompt disclosure.²⁰¹ The Justice Department has proposed an amendment to the Act requiring agencies holding confidential business information to provide notice to the submitter upon receiving a request for release of that information or upon making a determination that the information should be released, and establishing a time limit and an agency administrative process to ensure that there is ample notice to permit submitters to negotiate with the agency or to file suit if required.²⁰² Many agencies have already promulgated regulations requiring notification to submitters prior to disclosure. Although administrative adjudication of submitters' arguments would increase the cost and time required for processing requests, it would help prevent judicial reversal of agency determinations to disclose, discourage appeals to the courts, and expedite those judicial appeals that are brought.^{202a}

It has also been suggested that agencies should promulgate rules identifying entire categories of information that they would disclose automatically upon request under the Freedom of Information Act. Under the rule-making section of the

201. Clement, op. cit., footnote 198, at pp. 633-638

202. Shenefield, op. cit., footnote 26, at p. 5

202a. Clement, op. cit., footnote 198, at p. 638

Administrative Procedure Act, submitters and requestors would receive notification in the Federal Register of any such proposed rule and have the right to submit written comments before final promulgation. Judicial review of the final rule would also be available under the Administrative Procedure Act. This would substantially decrease the volume of ad hoc adjudications. Another proposal is that the agencies should adopt regulations permitting submitters to identify at the time of submission any information that they believe is non-disclosable and to substantiate their claims in writing with specific reasons. Failure to do so would be a consideration for the agency in processing future requests. This would be more efficient than awaiting receipt of a request before ruling on submitters' claims of non-disclosability. ²⁰³

The Department of Justice also proposes to permit courts to make orders respecting the transfer and consolidation of actions where the requestor files suit in one court and the submitter files a reverse-FOIA suit in another court. ²⁰⁴

Exemption eight was the product of an early version of exemption four, which did not specifically exempt financial information, and the powerful banking lobby. The present version of exemption four apparently exempts from disclosure the same information covered by exemption eight, and consequently the latter

203. Clement, op. cit., footnote 198, at pp. 638-639

204. Shenefield, op. cit., footnote 26, at p. 4

is rarely invoked. Exemption nine was also intended to protect a special interest group with a strong lobby (the oil industry), and also exempts from disclosure information that apparently could be withheld under exemption four.²⁰⁵

To sum up, the exemption in Bill C-43 is rather broader than the corresponding exemption in Bill C-15, probably out of a concern to avoid the confusion and discontent in the United States. It should be remembered, however, that Bill C-43 also provides third parties with an opportunity to make known their views on disclosure, which is lacking in the American legislation. The exemption in Bill C-15, coupled with the provisions in section 29 of Bill C-43, should provide adequate protection for the legitimate interests of third parties. The government might also adopt the idea of having submitters of information indicate whether they believe that it should be kept confidential, giving specific reasons.²⁰⁶ As with personal information, there may be cases where the private interest must be superseded in the public interest, so it would probably be a good idea to include a provision similar to subsection 26(2) of the Canadian Bar Association Model Bill.

205. Gorski, op. cit., footnote 107, at p. 158

206. See supra, p. 103

(9) STATUTORY EXEMPTIONS

At least seventy-three statutes currently restrict access to information,²⁰⁷ and it is important to establish whether the access legislation or the confidentiality clause in another statute is to have precedence in any given case. Some provisions could quite easily be made compatible with the exemptions, and therefore there would be no major obstacles to their being overridden by the new legislation. On the other hand, Parliament has given absolute protection to the classes of information²⁰⁸ covered by some of these clauses.

Section 25 of Bill C-15, following the corresponding American exemption, prohibits disclosure where release to the public or to unauthorized persons is prohibited in another Act of Parliament which

- (a) provides that the requirement to withhold information be exercised in such a manner as to leave no discretion in the matter; or
- (b) establishes particular criteria for withholding information or refers to particular types of information to be withheld.

Section 25 of Bill C-43 adds a provision for review of statutory prohibitions by a Parliamentary committee within three years after the coming into force of the access legislation on whether and to what extent the provisions are necessary.

The Canadian Bar Association Model Bill provides in section 37 that it is to take precedence over any other Act which

207. CBA Model Bill, footnote 27, Schedule 1

208. Fox, op. cit., footnote 16, at p. 16

provides for, prohibits or regulates disclosure of records. Although seventy-three federal statutes are listed in Schedule 1, the scope of the section is not limited to this list. The only exception would be where a prohibition in another statute is expressly stated to apply notwithstanding the provision of the Freedom of Information Act. (section 27) These two provisions have the effect of providing certainty.

The confidentiality provisions in some statutes may make it difficult for agencies to strike an appropriate balance between disclosure and confidentiality. For instance, the Anti-Dumping Tribunal had been misled by subsection 29(3) of the Anti-Dumping Act into an impression that confidential information must be kept confidential, no matter how compelling the need for disclosure. In the Magnasonic case,²⁰⁹ the Court reasoned that subsection 29(3) had to be read together with the section providing for a public hearing. The Tribunal had to find some way of fulfilling its obligation to disclose adequate information to the participants while, at the same time, protecting the confidentiality of information received from the parties. It has taken the approach of disclosing information in camera to independent counsel (as opposed to "house-counsel") on their undertaking not to disclose it to anyone else, but this has not altogether solved the problem.²¹⁰

209. Re Magnasonic Canada Ltd. and Anti-Dumping Tribunal, (1973), 30 D.L.R. (3d) 118, [1972] F.C. 1239

210. Franson, op. cit., footnote 9, at pp. 34-40

Professor McMillan in his Minority Report Bill proposed that secrecy provisions to be preserved should actually be listed in a Schedule to the Act, and some of the broader provisions simultaneously amended, creating a comprehensive code on openness and secrecy. It would avoid any litigation concerning whether a particular statutory provision is one that actually "prohibits",²¹¹ rather than regulates, the disclosure of information.

Exemption three of the American Freedom of Information Act, as originally worded, dealt with information "specifically²¹² exempted from disclosure by statute".²¹³ In FAA v. Robertson the Supreme Court ruled that the exemption included within its ambit statutory provisions granting general discretionary authority to the head of an agency, which allow the withholding of information "not required in the public interest". This decision was overturned by an amendment to the Freedom of Information Act²¹⁴ that was appended to the 1976 Government in the Sunshine Act.

The amended exemption allows non-disclosure provided that the statute other than the Freedom of Information Act

211. McMillan, op. cit., footnote 7, at p. 412

212. Intended to incorporate nearly 100 statutes or parts of statutes that restricted public access to specific government records. Gorski, op. cit., footnote 107, at p. 145

213. 422 U.S. 255 (1972)

214. 90 Stat. 1241 (5 U.S.C. Section 552b)

(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The interpretation of "particular" is not clear, and the courts remain confused as to the status of certain statutes.²¹⁵

To sum up, in light of the difficulties in the United States with their statutory exemption, it may have been unwise to have copied it. It would probably be better for the Access legislation to take precedence, except where another provision is expressly stated to apply notwithstanding the Access legislation, as provided in the Canadian Bar Association Model Bill. In this way there would be greater certainty, and special confidentiality provisions could be preserved. After the report of the Parliamentary committee, the number of these special provisions could probably be reduced.

215. Furby, op. cit., footnote 44, at pp. 794-797

CHAPTER IV

SCOPE AND PROCEDURE

(1) SCOPE

An important aspect of access legislation involves whether the legislation should operate retrospectively as well as prospectively, that is, in regard to documents created or received prior to as well as after the coming into force of the Act. The Canadian Bar Association Model Bill recommends that it should.²¹⁶ The Australian proposals recommended that the legislation should not apply to documents that came into existence prior to the coming into force of the legislation. Rather than an absolute exemption, the Canadian Government has opted for a phasing-in period.

According to the Government, the arguments against retroactivity are fairness and costs. It is said to be unfair to other governments and persons who have supplied information to "change the rules of the game" and make available information that they have supplied or developed with the idea that it would be confidential.²¹⁷ The Government also maintains that retrospective application would be costly and difficult. Administration of the

216. CBA Model Bill, footnote 27, at p. 18

217. But much of such information would likely be exempt, anyway, e.g. under exemptions for information received in confidence from other governments; commercial or financial information received from third parties; personal information

legislation will require considerable work to develop the necessary procedures and organization, and more generally to bring government institutions to the appropriate state of readiness. Among other things, each institution will have to adapt its records management operations to the legislation and try to separate what can be made readily available from information that might be exemptable. Many files, especially old ones, are badly kept. More and longer searches lead to high resource costs. The fact that most documents go to the Public Archives after a period of time should reduce the problem to some extent. The argument for retroactivity, of course, is that citizens should have more access to information to allow them to hold government accountable and to influence decisions. If the legislation does not apply retroactively, not much information will be available during the first years of operation.

218

219

Section 28 of Bill C-15 provided that during the first year of operation, the head of a government institution may refuse to disclose a record that was in existence more than five years before the coming into force of the legislation where, in his opinion, compliance would unreasonably interfere with the operation of the institution. Section 28 of Bill C-43 is a little more

218. But the Government began a sophisticated and expensive overhaul of its records management systems more than ten years ago. Mitchell, op. cit., footnote 103

219. Fox, op. cit., footnote 16, at pp. 23, 26-27

complicated. During the first two years of operation, the head may refuse to disclose a record that was in existence more than two years before the coming into force of the Act; and during the first five years, a record that was in existence more than five years before the coming into force of the Act. As Heather Mitchell points out,²²⁰ a requestor would have to wait until 1986 to get information from 1976 or before, until 1983 to get information from 1977 and 1978. Only information from 1979 and 1980 will be available immediately.

Another question in regard to the scope of the legislation concerns who can request information. Section 4 of both Bill C-15 and Bill C-43 gives the right to access to every person who is a Canadian citizen, a permanent resident or a corporation incorporated by or under a law of Canada or a province. Both Sweden and the United States allow foreigners to make requests. In briefs to the Commons committee studying Bill C-43, the Canadian Bar Association, the Canadian Daily Newspaper Publishers Association and the Centre for Investigative Journalism criticized the restriction in the proposed Canadian legislation.²²¹

Ronald Atkey has argued that a good case can be made for an adjudicatory tribunal to consider the special interests of the

220. Mitchell, op. cit., footnote 103

221. Aileen McCabe, Canadian Bar backs information bill, *The Citizen*, Mar. 20, 1981; Freedom-of-information bill hit as 'too restrictive', *The Citizen*, Mar. 26, 1981

requestor in determining whether to apply an exemption based on either competitive business considerations or protection of privacy. There would be a balancing of interests, considering such factors as (1) whether the person requiring confidentiality would suffer actual and substantial harm if the information were disclosed; (2) if so, whether the information requested is relevant to the issue and essential to the determination of the application before the tribunal; (3) whether the information sought is relevant and essential to the requestor (e.g., a party has a higher interest to balance against a claim for confidentiality than an outsider who is merely an interested member of the public). He does not think that the concept of the special needs of the requestor should be specifically written into freedom of information legislation, but should be allowed to develop through the individual tribunal and court decisions on a flexible basis.²²²

The Australian interdepartmental committee proposed that the provisions of the Act should apply only when the Act was specifically invoked by the requestor, whether at the time of the request or of the appeal from denial. Professor McMillan complained that this differentiation between requests was potentially discriminatory. The Act should provide that any request for documents

222. Atkey, op. cit., footnote 110, at pp. 175-177

made in writing should be processed under the Act. This would ensure that accurate statistics on requests and denials would be kept, and that any person denied access would be informed of the right to appeal. Oral requests and requests for information could be handled in the usual way. Before the 1974 amendments to the American Act, agencies took advantage of people's ignorance of their rights.²²³

To sum up, although there may be difficulties in implementation, the legislation should operate retrospectively, to provide maximum access. It is probably not necessary to restrict access to citizens and residents. As the Canadian Bar Association's brief pointed out,²²⁴ any foreigner could easily hire a Canadian to request information for him.

(2) INDICES AND MANUALS

Section 6 of Bill C-43 requires that a request for access "shall provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record". This is similar to the corresponding provision under the amended American Freedom of Information Act, which provides that a requestor must "reasonably describe" the records and make the request in accordance with published agency rules. According to the American

223. McMillan, op. cit., footnote 7, at pp. 424-425; section 6 of C-15 and C-43 requires request to be in writing; in Sweden, authorities under obligation to give verbal or written information about the contents of documents available to the public. Holstad, op. cit., footnote 34, at p. 35

224. McCabe, op. cit., footnote 221

Attorney-General, the description "would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate a record with a reasonable amount of effort".²²⁵ Before the American Act was amended, some agencies required a requestor to identify the file title or number of the document sought, although internal indices of documents were not made available.

The publication of indices and manuals is closely related to the issue of identifiability, as it is obviously difficult to frame a request precisely without some knowledge of what is available and where. In Sweden the identification of documents is achieved through public registers describing official files, but the objection is made that coverage in Canada would be intended to cover a much larger proportion of government documents, making public registers impractical owing to the extraordinary cost.²²⁶ In Australia, the interdepartmental committee recommended that a department should be able to refuse a request defined only in terms of the subject matter of the documents sought, where to answer the request would impose an unreasonable administrative burden. Since there was no requirement that internal filing indices be released, or that lists of such things as commercial reports be prepared, few requests would identify particular documents and the others might be regarded as framed by reference to the subject matter. Professor McMillan

225. Quoted in Green Paper, footnote 11, at p. 20

226. Ibid.

argues that any request should be answered that sufficiently identifies the documents to enable an officer of the agency to locate it. If considerable time were spent in locating the documents, this should be reflected in the search fees charged. 227

There are other reasons for the publication of manuals and the like. Professor Franson argues that the policies and procedures of any administrative agency should be readily available both to participants in the administrative process and to members of the general public, on grounds of fairness and accountability. The documents that cause the most trouble are staff manuals, prepared to guide agency staff in making decisions and often treated as confidential by staff. The effect of non-disclosure is to create a kind of secret law, known only to the agency and those fortunate participants who either have a great deal of experience with that particular agency or have been lucky enough to receive some "inside information". In the absence of a central registry of index, it is very difficult to find even the interpretative materials that are available. Many agencies have not formulated rules of procedure, with the result that participants have no way of determining in advance what procedures will be followed. He suggests that those rules or policies of general application that may be of general interest should be published. Interpretative documents like staff manuals that may be too bulky for publication

227. McMillan, op. cit., footnote 7, at pp. 424-425

should be made available for inspection, and adequate indices of these materials should be prepared.

Although the Statutory Instruments Act is designed to require publication of all delegated legislation, apparently quite a bit is not published because of inadequacies in the Act and a lack of co-operation on the part of the government. Even assuming that delegated legislation is in fact published, there are no adequate indices by which it may be found. So-called "comprehensive indices" are issued periodically, but they only list each regulation issued by name under the heading of the appropriate Act, and do not in any way provide an index to the subject matter. Some agencies issue office consolidations of regulations, but these are often unavailable, for various reasons.

Formal decisions and orders issued by an administrative agency in the adjudication of cases can often be helpful in the interpretation of the agency's policies, but there is no central directory indicating which agencies publish decisions. Some agencies publish all of their decisions; some only some; some none. Opinions differ on whether unpublished decisions are confidential documents or may be inspected by members of the public.

Some agencies issue guidelines and general interpretative bulletins, offering guidance to the public concerning interpretations that will be adopted by the agency, but more flexible than regulations or binding rules. Since they do not have the force of law, they do not necessarily fulfill the definition of statutory

instrument and may therefore not be published in the Canada Gazette. Although they are usually intended for public consumption, they are very difficult to locate. The only sure way of finding them is to write to all departments that might possibly have an interest, in the subject matter.²²⁸

The Government argues that the regular and compulsory publication of manuals that government institutions prepare for the use of officials in administering legislation (instructions, policy guidance or statutory interpretation) would be expensive and might prove useless if there were no demand for a particular manual. Access to a manual could, however, be requested under the legislation. If there were sufficient demand for a specific manual, the institution could have it published and made available at a lower fee. Manuals could also be made available in public reading rooms.^{228a} Accordingly, section 5 of Bill C-15 provides for the periodic publication at least once a year of

- (a) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;
- (b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act; and
- (c) the title and address of the appropriate officer for each government institution to whom requests for access ... should be sent.

228. Franson, op. cit., footnote 9, at pp. 21-26

228a. Fox, op. cit., footnote 16, at p. 25

To these Bill C-43 adds "a description of all manuals used by employees of each government institution in administering or carrying out any of the programs or activities of the government institution". A bulletin will also be published at least twice each year to bring this material up to date and provide other useful information.

The Canadian Bar Association Model Bill places agencies under an affirmative obligation to inform the public about their structures and operations. Section 29 requires information to be published about where to request and obtain information published or made available pursuant to sections 30 to 33. Section 30 requires each agency to provide information about its organization and operating procedures, as well as a list of the general types of records prepared or possessed by the agency, and the position, rank and address of the Access Officer responsible for each class of records. Section 31 requires that manuals containing substantive and procedural law that might affect the public be published, while section 32 requires the indexing of all such materials that appear, from one year after the commencement of the Act, in other than manual form. The publication requirement is meant to avoid the possibility that a member of the public making a request to inspect or copy a manual might have to pay for the work necessary to make the deletions permitted under the Act. Section 33 requires that an agency index the opinions, advice or recommendations submitted

by its officers in the reports, studies, plans or proposals about itself or the subject matter with which it deals, described in paragraphs 22(2)(b) to (1) and 24(2)(d) and (e) (policy advice and law enforcement), even though it would be entitled to withhold these records from disclosure if they were requested. Only if the very existence of the record could be withheld from disclosure can the agency exclude it from the index. The index must be updated at least every three months and must be published or made available for inspection or copying.²²⁹

Under the American Freedom of Information Act, the agencies are required to publish and distribute, through sale or otherwise, agency indices identifying information for the public as to any matter issued, adopted or promulgated after July 4, 1967, which is required by the Act to be made available or published, i.e., final orders, opinions, agency statements of policy and interpretations not otherwise published in the Federal Register, as well as administrative manuals, handbooks and agency staff instructions affecting the public, unless published in some other manner and copies offered for public sale. The indices must be updated at least every three months, but an agency may forgo publication of an index if the agency has determined by an order

229. CBA Model Bill, footnote 27, at pp. 27-28

published in the Federal Register that publication would be "unnecessary and impracticable". In that case, the agency would be required to provide copies of the index to the public upon request at a cost not to exceed the direct expense of duplication. ²³⁰

Exemption two permits withholding of information "relating solely to the internal personnel rules and practices of an agency". Because of conflicting congressional reports on the Act, the courts have differed in their interpretation of this provision. The Senate Report took the statutory language verbatim, granting exemption to rules and practices that affected all agency personnel (e.g., rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, etc.) The House Report believed that the exemption applied solely to agency operating rules and procedure manuals. In Department of the Air Force v. Rose ²³¹ the Supreme Court resolved the conflict by relying on the Senate version. The thrust of the exemption was found to be to relieve agencies from the necessity of assembling and maintaining for public inspection information that could not reasonably be expected to interest the public. The

230. Often when departments do not have an efficient listing and indexing system they cannot locate requested documents, nor can the requestor find out what documents he wants to request. This has led to "fishing expeditions" in which whole groups of documents are requested in order to obtain the one or two pieces of information wanted. Rowat, op. cit., footnote 28, at p. 12

231. 425 U.S. 352 (1976)

decision has been criticized on the basis that if the rationale that significant public interest in a matter precludes it from being related solely to internal personnel rules and practices were carried to its logical extreme, it could deny exemption two any meaningful effect.²³²

The Australian interdepartmental committee recommended that the following material should either be published or a public index of it published and updated annually:

- (a) interpretations of statutory provisions administered by a department and adopted by it in deciding application for rights, privileges or benefits or in imposing obligations under those provisions;
- (b) staff manuals and other rules of procedure adopted by a department for regulating or guiding performance by officers of the department of their duties in the administration of statutes or of schemes administered by that department; or
- (c) written decisions given in exercise of statutory discretion or other adjudicative function where these are of such a nature as to provide rules of general applicability for future cases of the same kind.

Professor McMillan argues that paragraph (a) should be broadened

232. Furby, op. cit., footnote 44, at pp. 792-794; while the Court relied on the Senate's construction, it implied that the House's construction may be invoked when disclosure of an internal rule or regulation may allow the requestor to circumvent the agency regulation. Gorski, op. cit., footnote 107, at p. 145.

to include statements of policy and substantive rules that are applied by the agencies. Paragraph (b) applies only to manuals and procedural rules relating to the administration of statutes and schemes, so that a rule on the enforcement of a law might therefore be excluded (such as important rules on fingerprinting, firearms and interrogation). He further argues that the unduly restrictive notion of precedent employed in paragraph (c) would ordinarily exclude advisory opinions addressed to a named individual. His Minority Report Bill sought to avoid these restrictions by including interpretations and instructions that are "to be applied by, or are to be a guideline for, any officer", and by providing that statements of policy and substantive rules are "adopted", whether contained in an internal memorandum or in a letter of advice to a member of the public.

The interdepartmental committee also proposed adoption of the American enforcement mechanism, that a person shall not be prejudiced by the failure of a department to publish or index any rule relating to the exercise of discretion. Professor McMillan objects that this assumes that people will be prejudiced, not benefited, by a rule. There is also an evidentiary problem in proving that an agency has relied upon an unpublished rule to one's detriment. He also criticizes the assumption that the objective of publication is to assist people engaged in negotiation, adjudication or litigation with the agency, when an equally

important objective should be to make agency law accessible to individuals, public interest groups and law firms who wish to investigate the policies and practices of an agency. He argues that there should be a provision for judicial enforcement of publication requirements, and that the Administrative Appeals Tribunal should be empowered to order that no fee shall be charged of a person wishing to inspect or copy material that has not been published or indexed as required.²³³

To sum up, agencies should be required to publish manuals and other internal law affecting the public, or make them available at a cost not to exceed the direct expense of duplication. This would allow the agency to save the expense of publishing a manual for which there was no demand, but a requestor would not be forced to pay for the work necessary to make the deletions permitted under the Act.

(3) DEADLINES AND FEES

Deadlines are an important factor in the effectiveness of access legislation. Before the 1974 amendments to the American Freedom of Information Act which imposed strict deadlines, requestors suffered unconscionable delays. It is often asserted

233. McMillan, op. cit., footnote 7, at pp. 430-432

that the American deadlines are not in practice being met, but this is true of only some agencies.²³⁴ The optimal set of administrative deadlines would combine sufficient pressure to meet the reasonable needs of applicants with a realistic possibility of consistent compliance without an undue increase in administrative staff and costs.²³⁵

Deadlines may be set out precisely in the body of the Act itself, as in the American legislation. Bill C-15 and Bill C-43 set limits which may be extended "for a reasonable period of time, having regard to the circumstances". The Government felt that it would be important not to set rigid and unworkable deadlines, especially before applicants became sufficiently experienced to frame requests in such a way as to elicit the information sought.²³⁶ The standard time limit of thirty days in section 7 may be extended under section 9 if

- (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution, or
- (b) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit.

234. See supra, p. 15

235. Green Paper, footnote 11, at p. 21

236. Fox, op. cit., footnote 16, at p. 24

237
Bill C-43 adds

(c) notice of the request is given pursuant to subsection 29(1).

When the requestor is given notification of the extension, and the length of the extension in the case of (a) or (b), he must also be informed that he has a right to make a complaint to the Information Commissioner about the extension. The Government felt that this review would ensure equitable treatment to applicants.
238

Section 7 of the Canadian Bar Association Model Bill also sets a standard time limit of thirty days for the initial response. The time limit may be extended for fifteen days, for reasons similar to those in the American legislation, with the addition of the necessity of consulting with "a person having a substantial interest in the document requested".
239 As under subsection 10(3) of Bill C-15 and Bill C-43, failure to disclose within the time limits is deemed a refusal to disclose, and the requestor may apply to the Information Commissioner for review.

Under the American Freedom of Information Act, an agency must determine within ten working days of receiving the request whether to comply. The time limits may be extended if there are

237. See supra, p. 96

238. Fox, op. cit., footnote 16, at p. 24

239. See U.S. Act infra; the Williams Commission in Ontario recommended a standard time limit of thirty calendar days, which could be extended by up to thirty days in certain circumstances.

"unusual circumstances". The Act provides that the following considerations must be weighed in determining whether there are unusual circumstances:

- (i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- (ii) the need to search for, collect and appropriately examine a voluminous amount of separate and distinct records demanded in a single request; or
- (iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having a substantial subject-matter interest therein.

The requestor must be notified in writing of the unusual circumstances and the date by which determination may be expected. No extension may exceed ten working days and it may be invoked only once, either at the initial or appellate stage. If the agency fails to comply with any of the time limits, the applicant is deemed to have exhausted his administrative remedies. If, however, the government can show that exceptional circumstances exist, and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of records.

The Department of Justice proposes to amend the Freedom of Information Act with a time limit tied to the work load

required. Requests requiring a massive search should be permitted more time than those requiring merely a cursory review. In no case would it be more than one year from the date of the request!²⁴⁰

According to Professor McMillan, the argument that time limits cannot be imposed presupposes either that delays are anticipated or that requests will thereby be reduced to manageable proportions by "citizen attrition".²⁴¹

Excessive fees can also discourage use of the legislation. Before the 1974 amendments to the American Freedom of Information Act, exorbitant inspection fees operated as "toll-gates".²⁴² The Government emphasizes that the legislation will not be self-financing, and that the public purse will be subsidizing it to a large extent.²⁴³ Section 11 of both Bill C-15 and C-43 sets guidelines for fees (application fee not to exceed twenty-five dollars), but the actual amounts may be prescribed by regulation. Heather Mitchell complains that the applicant may have to pay up to four times: once for making a request; once for the time it takes a public servant to search for the document (price to be set by the government); once for the time it takes a public servant to review the information and see if it can be withheld (price to be set by the government); and once for photocopies (price to be set by the government). The applicant pays the first three prices before finding out if the information exists, and whether or not the government discloses

240. Shenefield, op. cit., footnote 26, at pp. 2-3

241. McMillan, op. cit., footnote 7, at p. 423

242. Ibid., at p. 420

243. Fox, op. cit., footnote 16, at p. 26

the document.²⁴⁴ This is despite assertions in the Green Paper that review costs should not be charged, since they could become a de facto means of frustrating release, and that the application fee should be refundable in the case of complete denial or if no documents are found.²⁴⁵ The requestor may make a complaint to the Information Commissioner about the amount of fees.²⁴⁶ The head of a government institution may also waive or refund all or part of a fee,²⁴⁷ but it is not clear under what circumstances he would use this discretion.

Section 8 of the Canadian Bar Association Model Bill provides that the filing fee may not exceed ten dollars, and the search charge fifteen dollars. The copying charge may not exceed the direct cost of reproduction, and the filing fee shall be applied towards the cost of reproduction. Fees may be waived or reduced when it is in the public interest "because furnishing the information can be considered as primarily benefiting the general public". The agency shall consider in this regard such matters as the size of the public to be benefited, the significance of the benefit, the usefulness of the material to be released, the

244. Mitchell, op. cit., footnote 103

245. Green Paper, footnote 11, at pp. 27-28

246. Paragraph 11(5)(b)

247. Subsection 11(6)

likelihood that tangible public good will be realised. The requestor may also ask the Information Commissioner to review the agency's determination of fees. The Canadian Bar Association also recommends a uniform set of regulations and procedures to avoid the complexity and confusion in the United States where each agency or government department is responsible for its own regulations.²⁴⁸

Under the American Freedom of Information Act, agencies are required to promulgate regulations and fee schedules based on "reasonable standard charges for document search and duplication" of requested materials that "provide for recovery of only direct cost of such search and duplication". Fees do not include expenses for the examination or review of records. Documents shall be furnished without charge or at a reduced charge where it is in the public interest because furnishing the information can be considered as primarily benefiting the general public.²⁴⁹ This is central to the successful use of the Act by citizens and by public interest and community groups. It ensures that the first person to seek documents that will probably be sought by others does not have to foot the search bill. The courts have reinforced the importance of this provision by their willingness to review the agency's decision on whether to waive fees.²⁵⁰
²⁵¹

248. CBA Model Bill, footnote 27, at p. 28; the Williams Commission in Ontario recommended "reasonable standard charges for the direct costs of searching for and copying requested documents". If no records were found corresponding to the request, fees might be waived. How information right works, The Globe and Mail, Sept. 19, 1980, p. 4; cf. U.S. Act

249. Photocopies are usually at the rate of ten cents per page, with a search fee of \$7.50 per hour if necessary.

To sum up, the Government seems to have been unduly alarmed by the difficulties of certain American agencies in meeting deadlines. A definite time limit should be set on extensions, since excessive delays can greatly reduce the effectiveness of access legislation, especially when time is of the essence. Given that the legislation will not be self-financing, and that access to government information is an important democratic right, the barriers should be as low as possible. Review costs should not be charged, the application fee should be applied towards the cost of reproduction, and the application fee should be refunded in the case of complete denial or if no documents are found. Where the search is very time-consuming, some additional fee is not unreasonable. Fees should be waived or reduced, however, when it is in the public interest, so that the first person to seek documents that will probably be sought by others will not have to foot the search bill.

(4) REVIEW

Despite misgivings with regard to ministerial responsibility,²⁵² Bill C-15 established a two-tier process for

250. Cf. section 8 of CBA Model Bill

251. McMillan, op. cit., footnote 7, at pp. 425-426

252. See supra, pp. 7-10

review of departmental decisions in respect of access. At the first level, an Information Commissioner was empowered to receive and investigate any type of complaint relating to obtaining records under the legislation (including fees and deadline extensions). He could also initiate complaints. He was given only ombudsman-type powers, whereby he could either reject a complaint or recommend the appropriate action to the government institution concerned, but could not order release of documents or make any other binding order. It was felt that he could act as a convenient mediator prior to ultimate judicial review. While this may delay the final disposition in some cases, there would be many cases that could be resolved by the Commissioner, without the formality of a court proceeding.²⁵³

After an investigation by the Information Commissioner, a person who has been denied access may apply for review by a judge of the Trial Division of the Federal Court. Where the judge determined that the denial could not be justified on the basis of the exemption invoked, he could order release. He would not be involved in reviewing decisions about fees or time extensions. In certain circumstances, the Information Commissioner would have standing before the Court, and since in many cases he would have inspected the contested document, he would be in a better position than the applicant to argue in favour of release. Although judicial

253. CBA Model Bill, footnote 27, at p. 14

review would probably take place in relatively few instances, yet such review would guarantee the independence and effectiveness of the entire review process, and act as a deterrent to overly broad claims for exemption.²⁵⁴

In Bill C-43, judicial review is limited with regard to exemptions protecting public interests for which ministers are accountable to Parliament.²⁵⁵ In such cases, the Court would make a determination only as to whether it was reasonable for the Minister concerned to come to that conclusion. If it found that he had not acted reasonably, it could order release of the document so refused.

The Canadian Bar Association Model Bill also recommended a two-tier system, consisting of an Information Commissioner and summary (but unrestricted) judicial review. It felt, however, that the question of the reasonableness of fees should be reviewable by the Court.

Under the American Freedom of Information Act, if access is denied, the requestor may appeal to the head of the agency who must decide within twenty working days. If the agency

254. Fox, op. cit., footnote 16, at p. 19; CBA Model Bill, footnote 27, at p. 16

255. See supra, pp. 44, 46

256.

still denies the request, the requestor may file suit in a district court of the United States in the district in which the complainant resides or has his principal place of business, or in which the agency records are situated, or in the District of Columbia.²⁵⁷

to request issuance of an "order to produce". Such cases have precedence on the docket, except over those cases that the court, in its discretion, considers more important. The government must make a responsive pleading within thirty days after service, unless the court has directed otherwise for good cause shown. Before the court orders in camera inspection of records, the government should be given an opportunity to establish by means of testimony or a detailed affidavit that the documents are clearly exempt from disclosure. The burden of proof is on the government.

²⁵⁸The case of Vaughn v. Rosen set out some of the difficulties of in camera inspection of requested documents. The lack of knowledge of the party seeking disclosure seriously distorts the traditional adversary nature of the American legal system's form of dispute resolution.²⁵⁹ The examination is conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure. There is a

257. See section 53 of Bill C-43: any application relating to international affairs and defence shall, on the request of the head of the institution, be heard and determined in the National Capital Region.

258. 484 F2d 820 (D.C. Cir. 1973)

259. Also Canadian system, of course, but note that the Information Commissioner, who may have seen the document, will help to focus arguments if he appears. See supra, p. 131

serious burden on the time and resources of the court, which is especially tedious with no adversary debate to focus and narrow the analysis. There is an indirect incentive for agencies to submit the maximum amount of information in the hope that a busy judge will uncritically accept broad claims of exemption so as to avoid intensive review. The chances of a successful appeal will be very slim because the record will be inevitably scant, and the appellate tribunal will be unlikely to undertake its own in camera review. The case also set out guidelines for testing claims of exemption. Conclusory and generalized allegations of exemptions will no longer be accepted in agency affidavits. Detailed affidavits or testimony submitting detailed analysis in manageable segments must be provided. If a lengthy document is in issue, then the agency must specify which portions are allegedly exempt. The court requires systems of itemizing and indexing, correlating each claimed exemption to specific portions of contested documents. Such a list will also provide a more meaningful record for an appellate tribunal. If the court's task is still too burdensome, the court may designate a special master to examine the document.

Under the Australian proposals, appeal would be first to another officer in the same agency, whose review must be completed within fifteen working days. Then, unless a conclusive ministerial certificate has been issued, appeal lies to the Administrative Appeals Tribunal. The Tribunal could inspect the material in camera, and the burden of proof would be on the agency,

but the Tribunal would be confined to deciding whether the documents withheld are protected by the literal interpretation of one of the exemptions. Professor McMillan argues that the Tribunal should have a general power to decide whether technically exempt documents should be released in the public interest.²⁹⁶

To sum up, limited judicial review should be strictly reserved for those subjects involving "political judgment in its most classic form", i.e., in areas involving injuries to federal-provincial negotiations, international relations and defence.^{296a}

While it is desirable to have as much review as possible, this is probably the most realistic solution, in view of the constitutional structure in Canada and the apparent reluctance of judges to be involved in "political" decisions.^{296b} The courts should not be expected to decide what documents should be disclosed on the basis of public interest, without the guidance of well-defined statutory criteria.

(5) DISCIPLINARY PROCEEDINGS AND PENALTIES

Section 61 of Bill C-15 and section 66 of Bill C-43 make it an offence to obstruct the Information Commissioner or any

296. McMillan, op. cit., footnote 7, at p. 427; see also Mitchell, op. cit., footnote 103

296a CBA brief to Commons Justice and Legal Affairs Committee, Mar/81, quoted in National, April 1981, p. 2

296b See Colby, supra, p. 69; Evans, op. cit., footnote 19, at pp. 367-368 ("self-protective restraint"), 375-376

person acting on his behalf or under his direction, and impose a fine not to exceed one thousand dollars. The Canadian Bar Association Model Bill, on the contrary, imposes a term of imprisonment not to exceed five years for failing to comply with any provision of the Act or a court order, on the rationale that the government could simply pay a fine out of public monies.²⁹⁷

Under the American Freedom of Information Act, if a court finds in writing that an official has improperly withheld information, the Civil Service Commission is required to conduct an inquiry as to whether disciplinary action is warranted. The findings of the

297. CBA Model Bill, footnote 27, at p. 28

Commission and the recommended action are submitted to the administrative authority where the offender is engaged, and the administrative authority shall promptly take the disciplinary action recommended by the Commission. According to Professor McMillan, this power is central to any notion of the individual accountability of public servants and essential if the Act is to dislodge the "when in doubt - withhold" convention.²⁹⁸ There is no such provision in either Bill C-15 or Bill C-43.

To sum up, the penalty section in Bill C-43 is too vague. It should include failing to comply with any provision of the Act or a court order, and probably should impose imprisonment. There should also be provision for disciplinary proceedings for wrongful withholding of information.

(6) REPORTS

Section 37 of Bill C-15 (section 39 of Bill C-43) provides that the Information Commissioner shall submit an annual report to Parliament on the activities of the preceding year. Where the Commissioner believes that some matter within his powers, duties and functions is so urgent or important that a report on it should not be deferred, he may make a special report at any time. Any such report that relates to an investigation under the Act, however,

298. McMillan, op. cit., footnote 7, at p. 427; this power is also found in Sweden

shall be made only after the commissioner has reported to the head of the government institution, the complainant, and any third parties.²⁹⁹ Section 69 of Bill C-43 further provides that the head of every government institution shall prepare for submission to Parliament an annual report on the administration of the Act within the institution during the preceding fiscal year. The administration of the Act shall be reviewed on a permanent basis by a Parliamentary committee.³⁰⁰ Bill C-15 also provided that the committee should, within three years after the coming into force of the Act, undertake a comprehensive review of the provisions and operation of the Act, and submit a report to Parliament thereon, including a statement of any changes that the committee would recommend.

Anticipating that the Information Commissioner could act as a useful reporting agency to Parliament on the compliance of ministries and departments with the Act,³⁰¹ the Canadian Bar Association Model Bill provides in section 15 for an annual report. Section 34 requires an annual report to Parliament from each agency on the operation of the Act in relation to that agency, and sets out in detail matters that the report should include, such as the number of requests, number of refusals, number of appeals,

299. Section 38 of C-15; section 40 of C-43

300. Section 66 of C-15; section 72 of C-43

301. CBA Model Bill, footnote 27, at p. 14

amount of fees collected, facilities available for inspecting and copying documents, etc.

Under the amended American Freedom of Information Act each agency must submit an annual report to the House and Senate, which must include statistical information on the number of refusals, the reasons for withholding, the number of appeals with the result and reasons for each, a copy of the agency fee schedule with the total amount of fees collected during the year, the names and titles of the persons responsible for denials of records, the number of times each person was involved in a denial of a request for information, and such other information as would indicate efforts to administer the law properly. The Attorney-General must also submit an annual report listing the number of cases that have arisen in the federal courts under the Act. Ideally these should give Congress an indication whether the Freedom of Information Act is in fact achieving the goals of releasing information to the public.³⁰² The Congress held oversight hearings in 1972 and 1973 which uncovered numerous problems and abuses, many of which were corrected in the 1974 amendments.

To sum up, the provision in C-15 for a comprehensive review and report by the Parliamentary committee should have been retained, as it could uncover problems with the legislation. The legislation should also set out in detail the matters that the annual report from each government institution should include.

302. Michael P. Cox, A Walk Through Section 552 of the Administrative Procedure Act; The Freedom of Information Act; the Privacy Act; and the Government in the Sunshine Act, (1977),

46 Cincinnati Law Review 969, at p. 974

CHAPTER V
PRIVACY LEGISLATION

(1) CANADIAN HUMAN RIGHTS ACT, PART IV

At present the only federal legislation guaranteeing access to information is Part IV of the Canadian Human Rights Act, which deals with certain personal information in government files. It received Royal Assent in July, 1977 and became operational on March 1, 1978. Its objectives were (a) to inform individuals of the types of personal information that the government holds about them and the uses to which such information is put; (b) to provide a right of access for individuals to information about them held by government; (c) to control the way in which personal information held by the government is used and made available to others; and (d) to regulate the collection and storage of personal information. The legislation applies only to the boards and agencies included in the schedule. When the Bill was in Committee, it was criticized by the Canadian Bar Association on the basis that the exemptions were too broad, and that too much power was given to the appropriate minister, who had no supervision.

All personal information held by the government is stored in a series of information "banks" listed and described in an

302a. S.C. 1976-77, c. C-33

303. Chrétien, op. cit., footnote 187, at p. 1

304. Rankin, op. cit., footnote 2, at pp. 141-142

annual publication entitled "Index of Federal Information Banks" that must be made available throughout Canada, pursuant to section 51. Critics have suggested that having to search through an index is too complicated, but Privacy Commissioner Inger Hansen points out that this criticism appears to disregard the fact that simplification or a centralized system might result in a lessening of personal information rights. If the federal government were to establish a central storage facility for personal information, the right to object to proposed non-derivative administrative use of personal information provided by the individual would probably disappear. If the choice of banks to be searched were made by public servants, the individual seeking access would have lost a measure of control. As long as government departments and institutions keep separate information banks and as long as the individual concerned makes separate access requests, it is possible to provide some protection against the illegal passing of information.

305

The individual has access only to information that is used to make decisions about him (e.g., income tax returns, public service employment records and licence applications, but probably not investigatory files). The subject individual may also request correction of any record that he believes contains an error or omission, and require a notation on the record of a requested

305. Inger Hansen, *The Privacy Law and Inmates*, (1980), 4 *Provincial Judges Journal* 1, at p. 2

correction that has not been made.³⁰⁶ Before any personal information may be used for purposes that are, in the opinion of the Minister, inconsistent with the purposes for which it was originally provided, the subject individual must consent. This right is limited, however, to the use of data for "administrative purposes", i.e., decision-making affecting the subject individual. Presumably an agency could use it for investigatory purposes, or sell or give such data to outside agencies for any purpose at all, without obtaining consent.³⁰⁷

The individual's right of access is also subject to the exemptions in section 53 and 54, some of which are very broad. Under section 53, which deals with material disclosure of which would be injurious to international relations, national defence or security, or federal-provincial relations, or would disclose investigatory material, a whole bank may be exempted from access where it is recommended by the responsible Minister and an order in council to this effect is passed. Under section 54 a Minister may refuse access to a document contained in any of the remaining banks when he believes that one of the exemptions specified in the section applies. Approximately fifteen hundred information banks are listed in the Index, of which twenty are closed banks

306. Section 52

307. Franson, op. cit., footnote 9, at p. 42

under section 53. This provision is said to eliminate the need for detailed review of documents to which access would almost certainly be refused in any case. It also protects against accidental release of documents that could result in injury.³⁰⁸ These banks deal primarily with law enforcement information.

There is also a Privacy Commissioner (Inger Hansen) with the powers of an ombudsman to investigate complaints and make recommendations to the Minister concerned, but she cannot order release of a document that is being withheld.

The President of the Treasury Board is responsible for supervising administration of the Act and the way in which departments store and dispose of personal information. During the first year of operation there were 13,081 formal requests - one-half to the Canadian Corrections Service, the R.C.M.P. and the Department of National Defence; nearly one-third to the Canadian Corrections Service alone.³⁰⁹ Exemptions were claimed for documents in approximately 2400 instances, and 707 complaints

308. Chrétien, op. cit., footnote 187, at p. 15; according to the Privacy Commissioner, an individual's right of access to personal information can be denied by transferring sensitive information on so-called "troublemakers" to closed banks. Information banks still not foolproof, The Citizen, Nov. 20, 1980

309. Approximately half the complaints received by the Commissioner were from convicted persons, mostly about delays. A report on this matter revealed that the Solicitor General's Department did not appear prepared for the large volume of requests. The review process was complicated because unnecessary information had been placed on file, simply because it had been collected. In addition, there was resistance to a new policy on the part of the staff and fear of disclosure. Hansen, op. cit., footnote 305, at p. 26

were filed with the Privacy Commissioner. The total estimated cost of implementing and operating the legislation was three million dollars, including administrative costs to departments and agencies plus the cost of central coordination by the Treasury Board.³¹⁰
In 1979 only 6,636 new requests for access were made.³¹¹

(2) PRIVACY ACT (BILL C-43)

Bill C-15 did not attempt to deal with Part IV of the Canadian Human Rights Act, but it was felt that amendments were needed to ensure consistency with the Access to Information legislation, and to ensure that provisions in one statute cannot be used to circumvent the other, as has developed in the United States. The Canadian Government claims that the Freedom of Information Act is used to circumvent provisions in the Privacy Act,³¹² although American critics argue, on the contrary, that the Privacy Act is being used to circumvent the Freedom of Information Act.³¹³ The situation would be a little different in Canada, in that Bill C-43 gives no right of access to personal information, although the Minister has discretion to disclose in certain circumstances. In the United States, the onus is on the

³¹⁰. Chrétien, op. cit., footnote 187, at p. 15

³¹¹. Requests for information dwindle, *The Citizen*, Oct. 18, 1980

³¹². Chrétien, op. cit., footnote 187, at p. 5

³¹³. Marc Arnold and Andrew Kisseloff, An Introduction to The Federal Privacy Act of 1974 And Its Effect On The Freedom of Information Act, (1976), 11 *New England Law Review* 463, at pp. 477-493; Michelle Leslie Oxman, FOIA and Privacy Act Interface: Toward a Resolution of Statutory Conflict, (1977), 8 *Loyola University*

government and/or the person whose privacy is being invaded to establish that access amounts to a "clearly unwarranted invasion of privacy".³¹⁴

In Bill C-43 the scope of the legislation has been extended to provide access to all personal information under the control of a government institution that can reasonably be located by that institution.³¹⁵ A two-level review process, identical to that in the Access legislation, has been provided. All government institutions that must provide access under the Access to Information legislation must also provide access to personal information under the Privacy legislation. Like the Access legislation, the Privacy legislation includes a clause protecting Ministers and public servants acting in good faith under the legislation from proceedings under civil or criminal law.³¹⁶ There is a fine of up to one thousand dollars for obstructing the Privacy Commissioner.³¹⁷

The Privacy legislation has been removed from the Canadian Human Rights Act, because there is no necessary interrelationship between Part IV and the rest of the Act. It was felt that this arrangement did not give sufficient emphasis to the protection of privacy, so that many people were unaware of the

Law Journal 570, at pp. 578, 589-592; Gorski, op. cit., footnote 107, at p. 140

314. Chretien, op. cit., footnote 187, at pp. 3-4; see supra, Chapter III, Section (7)

315. Section 12

316. Section 72

317. Section 67

provisions. The only significant tie was that the Privacy Commissioner was a member of the Canadian Human Rights Commission, but the roles were quite different, which could lead to conflict and a confusion of functions. There was also some confusion because the scope of the two sets of provisions differed, in that Part IV applied only to the departments and agencies listed in the schedule.³¹⁸

Sections 4, 5 and 6 regulate the collection, retention and disposal of personal information, incorporating suitable provisions of the regulations made under the previous legislation and Treasury Board guidelines. No personal information shall be collected unless it relates directly to an operating program or activity of that government institution. Wherever possible, personal information for an "administrative purpose" should be collected directly from the subject individual. Individuals should be informed as to the purposes for which information is collected, unless this would result in the collection of inaccurate information or defeat the purpose or prejudice the use for which information is collected.³¹⁹ Personal information that has been used for an administrative purpose shall be retained long enough to ensure

318. Chrétien, op. cit., footnote 187, at pp. 7-9

319. This exception has been criticized as greatly reducing the effectiveness of the provision. Private and confidential, (Editorial), The Globe and Mail, Dec. 29, 1980, p. 6

that the subject individual has a reasonable opportunity to obtain access to the information. To the extent possible, government institutions should use only accurate, up-to-date and complete information to make decisions about individuals, and should dispose of information that is out-of-date.

Sections 7, 8 and 9 regulate the use and disclosure of personal information. It may not be used without the consent of the subject individual except for the purpose for which it was obtained or compiled or for a consistent use or for a purpose for which it may be disclosed under subsection 8(2). Subsection 8(2) details the purposes for which information may be disclosed without the consent of the subject individual. These are:

- (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
- (b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
- (c) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information;
- (d) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

- (e) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed;
- (f) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;
- (g) to a member of Parliament for the purpose of assisting the individual to whom the information relates in resolving a problem;
- (h) to officers or employees of the institution for internal audit purposes, or to the office of the Comptroller General or any other person or body specified in the regulations for audit purposes;
- (i) to the Public Archives for archival purposes;
- (j) to any person or body for research or statistical purposes if the head of the government institution
 - (i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and
 - (ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;

- (k) to any government institution for the purpose of locating an individual in order to collect a debt owing to Her Majesty in right of Canada by that individual or make a payment owing to that individual by Her Majesty in right of Canada; and
- (l) for any purpose where, in the opinion of the head of the institution,
 - (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or
 - (ii) disclosure would clearly benefit the individual to whom the information relates.

Copies of requests under paragraph (2)(e) must be retained, and made available to the Privacy Commissioner upon request. A record of any use or disclosure for a use or purpose not included in the index must be attached to the personal information. Where personal information is used or disclosed for a consistent use not included in the index, the head must notify the Privacy Commissioner and include the use in the next statement of consistent uses in the index. The provision in paragraph (e) is intended to balance effective law enforcement against the right of an individual to control use made of information about him. Otherwise, government institutions could not provide evidence of illegal activities except information relating to the commission of an offence in providing information. The requirement that requests must be in writing and specify the purpose is intended to prevent "fishing

expeditions". Paragraph (f) provides for the exchange of information between police forces.³²⁰

Section 11 sets out the material that must be included in the personal information bank index. Whereas Part IV required only the name or identification of each bank, the type of records stored therein, the derivative uses of those records and such other information as prescribed by the regulations, Bill C-43 adds the registration number; a description of the class of individuals to whom the personal information contained in the bank relates; the title and address of the appropriate officer to whom requests should be sent; a statement of the retention and disposal standards; and an indication, where applicable, that the bank was designated as an "exempt bank" by an order made under section 18 and the provision of section 21 or section 22 on the basis of which the order was made.

Section 12 provides the right of access. Besides the rights of correction and notation found in Part IV, Bill C-43 provides that the subject individual may require that any person or body to whom such information has been disclosed for use for an administrative purpose, within two years prior to the time a correction is requested or a notation required, be notified of that correction or notation.^{320a}

The standard time limit for answering a request for

320. Chrétien, op. cit., footnote 187, at pp. 10-14

320a..Cf. U.S. Act: any disclosure of which accounting kept

access is thirty days,³²¹ which may be extended by up to thirty days if

- (i) meeting the original time limit would unreasonably interfere with the operations of the government institution, or
- (ii) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or

for a "reasonable" period of time if additional time is necessary for translation purposes, by giving notice of the extension and the length of the extension to the requestor and informing him that he may complain to the Privacy Commissioner.

If access is refused, the head must state that the personal information does not exist, or state the specific provision of the Act on which the refusal was based or could be based if the information existed, but as under the Access legislation,³²² he need not indicate whether the personal information exists. The individual must be informed of his right to make a complaint to the Privacy Commissioner about the refusal. A failure to give access is a deemed refusal.

Under section 18 the Governor in Council may by order designate as "exempt banks" certain personal information banks

321. Section 14

322. See supra, pp. 39-40. A similar provision in the U.S. Justice Dept. regulations has been criticized as contravening the mandate of the Privacy Act that there be no secret maintenance of records. Oxman, op. cit., footnote 313, at p. 579

that contain files all of which consist predominantly of personal information described in section 21 or 22,³²³ specifying the basis of the order. Section 53 of Part IV was broader, in that it did not require that most of the information in the files would come under the headings set out. The head may refuse to disclose any personal information contained in an exempt bank.

The Privacy Act also has various exemptions for individual records, similar to those in the Access legislation and subject to the same criticisms. The Privacy Act adds some other exemptions. Section 23 exempts personal information connected with security clearances if disclosure would reveal the identity of the individual who furnished the information.³²⁴ Section 24 exempts personal information collected or obtained by the Canadian Penetentiary Service, the National Parole Service or the National Parole Board while the requestor is under sentence for an offence against any Act of Parliament, if the disclosure could reasonably be expected to lead to a serious disruption of the individual's institutional, parole or mandatory supervision program, or reveal information about the individual originally obtained on a promise of confidentiality,³²⁵ express or implied. Section 26 exempts personal information

323. International affairs and defence; law enforcement and investigation - similar to sections 15 and 16 of Access legislation

324. Cf. (k) (3) of U.S. Act, infra; source must have furnished information under express promise of confidentiality (or implied promise if before legislation came into effect)

325. Cf. (j)(2) of U.S. Act, infra

about an individual other than the requestor. Section 29 exempts medical records where a duly qualified medical practitioner or psychologist certifies that examination of the information by the individual would be contrary to the individual's best interests.³²⁶ Most of these exemptions appeared in Part IV, sometimes in slightly different form.

In addition to investigating complaints, the Privacy Commissioner may investigate exempt banks to confirm that all files belong in that bank,³²⁷ and apply to the Court under section 44 if appropriate action is not taken within a reasonable time on her recommendations. She may also investigate the manner in which personal information is used or disclosed to ensure compliance with section 7 and 8.³²⁸ The Privacy Commissioner must make an annual report to Parliament on the activities of the office during the preceding fiscal year.³²⁹ She may make a special report at any time,³³⁰ or the Minister of Justice may refer a study to the Commissioner.³³¹

326. The Krever Commission in Ontario proposed that an impartial health commissioner be appointed to adjudicate situations where hospitals are reluctant to tell patients the contents of their medical files. The commissioner's decision could be appealed to the County Court or Supreme Court. The Mental Health Act should be amended to give patients access to their clinical record during a medical hearing. Students age 16 and over, or their parents, should have the right to inspect information obtained for a board of education by a local public health agency. Kerra Lockhart and David Evans, Health file security demanded, *The Citizen*, Dec. 31, 1980

327. See footnote 308. The Commissioner cannot disclose anything in exempt banks or confirm or deny the existence of a record. Information can also be transferred to project files, which do not deal with individuals and are not open to the public.
Ibid.

As under the Access legislation, appeal lies to the Federal Court after an investigation by the Commissioner. Where the Commissioner applies under section 44 for a review of a file contained in an exempt bank, the Court can order the file removed if it determines

- (a) in the case of a file contained in the bank on the basis of personal information described in paragraph 22(1)(a) or subsection 22(2), that the file should not be included therein, or
- (b) in the case of a file contained in the bank, ³³² on the basis of personal information described in section 21 or paragraph 22(1)(b), that reasonable grounds do not exist on which to include the file in the bank.

Section 56 provides that the Information Commissioner may be appointed as Privacy Commissioner. There are said to be several advantages to such an arrangement: (1) consistency in interpretation; (2) avoidance of potential conflicts between the Commissioners; (3) lower operating costs as only one administrative support staff would be needed. The disadvantages would be that the workload might lessen personal contact, and the profile of the Privacy Commissioner could be diminished. ³³³

328. Section 38

329. Section 39

330. Section 40

331. Section 59

332. Injurious to international affairs or defence; injurious to law enforcement, the conduct of lawful investigations by an investigative body specified in the regulations or the security of penal institutions. Cf. section 51 of Access legislation

333. Chrétien, op. cit., footnote 187, at pp. 17-18

To sum up, the extended scope of the proposed Act and a more effective review process are commendable. In view of the difficulties in the United States, it is probably wise to make provisions of the Access and Privacy legislation consistent. The requirement to use accurate information should be strengthened. Institutions should be required to keep records of all uses and disclosures, so that the subject individual will know who has received information about him and for what purpose. Publication of consistent uses should precede use or disclosure in all cases. There should be more effective controls on the collection of personal information. Limited judicial review should be strictly reserved for areas involving "political judgment in its most classic form", i.e., injuries to federal-provincial negotiations, international relations and defence.^{333a}

(2) AMERICAN PRIVACY ACT 1974

The Privacy Act was the first comprehensive statute governing the federal executive agencies and departments in their collection and handling of information pertaining to individuals. Its major purposes, as set forth in the Senate Report,³³⁴ were

333a. See supra, p. 46

334. Quoted in Arnold and Kisseloff, op. cit., footnote 313, at p. 463

... to promote governmental respect for the privacy of citizens ... to promote accountability, responsibility, legislative oversight and open government with respect to ... personal information systems ... and files ... to prevent the kind of illegal, unwise, overbroad investigation and record surveillance of law-abiding citizens produced in recent years ... to prevent the secret information systems or data banks ... by agencies of the executive branch.

According to Senator Charles Percy, many federal agencies "[had] become omnivorous fact-collectors - gathering, combining, using and trading information about persons without regard for his or her rights of privacy".³³⁵ The Act was passed hastily, as a result of private meetings between the respective House and Senate sponsors and their staffs. Because a full conference committee report is not available, there is little legislative guidance with respect to some aspects of the Act.³³⁶

The Act gives subject individuals a specific right to ascertain the existence of and obtain access to records contained in a "system of records".³³⁷ He may challenge the accuracy,

335. David F. Linowes, *The Privacy Act Looks at Business*, (1976), 42 *Vital Speeches* 273; as of 1975, more than eight thousand systems from which agencies retrieve information by reference to an individual's name or some other personal identifier. (*ibid.*)

336. Gorski, *op. cit.*, footnote 107, at pp. 137, 159

337. Nothing in the Act dictates the specificity required in a request. Different agencies have different requirements, but some will help the requestor define his request. Oxman, *op. cit.*, footnote 313, at p. 573

timeliness or completeness of information in his record and ask the agency to amend it. Where the agency refuses, the individual must be notified of the reason and of his right to appeal to the head of the agency.³³⁸ The agency must complete review within thirty days unless the head extends the period "for good cause shown".³³⁹ If the agency still refuses, the individual must be informed of his right to judicial review. The individual may also file with the agency a concise statement of his reasons for disagreement with the decision, which must be included in any subsequent disclosure by the agency containing the information under dispute. The agency must also notify of any corrections or notations of dispute any agency or person to whom disclosure has been made, to ensure that the disclosed record will remain up-to-date and accurate.

The subject individual may obtain access to and a copy of his record, unless disclosure of the information would reveal the identity of a source who gave information to the government under an express promise of confidentiality, or unless the system of records that includes his file has been properly exempted by

338. The Act does not provide for administrative review of denial of access or failure to respond to a request, although specific agency regulations may provide for review.

339. The Act does not specify what constitutes "good cause" or to whom it must be shown; neither is there any statutory limit upon an extension of time. Oxman, op. cit., footnote 313, at p. 576. Cf. section 14 of C-43(Privacy)

the agency. The exemptions are not automatic, like exemptions from the Freedom of Information Act, but every exemption must be published in the Federal Register, showing (1) the name of the system, (2) the specific provision of the Act from which the system is to be exempted, and (3) the reasons for exempting the system. Such notice is to be followed by public hearings. After the hearings, the exemption is published as an administrative rule in accordance with the requirements of the Administrative Procedure Act.

A system of records maintained by the Central Intelligence Agency or a criminal law enforcement agency may be exempted from all provisions of the Privacy Act except those dealing with (1) conditions of disclosure; (2) accounting of disclosures; (3) publication of notice, existence and nature of a system of records; (4) particular record management standards; and (5) criminal penalties. The Central Intelligence Agency has promulgated rules that effectively exempt most of its records simply on the grounds that the material has been compiled by that agency. Although patterned after exemption seven under the Freedom of Information Act, the general Privacy Act exemption (j) is narrower in scope in that it does not cover civil law enforcement records, which are treated under (k)(2), but broader in that it covers records compiled before, during and after the trial of a criminal defendant. It includes not only police activities, but

also the activities of prosecutors, courts and correctional, probation, pardon and parole authorities. The record must pertain to a specific individual and fall within one of three specified categories: (1) information compiled in order to identify criminal offenders and alleged offenders, comprised only of identifying data and criminal history; (2) information compiled for a criminal investigation associated with an identifiable individual; or (3) reports compiled at any stage of an enforcement proceeding from arrest through release from supervision. These are all much broader than exemption seven.³⁴⁰ Although these agencies are prohibited from maintaining secret record systems, they may exempt their record systems not only from the access and challenge provisions of the Act, but also from the grant of jurisdiction to the federal courts. Thus there is no way that an individual refused access can challenge the propriety of the exemption. Fifteen Justice Department record systems have been so exempted. An agency may maintain inaccurate or irrelevant information in an individual's file indefinitely, since he cannot challenge the contents.³⁴¹

340. Gorski, op. cit., footnote 107, at pp. 162-163; Oxman, op. cit., footnote 313, at p. 582

341. Oxman, op. cit., footnote 313, at p. 582; cf. exempt banks under section 18 of C-43

In addition, there are seven specific exemptions under (k): (1) matters covered by the national security exemption under the Freedom of Information Act; (2) investigatory material compiled for law enforcement purposes; (3) matters maintained in connection with providing protective services to the President of the United States; (4) records required by statute to be maintained and used solely for statistical purposes; (5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified material; (6) testing or examination material used solely to determine individual qualifications for appointment or promotions in the federal service, disclosure of which will compromise the objectivity or fairness of the testing or examination process; or (7) evaluation material used to determine potential for promotion in the armed services. Of (k)(1), the ³⁴² Senate Report states:

This section is not intended to provide a blanket exemption to all information systems or files maintained by an agency which deals with national defense or foreign policy information. Many personnel files and other systems may not be subject to security classification or may not cause damage to the national defense or foreign policy simply by permitting the subjects of such files to inspect them and to seek changes in their contents under this act.

342. Gorski, op. cit., footnote 107, at p. 165

Clause (k)(2) is intended to prevent warning the subjects of investigations, who might then be able to escape detection or prosecution. The Guidelines of the Office of Budget and Management provide that to the extent that an investigatory record has been used as a basis for denying an individual any right, privilege or benefit (including employment) to which the individual would be entitled in the absence of that record, the individual must be granted access to that record except to the extent that access would reveal the identity of a confidential source. This exemption applies only to materials compiled during the investigatory stage. Clause (k)(3) is intended to allow agencies such as the Bureau of Census to compile statistical data without the hindrance of requests for access which would provide little benefit. The Guidelines suggest that material exempted under clause (k)(6) should be limited to test questions, answers or procedures.

343

344

345

Unlike the general exemption, which lists the particular provisions from which information may not be exempted, this lists the provisions from which information may be exempted: accounting of disclosures; access to records; relevancy restrictions; notice

-
343. Responsible for implementing the Act and encouraging agency compliance, as the Justice Dept. is responsible for defending suits against agencies under the Act.
344. Such material would usually be available under the Freedom of Information Act as "purely factual", unless the strict controls on the use of some statistical data would bring it under exemption three. Gorski, op. cit., footnote 107, at pp. 168-169.
345. Ibid., at pp. 166-170

346

requirements; and agency rule-making requirements.

An individual can challenge in a Federal District Court the propriety of any exemption, unless the system has been exempted from the grant of jurisdiction, and ask the Court to enjoin the agency from withholding. The Court can examine in camera only those records exempted under (k), however. An individual can also bring an action in a Federal District Court, after exhausting his administrative remedies, to expunge information from a record. Standing requirements would be satisfied by a final agency determination to deny access or refuse to amend, which constitutes a "cognizable legal injury".³⁴⁷

As a general rule, no record contained in a system of records may be disclosed to any other person or to another agency except with the written consent of the subject individual. Because such an absolute rule would unduly hinder the functioning of government, there are eleven exceptions. A record may be disclosed to "those officers and employees of an agency which maintains the record who have a need for the record in the performance of their duties"; if required under the Freedom of Information Act; for a "routine use", i.e., a use compatible with the purpose for which the information was initially collected, and its selection as a routine use must be published in the Federal Register so that

346. It has been argued that allowing agencies to exempt their record systems from the relevancy requirement is unjustifiable, and undermines the avowed purposes of the Act. Oxman, op. cit., footnote 313, at pp. 584-585

347. Arnold and Kisseloff, op. cit., footnote 313, at p. 471

there is an opportunity for public comment. By denominating a use as "routine", an agency may freely transfer records between agencies and outside the federal government. The remaining eight exceptions deal with information gathered for the Bureau of the Census; for statistical research; for the National Archives; for law enforcement; for health or safety; for either House of Congress; for the Comptroller General; or pursuant to an order of a court of competent jurisdiction.³⁴⁸

For each disclosure (except within agencies or necessitated by the Freedom of Information Act), an accounting must be made including the date, nature and purpose of each disclosure, and the name and address of the agency or person to whom disclosure is made. This accounting must be kept for five years or the life of the record, whichever is longer, and it must be available to the individual, except where the disclosure was for law enforcement purposes.³⁴⁹ Prior to releasing any information, except for intra-agency and Freedom of Information Act disclosures, the agency must make reasonable efforts to ensure the accuracy of its records. Because of these exceptions, even if the subject individual later gains access to his record and obtains amendment, a recipient of inaccurate information under the Freedom of Information

348. Cf. subsection 8(2) of C-43

349. Cf. subsection 8(3) of C-43; notice to Privacy Commissioner of law enforcement disclosure.

Act will not receive notification because no accounting of such disclosures is required. If the record is exempted from access, the subject individual may never know that the government maintained such information, that it was disclosed, or that it may have been used against him by the recipient. It would be impossible to prove harm caused by a failure to comply with the Act without knowing who had received the information.³⁵⁰

An agency may collect only relevant information necessary to accomplish a purpose required by statute or executive order. It is prohibited from maintaining records on the manner in which an individual exercises First Amendment rights³⁵¹ unless expressly authorized by statute or by the individual or unless it is pertinent to and within the scope of an authorized law enforcement activity. If the collection process could result in a determination adverse to the "individual's rights, benefits, and privileges under federal programs", information should be gathered directly from the individual involved, to the greatest possible extent. The agency must provide the person being questioned with a statement of its authority to solicit information, the purpose for which the information is being solicited, the routine uses of the

350. Oxman, op. cit., footnote 313, at pp. 585-586

351. Freedom of religion; freedom of speech; right to assemble peaceably, and to petition the Government "for a redress of grievances"

information, and the consequences of refusing to provide it. ³⁵²

An individual who cannot show an "adverse effect" cannot enjoin the collection of any type of information by an agency, since the only injunctive relief is that of enjoining the agency from withholding information from the individual. If he could show actual injury, the standing requirements would be satisfied, and he could enjoin collection through the court's general equity powers without recourse to the Privacy Act. ³⁵³

It is unlawful for any federal, state or local government to deny to any individual any right, benefit, or privilege provided by law because of that individual's refusal to disclose his social security account number, but this does not apply with respect to any disclosure required by federal statute, or disclosure to any federal, state or local agency maintaining a system of records in existence and operative before January 1, 1975, if such disclosure is required under statute or a regulation adopted prior to that date to verify the identity of an individual. Any federal, state or local government agency that requires an individual to disclose his social security account number must inform that individual whether that disclosure is mandatory or voluntary, by

352. Cf. weaker provision under section 5 of C-43

353. Arnold and Kisseloff, op. cit., footnote 313, at p. 473

what statutory or other authority the number is solicited, and what uses will be made of it.

There are four civil causes of action for an agency's non-compliance: (1) refusal to amend or correct a record in a system of records; (2) refusal to grant access to records by the individual concerned; (3) failure to keep accurate records; (4) failure to comply with any other provision of the Act. Any infringement of the new substantive rights of access and amendment constitutes a "cognizable legal injury". In other cases, the plaintiff must show that the failure to comply with any other provision has had "an adverse effect" on him, or that the agency has made an "adverse determination" on the basis of information that was not maintained in accordance with the standards of "accuracy, relevance, timeliness and completeness" required by the Act, and that either of these adverse consequences resulted from "intentional or willful" action by the agency.

354. The Williams Commission in Ontario recommended that provincial government institutions should not be allowed to deny rights or benefits to people who refuse to provide their social insurance number (SIN). The Government could demand the SIN only if it was required by law or by the regulatory body set up to review privacy legislation, and it must tell the individual if disclosure is mandatory or voluntary, what law requires disclosure and what will be done with the number. -Privacy Commissioner Inger Hansen recently completed a study on SIN use, ordered in Feb., 1980 by then Justice Minister Jacques Flynn. It was found that the real threat to privacy comes from the possibility of extensive computer linkage of personal data. There is no evidence that prohibiting collection and use of SINs will eliminate sharing of information in computerized data banks. The need for the number will decrease

Any agency officer or employee who knowingly and willfully discloses a record contrary to the Act or who willfully maintains a system of records not permitted by the Act, or any person who knowingly and willfully requests or obtains any record under false pretenses, is guilty of a misdemeanor and shall be fined not more than five thousand dollars. The criticism has been made that the criminal penalties are not a significant enforcement tool, in that they are limited in scope and require a high degree of scienter.³⁵⁶

It has been suggested that the Privacy Act could be improved by increasing the rights of individuals to bring suit to enjoin improper collection and dissemination of information, without the necessity of showing an "adverse effect" as a condition precedent to any relief, and thus enable the individual to protect himself against the sort of improper disclosure that the civil remedies in the Act allow him to redress after the fact. The burden of proof for recovery of civil damages should be reduced from "wilful and intentional" action by the agency to a simple negligence standard. A regulatory body should also be created, with broad powers to enforce agency compliance with the Act, and there should be uniform standards for the maintenance of records.³⁵⁷

as the speed and scope of computer capacity increases and the cost decreases. She proposes a Criminal Code amendment creating "an offence against the privacy of another", which would prohibit data linkage by persons, corporations or governments unless the individual consents, it is provided for elsewhere in law or is implicit in the original purpose for which the information was gathered. Don Butler, Penalties for SIN abuses urged, The Citizen, Apr. 1, 1981

355. Arnold and Kisseloff, op. cit., footnote 313, at pp. 471-473

The Privacy Act set up the Privacy Protection Study Commission, an independent seven-member body, headed by David Linowes, to study various aspects of the problem of privacy protection and report its recommendations to the President and Congress. It was charged with determining whether or not the principles and requirements of the Privacy Act should be extended to the private sector, and if so, to what extent. As well, it was also charged with monitoring the success of the Act with a view to recommending whether or not it should be amended. The Commission conducted research and public hearings in the areas of medical records; credit grantors, credit cards, credit reporting and credit investigations; employee and personnel records; welfare records and other records of social service agencies; the record-keeping practices of the insurance industry; the use of the Social Security number as a universal identifier; and mailing lists. ³⁵⁸

In 1977 the Commission made its recommendations, which resulted in four Bills introduced in April 1979. The areas covered were scientific research, medical treatment, commercial transactions and communications. In the area of scientific research, the legislation would formalize (i.e., enforce) the pledges of

356. Arnold and Kisseloff, op. cit., footnote 313, at p. 468

357. Ibid., at pp. 493-496

358. Linowes, op. cit., footnote 335, at pp. 273-274

confidentiality commonly made to research subjects. Researchers would be prohibited from releasing information to anyone unless the subject was informed, and failure to comply would make them subject to a five thousand dollar fine and the possibility of a civil suit by the subject. The requirement for the pledge could be waived by an institutional review board, an authorized body that approves research proposals. Scientists would be barred from recontacting subjects of earlier research without the approval of an independent body such as an institutional review board. Researchers could not see individual files compiled by other researchers unless they first signed a pledge of confidentiality. In the area of medical treatment, the general rule would be that individuals would have the right to see their own medical records, but that others could not see the records without their prior consent. There were, however, twenty-two exceptions to the rule. The legislation would also prevent the use of blanket disclosure authorizations, and provide a penalty for obtaining records under false pretenses. In the area of communications, the legislation would prohibit the search or seizure by law enforcement authorities of a "work product", such as a manuscript, if the author was engaged in disseminating information to the public. Although it was intended primarily to apply to the media, the legislation would also apply to academic faculty. A subpoena would be necessary to seize uncompleted work.³⁵⁹ This last Bill was enacted in October, 1980

359. Carter Privacy Bills Cover Research, Medicine, (1979), 204
Science 284

as the Protection of Privacy Act, 1980.³⁶⁰ The other Bills do not appear to have been passed.

(4) RELATIONSHIP BETWEEN THE PRIVACY ACT AND THE FREEDOM OF INFORMATION ACT

The Privacy Act, which restricted agency discretion to disclose individual records, was passed within a month of the amendments to the Freedom of Information Act strengthening citizen access. The Freedom of Information Act's objective of maximum disclosure cannot be achieved without some invasion of privacy. Similarly, absolute protection of the privacy of record subjects cannot be achieved without compromising the public's right to full disclosure. Some balance must be attained, but conflicts between the two statutes could defeat the legislative purpose behind both.³⁶¹

Generally, an individual seeking information regarding a third party must proceed under the Freedom of Information Act, unless the requestor qualifies under one of the eleven conditions of disclosure, e.g., the release of information about recently arrested persons is permitted as a routing use. If disclosure would not be a clearly unwarranted invasion of privacy³⁶² or

360. 96 Stat. 440 (42 U.S.C. 2000aa)

361. Oxman, op. cit., footnote 313, at pp. 570-571

362. There is concern that the policies expressed by the Privacy Act may influence the courts to give greater weight to personal privacy interests in construing exemption (b)(6) and thus forbid disclosure in some situations where it was previously required. More material will be governed exclusively by the Privacy Act, and thereby effectively prohibited from disclosure to third party requestors. Arnold and Kisseloff, op. cit., footnote 313, at pp. 484-486

prohibited by any other exemption under the Freedom of Information Act, then the file must be released, notwithstanding any exemption under the Privacy Act.

If the information sought relates to the requestor, disclosure may also be sought under the Privacy Act. Fees under the Privacy Act are only for copying costs, not for search fees as under the Freedom of Information Act. If the system which contains the record has not been exempted from the access provisions of the Privacy Act, the individual will be able to obtain more information under the Privacy Act than under the Freedom of Information Act because the exemption for intra-agency and inter-agency memoranda would not apply. Another advantage is the right to challenge the contents of one's record.³⁶³

The Justice Department originally contended that the Privacy Act was the sole means available to individuals to obtain access to their own records. If a system of records was exempted under the Privacy Act, the requestor would obtain nothing under either statute.³⁶⁴ This interpretation has been modified to some extent, but the Justice Department Regulations remain ambiguous.

363. Oxman, op. cit., footnote 313, at p. 578

364. This contention must operate through Freedom of Information Act exemption three - the system of records is "specifically exempted from disclosure by statute", i.e., by the Privacy Act. Arnold and Kisseloff, op. cit., footnote 313, at pp. 487-488

Regulation 16.57(a) provides that any request by a record subject for his or her file will be processed under the Department's Privacy Act regulations, and the release of any records beyond the requirements of the Privacy Act is a matter of the system manager's discretion. Paragraph (b) provides that a requestor "shall receive" all records within the scope of the request to which the individual "would have been entitled" under the Freedom of Information Act "but for the enactment of the Privacy Act" and the agency's exemption of the system under the Act.³⁶⁵ The manager apparently has discretion to withhold any material not required to be released under the Privacy Act, whether or not the requestor is entitled to information under the Freedom of Information Act.³⁶⁶

If information has been exempted from disclosure under paragraph (j) and the system has also been exempted from the grant of jurisdiction,³⁶⁷ there may be some question whether an individual can contest the withholding in court. If the request was made only under the Privacy Act, the court probably has no jurisdiction, but it has been argued that if it was made under both Acts, the jurisdictional provisions of the Freedom of Information Act should apply, notwithstanding the agency's policy

365. This clearly implies that the Department interprets the Privacy Act as repealing by implication the Freedom of Information Act's grant of access so far as it applies to requests by individuals for their own records. Oxman, op. cit., footnote 313, at p. 578; see also Arnold and Kisseloff, op. cit., footnote 313, at p. 490

366. Oxman, op. cit., footnote 313, at p. 579

367. See supra, p. 158

of treating all requests as being made under the Privacy Act unless it specifies that it is being made only under the Freedom of Information Act.³⁶⁸

An individual whose objective is to obtain the maximum disclosure should state that the request is made primarily under the Freedom of Information Act, and that he requests, in addition, any other records that may be available under the Privacy Act. It may even be desirable, when dealing with an agency whose regulations are similar to those of the Justice Department, to make a separate request under each Act.³⁶⁹

In order to protect the right of public access under the Freedom of Information Act, clause (b)(2) of the Privacy Act expressly removes from the operation of the Privacy Act disclosures required under the Freedom of Information Act, but it appears that the potential impact of the Privacy Act exemptions on the newly-expanded rights of access under the Freedom of Information Act were not fully appreciated or considered by Congress. As it cannot seriously be contended that Congress made a considered determination to repeal the amendments only a few weeks after they were enacted, the statutes must co-exist. It has been argued that the access

368. Oxman, op. cit., footnote 313, at p. 579

369. Ibid., at p. 580

provisions of the Privacy Act are for the most part intended to allow an individual to obtain his entire record, but that allowing agencies to exempt certain records from this unrestricted access is not inconsistent with continuing to permit the more limited access available under the Freedom of Information Act. Because agencies are not forbidden to use regulations exempting records systems from access under the Privacy Act as a basis for denying requests under the Freedom of Information Act, there is a danger that they may use the Privacy Act to undermine the right of public access under the Freedom of Information Act.³⁷⁰

370. Oxman, op. cit., footnote 313, at pp. 589-592; see also Arnold and Kisseloff, op. cit., footnote 313, at pp. 491-493

CONCLUSIONS

Bill C-43 could be improved and made more effective by restricting use of limited judicial review to international relations, defence and federal-provincial negotiations; reform of the classification system for documents, which could then serve as the basis for the international relations and defence exemption; a law enforcement exemption based on a narrowly defined injury test; provision for more effective balancing of competing interests with regard to personal information; provision for the Access legislation to take precedence over confidentiality provisions in other legislation, except where such other provisions are expressly stated to apply notwithstanding the Access legislation; lower fees; and tighter controls on government collection and use of personal information.

BIBLIOGRAPHY

STATUTES

Freedom of Information Act, Bill C-15, First Session, Thirty-first Parliament, 28 Elizabeth II, 1979

Access to Information Act; Privacy Act, Bill C-43, First Session, Thirty-second Parliament, 29 Elizabeth II, 1980

Freedom of Information Act, 5 U.S.C. Section 552 (1970 & Supp. IV 1974)

Privacy Act, 5 U.S.C. Section 552a (Supp. IV 1974)

BOOKS AND REPORTS

Chrétien, Jean. Privacy Legislation. (Cabinet Discussion Paper, 1980)

Fox, Francis. Access to Information Legislation. (Cabinet Discussion Paper, 1980)

Franson, Robert T. Access to Information: Independent Administrative Agencies. A Study Prepared for the Law Reform Commission of Canada (1979)

Kernaghan, Kenneth. Freedom of Information and Ministerial Responsibility. Research Publication Prepared for the Commission on Freedom of Information and Individual Privacy, Province of Ontario (1978)

Rankin, T. Murray. Freedom of Information in Canada: Will the doors stay shut? A research study prepared for the Canadian Bar Association (1977)

Roberts, John. Legislation on Public Access to Government Documents. (Green Paper, 1977)

Administrative Secrecy in Developed Countries. Edited by Donald C. Rowat. (New York: Columbia University Press, 1979)

Freedom of Information in Canada: A Model Bill. Prepared by the Special Committee on Freedom of Information, Canadian Bar Association (1979)

BIBLIOGRAPHY

(2)

ARTICLES

- Arnold, Marc and Andrew Kisseloff. "An Introduction to The Federal Privacy Act of 1974 And Its Effect On The Freedom of Information Act" (1976), 11 New England Law Review 463
- Atkey, Ronald G. "Freedom of Information: The Problem of Confidentiality in the Administrative Process" (1980), 18 University of Western Ontario Law Review 153
- Bazillion, Richard J. "Access to Departmental Records, Cabinet Documents, and Ministerial Papers in Canada" (1980), 43 American Archivist 151
- Berkman, Eileen J. "The Reverse-FOIA Lawsuit: Routes to Nondisclosure After Chrysler" (1980), 46 Brooklyn Law Review 269
- Butler, Don. "Penalties for SIN abuses urged" The Citizen, Apr. 1, 1981
- Clement, Daniel Gorham. "The Rights of Submitters To Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Lawsuit" (1977), 55 Texas Law Review 587
- Cohen, Stanley A. "Freedom of Information and the Official Secrets Act" (1979), 25 McGill Law Journal 99
- Cox, Michael P. "A Walk through Section 552 of the Administrative Procedure Act: The Freedom of Information Act; the Privacy Act; and the Government in the Sunshine Act" (1977), 46 Cincinnati Law Review 969
- Delekta, Diane Hubel. "Federal Open Market Committee of the Federal Reserve System v. Merrill: Delayed Disclosure to Protect Government Interests Under the Freedom of Information Act" (1980), 2 Detroit College of Law Review 669
- Evans, J.M. "Comment" (Public Interest Immunity and State Papers) (1980), 58 Canadian Bar Review 360
- Evans, Keith R. "Nova Scotia Freedom of Information Act" 1979 Dalhousie Law Journal 494
- Furby, Tommy E. "The Freedom of Information Act: A Survey of Litigation Under the Exemptions" (1977), 48 Mississippi Law Journal 784

BIBLIOGRAPHY

(3)

- Gaudet, Roland. "New Brunswick: Secrecy - reversing the trend" Perception, July-August, 1979, 40
- Gorski, James M. "Access to Information ? Exemptions From Disclosure Under the Freedom of Information Act and the Privacy Act of 1974" (1976), 13 Willamette Law Journal 135
- Gray, Grattan. "Will freedom of information help or hinder business ?" (Sept. 1979) 52 Canadian Business 14.
- Hansen, Inger. "The Privacy Law and Inmates" (1980), 4 Provincial Judges Journal 1
- Hill, Bert. "Minister faced information drought" The Citizen, Mar. 4, 1981
- Knoppers, Jake. "A Freedom of Information Act and the Future of Social Science Research" (1979), 7 Social Sciences in Canada (No. 4) 9
- Linowes, David F. "The Privacy Act Looks at Business" (1976), 42 Vital Speeches 273
- Lockhart, Kerra and David Evans. "Health file security demanded" The Citizen, Dec. 31, 1980
- McCabe, Aileen. "Requests for information dwindle" The Citizen, Oct. 18, 1980
- McCabe, Aileen. "Canadian Bar backs information bill" The Citizen Mar. 20, 1981
- McMillan, John. "Freedom of Information in Australia: Issue Closed" (1977), 8 Federal Law Review 379
- Madans, Alan S. "Developments Under the Freedom of Information Act - 1979" 1980 Duke Law Journal 139

|

BIBLIOGRAPHY

(4)

- Mitchell, Heather. "Information still isn't quite free" Maclean's, Sept. 15, 1980, p. 6
- Oxman, Michelle Leslie. "FOIA and Privacy Act Interface: Toward a Resolution of Statutory Conflict" (1977), 8 Loyola University Law Journal 570
- Oziewicz, Stan. "Access to government information, appeal system urged" The Globe and Mail, Sept. 18, 1980, p. 1
- Oziewicz, Stan. "Tories plan information, privacy bills this fall" The Globe and Mail, Sept. 19, 1980, p. 4
- Oziewicz, Stan. "Some of Ontario's 'secret law' is made public" The Globe and Mail, Sept. 27, 1980, p. 4
- Peterson, Trudy Huskamp. "After Five Years: An Assessment of the Amended U.S. Freedom of Information Act" (1980), 43 American Archivist 161
- Rankin, T. Murray. "Freedom of Information: Two Research Publications" (1979), 5 Canadian Public Policy 413
- Relyea, Harold C. "The provision of government information: the federal Freedom of Information Act experience" (1977), 20 Canadian Public Administration 317
- Relyea, Harold C. "Freedom of Information, Privacy, and Official Secrecy: The Evolution of Federal Government Information Policy Concepts" (1980), 7 Social Indicators Research 137
- Riley, Tom. "FOI movement making gains around world" 7 National (July-August 1980) 22
- Rowat, Donald C. "Freedom of Information: The American Experience" (1978), 58 Canadian Forum (Sept.) 10
- Taylor, Rupert J. "The Electronic Gossips" Canada & the World Sept., 1979, p. 20
- Wilkerson, Carl. "Reconciling The Conflicting Goals Of The Right To Know And The Right To Privacy Under The Freedom Of Information Act" (1977), 25 Chitty's Law Journal 217

BIBLIOGRAPHY

(5)

- Williams, Robert J. "Official Secrets and Open Government: A Reappraisal" (1979), 50 Political Quarterly 100
- Wintour, Patrick. "What the White Paper should have said" New Statesman, July 21, 1978, p. 76
- "British reject reform of secrecy system" The Citizen, Jan. 8, 1981
- "Carter Privacy Bills Cover Research, Medicine" (1979), 204 Science 284
- "Changes sought in secrecy law" The Citizen, Oct. 18, 1980
- "C.I.A./F.O.I.A." (Editorial) The Nation, Apr. 26, 1980, p. 483
- "Files being closed" The Citizen, Mar. 25, 1981
- "The Freedom of Information Act and the Exemption for Intra-Agency Memoranda" (1973), 86 Harvard Law Review 1047
- "Freedom-of-information bill hit" The Citizen, Apr. 3, 1981
- "Freedom-of-information bill hit as 'too restrictive'" The Citizen, Mar. 26, 1981
- Freedom of Information File, Australian High Commission, Ottawa
- "How information right works" The Globe and Mail, Sept. 19, 1980
- "National Security and the Amended Freedom of Information Act" (1976), 85 Yale Law Journal 401
- "N.B: Liberals press 'favoritism' probe" The Citizen, Dec. 31, 1980
- "Official Secrets" (1978), 49 Political Quarterly 397
- "Private and confidential" (Editorial) The Globe and Mail, Dec. 29, 1980, p. 6

BIBLIOGRAPHY

(6)

"Report, legislation plan bring praise" The Globe and Mail
Sept. 19, 1980, p. 4

"Secrets unsafe in U.S." The Citizen, Oct. 8, 1980

"Their information law a flop, Nova Scotians say" The Globe and Mail, June 4, 1980

BIBLIOGRAPHY

ADDENDA

REPORTS

Report on Evidence (L.R.C.C., 1975), at pp. 32-33; 82-83

ARTICLES

Fairweather, Gordon. "Why the sacred cow should die and the public should see more" The Globe and Mail, Sept. 9, 1972, p. 7

Hanson, Stephen. "Bar backs access bill" National, Vol. 8 no. 4, April 1981, p. 1

Linstead, S. "The Law of Crown Privilege in Canada and Elsewhere" (1968-69) 3 Ottawa Law Review 79, at pp. 120-130

Robertson, Gordon. "Official Responsibility, Private Conscience, and Public Information" Transactions of the Royal Society of Canada, Series IV, Vol. X (1972) 149

Robertson, Gordon. "Confidentiality in Government" (1978) 6 Archivaria (Summer) 3

RESUME

Over the past sixteen years, there has been an ever growing movement pressing for freer public access to information held by the federal government, in place of the excessive administrative secrecy that has long prevailed. This movement culminated in the introduction of Bill C-15 in October 1979 by the then Conservative Government, but the fall of the Government prevented passage. The succeeding Liberal Government introduced Bill C-43, a revised version, in July 1980, and this Bill passed second reading and was referred to the Justice and Legal Affairs Committee on January 29, 1981.

This thesis proposes that public access to government-held information is desirable, and that Bill C-43, although it possesses some commendable features, falls short of providing effective access to government-held information. On the positive side, the legislation abolishes the doctrine of Crown privilege; provides limited judicial review of denials of access; provides a mechanism for third parties who have supplied information to the government, or who would be adversely affected by disclosure of certain information, to make their views known in order to allow a balancing of interests; and expands access by individuals to information about themselves. Among its defects are the limits placed on judicial review in key areas; an unnecessary exemption relating to federal-provincial negotiations; the failure to reform the classification system and the Official Secrets Act; an unnecessarily broad exemption relating to law enforcement; inadequate provision for the balancing of competing interests with regard to personal information; the failure to delineate clearly the relationship

between the access legislation and other secrecy provisions; procedural barriers to access; and inadequate controls on the collection and use of personal information. These issues will be examined by comparing the provisions of Bill C-43 with other proposals for freedom of information legislation (including Bill C-15 and the Canadian Bar Association Model Bill in Canada, the Report of the Government Interdepartmental Committee and John McMillan's Minority Report Bill attached to the Coombs Report in Australia), as well as with similar legislation in other jurisdictions, with particular emphasis on the United States and Sweden.