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The charred remains of Butterworths' Editorial Department after the fire

BUTTERWORTHS' NEW ADDRESS

Following the fire in the building formerly housing the editorial department, Butterworths of NZ Ltd have moved not only out of Hannahs Building but also out of the NZ Law Society Building in Waring Taylor Street and are now all under one roof in the T & W Young Building, 77-85 Customhouse Quay, Wellington (ground floor). (PO Box 472. Ph 722-021)

SWEARING IN OF MR JUSTICE RICHARDSON

On 2 May 1977 at the Supreme Court in Wellington Ivor Lloyd Morgan Richardson was sworn in as a Judge of the Supreme Court. Among the large gathering of practitioners in attendance were numbered many of his former students.

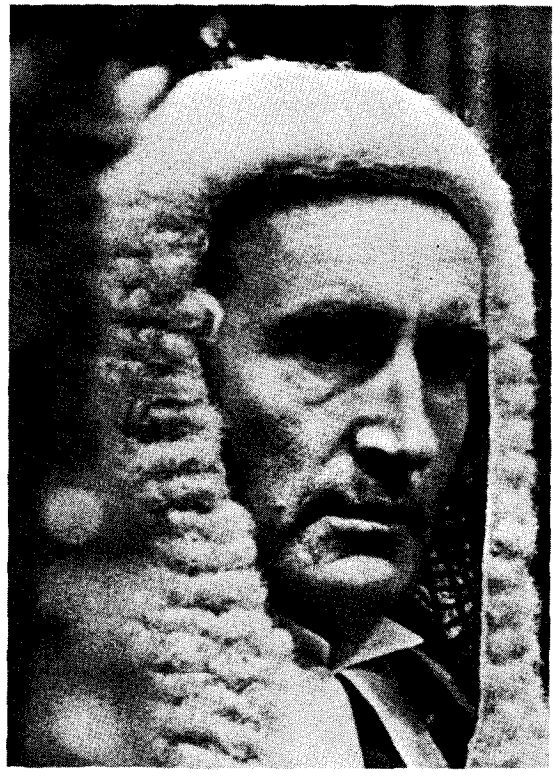
After administering the oaths of office the Chief Justice, Sir Richard Wild, welcomed his Honour to judicial office and called attention to the wide experience Mr Justice Richardson brought to the office:

"You have attained academic distinction in New Zealand and also at the University of Michigan in the United States. You have occupied a chair in law and been Dean of a Law School. You have had two periods of private law practice and you have given distinguished service to the Crown Law office. You have served the organised profession in its Council. You have appeared in all our Courts including the Judicial Committee of the Privy Council. In all this you have shown the quality of decisiveness and an abundance of energy. We are all delighted to welcome you to this Bench."

Speaking in place of the Attorney-General the Solicitor-General, Mr R C Savage Q C, also welcomed the appointment of Mr Justice Richardson on behalf of the Government and profession generally.

"The appointment of a Judge of the Supreme Court is ordinarily made by His Excellency the Governor-General in the name and on behalf of Her Majesty the Queen. It is worth recording that in Your Honour's case that was not so for, by a happy chance, Her Majesty the Queen was in New Zealand when the recommendation was to be made. Your Honour's Commission was signed by Her Majesty personally. It is, I believe, the first such Commission to have been signed by the Sovereign for a New Zealand Judge in more than 100 years.

"I would like to read some words from an address by the then Lord Chancellor, Lord Hailsham, given at the fourth Commonwealth and Empire Law Conference held in New Delhi in 1971. It is apt to refer to this address for two reasons. First because there is to be another Commonwealth Law Conference to be held in Edinburgh later this year and secondly because I believe the passage has particular appropriateness in the light of Your Honour's qualities.



Mr Justice Richardson

> " 'Law is not a sacred mystery revealed in an archaic language only to a few initiates. Law is a social science, and lawyers must learn to regard themselves as social scientists. The principles of justice do not change, but their application in terms of positive law must alter with changes in society and circumstance. This presupposes a race of lawyers, a breed of Judges, not aloof from the society of their time but alive to its realities.'

"The record of Your Honour's career shows clearly that you are not aloof from the society of your time but very much alive to its realities. It shows, too, an admixture of academic attainment and practical professional experience in the law that very few of your predecessors upon the Bench had ever had.

"You graduated from Canterbury University

with considerable distinction and then attained a doctorate in law from Michigan University. You practised in Invercargill, as a partner in the firm of the Crown Solicitor there, and then joined the Crown Law Office. After some years in that office, during which you conducted much varied and important litigation for the Crown, you returned to the world of legal scholarship to become Professor of Law at Victoria University and Dean of the Faculty. Five years later your returned to full time legal practice as a partner in one of the leading firms of this City. Your work has included most areas of law from the workaday fields of crime to the esoteric ones of tax, and it has taken you from the Magistrates Court to, on several occasions, the Privy Council. In between times you have been the joint author of a biography of Chief Justice Sir Robert Stout and a contributor to the history of the legal profession in New Zealand; written on various topics of social and legal interest ranging from Religion and the law to nuclear energy and the right of assembly; served the profession in the Council of the Wellington District Law Society and on the Council of Legal Education; worked in Mauritius and Western Samoa for the Governments of those countries in the revision of their tax laws; and recently you were the Chairman of a Committee which produced an important and radical report upon inflation accounting."

The significance of the independence of the judiciary was emphasised by the President of the New Zealand Law Society, Mr L H Southwick QC:

"The independence of the judiciary as a fact must be as accepted now as it ever was. It is as accurate now as ever to regard that independence as a necessary part of the rule of law itself.

"In a lecture given last year, Dr Ralf Dahrendorf, Director of the London School of Economics, said that the capacity of the judiciary for self-defence is limited. There is nothing he claimed, that can positively guarantee that a Supreme Court remains in operation, let alone that its decisions and its sentences are observed. He alleged that it can be said that technically the law and the Courts are ultimately powerless.

"Whatever feelings or apprehensions may arise from these claims the counter to them is surely to be found in the peculiar power which lies in the independence of the law and of the judiciary. As part of that independence, respect and dignity must be associated with the law and with the judiciary.

"The appointment of Judges and their tenure of office must be so arranged as to emphasise that they are in no way dependent on other branches of public authority.

"I believe that the power of the law, and of those who administer it, is in the very fact that they are not and surely never will be seen to be competing with the partisan powers of the Executive, or even of the Legislature. If the law and the judiciary should ever become under Government control, the situation would be so serious that they could cease to be necessary. If Courts should ever become part of political struggles, they would then do little more than simulate Parliament and parties. They would lose their functions.

"I do not hesitate, therefore, on this significant occasion to plead for a renewed understanding of the independence of the law and of the judiciary.

"The New Zealand Law Society welcomes the appointment of another Judge to the Supreme Court bench. It welcomes the contribution which it knows he will make to the fulfilment in the public interest of the tasks imposed upon the Court. It welcomes too, the assistance he will render to his brother judges in lightening the work load they carry. On a personal plane, as President of the New Zealand Law Society, I extend to Mr Justice Richardson the congratulations and thanks of his former companions in the Society. We are grateful to his Honour for his service to all members of the Society in the field of legal education where he was a member of its Legal Education Committee and of the Council of Legal Education. The work his Honour was involved in is not completed. Its importance warrants continued endeavour. We who still serve on the Council of the New Zealand Law Society record our thanks to his Honour for his work there. We will miss his kind and wise assistance.

"It is with pleasure that I extend to his Honour my own best wishes and those of the Society I here represent, for the year ahead."

The feelings of those present were almost certainly best stated by the President of the Wellington District Law Society in his expression of regret that his Honour's judicial service will take him from Wellington.

"These regrets are purely selfish, however, and in wishing your Honour a happy and satisfying career in his high office, we who know you and have worked with you express our confidence that your judicial work will be of the same high quality that has characterised your work at the bar and in the University."

ADMINISTRATIVE LAW

VOID AND VOIDABLE

By J F NORTHEY *Professor of Public Law, Auckland University.*

The opening shot in the battle over void/voidable was probably fired by Lord Denning, but the controversy deepened with the decision of the Privy Council in *Durayappah v Fernando* [1967] 2 AC 337, where the Mayor of Jaffna was refused relief because it was said he had no standing to have the Minister's order declared void. The need for the distinction between void and voidable has been questioned and the use of contractual analogies deprecated. Just when it was thought that the notion of voidability was about to die a natural death, a decision of the English Court of Appeal (which included Lord Denning) gave it a new lease of life. Reference should be made to *R v Secretary of State for the Environment ex parte Ostler* [1977] 1 QB 122, which also revived the much criticised *East Elloe* decision, [1956] AC 736.

The New Zealand Court of Appeal in *Reid v Rowley* (judgment 25 May 1977) was required to determine what effect, if any, should be given to a decision of a sub-committee appointed under the rules of the New Zealand Trotting Conference. Reid had been charged with and convicted by the subcommittee of having committed a corrupt practice. He appealed unsuccessfully against that decision. In the present proceedings, the appellant claimed that the sub-committee had received and considered a report by a Racecourse Inspector which contained statements prejudicial to Reid. That report was not disclosed to him. His argument was that this non-disclosure was a breach of natural justice which rendered the decision of the subcommittee (and consequently that of the appeal tribunal) a nullity. This argument succeeded. Two questions arose:

(a) had the exercise of the appeal right in some way deprived the appellant of relief; and

(b) did the decision of the appeal body have validity independently of the status of the decision of the subcommittee?

The judgments of Richmond P and Woodhouse J are brief, but Cooke J obviously approached the problem with relish. He devoted much of his judgment to the effect of the appeal on the jurisdiction of the Court. He began this part of his judgment by referring to *Ridge v Baldwin* [1964] AC 40, where a declaration was made that the dismissal of the Chief Constable of Brighton was void, despite an appeal having been taken to the Home Secretary from the decision of the Watch Committee. He agreed with many of Dr Wade's comments on that decision, but observed that he had reservations about the distinction between ultra vires and error on the face of the record being as black and white as Wade sees it.

He indicated his unease about the terminology in the *Durayappah* case and preferred the approach of Lord Wilberforce in *Anisminic* [1969] 2 AC 147, 207-8, doubting the existence of the distinction between void and voidable. Cooke J expressed reservations about the recent decision in *Ostler* [1977] 1 QB 122. His honour turned thankfully to *Annamunthodo v Oilfields Workers' Trade Union* [1961] AC 945, a decision of the Privy Council "not complicated by the sort of semantic difficulties which have obscured administrative law". In that case, it was said that an appeal is not an act of affirmation, that the exercise of an appeal right before seeking review is quite proper, and that by so doing the appellant does not forfeit his right to redress from the courts.

Other English authority, including *Leary* [1971] Ch 34, a decision of Megarry J supported the general rule that a breach of natural justice is not cured by an appeal. The decisions of Speight J in *Denton* [1969] NZLR 256, where the exercise of an appeal right did not preclude the court from declaring the initial decision a nullity and *Wislang* [1974] 1 NZLR 29, where the existence and exercise of a full right of appeal was treated as relevant to the exercise of the discretion against the applicant, together with the decision of Wild CJ in *Spearman* [1974] 1 NZLR 360, when *Denton* was distinguished, were alluded to by Cooke J. His conclusion was expressed in these words:

> "In my opinion, high authorities, especially *Annamunthodo* and *Ridge v Baldwin*, point to a principle which should now be accepted: that normally a breach of natural justice by a tribunal of first instance is not cured by an appeal to a domestic or

administrative appeal tribunal, in the sense that the jurisdiction of the Courts to redress breaches of natural justice is not thereby ousted. Here again I am in broad agreement with Dr Wade: see his *Administrative Law*, (3rd ed) 146. The ratio of these authorities, appearing most clearly from *Ridge v Baldwin*, is that the initial decision is invalid in law (or 'null and void') and that an appeal on the facts and the merits does not give it validity."

The use of "normally" was explained:

"I have added the qualification 'normally' to allow for the possibility of exceptional cases in which a statute may show that a so-called 'appeal' should be treated as entirely independent of the validity of the first instance decision. An example might perhaps be found in *Stringer v Minister of Housing* [1971] 1 All ER 65, 75, although that was not a natural justice case."

Our present concern is with the cases or categories where, despite a breach of natural justice by the decider at first instance, this can be cured by an appeal or where for some other reason the courts will decline to intervene in the exercise of their discretion. First, there are those which fall within the category illustrated by the *Stringer* case mentioned by Cooke J. Does the Town and Country Planning Appeal Board fall into this category? Despite the wording of the Town and Country Planning Act 1953, s42(1A), referred to by the Chief Justice in *Spearman* (at p 363), the Board was seen by Cooke J as an ordinary appellate body whose powers depend on a valid decision by the first instance tribunal. Secondly, there will be cases where the discretion is exercised against the applicant. The nature of the hearing before the tribunal is relevant, as Speight J recognised in *Wislang*. Other factors are also relevant, for example, the knowledge of the defect by the party exercising the appeal right. Cooke J declined to attempt to make an exhaustive list of relevant factors on the ground that this would be undesirable.

Cooke J has indicated that until the Supreme Court has declared the decision of the decider at first instance to be a nullity, it should be treated as valid. Thus if the Health Department in *Wislang* or the Trotting Conference in *Reid* had sued to recover costs or a fine, it would not have been appropriate for a Magistrate's Court to rule on the effect of the breach of natural justice on the part of the initial decider. Decisions are, it would seem, void (when the Court has so described them) or valid and there is, from the point of view of their enforcement, no intermediate category.

This case might be taken as having settled the effect of the exercise of an appeal right on the validity of the initial decision and the usefulness of the distinction between void and voidable in New Zealand. But a recently reported decision of the Australian High Court indicated that these questions continue to bedevil the judges. In *Twist v Randwick Municipal Council* (1976) 12 ALR 379, only Mason J chose to offer a view and his views are apparently obiter. At page 387 he declared:

"But if the right of appeal is exercised and the appellate authority acts fairly and does not depart from natural justice the appeal may then be said to have 'cured' a defect in natural justice or fairness which occurred at first instance. Certainly this view has been taken in a number of cases – notably by the Privy Council in *De Verteuil v Knaggs* [1918] AC 557; *Pillai v Singapore City Council* [1968] 1 WLR 1278 at 1286; and by the Supreme Court of Canada in *Re Clark and Ontario Securities Commission* (1966) 56 DLR (2d) 585 and *King v University of Saskatchewan* (1969) 6 DLR (3d) 120; cf *Denton v Auckland City* [1969] NZLR 256 and *Leary v National Union of Vehicle Builders* [1970] 3 WLR 343; [1970] 2 All ER 713, where the contrary view was taken. In this conflict of authority my preference is for the approach taken by the Privy Council and the Supreme Court of Canada; first, because the party affected has elected to treat the administrative decision as a valid, though erroneous decision, by appealing from it in preference to asserting his right to a proper performance by the authority of its duty at first instance; and secondly, because in some cases the court will be compelled to take account of the public interest in the efficiency of the administrative process and the necessity for reasonably prompt despatch of public business and balance that interest against the countervailing interest of the individual in securing a fair hearing – in appropriate cases that balance will be achieved if the individual secures a fair hearing on his appeal."

This view and that of Cooke J are almost entirely at odds, but it is significant that the decision found by Cooke J to be most relevant and helpful, the *Annamunthodo* case, was not mentioned by Mason J. It is to be hoped that efficiency and expediency will not be seen to justify depriving an individual of his entitlement to justice both at the initial and the appellate level of decision making. Considerations such as those mentioned by Mason J may be relevant to the exercise of the discretion, but that is seen as a separate issue.

ADMINISTRATIVE LAW

MAKING GOVERNMENT ACCOUNTABLE— A Comparative Analysis of Freedom of Information Statutes — Part III

This part concludes the series by JOHN McMILLAN *of New South Wales University. Parts I and II appeared at pages 248 and 275.*

United States of America *(at)*

Just as a portrayal of official secrecy in Commonwealth countries provides unique insights into the style of politics and administration in those countries, similarly the tale of the US Freedom of Information Act (FOIA) lays bare many salient features of government administration in the US. The Act was poorly drafted and its policy imperfectly conceived; it has provoked sharp conflicts between the Executive on the one hand and Congress and the citizenry on the other; much of the battle has been transferred to the courts, where the Act has been both moulded and distorted in the hands of a sometimes fickle judiciary; as yet another measure to make the Administration manageable, the Act has added another costly and complicated layer to its structure; it has exposed Executive independence, ingenuity and lawlessness; and yet it has had a remarkable democratic impact by promoting administrative accountability and public participation in government.

The history of open government legislation began in 1946 when Congress enacted s3 of the Administration Procedure Act *(au)* which required that all matters of official record had to be made available but, in effect, could be withheld if the document required "secrecy in the public interest", it related "solely to the internal management of an agency", it had to be "held confidential for good cause found", or the person seeking access was not "properly and directly concerned". In this form, the section became the "statutory authority for the withholding of virtually any piece of information that an official or agency does not wish to disclose"; it was "relied upon almost daily to withhold information from the public *(av)*. Thereafter, from 1955 until 1966, a succession of bills were introduced and Congressional hearings held to replace the section. Finally, in 1966 the FOIA was passed *(aw)*, to become effective on Independence Day 1967.

The launching was promising, President Johnson signing it "with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded" *(ax)*, and Attorney-General Ramsey Clark declaring that "Nothing so diminishes democracy as secrecy" *(ay)*. Just as swiftly, however, the bureaucracy interred the Act. Ralph Nader was soon to allege that legislation "which came in on a wave of liberating rhetoric is being undercut by a riptide of agency ingenuity" *(az)*.

To stem the tide of evasion and patch the gaping loopholes, Congressional committees held further hearings on the Act in 1972 *(ba)*. As a result the Act was amended — and significantly repaired and strengthened — in 1974, most notably by the amendment of the national security and law enforcement exemptions, the addition of procedural safeguards, and provision for payment of attorney's fees to successful litigants. (President Ford vetoed the amendments, but in a demonstration of its concern to protect the "right to know" Congress overrode the vote,

(at) Parts of the following discussion of the US and Australian position are taken verbatim from a report written by the author in which the issues are more fully discussed : see App Vol 2 to RCAGA Report, note 3 supra. Thorough analyses of the US Act are contained in : Project Report, "Government Information and the Rights of Citizens" (1975) Mich L Rev 971; and G Walpole, "The Freedom of Information Act : A Seven-Year Assessment" (1974) 74 Columb L Rev 895. See also sources quoted hereafter, many of which are reprinted in a Source Book on the Legislative History of the Act, available from the US House of Reps Committee on Government Operations (March 1975).

(au) 5 USC 1002, n 3(c) for details of the 46 State open records laws, see Access Reports, Nos 1 (Dec 1974) and 27 (Jan 1977).

(av) Sen Rep No 89-813, 89th Cong 1st Sess (1966); and H R Rep No 89-1497, 89th Cong 2nd Sess, (1966).

(aw) 5 USC 552.

(ax) His statement is published in (1968) 20 Admin L Rev 263.

(ay) Id 264.

(az) R Nader, "Freedom from Information : The Act and the Agencies" (1970) 5 Harv Cir R – Civ Lib L Rev 1, 5.

(ba) See Administration of the Freedom of Information Act (H R Rep No 92-1419, 92nd Cong 2nd Sess, 1972); Amending Section 522 of Title 5, United States Code, Known as the Freedom of Information Act (H R Rep No 93-876, 93rd Cong 2nd Sess, 1974); and Amending the Freedom of Information Act (S Rep No 93-854, 93rd Cong 2nd Sess, 1974).

the House voting 371-31 and the Senate 65-27) *(bb)*. More recently in 1976 another exemption was amended (for documents protected by other statutes) *(bc)* – a tribute again to successful lobbying by "Congress Watch", the lobbying arm of the Nader groups.

The recent history of the FOIA has largely been successful, and has seen the disclosure of a range of documents that in other countries are buried beneath a multitude of locks, a staggering increase in public interest, and a faithful (if begrudging) attempt by most agencies to implement the spirit of the Act. Moreover, the Congressional fervour which sired the Act has conceived four relations to it:

– The Family Educational Rights and Privacy Act of 1974 *(bd)* requires schools receiving federal funds to permit students either over 18 or attending a tertiary institution and the parents of younger students to inspect records intended for school use or to be available to parties outside the school. There are also rights to correct inaccurate or misleading records and to restrain the disclosure of personally identifiable records.

– The 1250 or more federal advisory committees established to provide advice or recommendations to agencies and whose membership includes those who are not full-time Government employees are now required to open their meetings to the public pursuant to the Federal Advisory Committee Act 1972 *(be)*. Meetings discussing matters similar to the FOIA exemptions (except the decision-making exemption) may be closed, however minutes must be kept and citizens have a right to enjoin both the closure of a meeting and the non-disclosure of minutes. The Act also contains provisions designed to limit the life of advisory committees and the creation of new ones; to balance their membership and preclude them from solely representing special interests; to limit them to providing advice; and to provide for Congressional oversight of the committee system.

– The Privacy Act of 1974 (effective 27 September 1975) *(bf)* is an omnibus measure regulating the acquisition, storage, retention and dissemination of personal files. Whilst it is too comprehensive to summarise briefly, some of its main innovations include the broad right of access to files which it confers (for instance, an individual can inspect investigatory and evaluation materials used in making decisions concerning employment, promotion and the award of contracts unless disclosure would reveal the identity of any source of the material who had sought confidentiality); individuals have an enforceable right to demand correction of files which are not accurate, relevant, timely and complete; agencies may only disclose files where authorised by statute, for a "routine use", or with the permission of the individual affected; agencies must publish annually a notice describing their personal records systems, the categories of individuals and kinds of data covered by each system, the uses to which the information is put, and the agency policy regarding storage and disposal; and an agency official may be fined up to $5,000 for wilfully breaching some of the Act's requirements, and an agency is liable for civil damages of not less than $1,000 if an individual is adversely affected by the agency's failure to comply with the Act.

– The feared newcomer, which begins operating on 12 March 1977, is the Government in the Sunshine Act 1976 *(bg)*. It does not apply to departments, but only to independent statutory authorities (mainly the regulatory agencies) and requires meetings of the governing body to be open to the public (for instance, meetings of the Commissioners in the Federal Trade Commission, the Securities and Exchange Commission and the Federal Communications Commission). Meetings may be closed along the same lines as under the Advisory Committee Act, although transcripts or recordings must be kept of closed meetings. Again, a citizen may enjoin an agency from closing meetings or not disclosing transcripts. The Act also prohibits ex parte communications in agency adjudicative hearings.

To return, however to the FOIA, that Act is sufficiently different from those previously discussed to merit extensive summary. Essentially, the Act can be divided into four parts. The first part, which requires that certain documents be published or listed in a public index, provides the positive side to open government. Material must firstly be published in the Federal Register which would notify the public of the structure of agencies and the way in which they handle

(bb) H R Exec Doc No 383, 93rd Cong 2nd Sess (1974) (veto message); 120 Cong Rec H 10,875 (20 Nov 1974); 120 Cong Rec S 19,823 (21 Nov 1974).

(bc) The new exemption is reproduced in text preceding note *(bh)* infra.

(bd) 20 USCA 1232g (Supp Feb 1975).

(be) (1972) Pub L 92-463; 86 Stat 770; 5 USC App 1 (Supp III, 1973); discussed in B W Tuerkheimer, "Veto by Neglect : The Federal Advisory Committee Act" (1975) 25 Am Uni L Rev 53.

(bf) (1974) Pub L 93-579; 88 Stat 1896; 5 USC 552a.

(bg) (1976) Pub L No 94-409; 90 Stat 1241; 5 USC 552b. Measures have also been introduced to open most Congressional committee meetings, and indeed the Senate draft of the Sunshine Act would have applied to committees : See S Rep No 94-354; 94th Cong 1st Sess, (1976) 6-7. President Carter also announced that he plans to open Cabinet meetings to the Press (Wash Star, 31 Jan 1977).

matters concerning the public – for example, matters 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 channelled and determined, and rules of procedure.

The remainder of the first part of the Act relates (more importantly) to the internal law of agencies. Stated briefly, this includes 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 discharging their official and statutory duties; the reasons given by any officer who exercises a statutory power; and the rules of policy applied by agencies in administering schemes which may affect the public. In Australia and New Zealand, this law (which has supplanted legislation and often affects citizens to an extent greater than the law contained in statutes or court reports) is either secret or hidden and inaccessible – our most tragic negation of the rule of law so cherished by decades of British jurists. In America, some of this internal law 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 the first 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.

The second part of the Act contains the general access principle, that all other documents in the possession of agencies are to be made available for inspection or copying by a member of the public unless covered by one of nine exemptions. The exemptions are only permissive in form; an agency may disclose an exempt document if it wishes so to do (the exemptions also apply to the documents to be published or made available under the first part of the Act). It will be simpler at this stage merely to quote the US exemptions and some of them will subsequently be explained:

"This section does not apply to matters that are

"(1)(A) specifically authorised under criteria established by an Executive order to be kept secret in the interest of national defence or foreign policy, and (B) are in fact properly classified pursuant to such Executive order;

"(2)related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute (other than the (Government in the Sunshine Act)), provided that such statute (A) requires that the matters be withhold 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;

"(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;

"(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, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

"[(8) and (9) are two unimportant exemptions for certain information relating to financial institutions, and oil well data.]

"Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

The main exemptions requiring explanation are exemptions 1, 2, 4 and 5 *(bh)*. Before its amendment in 1974, exemption 1 had been so interpreted by the Supreme Court as to afford the Government one of its greatest loopholes: a court would not examine classified documents in camera either to review the propriety of a

(bh) For an excellent analysis of the case-law, see C M Marwick (ed Litigation Under the Amended Federal Freedom of Information Act (1976 2 ed) (purchasable from Project on National Security and Civil Liberties, 122 Maryland Ave, N E, Wash, 20002).

classification or to separate non-exempt from exempt information *(bi)*. Since 1974, the exemption refers in effect to documents which are properly classified "Top Secret", "Secret" or "Confidential" under Executive Order 11652 *(bj)*. An agency must meet both substantive and procedural criteria in order to prove that a document is properly classified. Under the substantive criteria, the agency must establish that the disclosure of the document could be reasonably expected to cause (respectively) "exceptionally grave damage", "serious damage" or "damage" to national defence or foreign relations. Under the procedural criteria, a document must have been classified by an officer who was authorised in writing so to do, and the classification mark should reveal the name of that officer, the date of classification, and the portions or the document to which the mark applies. Further, there is a system of automatic declassification: as a general rule, "Top Secret" documents are to be declassified after ten years, "Secret" after eight and "Confidential" after six.

Understandably, the courts have been reluctant to review classified material in camera, and government attorneys have argued vigorously that at most the court should inspect government affidavits in camera and ex parte. Nevertheless, there have been cases in which material has been inspected in camera, disclosure has been ordered on the basis that procedural criteria were not met, and several decisions have required the Government to demonstrate that all the criteria were met *(bk)*. But more important from the public's point of view is that the new classification system instituted by Executive Order 11652 appears to be working reasonably well and has resulted in the improvement of the classification system and declassification of a large volume of material (examples are given below).

Exemption 2 was intended to be a pragmatic exemption that would permit an agency to withhold trivial information that would not be of public interest, such as parking regulations and sick leave policies. However, relying on a 1966 House Report, the agencies have sought to apply the exemption to important segments of their internal law *(bl)*. Courts have sanctioned non-disclosure of investigative manuals where "the sole effect of disclosure would be to enable law violators to escape detection" *(bm)* (such as manuals describing negotiating, litigating and auditing strategies *(bn)*, and surveillance techniques used by customs agents *(bo)*, however the major thrust of the agency arguments have been rebuffed. For instance, it has been held that the exemption does not protect the manuals for tax auditors, where disclosure might encourage rather than defeat compliance with the law *(bp)*; the Parole Commission was ordered to publish its guidelines for determination of parole applications *(bq)*; and very recently a district court ordered the disclosure of records describing criteria for treatment of first offenders and the exercise of the government's discretion to prosecute *(br)*.

In apparent contradiction of the professed "free enterprise" character of the US business system, vast reservoirs of secret information on corporate activities has been amassed by agencies in pursuance of their ubiquitous regulatory activities and has traditionally and routinely been withheld from the public. Thus has exemption 4 become the battleground for citizens, industry and agencies disputing the secrecy of records ranging from financial data on concessionaires in national parks *(bs)* to figures on natural gas deposits and reserves *(bt)*, and from affirmative action reports on industry compliance with civil rights and equal opportunity laws *(bu)* to a film recording the distressing annihilation of dolphin populations by fishing fleets *(bv)*. In general, the courts have favoured disclosure. Wrestling with the drafting ambiguities of exemption 4, they have adopted a functional approach and hold that commercial or financial information is confidential.

"... if disclosure of the information is

(bi) EPA v Mink (1973) 410 US 73.

(bj) Weekly Compilation of Presidential Documents (13 March 1972) p 542. The Order is analysed in Project Report, note *(at)* supra, at 973-1015.

(bk) See respectively, Military Audit Project v Bush, Civ No 75-2103 (DDC 1976); Halperin v Sec'y of State, Civ No 75-674 (DDC 1976); and Halperin v Colby, Civ No 75-676 (DDC 1976).

(bl) See H R Rep No 89-1497, 89th Cong 2nd Sess, 10 (1966).

(bm) Hawkes v IRS, 467 F 2nd 787, 795 (6th Cir 1972).

(bn) Lord & Taylor v Dept of Labour, 22 W H Cases 1245 (SDNY 3 Sept 1976).

(bo) City of Concord v Ambrose, 333 F Supp 958 (ND Cal 1971).

(bp) Hawkes v IRS, 467 F 2nd 787 (6th Circ 1972).

(bq) Pickus v US Board of Parole, 507 F 2nd 1107 (DDC 1974).

(br) Jordan v Dept of Justice, Civ No 76-0276 (DDC 18 Jan 1977).

(bs) National Parks and Conservation Ass'n v Morton, 498 F 2nd 765 (DC Cir 1970) (most of the material disclosed).

(bt) Pennzoil Co v Federal Power Comm, Civ No 75-2961 (5th Cir 2 July 1976) (Court reversed agency's decision to disclose in this case).

(bu) Chrysler Corp v Schlesinger, Civ No 75-159 (D Del, 17 June 1976) (disclosed).

(bv) Save the Dolphins v Dept of Commerce, 404 F Supp 407 (ND Cal 1975) (disclosed).

likely to have either of the following effects:

"(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. *(bw).*

By and large this standard has been applied sensibly – for instance, a Government promise of confidentiality is not conclusive *(bx)*; the Government's sources of information are unlikely to be impaired where information has been supplied pursuant to statute or as a condition of obtaining a government benefit *(by)*; and competitive injury is unlikely in a monopolistic environment *(bz)*. The most complicating development however has been "reverse FOIA" suits. Courts have permitted private concerns to enjoin the disclosure of exempt information submitted to an agency and at least thirty such suits have now been instituted *(ca)*.

Exemption 5 safeguards deliberative, consultative, and decision-making processes by protecting documents containing advice, opinions or recommendations; factual material to the extent that it is either inextricably intertwined with policy-making material or is selected and summarised in such a way that it reflects a deliberative process; and records covered by the common law privilege for the attorney's work-product. Once again, the courts have attempted to impose functional qualifications upon what is otherwise an extremely broad exemption, for example, by bearing in mind the interest to be protected (internal frankness and candour); by drawing a distinction between predecisional documents, which are protected, and post-decisional documents embodying or explaining a decision, which are not; and where possible by excluding from the coverage of the exemption the internal law defined in the first part of the Act *(cb)*.

The third part of the US Act contains the procedural requirements with which agencies must comply when handling requests. A request must "reasonably describe" the records which are sought *(cc)*. An agency must determine a request within ten working days of its receipt, and must then notify the person making the request of the decision, the reasons therefore, the name of the officer who made the decision, and the right of the person to appeal any adverse determination to the head of the agency. An internal appeal must be disposed within 20 working days of receipt of the notice of appeal. Either of the two time limits may be extended by the agency for a further ten working days if one of a number of "unusual circumstances" exists – for instance, if there is a need to collect documents from a field facility, to consult "with another agency having a substantial interest in the determination of the request", or to "search for and appropriately examine a voluminous amount of separate and distinct records". Failure by the agency to determine the request within the applicable time limits is deemed to amount to a refusal to disclose and the person may thereupon appeal the matter to a court; the court may allow the agency additional time to review the request.

An agency may charge a fee for inspection or copying of a document. "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". Fees are to be reduced or waived if the agency thinks that "furnishing the information can be considered as primarily benefiting the general public".

Lastly, each agency must prepare an annual report to Congress containing information on such things as the number of denials in the year, the number of internal appeals and their outcome, the names of the officers who denied access to records, and the amount of fees collected. The Attorney-General must submit a similar annual report dealing with all court cases that have arisen under the Act.

The fourth and final part of the US Act provides that a person who has been denied access to a document may appeal the matter to a court. The burden of proof is on the agency, and the court may examine any records in camera (even classified documents), although the court is confined to deciding whether the document falls within one of the exemptions; if it does, the court must uphold the agency's decision. The Act contains a few other provisions relating to court proceedings: the court is urged to give precedence to all freedom of information cases; pleadings are

(bw) Morton, note *(bs)* supra at 770.

(bx) Ackerly v Ley 420 F 2nd 1336 (DC Cir 1969).

(by) Morton, note *(bs)* supra.

(bz) Hughes Aircraft Co v Schlesinger, 384 F Supp 292 (CD Cal 1972).

(ca) See, e.g., Charles River Park "A" v HUD, 519 F 2d 935 (DC Cir 1975).

(cb) See, e.g, EPA v Mink (1973) 410 US 73; NLRB v Sears Roebuck & Co, (1975) 421 US 132; and Vaughn v Rosen, 383 F Supp 1049 (DDC 1974), aff'd, 523 F 2d 1136 (DC Cir 1975).

(cc) A 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 the record with a reasonable amount of effort" (HR Rep No 93-876, 93rd Cong 2d Sess, 1974).

to be completed within thirty days of the appeal being lodged; costs may be awarded against the United States if the plaintiff has substantially prevailed; and if the court issues a written finding suggesting that an officer has acted arbitrarily or capriciously in withholding documents, the Civil Service Commission is to conduct an enquiry to decide whether disciplinary action should be taken against the officer.

The differences between the US Act and the legislation of other countries are numerous: the FOIA contains unique provisions for publication and indexing of internal law (although the public registers and journals serve a similar purpose in Sweden); regulation of administrative procedures is an integral part of the Act; disputes are heard in the ordinary civil courts; requested documents must be identified; the Act does not apply to Congress or the courts; The Act incorporates the classification system; and while, for instance, the law enforcement exemption is narrower than that of other countries, the policy-making exemption is more pervasive than the comparable Swedish one. By far the greatest difference however relates to the operation of the Act.

In other countries the Acts have not been used extensively, except in Sweden where the Press has been the greatest beneficiary. The US Act has been a battleground since its enactment. Most of the early statistics described the obduracy, delay and improbity of many of the agencies. For instance, a 1972 study by the library of Congress showed that, on average, it took agencies 33 days to respond initially to a request and an additional 50 days to decide on internal appeal. In some agencies, the average figures were as high as 69 days (Federal Trade Commission) and 127 days (Department of Labour) respectively *(cd)*. Congressman Moorehead, the Chairman of the House sub-committee which investigated the Act in 1972, thought that delay was "probably the single most important failure in the administration of the FOIA" *(ce)*.

Many citizens couldn't afford freedom of information. Fees were described in 1972 as "toll-gates on public access to information". Search fees varied among agencies from $3-$7 per hour, and copying costs varied from 5c-$1 per page. Other practices varied as well: some agencies required pre-payment before a search would be undertaken; some required payment even if a document was withheld; others demanded a minimum fee (sometimes as high as $10); agencies such as Health, Education and Welfare rarely charged fees, yet in one agency an officer charged a fee when asked for the names of the 26 subordinates who reported directly to him; and some agencies would charge citizens, but not regular clients *(cf)*.

The high and non-reimbursable court costs also contributed to a failure or unwillingness of people to challenge information denials. A study undertaken by a House sub-committee of cases that had been reported to it in detail revealed that in nearly 2,200 denials over the first four years of the operation of the Act, there were fewer than 300 internal reviews (in two-thirds the agency decisions were fully upheld), and roughly 100 court appeals. The agency denials were fully sustained by the court in less than 25% of cases. Moreover, the success of the agencies was greatest where the exemptions invoked were for national security or law enforcement – the two exemptions which were amended by Congress in 1974 *(cg)*.

Administrative abuses were not the only problem. Innocuous material was routinely withheld. In the Department of Interior, for instance, where 60 percent of requests were denied, the sorts of information withheld included details of deaths and disabling injuries in national parks; documents relating to water pollution control; a report on a wilderness area; and a consultant's report on the department's information and public relations functions *(ch)*.

Probably the greatest public defeat however was suffered in respect of the one billion or more classified documents which, pursuant to a 1973 Supreme Court decision, agencies could withhold *(ci)*. The enormity of this defeat was realised in hearings held in 1972-74 which revealed, inter alia, that, 55,000 government employees were authorised to classify a document – "hundreds of thousands" could stamp a document "for official use only". At least 66 different classification marks were discovered *(cj)*. Despite this, conservative estimates put at two-thirds the number of documents that could be released without damage to the national security *(ck)*. The Pentagon Task Force on Security in 1970 suggested a 90% reduction in the amount of scientific and technological information under

(cd) HR Rep No 92-1419, note *(ba)* supra, at 16.

(ce) Interagency Symposium, note *(b)* supra, at 17.

(cf) Generally, see Rep No 93-854, note *(ba)* supra, at 10-12; and HR Rep No 92-1419, note *(ba)* supra, at 53-59.

(cg) HR Rep No 92-1419, note *(ba)* supra, at 71-72.

(ch) Id, at 45, 61-62.

(ci) Note *(bi)* supra.

(cj) Executive Classification of Information-Security Classification Problems Involving Exemption (b) (i) of the Freedom of Information Act (HR Rep No 92-221, 93rd Cong 1st Sess, (1973), opening statement of Congressman Moorehead, 1 May 1972.

(ck) F Horton, "The Public's Right to Know" (1972), Jan-Feb) Case and Comment 1, 3.

classification *(cl)*. A retired Air Force Security classification expert with 43 years of federal service went as high as 99.5 percent *(cm)*.

In recent years, and particularly since the 1974 amendments, the Act has given substance to the peoples "right to know". The most notable change has occurred in public interest. The Justice Department, for instance, was receiving 5 requests per week prior to 1974, but in 1975 it received 30,000 under the FOIA and the Privacy Act (14,478 of these were for the FBI); the CIA received 6,609 under the FOIA and 552 under the Privacy Act; Health, Education and Welfare received 13,000; the Defence Department 27,000 FOIA requests, and another 13,000 requests to the Army under the Privacy Act; and the Federal Trade Commission 213 between February-May 1975 and the Securities and Exchange Commission 145 in the same period. Most of these requests, it should be pointed out, are met, although there are nevertheless about 500 FOIA suits pending *(cn)*.

Fanning this flame of interest are a number of organisations, the most prominent of which is Ralph Nader's Freedom of Information Clearinghouse established in 1972. The Clearinghouse has testified before Congress, published articles, answered thousands of individual requests about how to get information, disseminated over 20,000 pamphlets describing the Act, and instituted nearly 50 court cases (most of which have been won). In addition to this there are at least two private organisations established to gain information for individuals; a special Press Committee to assist newsmen; a number of regular newsletters on the operation of the Act; and a plethora of Washington-based public interest groups to whose operations the Act is central.

There have also been significant reforms to the classification system under Executive Order 11652. There has been a 75 percent reduction in the number of officers authorised to classify a document. The Atomic Energy Commission reported in 1973 an 83 percent reduction in the number of documents classified "Top Secret", whilst the US Information Agency estimated that overall it classified 30 percent fewer documents. In relation to all agencies, over half the requests for declassification of documents which had been classified for more than 10 years were met. And at least one agency, the Department of State, has warned 400 employees against over-classifying information *(co)*.

However, the most important evidence of the Act's success is the range of documents that has been released. This includes: CIA and FBI files on individuals; files on the Hiss and Rosenberg investigations; the Department of Army Report on the My Lai Massacre; reports by staff scientists on the Atomic Energy Commission that a major nuclear reactor accident might kill up to 45,000 people and create a disaster area the size of Pennsylvania; meat inspection reports showing that products were suspected of being adulterated or unwholesome; nursing home reports; civil rights and Medicare compliance reports; Red Cross reports revealing deplorable conditions in South Vietnamese prisoner of war camps; FBI documents on several counter-intelligence programmes aimed at left-wing groups and civil rights workers; antitrust files relating to merger clearances; correspondence with auto-manufacturers on defect investigations; the list of insecticide products containing vinyl chloride; documents revealing investigations by the Internal Revenue Service of dissident political groups; records concerning Lockheed's use of government property and its performance of the C5A project; and consumer test reports *(cp)*.

Australia *(cq)*

There now exists a strong possibility that Australia will see the enactment of a federal freedom of information Act within a year or so. There exists an equally strong probability that it will be a pale shadow of its Swedish and American counterparts.

Soon after its election in 1972, the new Labour Government took an initial step towards implementing its "open government" promise by establishing an inter-departmental committee to propose freedom of information legislation

(cl) A Schlesinger Jr, "The Secrecy Dilemma", NY Times Magazine, 6 Feb 1972, p 12.

(cm) Note *(cj)* supra.

(cn) See Wash Post, 25, 26, 27, 28, 29 July 1976. Costs of administering the Act have also risen, possibly to an annual figure close to $20 million. While the costs of most agencies were not in excess of $½ million, some of the higher figures in 1975 were Treasury ($3.3), Defence ($5.9), Health, Education and Welfare ($2.36), CIA ($1.39), and FBI ($1.6). In part, these high figures are due to the surge of requests received since the 1974 amendments, cumbersome administrative procedures and filing practices that are yet to be reformed, and the huge volume of unnecessarily classified material that has to be declassified in response to requests (Ibid). Against this one must remember that the US agencies have over 90 billion pieces of paper (text to note *(b)* supra), and that the cost of government secret-keeping runs as high as $60-80 million per year (NY Times, 24 Jan 1972).

(co) Project Report, note *(at)* supra, at 990-998.

(cp) See, e.g., Marwick, note *(bh)* supra, at 146-161; and N Blackstock, Cointelpro – The FBI's Secret War on Political Freedom (1976).

(cq) There were many "open government" developments in Australia during 1973-1975 that are not discussed here – e.g., the creation of a Department of Media, Information and Advice Centres, a Digest

along the lines of the US Act. Twenty months later, in September 1974, the Committee published a brief report that was widely criticised for its emasculation of the policy of the US Act *(cr)*. Because of political troubles in which the Labour Government soon became embroiled the Report was never acted upon before the dismissal of that Government in 1975.

To the surprise of many, the new Government carried forward the promise of legislation, and reconvened the same committee comprising the representatives of the Departments with an interest in secrecy (such as Treasury, Defence, Foreign Affairs, Attorney-Generals, and Prime Minister and Cabinet). A much lengthier report was published by the Committee in December 1976, in which they endorsed most of the proposals in their earlier report yet made a few suggestions for improvement *(cs)*. Legislation incorporating most elements of the Committee's Report is expected to be introduced in the August session of the Parliament.

The legislation proposed by the Committee is similar in outline to the US Act, and in some respects their proposals are improvements on the US Act. Their substitution of review by the Administrative Appeals Tribunal *(ct)* for that of a court is sensible, in view of the time delays and costs associated with court proceedings in America, and considering the conservatism that might be expected from judges who were unfamiliar with cases involving the Administration. In another respect some of the exemptions proposed by the Committee are improvements because of the qualification added to some that disclosure must "be reasonably likely to have a substantial adverse effect" on, say, the position of a department in negotiations or in legal proceedings; or expose a commercial enterprise "unreasonably to disadvantage".

Nonetheless in most respects the Committee's proposals are handicapped. Following is a brief selection of some of the major faults:

– With two exceptions, the proposed Act would not apply to material that predates the Act. The exceptions are for documents which either embody the Government's internal law or are reasonably required for an understanding of public documents which post-date the Act. This would undercut one of the major purposes of the legislation – the public would be denied access to important policies that predetermine Government actions for years to come, to documents revealing the perpetuation of traditional or worn-out values and principles, and to evidence of methods of decision-making or investigation that might be publicly disapproved.

– The Committee's Report is imbued with an exacting adherence to a desire to retain fully the Westminster conventions of Cabinet and ministerial responsibility. From that premise, the Committee concluded that a Minister, and not the Tribunal, should conclusively determine whether the Government would have to release documents relating to security, defence, international relations, relations between the Commonwealth and State governments, information received in confidence from other governments, or documents that would involve the disclosure of Cabinet deliberations or decisions. This proposal is ingenious for its embodiment of the principle of Executive autocracy. The only rationale for preserving this principle within a freedom of information Act can be either, that neutral adjudicators cannot be trusted to interpret a statute and decide whether some documents should be disclosed – a sad reflection upon British justice – or that the questions involve political judgments which must be made by the Administration – the very principle that freedom of information legislation is meant to extinguish.

– There are 13 other exemptions recommended by the Committee, few of which are free of fault. For instance, two of the exemptions are for documents the disclosure of which would be reasonably likely to have a substantial adverse effect on "the public interest in the efficient and economical operations of a department" or "the financial, property or personnel management interests of a department". To a conservative Administration accustomed and committed to secrecy, there will be no limit to the range of documents they withhold under these criteria. Examples might include efficiency audits or reports on the public image of an agency (the disclosure of which might damage morale); complaint letters received from the public; the internal law of agencies, consumer test reports on products to be used by an agency; government valuation reports; and details of agency contracts,

containing Ministerial Statements etc, Green Papers, committees of enquiry, and advisory committees with a broad community membership (most of these institutions or initiatives were abolished or halted in 1976). See, e.g., R Kirkpatrick, "The Minister for Open Government", in R Scott and J Richardson (eds), The First Thousand Days of Labour (1975) Vol 1.

(cr) Proposed Freedom of Information Legislation (1974, A-G's Dept).

(cs) Policy Proposals for Freedom of Information Legislation (1976, A-G's Dept). The Government has stressed that it is not bound by these proposals, and is free to formulate new ones.

(ct) Created by the Administrative Appeals Tribunal Act 1975 (6th). The Tribunal exercises an appellate jurisdiction over defined categories of administrative discretions.

leasing arrangements, requisitions and second-hand property disposals. However, a more curious exemption still, is for documents which the Attorney-General certifies would be privileged from disclosure in judicial proceedings on a ground of public interest. Presumably, this is the "catch-all" exemption to be used when all else fails. Apart from its breadth *(cu)*, the exemption is remarkably elastic, since courts adjudicate claims of Crown privilege by weighting the Government's interest in secrecy against the litigant's interest in disclosure. If this approach were adopted, the ordinary citizen would be compelled to demonstrate some interest in or need for the documents. The democratic duty of curiosity would be stifled.

– In deciding a case, the Administrative Appeals Tribunal would be confined to deciding whether requested documents come within a literal interpretation of one of the exemptions; if so, the agency's ruling has to be sustained. This approach ignores the perennial problem of the draftsman in devising a general formula to cover a multitude of discrete fact situations. Any exemption, if it is to perform its role, will be so broadly defined as to encompass innocuous information. Furthermore, the courts of law for many decades have had jurisdiction to question the legality of official acts. The Administrative Appeals Tribunal was established in Australia because of a view that official decisions should now be open to review on the merits. In the other areas of its jurisdiction, the Tribunal has power to undertake a de novo review of the discretionary judgements of the Administration; the proposed Act would be the singular exception.

– Many of the other faults with the Committee's proposals are errors of omission. No recommendations were made for reforming the system of document classification, which in many areas is the root cause of secrecy. No changes were proposed to s70 of the Commonwealth Crimes Act 1919, which prohibits under penalty of two years gaol the unauthorised disclosure of any documents. Since subordinate officials will need authority to release, caution, timidity and prevariation will be the governing principles. And the Committee recommended against inclusion of any of the procedural safeguards that were judged essential to the successful operation of the US Act in 1974. (They were of the opinion that the Ombudsman is a sufficient safeguard.)

The Australian Government is not committed to accepting the proposals of the Interdepartmental Committee, and has indicated that it will defer any final action for six months until public comments on the proposals can be assessed. A number of parliamentarians have expressed an interest in examining alternative proposals, Press interest in the idea of legislation has been aroused, and a committee has been formed called the Freedom of Information Legislation Campaign Committee, which comprises representatives of many leading community groups and includes a broad community membership *(cv)*.

But most importantly, an alternative to the Committee's proposals exists. In 1976 the Royal Commission on Australian Government Administration published as an appendix to its Report a Draft Freedom of Information Bill and a lengthy Explanatory Memorandum (prepared by this author) as a dissenting report of one of the five Commissioners *(cw)*. The Draft Bill is similar in outline to the US Act and many of its other provisions are reflected in the preceding comments. A brief account follows of some of the principles upon which the Bill is based.

(a) Exemptions. Essentially, the various statutes discussed above 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 are thus encouraged.

The Draft Bill seeks to combine and to supplement the better features of both approaches. Most of the exemptions first define the classes of documents and interests that have to be protected by non-disclosure, and then they define the classes of documents that should be disclosed and the interests that favour disclosure. For instance, one of the exemptions protects trade secrets and other commercial or financial information acquired from

(cu) For instance, in Conway v Rimmer, Lord Reid stated quite categorically that the proper functioning of the public service required the exclusion of "all documents connected with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies" (1968) AC 910, 952).

(cv) The Committee's address is PO Box 346, Dickson, ACT 2602.

(cw) App Vol 2, RCAGA Report, note c supra.

a commercial or financial institution, if disclosure would expose the institution unreasonably to disadvantage. In deciding whether this disadvantage would occur, the agency is instructed to consider and take account of a number of considerations, including whether the information is generally available to competitors of the institution, whether it could be disclosed without any substantial adverse impact on the competitive activities of the institution, and whether there are any compelling public considerations in favour of disclosure which outweigh any competitive disadvantage to the institution, for instance, the public interest in improved competition or in evaluating aspects of government regulation of trade practices or environmental controls. To similar effect is the exemption for documents connected with the policy-making or decision-making process. There is a list of sixteen items which are excluded from this exemption, except in so far as premature disclosure of any of the documents in the list would unreasonably impede the making of a decision or the implementation of a policy. Included in the list are documents containing factual material, statistical analyses, consumer test reports, environmental impact statements, efficiency audits, feasibility studies and cost/benefit analyses, reports from outside advisory bodies, interdepartmental committee and task force reports, final proposals for the preparation of subordinate legislation, Cabinet submissions (other than budgetary proposals) prepared within an agency rather than by the Minister, the internal law of agencies, and the reasons given for the exercise of a statutory discretion.

In all, there are 22 exemptions, since some of the global exemptions customarily found in other statutes have been split into smaller units. For example, the exemption to protect the effectiveness of administrative procedures is split into exemptions for such things as the procedures to be followed in negotation, contract tenders, and examination papers. A final feature is that some documents are protected only until 10 years after their creation (this applies to many Cabinet and policy documents and much classified information). Other classes of documents are protected only for so long as disclosure would have a certain harmful effect, such as invade somebody's privacy.

(b) Administrative arrangements. A common feature of most of the statutes examined is that they contain few, if any, directions on administrative implementation of the legislation. This retards the legislative purpose, since secrecy is caused as much by elements like the classification process and the hierarchical and centralised nature of decision-making as it is by express proscriptions against disclosure. Three ways in which the draft bill affects administrative arrangements are by revising the statutes which currently impose penalties for unauthorised disclosure (the revision is along the lines recommended by the UK Franks Committee except that Cabinet documents are not protected by criminal sanctions); specifying time limits for answering requests; and reforming the classification system along US lines and tying the national security exemption to this. Additionally, a Classification Review Committee is established, comprising parliamentary, departmental and outside members, with power to review classifications and make appropriate recommendations.

Lastly, the Bill impliedly prescribes that requests should be determined by a small number of officers who will not include the Minister or the administrative head of the agency; desirably the function would be handled by public information specialists, such as an information officer advised by a lawyer. This prescription arises indirectly, in that the administrative head is authorised to designate the officers who will be responsible for handling all requests; if no such officers are designated, or if the Minister or the administrative head is given the power, then any denial may be appealed directly to the Administrative Appeals Tribunal rather than to another officer in the same agency (in effect, the agency would have substantially less time overall in which to consider a request and might suffer other disadvantages because of the variety of orders which the Tribunal is authorised to make).

(c) Enforcement. Three methods of enforcement are employed: judicial, parliamentary and "self-enforcement". In addition to the powers the US FOIA gives to courts to award attorney's fees and refer cases of breach of duty to a personnel authority, the Tribunal is authorised to order that a document (other than a Cabinet document) be disclosed, notwithstanding that the document is within the scope of one of the exemptions; and if it orders an agency to disclose documents it may direct that the agency charge a reduced inspection fee.

There is a provision similar to one on the US Act requiring preparation of annual reports, and thus making parliamentary review possible. The Bill additionally provides that these reports be considered by the Administrative Review Council (an oversight body created by the Administrative Appeals Tribunal Act 1975).

The Bill also includes devices which are designed to make it self-enforcing. Some of these devices have already been mentioned, and include authorising the Tribunal to impose sanctions against agencies, thus encouraging them to decide

matters in a way that will avoid Tribunal review. Another mechanism is the requirement that any refusal to disclose must be in writing and must include particulars of the exemption under which the document is withheld, an explanation as to why the document is covered by that exemption, and the name and position of the officer who made the decision to refuse access. That each officer must accept responsibility and be publicly accountable for refusing to disclose information is further ensured by the requirement that the annual report identify those officers. There were some procedural problems that recurred in America and which had the effect of depreciating the public's right to know. To minimise the occurrence of those problems in Australia, the Bill provides that a person affected may appeal directly to the Tribunal thereby circumventing the internal agency review. Circumstances in which this right arises include where an agency has failed to consider a request within the requisite time limits, where an agency has replied that a requested document either does not exist or cannot be found, or if an agency insists that a person who has made a request to inspect a document pay, as a condition precedent to inspection, a fee for a copy of that document. A final example of a self-enforcing mechanism is that contained in the provisions requiring preparation of indexes and publication of internal law. If a document is not indexed or published as required, then no fee can be charged of a person who wishes to inspect that document.

(d) Publication. The Bill requires internal law to be made available, although in a simpler fashion that the US Act which requires publication of substantive rules of general application and indexing of others. Agencies are required to publish their legislative and staff manuals, and to prepare an index of the remaining law and to make the index publicly available. Other provisions require the preparation and publication of material describing the organisation and operating procedures of each agency; of a register of most Cabinet decisions; a register of "D" Notices; and preparation of an index of particular types of documents, such as reports from outside advisory bodies, feasibility studies, interdepartmental committee and task force reports, and submissions to Cabinet prepared by an agency.

(e) Ministerial authority. Unlike the Australian Government's Interdepartmental Committee Report, the Bill does not ascribe to the Westminster conventions a mystical immutability. Specific protection is given to the position of Ministers and their supervisory authority at only a few appropriate points: first, there are the provisions for Ministerial review prior to Tribunal proceedings; next, a Minister is authorised to issue instructions on whether documents covered by the exemptions should ever be released (these instructions do not bind the Tribunal); neither the Tribunal nor any administrative officer has a discretion to release Cabinet documents, including Cabinet submissions prepared by a Minister; and lastly, party-political correspondence of Ministers is not subject to the Bill.

NEW ZEALAND LAW STUDENT CONFERENCE & MOOTS '77 25 - 28 AUGUST

All Law Students, Lawyers and Law Faculty Staff are cordially invited to attend the events of annual New Zealand Law Student Conference and Moots '77, to be held in Wellington over the period 25-28 August, hosted by the VUW Law Faculty Club Inc. In addition to the annual inter-faculty mooting competitions the Organisers have prepared a comprehensive programme of educational, sporting and social functions to be held at a number of interesting venues. Registration entitles the bearer to all the privileges of a Conference delegate. This includes admission to all functions, a Conference booklet of proceedings, and for out-of-town students who require it, billeting. Registration Cards for the Conference can be obtained by writing directly to: VUW Law Faculty Club Inc, C/- Faculty of Law, Victoria University of Wellington, Private Bag, Wellington, enclosing $11. It is advisable to apply for a Registration Card in advance as several of the functions will have to be strictly limited in size.

A stimulating set of Seminars and workshops has been planned, giving each a broad title, in order to allow a broad spectrum of speakers the maximum possible latitude when deciding which aspects to the title to explore.

There will be two separate sets of inter-faculty mooting competitions held during the Conference. One will be judged by Mr O'Brien QC and the other will be judged by the Hon Sir Robin Cooke.

This Conference is held under the auspices of the New Zealand Law Students Association, a body to which all New Zealand Law Students belong, through their constituent Law Student Society. Further details of the Conference are available from: The NZLSA Secretary, C/- Faculty of Law, Victoria University of Wellington, Private Bag, Wellington.