

FREEDOM OF INFORMATION LEGISLATION

Memorandum by the Commonwealth Secretariat and a paper prepared by
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In their Declaration of Commonwealth Principles made at Singapore in 1971, Commonwealth Heads of Government affirmed the "inalienable right of (their peoples) to participate by means of free and democratic political processes in framing the society in which they live".

2. In recognition of the fact that the availability of appropriate categories of information lies at the heart of this democratic political process, a number of Commonwealth governments have proposed measures designed to increase the level of information available to the public while at the same time seeking to avoid the creation of impediments to sound administration. In some Commonwealth juris-

dictions legislation is either pending or has been enacted to this end.

3. The paper is designed to highlight some of the issues on which Ministers may wish to share their ideas and experience, and does not purport to canvass all of the enactments and proposals made in Commonwealth jurisdictions. In the light of discussions, a further study could be prepared which might analyse in detail the different drafting approaches that can be adopted, and take account of differing constitutional frameworks and governmental structures into which any Freedom of Information statute must fit.

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This paper surveys briefly some of the issues that arise in the debate, now frequently occurring in many countries, over whether freedom of information legislation should be enacted for the purpose of facilitating a greater degree of openness in government and for guaranteeing the right of individuals to inspect government documents. The paper is only of an interim nature, designed to highlight without critical analysis some of the main issues that arise. In particular, the paper notes the developments that have occurred in many countries, states the main arguments for and against enacting freedom of information legislation, and examines on a comparative basis some of the more important provisions of the freedom of information statutes.

International Developments

2. History now shows that freedom of information legislation is not suited to any one constitutional or governmental scheme, but instead is appropriate to any political system in which it is sought to ensure, on the one hand, a greater measure of accountability on the part of those in a decision-making capacity, and, on the other hand, an enhanced opportunity for public participation in the operation of government. Consequently, statutes have now been enacted or proposed in countries where there is a separation of the Executive and the Legislature, where there is a Westminster arrangement with a parliamentary executive, and where neither scheme exists but elements of both are present.¹

3. The earliest open records legislation dates back to Sweden, in 1776. The present law called the Freedom of the Press Act, was enacted in 1949, and is unique to the extent that it is one of the four Acts which together comprise the Constitution. Whilst this law outlines the main principles of the open records scheme, the detailed provisions on exemptions and procedure are contained in an ordinary Act, called the Secrecy Law. Legislative schemes somewhat similar to that in Sweden, yet nowhere as rigorous in their requirement of openness, were enacted in Norway and Denmark in 1970, and in Finland in 1971.

4. In Europe, consideration of the issue has not been confined to the Scandinavian countries, and at least three other countries have made some advance. In The Netherlands a law on Openness in

Administration was approved in 1978; in France a statute inspired by the United States Act was enacted in 1978; and in Austria there is a Federal Ministers Bill, pursuant to which the Federal Chancellery has issued guidelines setting out broadly the procedures and exemptions that should be observed in making information available to the public. As well, both the Council of Europe's Legal Affairs Committee and the Human Rights Commission have looked at freedom of information proposals.

5. Probably the most well-known statute is the Freedom of Information Act which was enacted in the U.S. in 1966 and which commenced operation in 1967. The Act has since been amended twice, in 1974 and 1976, on each occasion with a view to strengthening its provisions. The history of the Act is starred among other things by a number of congressional enquiries that have exhaustively examined most aspects of its operation. In particular general hearings on the Act were held in 1972, and from 1978 there have been hearings on such things as the application of the Act to business data, and the law enforcement and security agencies. Major assessments of the Act have also been prepared by such agencies as the General Accounting Office. Another matter of contextual significance is that the Act has in recent years been supplemented by other statutes that have extended the concept of openness into different areas—for instance, the Privacy Act 1974, the Educational Rights and Privacy Act 1974 (applying to some educational institutions), and the Federal Advisory Committee Act 1972 and the Government in the Sunshine Act 1976 (both requiring some agencies to have open meetings). Lastly, the Federal experiment has now been followed in all States, with each having some form of open records legislation.

6. The interest shown in freedom of information by Commonwealth countries is of somewhat recent origin. By now the furthest advanced is Australia, to the extent that a Freedom of Information Bill has been introduced into the Australian Parliament by the Attorney-General (in June 1978), and is awaiting debate. Prior to this, two reports discussing the form that legislation could take were published in 1974 and 1976 by an interdepartmental committee convened by successive governments, and a Bill was published in 1976 as a Minority Report by one of the members of the Royal Commission on Australian Government Administration. The present Bill has also been the subject of a lengthy report, published in 1979 after extensive public hearings were held by the Senate Standing Committee on Constitutional and Legal Affairs. An announcement is soon expected from the Government as to which of the Committee's 100 or so recommendations it is prepared to accept.

7. The development of freedom of information proposals in Canada somewhat parallel Australian developments. In 1973, a private member's Right to

¹ For a fuller discussion of foreign developments and citation of other references see J. McMillan, "Making Government Accountable: A Comparative Analysis of Freedom of Information Statutes—Parts I, II and III", *New Zealand Law Journal*, vols. 11, 12 and 13, June-July 1977 pp. 248-256, 275-280, 286-296; Canada, Commission on Freedom of Information and Individual Privacy, *Public Access to Government Documents: A Comparative Perspective* (Research Publication 3, Dr. D.C. Williams, Chairman), The Commission, Ontario, November 1978; I. Galnoor, *Government Secrecy in Democracies*, Harper & Row, New York, 1977.

Information Bill, and a set of Government guidelines entitled "Notices of Motion for the Production of Papers", were referred for consideration to the Standing Joint Committee on Regulations and Other Statutory Instruments, which held hearings in 1974-75 and tabled a report in December 1975 endorsing in principle the concept of freedom of information legislation. Later, in June 1977, a Green Paper on freedom of information was published by the Government; it too was the subject of a further report by the Committee in June 1978. A Freedom of Information Act was first introduced into the Parliament by the Clark Government in October 1979, although the bill lapsed with the subsequent dissolution of the Parliament.

8. Further advances have been made at the Provincial level in Canada. Acts were passed in Nova Scotia in May 1977 and New Brunswick in June 1978 (proclaimed in January 1980). Private members bills have also been introduced in most of the other provinces. Lastly, in Ontario a "Commission on Freedom of Information and Individual Privacy" has been operating since March 1977, and to date has published 13 research publications which examine in considerable detail a large number of freedom of information and related issues.

9. In the United Kingdom, legislative activity has in the main been directed to amendment of the Official Secrets Act. Revision of the Act was first proposed in the Report of the Franks Committee in 1972, and later in a White Paper published in July 1978. A Protection of Information Bill to amend the Official Secrets Act was introduced in November 1979, yet was later discarded after critics claimed that details of the Fourth Man, Anthony Blunt, could not have been made available to the public under the legislative revision that was proposed. The only legislation proposing a guaranteed right of access to documents by individuals has been introduced by private members, in January 1979 by Mr. Clement Freud, M.P. (Liberal), and in November 1979 by Mr. Michael Meacher, M.P. (Labour). The first lapsed with the dissolution of the Parliament, while the latter did not reach a second reading.

Arguments for Freedom of Information Legislation

10 This section of the paper examines the arguments that are generally put for greater openness in government, and for guaranteeing public access to government documents by means of legislation. The first three sub-sections deal with the arguments for openness, as they apply to the political system, to the operation of the civil service or Government Administration, and to the enhancement of public participation in democratic processes; the last sub-section examines why legislation is argued to be the best means of ensuring openness.

(a) Openness and the political system—the right to know

11. In most literature the arguments for greater openness are phrased in the language of political

theory and are commonly premised upon "the right to know". The spirit of this ideal is best captured in the remark of James Madison, one of the U.S. constitutional fathers:

A popular Government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

In short, according to this argument there can be no democracy without freedom of information. Secrecy impedes the political education of the community. The electoral judgments cast by voters are not fully informed; people are not always aware of the critical choices that face their society; the opportunity for individuals to make a meaningful response to political initiatives or inactivity is undermined; and a political climate flourishes in which citizens apprehend government, not with responsibility and a sense of enquiry, but with malevolence and distrust. Seen as part of or in conjunction with the right to a political education, the right to know is commonly united with the cry for freedom of the press. The best-known example of this union is the Swedish Freedom of the Press Act, a constitutional document which creates a public right of access to government documents as one of the elements necessary to ensure freedom of the press and an informed public: the Act reads, "to further free interchange of opinion and enlightenment of the public, every Swedish national shall have free access to official documents...". A similar declaration linking press freedom and the right to know was a resolution adopted by the U.N. General Assembly at its first session in 1945, declaring that "freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations was consecrated".

12. This form of argument, that fulfilment of the public's right to know results in better government, is difficult to establish empirically, and often is hard to appreciate. Election and control of governments, and management of a society, are more complex and sophisticated matters than the argument suggests. However, the difficulty in evaluating the right to know subsides in part when it is linked to the doctrine of accountability. The central goal of any democratic system of government is political accountability, and secrecy—it is claimed—can be fatal to accountability. Informed judgment and appraisal by Parliament, Press and public alike is a difficult, if not fruitless, task where government activities and decisions, the thinking or evidence that supports or undermines them, and the options available, are concealed from external scrutiny. For instance, where secrecy prevails policies on a country's defence or foreign relations can be entrenched before public appraisal occurs; the priorities in a country's budget can be published as a virtual fait accompli with no realistic opportunity for revision in the light of public and Parliamentary debate; and long-standing programmes can be irretrievably scrapped before there is any public comment.

(b) *Openness and the Government Administration*

13. The principle of accountability has special relevance as it appertains to the Government Administration, in particular because most subject areas of government activity are effectively freed from the reach of that principle. In part this arises, as only a few issues will ever be of electoral or political importance. But it arises in the main when public officials in most States are invested with a vast number of discretionary powers that can affect most aspects of community life—powers to grant and refuse benefits, privileges, subsidies and concessions; to control imports and exports; raise wages; fix prices; assess and levy taxes; impose manifold conditions, obligations and liabilities; control the quality, appearance and placement of public utilities, houses, streets and amenities; affect the employment of the work force; and determine even such matters as the edibility of food. Whatever the statutory framework, the function of the judiciary, or the constitutional system—whether there is a separation of the Executive and the legislature; accountability along Westminster lines of Ministerial accountability; or a one party State—there is a physical improbability of complete political control over the repeated exercise of these powers. Even regarding decisions which a government makes (either pro forma, or in substance and in fact) the government may have to rely heavily on pre-emptive research by public servants which chooses problem areas, defines the problem, presents options, and selects facts—determinations or assessments (possibly even value judgments) with which many outside the public service might disagree, given the chance so to do. If these administrative processes were largely open to public scrutiny, undoubtedly a degree of accountability may be introduced that could presently be lacking.

14. There are, it is true, in many States, mechanisms which supplement the function of political and Parliamentary processes in controlling administrative action. Yet even control by the judiciary and administrative tribunals, review by Parliamentary committees, Royal Commissions, and committees of enquiry, and scrutiny by the Press, are processes that are themselves largely dependent upon the existence of available information. There is, in addition, in some States, an Ombudsman who can investigate the complaints of individuals, but however successful, the Ombudsman can never be an agent for public participation in the affairs of government—an additional benefit that openness might generate.

(c) *Openness and the community*

15. The mechanisms of accountability that have been mentioned impose a form of control that is essentially negative in character—the very notion of answerability itself largely assumes imputation of blame after an event. There is no guarantee from the outset that there will either be positive controls over the allocation of resources, or an opportunity for public participation in the formulation of policy. Openness, it is argued, is the best method for ensuring this, since the preconditions for public participation include awareness of when a matter is

being considered and is approaching a determinative stage, and knowing the case that has to be met or supported (as the case may be). Openness can facilitate public participation in other ways. For instance, government departments in most States are still the largest social laboratories; if members of the public possessed the facts, results, analyses, ideas and evidence arising in this forum, they could be better enabled to detect problems or to substantiate submissions or arguments that may be put. As it is often said, information is power—“knowledge will forever govern ignorance”.

16. Another aspect to the argument for community participation is that, besides being a democratic ideal, it is also a practical need. On a sociological analysis, the policy-making ranks of most civil services stand apart from the remainder of the population. Typically, those ranks include a high preponderance of males, who are university educated, are above the population average in age, are reasonably well paid, and are urban dwellers (usually grouped together in the one city). This sector, it is argued, cannot represent or consider empathetically the interests of other groups, like rural dwellers, women, ethnic minorities, new settlers, the poor, industrial workers, the handicapped, single mothers, or the uneducated. Only a participatory system, which must perforce be an open system, can properly accommodate these pluralistic interests in a society.

17. Probably the best evidence that the influence of individuals and public groups can grow apace with their relative access to government information is afforded by experience under the United States' Freedom of Information Act. Numerous examples are available to illustrate how groups using the Act to uncover Government research that has not been properly acted upon, have had a dramatic impact on the development of policy. Government information, for instance, has been a significant weapon in public interest programmes to force Red Dye No. 2 (a carcinogenic agent) off the market; to halt the distressing annihilation of dolphin populations; to force correction of automobile defects; to introduce consistency and natural justice into the parole system; strengthen regulation of meat and poultry processing; to expose inactivity by government agencies charged with corporate regulation, oversight of trade practices, and regulation of new drugs; to reform the national security and law enforcement agencies; to ground the Concorde; and to compel changes in a research project in which the National Institutes of Health was comparing the effectiveness of full and partial mastectomies without telling the women who would undergo surgery which group they would be in.

18. Another force which should derive much benefit from more open government is the Press. The extent to which major stories and revelations in many States are based upon leaks is one pointer to the enhanced role that could be played by the Press if they had regular access both to reports, studies and other documents that may presently be secret, and to

the unexpurgated text of happenings that are presently leaked or selectively released to them. Examples are again available from the U.S. of how journalists have used the Freedom of Information Act to obtain such things as details of the F.B.I.'s secret counter-intelligence programmes, and government reports on conditions in nursing homes and on Medicare compliance.

(d) *Implementing open government*

19. The proposition that an open system of government is desirable is one that commands widespread agreement in a number of countries. There is not the same measure of agreement on how this policy is best implemented. Essentially three different approaches can be adopted:

(i) Present arrangements can be left much as they are. Political officers and public servants would retain their discretion to decide when and what to release, however administrative practices could be revised—for instance, preparation of White and Green papers and informative departmental submissions to Parliamentary committees; rehabilitation of the information units in departments; relaxation of some of the express restrictions on disclosure, and expansion of the range of officers with authority to release information to the public; and encouragement of senior officers to be more available to the Press and in public forums to explain government policies and departmental initiatives. The principal vehicle of reform would be a change in attitude on the part of political officials and public servants; political forces, media pressure, and public criticism would be the sanctions against secrecy.

(ii) Administrative guidelines can be drafted, specifying the categories of information that should be disclosed or withheld and the procedures to be followed when information is requested. The only substantial difference between this proposal and freedom of information legislation is that the administrative guidelines—though they might be expressed to be binding—would in the ultimate be interpreted and enforced by the Administration. This difference may be disguised, by provision for appeal from a refusal to a Minister (in a Westminster type system) or even to an Information Commissioner with advisory powers: however, the fact remains that administrative discretion would be preserved. Reference can also be made to the fact that this system has been tried, seemingly without success, in Canada and the United Kingdom. In Canada, in February 1973 all departments and agencies were issued (pursuant to a Cabinet directive) with guidelines requiring that all government papers, documents, and consultant reports be produced to Parliament pursuant to any Notice of Motion for the Production of Papers, except where the papers fell within the scope of 16 enumerated exemptions. The guidelines also came to be used in determining what information should be disclosed in response to a Parliamentary question or a citizen's request. It seems the guidelines have not been regarded as adequate by many Parliamentarians and members of the public who have voiced insistent demands for stronger legislative measures to be implemented, nor

apparently by either the Trudeau or the Clark governments, which both published proposals for freedom of information legislation. In Britain the guideline is in the form of a directive to departments, in July 1977 by the head of the Civil Service, now Lord Croham, advising them to implement new practices to facilitate openness. *The Times* (18 March 1980) published details of a survey carried out monitoring the effect of the directive on departments under the Callaghan Government; it found that in 35 departments 836 items were released, "most of which would have been published without the introduction of Labour's much vaunted open government policy", and only 8 per cent of which "carried out the directive's instructions to the letter".

(iii) Legislation is the final option. The salient feature of a Freedom of Information Act is that a person denied access to a document can appeal the refusal to an impartial body that is independent of the Administration. The rulings of the appellate body—which may be a court, a specialist tribunal, or even an Information Commissioner or Ombudsman—bind the Administration.

20. Supporters of legislation argue that it is the only *guarantee* that government processes will be exposed to greater public scrutiny and participation. They argue that, no matter how firm the undertaking either by politicians or by senior administrators to practice greater openness, the danger is perpetual that promises will become rhetoric when it appears prudent to avoid controversy. Political pressure, media comment and public opinion are said to have done little in the past to dislodge the ingrained and institutional disposition for secrecy that is found in most Administrations. They point out, moreover, that there is a gulf between official and public attitudes regarding how much should be disclosed. To allow one side—the Administration—to be the sole and final arbiter in this dispute is to violate the fundamental principle of natural justice, according to which a dispute between two parties should ideally be settled by a third and independent party.

21. Another feature of legislation is that it can establish practices that must be observed, even by the unwilling. To this end freedom of information legislation can reverse the current presumption in favour of secrecy: citizens would have a legal right to government documents without first having to prove any special interest; and the burden of justifying non-disclosure could be cast upon the Government Administration. Depending upon the form of the legislation, other legal rights could also be created: time limits within which requests must be answered could be imposed; indexes of documents available to the public could be required; publication of the internal and hidden law of agencies could be commanded; and unimpeachable access to specified classes of documents can be conferred. Legislation alone seems the means for producing an active commitment to open government of that sort.

Countervailing interests

22. Although there is as much variety in the form of freedom of information statutes as there is in the

political and constitutional schemes of the countries that have adopted it, there is on the other hand a much higher degree of commonality in the arguments that have been advanced, either in opposition to open records legislation, or in favour of tempering its provisions. The form in which the arguments are put of course varies depending upon the precise provisions of the freedom of information scheme in question, so the general arguments will only be examined briefly at this stage.

(a) *Administrative convenience and cost*

23. It is often argued that freedom of information legislation will intrude on the efficiency of the administrative process, in particular by diverting staff resources away from programmes that could benefit the public at large, and towards the handling and satisfaction of requests that may solely concern individuals. A chief example given in this argument is the fact that in the U.S., agencies like the F.B.I. and C.I.A. have had to reassign a large number of officers to freedom of information inquiries—as many as 400 in the case of the F.B.I. (6 per cent of staff). In so far as this argument raises a question of inadequate administrative resources, the problem might arguably be solved in part by the allocation of more funds and staff. The reality, however, is that in most States there is a present concern with the size of the public sector, and when new programmes are introduced governments usually opt for rearrangement of existing staff resources rather than the engagement of new staff. One aspect of this argument that is not easily solved by employment of additional staff, is that requests in some areas must be examined by senior or specialised staff who have the experience to understand the interests that could be damaged by disclosure. Examples are documents relating to national security or to foreign relations. Another could be documents relating to the regulation of corporate activities; here, the officials who might have to examine requests for documents are the same officials who, in whatever other time is available, must carry out the investigations of the corporations that in many cases might be making the document requests.

(b) *Policy-making processes*

24. Another aspect of the administrative process that could be affected by too much openness is said to be the free and frank interchange of opinions between public officials—a metaphoric expression of the argument is that public officials cannot operate effectively in a fish bowl. The argument is also phrased well by the U.S. Supreme Court:

“the frank discussion of legal and policy matters in writing might be inhibited if the discussion were made public (and) human experience teaches that those who expect public dissemination of their remarks may well temper candour with a concern for appearances ... to the detriment of the decision-making processes”

(*National Labour Relations Board v. Sears, Roebuck and Company* (421 U.S. 132(1975)))

(c) *Nature of public service*

25. In countries which have embodied in their constitutional system the convention of a pro-

fessional public service, a further variant of the preceding argument is put. It is argued that too much openness could imperil some aspects of that convention, namely that public servants are appointed on merit, and not because they are politically trustworthy; that they are expected to provide impartial advice to any Government, to carry out policies in the manner directed (in some systems by a Minister, and in others by a statute), and—in a Westminster arrangement, where it may be necessary to preserve the authority and responsibility of the Minister—to be anonymous to some degree; and that the public must have faith in individual public servants, and trust that they will approach every issue with an open mind. It is argued that too much openness, particularly of the advice, opinions or recommendations of officials, could imperil this independence and lead to a situation in which the public identifies officials with certain views. A by-product of this could be an attempt (particularly by Ministers in a Westminster system) either to influence or govern the advice which officials will give, or even to secure the appointment of officials whose views, if published, would not be embarrassing.

(d) *Confidence in Government*

26. Although any Freedom of Information Act has exemptions from disclosure, it is argued, even so, if the Administration no longer controls the disclosure of information, officials and outsiders alike will be reticent to commit information to government files—officials may be less candid in recording their views; private businesses, individuals and other governments may not voluntarily submit information to the government; police informers may be stifled; and the community generally may distrust the ability of government to preserve personal privacy.

(e) *Westminster traditions*

27. In countries with a Westminster type Government, it is often argued that freedom of information legislation is an expedient more suited to countries like the United States of America that have a system in which the legislative and executive arms of government are completely separated, and the Executive is expected to be directly and openly answerable both to Congress and to the people. It is argued that accountability by way of a Parliamentary executive, and the conventions of individual and collective Ministerial responsibility, are in their own setting a sufficient form of accountability; further, that an additional legislative requirement of openness could destroy the authority of Ministers by exposing officials to external scrutiny and accountability. The other argument that is put is that it is inconsistent with the notion of Westminster Government that a court, and not Parliament and its Ministers, should ultimately decide what information has to be released.

(f) *Public benefit*

28. Lastly, it is argued that, whatever benefits could flow to the community at large from increased openness, freedom of information legislation will not be the catalyst to this end. The benefit of any legis-

lation would accrue primarily to those who use it, and they will not be average members of the public but special interest groups. For instance, the greatest users of the U.S. Act in respect of some agencies are said to be businesses spying on each other, and law firms acting for their clients. Similarly, even though some members of the public are likely to use legislation (either individually or through community groups) they are likely to be among the informed, articulate and educated members of the public, who are already able to protect their rights to some extent. It is also said that the Press (who can use such legislation and disseminate the findings to the public at large) are likely to rely instead for their information on accustomed practices, like leaks and departmental and political contacts. Another variant of the public benefit argument is also advanced, namely that the public is already "snowed" with vast quantities of government information, which tends to bore or infuriate them; what they want is not more information, but better government.

Variants in a Freedom of Information statute

(a) Scope of legislation

29. The first matter to be determined is the range of authorities to which an Act should apply. All existing and proposed statutes apply at least to most of the agencies of the executive arm of government (with occasional exceptions for bodies like commercial enterprises). Beyond this there is variation—for instance, the Swedish Act applies as well to Parliament, the Synod of the Church, and the courts; the Australian proposed Act does not apply to Parliament or the courts; while the U.S. Act has the same exclusions, and in addition does not apply to the Office of the President.

30. Next there is the range of documents subject to the legislation. The most restrictive is the Australian proposed Act, which only applies to documents created after the Act commences operation (subject to two small exceptions); an Australian Senate Committee recently recommended relaxation of this prohibition so that an individual could gain access to his own records, however old, and general access to pre-existing records would be phased in according to a schedule written in the legislation. A variant on this approach was the Canadian proposed law, which was retroactive for five years, and even beyond unless access would unreasonably interfere with the operation of the relevant institution. At the other end are the U.S. and Swedish laws, which apply to all documents possessed by agencies—though in the U.S. submissions have been made in recent Congressional hearings by some agency officials to the effect that access to pre-existing law enforcement documents should be suspended for a number of years.

31. Lastly there is the range of people who use the Acts. Only citizens can request documents under the Swedish law; Canada broadened this to include permanent residents and corporations; in Finland "It is up to the authority to decide to what extent foreigners shall have access to official documents";

while anyone can avail of the U.S. Act, or the proposed Australian law.

(b) Making a request

32. Most of the statutes recently proposed in different countries follow the approach in the U.S. Act, which requires that a person make a request for records "which (a) reasonably describes such records and (b) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed". There are some textual variations to this—the Canadian proposed law required that the request be in writing and "provide sufficient detail to enable an experienced employee of the institution to identify the record"; while the Australian proposed Act requires a person to "provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency ... to identify the document". Each of these laws also prescribes the time limit within which a decision whether to withhold or disclose the document must be made. In the U.S. it is ten working days after receipt of the request, although the period may be extended for another ten working days in "unusual circumstances", which is defined in the Act to include circumstances where it is reasonably necessary to the proper processing of a particular request to obtain the record from a separate field facility, to obtain a voluminous amount of separate and distinct records, or to consult with another agency (or another component of the agency) having a substantial interest in the determination of the request. The proposed Canadian law set a time limit of 30 days, with provision for extension in circumstances similar to those in the U.S. Act. The proposed Australian law allows a period of 60 days, and an extension could only be obtained after an appeal has already been instituted by the applicant to the appellate tribunal; an Australian Senate Committee has recommended that the Act provide for a reduction of this 60 day time limit to 45 days two years after the Act commences operation, and to 40 days four years after commencement. By contrast, the same procedural detail is not contained in any of the Scandinavian laws. The approach in these statutes is, by and large, to declare what documents are public, and then to require that a copy of the document shall be made available to a person upon request, or that the person be "apprised of the contents of the document".

(c) Determining a request

33. There is also a difference among countries as to which officer or level of officer will make the decision whether to release a document. The U.S. Act does not contain any directions on this matter, and it is left to each agency to devise its own administrative system. Consequently, in some agencies (notably law enforcement agencies) only a small number of senior officers usually have authority to release a document in response to a request, while in other agencies this power is delegated widely—for instance, in the Department of Health, Education and Welfare only 16 officers have authority to decide that a document will not be released, while every officer has authority to disclose.

In the Swedish law the official who is entrusted with the care of a document has a duty to deliver it if it is not exempt from disclosure. Usually the official who must make this decision will be a subordinate official, though in doubtful cases the official may refer the request to his agency for decision "provided that this is possible without undue delay". In both the Canadian and Australian laws the responsibility is nominally cast upon the head of the agency, but in each there is provision for him or her to delegate that function to other officers.

34. A new procedural complication that has been introduced, e.g. by the proposed Australian law, is to confer power upon an agency to refuse access to a document on procedural grounds—for instance, access to a non-exempt document may be deferred "where it is reasonable to do so in the public interest or having regard to normal and proper administrative processes", and a request that seeks all documents of a specified class, that contain information of a specified kind or relate to a specified subject matter, may be refused if answering it "would interfere unreasonably with the operations of the agency."

(d) *Costs and charges*

35. The simplest laws in this respect are the Scandinavian laws, since they do not provide for any charge to be levied when access is granted. It now seems customary in new statutes to provide that fees can be charged when access is given. This practice stems mainly from the U.S. Act, which provides that each agency shall adopt a schedule of fees that is uniform for all units of the agency, and that "such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication." To ensure that this requirement does not discourage individual members of the public from making requests, the Act was amended in 1974 to provide that fees can in some instances be waived: "Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public."

(e) *Exemptions*

36. It is accepted in all existing and proposed statutes that the same areas of government activity require protection—principally defence, national security, foreign relations, law enforcement, trade secrets, personal privacy, and to some extent, the internal deliberative process of the agency. Beyond this there is a marked diversity in the detailed manner in which the exemptions are defined, though in general it could be said that the statutes follow one of two approaches. Either the exemptions define, in varying degrees of specificity, the types or classes of documents to be protected, or they state the interests which need protection by non-disclosure. There are difficulties with each approach. One difficulty with the first approach is that within each general class of documents there will be many exceptions where

material could safely be released. Another difficulty is that the more specific the list is, the longer and less manageable it becomes. With the second approach, the prime difficulty is that it relies for its success upon a benevolent interpretation of interests by judges and administrators alike. Furthermore, it provides little actual guidance on whether a particular document should be released; prevarication and delay may thereby be encouraged.

37. A few introductory comparisons will indicate the variations that exist. The Swedish secrecy law has as many as 250 different exemptions, some defined by reference to protected interests, others by reference to categories of documents. Many contain a time limitation on the life of the exemption, which varies from 70 years in some cases to two years in others, while some documents are only protected until the occurrence of a particular event (for instance, documents prepared for auditing or inspection activities until the audit or inspection has been held). Most of the other existing or proposed statutes contain a much smaller number of exemptions, and breadth can thus be a problem. In Denmark, for example, documents can be withheld out of consideration to "the public's economic interests" or "where secrecy is required by the special character of the circumstances". In Norway, access can be refused "because publicity will thwart public regulation and control measures or other necessary requirements or prohibitions, or endanger their accomplishment". The U.S. Act contains only nine exemptions, though some of these incorporate by reference other standards—for instance, the security classification system is incorporated by reference, and so too are the rules developed by the courts for determining what documents connected with the deliberative processes of an agency are exempt from discovery in civil law proceedings. It is also necessary to look beyond the U.S. exemptions to the decisions of the courts interpreting the Act, as these place a substantial gloss upon vaguely worded exemptions, like that protecting "trade secrets and commercial or financial information obtained from a person and privileged or confidential". The proposed Australian law seeks to qualify the breadth otherwise existing in some exemptions, for instance by requiring that documents of a particular description are only exempt if disclosure "would have a substantial adverse effect" on the protected interest; or that disclosure of a particular type of document would also be "contrary to the public interest". The proposed Canadian law adopted a slightly different approach designed to limit the scope of an exemption, by stating the particular interest to be protected, and then in effect giving examples of the types that could be encompassed by that interest—for instance the exemption protecting the economic interests of Canada gives as examples information relating to the currency, coinage or legal tender of Canada, information relating to the regulation or supervision of financial institutions, and information concerning a contemplated change in the rate of bank interest, tariff rates, taxes or duties or concerning the sale or acquisition of land or property.

(f) *Review and appeal*

38. Here again a number of variations are possible. An Act may provide for internal review of a refusal to disclose (either as an interim or a final form of review), review by a court, review by a specialist administrative tribunal, or investigation of a refusal by an Information Commissioner or Ombudsman.

39 The U.S. Act has two tiers in the appeal structure. First, a person may seek an internal review of a decision, and this must be completed within 20 days of the appeal being lodged; and thereafter a person may appeal a denial to a federal court. The courts have power to review any refusal and determine whether the refusal is permitted under one of the exemptions; in addition the courts have other powers, including power to make an award of legal costs in favour of an appellant "in any case ... in which the complainant has substantially prevailed and power to refer to the Civil Service Commission circumstances which "raise questions whether agency personnel acted arbitrarily or capriciously" with respect to a withholding. A similar appeal structure is provided for in the proposed Australian Act, though here the appeal goes to a specialist body called the Administrative Appeals Tribunal which hears appeals against administrative decisions; the Tribunal does not have power to make an award of legal fees in favour of an applicant. There is in addition in Australia a Federal Ombudsman, who it is anticipated will have some powers to investigate refusals to disclose, subject to one major exception that he has no jurisdiction to investigate a decision made by a Minister. The proposed Canadian law went further in this respect, by actually creating an Office of Information Commissioner, who would have power not only to investigate a refusal, but also to appeal of his own motion to the Federal Court, to appear before the Court on behalf of a person who independently lodged an appeal, or to intervene in the hearing of any such appeal. In other Canadian jurisdictions where freedom of information legislation has been proposed an even greater role would be given to the Ombudsman or Information Commissioner. Legislation enacted in New Brunswick in June 1978 provides that an appeal may be made to the Ombudsman or to a Judge of the Supreme Court, while a bill proposed by the Prince Edward Island Government provides for the appointment of an Information Commissioner with a power to order release as the sole avenue of appeal. In Sweden also a refusal may be investigated by the Ombudsman, or appealed to the appropriate administrative tribunal. One factor common to the Swedish and Australian laws is that Ministerial decisions have a special importance. In Sweden a denial which is made by a Minister cannot be appealed to a tribunal, though in practice Ministers make few decisions under the statute. In Australia a decision of a Minister cannot be appealed if the Minister issues a certificate stating conclusively that a document is exempt on the ground that it relates to defence, national security, international relations, Federal/State relations, is a cabinet document, or is a document obtained from another Government. It is

generally anticipated in Australia that Ministerial decisions will not be rare.

(g) *Internal Law and Publication*

40. A central feature of the U.S. Act, that was copied in the Australian proposed law, is the provisions requiring the indexation and publication of various categories of information. First, under the U.S. Act, material must be published in the Federal Register which would notify the public of the structure of agencies and the way in which they handle matters concerning the public—for example, matters that are included are a description of the organisation of the agency, the methods whereby the public may obtain decisions, a statement of the general course by which functions are channeled and determined, and rules of procedure.

41. Different rules apply to what might loosely be called the internal law of agencies—the interpretations formulated by agencies of the legislation they administer; the staff manuals, rule books, and other instructions provided for the guidance of officers when exercising their official and statutory duties; the reasons for decision given in the exercise of statutory powers; and the rules of policy applied by agencies in administering schemes that may affect the public. Some of this internal law in the U.S. has to be published (and indexed), other parts of it have only to be indexed and made available for inspection. Substantive statements, policies and interpretations of general application have to be published, whilst other statements, policies and interpretations which have been adopted, in addition to the orders made in individual cases, have only to be indexed. The enforcement requirement for this part of the Act is that a person shall not be adversely affected by a rule, policy or interpretation which is not published or indexed in accordance with the Act, unless the person has actual or timely notice of the terms thereof.

42. A broadly similar approach has been adopted in the proposed Australian Act. The main differences are first, that the material to be published on the structure of agencies will appear annually in an existing publication, called the *Government Directory*, and will include in addition a description of the main categories of documents held by an agency. The Australian Senate Committee that reviewed the Bill recommended that the range of matters be expanded, with an emphasis upon publication of items that would facilitate public access to agency facilities and the utilization of participatory mechanisms that presently exist. As to the internal law of agencies, the range of information required to be indexed and made publicly available is if anything defined more narrowly than in the U.S. Act. Moreover, indexation is required annually, compared to three-monthly in the U.S. Act.

43. Although there are no provisions in the Scandinavian laws dealing separately with publication and internal law, there are provisions that achieve a somewhat similar purpose. For instance, in the Swedish law it is provided that diaries, journals and registers (for instance, of docu-

ments possessed by an authority or of decisions made and cases handled by it) are official, and thus public, when they are ready for entry or posting.

(h) *Archival Rules*

44. Since it is accepted that some documents must initially be withheld from public access, the question arises as to when access should ultimately be given. Most countries prefer to adopt a set archival limit, by which time most documents which are initially withheld are released. It is possible to contain the archival limit in the freedom of information statute, or in separate legislation. For instance, most of the exemptions in the Swedish law state the period for which they are effective—with periods of two, five, ten, 25 and up to 70 years being stated. In the United States, the exemption protecting documents relating

to defence or foreign policy incorporates by reference the security classification system which is established separately by an Executive Order. This system provides that most documents will be declassified by the age of six years, and documents requiring protection for a longer period are presumed to be available within 20 years, unless a very senior officer makes a determination that the document must remain secret for an even longer period. In the proposed Canadian law the only exemption specifically incorporating its own time limit was that protecting the deliberative processes of government, and here a 20 year period was prescribed. In Australia a Separate Archives Bill was introduced into Parliament simultaneously with the Freedom of Information Bill; it preserves the existing 30 year rule that presently is imposed by executive decision.