Economic Council of Canada
Conseil économique du Canada

Technical Report No. 22

Provision of Information in the Context of Regulation

Margot Priest
Economic Council of Canada

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TECHNICAL REPORT NO. 22

PROVISION OF INFORMATION IN THE CONTEXT OF REGULATION

by

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Economic Council of Canada

ONTARIO MINISTRY OF TREASURY AND ECONOMICS
APR - 1 1982
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ISSN-0225-8013

January 1982

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Résumé

L'intervention croissante de l'État dans le secteur privé, par le biais de la réglementation, a attiré l'attention sur le rôle de l'information dans cette activité des organismes publics. De quels genres de renseignements ont-ils besoin pour formuler des règlements ? Quels sont les avantages et les inconvénients de réglementer en obligeant à divulguer les renseignements ? Jusqu'à quel point le besoin d'information des gouvernements constitue-t-il un fardeau pour le secteur privé ? Sur quels critères la divulgation des renseignements devrait-elle se fonder ? Quel rôle joue-t-elle pour assurer la responsabilité des organismes de réglementation envers les entreprises réglementées, le public en général et le Parlement ?

Le présent document examine ces questions, ainsi que plusieurs articles de la future Loi sur l'accès à l'information (Bill C-43) qui touchent de près à la réglementation et qui portent sur les renseignements provenant de tiers (20), les documents de travail et autres documents du Cabinet (21), et les avis donnés à un ministre pour l'élaboration de politiques (22). Nous trouvons inquiétante l'étendue de certaines exemptions aux règles de divulgation, étant donné notamment que la Loi aurait tendance à devenir la norme à ce sujet dans toute l'administration fédérale. À noter que même si un régime d'accès à l'information convient bien dans les cas où, manifestement, le demandeur ne s'intéresse

pas aux renseignements ou n'en a pas besoin pour lui-même, ce régime n'est pas nécessairement indiqué lorsque d'autres intérêts sont en jeu.

Ces autres intérêts sont étudiés au chapitre portant sur l'information et les entreprises réglementées. Ce chapitre examine notamment les systèmes de traitement des documents confidentiels, les critères de divulgation dans les cas où il existe d'autres intérêts, comme l'"intérêt public", ainsi que les besoins du demandeur ou de l'intervenant auprès d'un organisme de réglementation. Nous étudions la confidentialité, en droit coutumier et selon l'équité, afin de souligner certains des critères déjà établis pour répondre aux besoins tant des personnes qui demandent la communication de renseignements que de celles qui désirent la confidentialité. Nous examinons le rôle que peut jouer la divulgation pour assurer la responsabilité des organismes de réglementation à l'égard des décisions qu'ils prennent. Nous signalons aussi certains efforts, de la part d'organismes publics, pour améliorer ou rationaliser la cueillette des données, et nous montrons la façon dont ces efforts tiennent compte du "fardeau de la réglementation" imposé au secteur privé.

Voici quelques conclusions que nous portons à l'attention du Conseil.

(1) Une loi sur la liberté d'information devrait être adoptée au Canada comme première étape d'un régime de divulgation. Elle assurerait l'accès à l'information dans les cas où on jugerait qu'aucun intérêt particulier, y compris l'"intérêt public", ne va à l'encontre de l'intérêt pour la confidentialité. Le projet de loi C-43, présentement à l'étude et intitulé Loi sur l'accès à l'information, comporte des faiblesses qui peuvent permettre un degré de confidentialité plus élevé que nécessaire pour assurer la responsabilité des organismes de réglementation, étant donné qu'une autre loi précisera les normes du processus de divulgation. Le critère qui conviendrait pour juger du tort causé par la concurrence (y compris l'intervention dans les négociations et la conclusion des contrats) devrait être : un "tort considérable" ou "important".

(2) Une deuxième série de critères pour la communication de renseignements devrait être mise au point par les divers ministères et organismes gouvernementaux pour répondre aux demandes de divulgation dépassant les limites permises par une loi sur l'accès à l'information. Les circonstances de la demande, les besoins et l'identité du demandeur doivent entrer ici en ligne de compte, de même que la nécessité de soupeser les intérêts en cause. C'est justement dans ce contexte qu'il faudrait étudier les caractéristiques particulières d'une entreprise, comme sa position

concurrentielle et le genre de réglementation auquel elle est soumise (par exemple, les restrictions imposées à l'accès au marché). Il ne faudrait pas que des politiques sur la divulgation soient établies à cause de l'inefficacité d'autres politiques gouvernementales, comme celles qui visent la concurrence et les investissements étrangers.

(3) Des directives explicites et publiques s'imposent concernant les ententes en vue de maintenir ou de reconsidérer la confidentialité de l'information. Peut-être conviendrait-il que chaque ministère ou organisme mette au point ses propres directives, mais alors certaines procédures communes seraient souhaitables : la personne qui confie à un organisme gouvernemental des documents qu'elle désire voir traiter confidentiellement devrait d'abord les identifier; le degré de confidentialité devrait être déterminé à l'occasion d'une demande de divulgation et notifié au demandeur; il devrait y avoir possibilité d'être avisé et de s'adapter.

(4) Il faudrait que le gouvernement intensifie ses efforts pour rationaliser et accroître l'échange de renseignements. Pour favoriser cette initiative, il faudrait mettre au point des règles spécifiques sur l'échange de l'information entre les divers organismes du gouvernement, et les rendre

publiques, afin de satisfaire les demandeurs qui désirent que les renseignements portant sur des questions délicates fassent l'objet de la même attention que leur accorderait l'institution gouvernementale qui les a reçus en premier. Les directives relatives aux ententes sur la confidentialité, dont nous avons parlé, devraient tenir compte de cet aspect de l'échange, de la notification et de la divulgation de l'information.

Summary

The increased role of government in private sector activity through regulation has focussed attention on the role of information in regulation. What are the information needs of regulations? What are the advantages and disadvantages of regulating by mandating disclosure of information? What burdens are placed on the private sector by government requirements for information? What criterion should govern disclosure of information? What role does information disclosure play in ensuring the accountability of regulators to regulated firms, the general public and "Parliament"?

This paper looks at these issues, as well as examining several sections of the proposed Access to Information Act, Bill C-43, that are particularly relevant to regulatory matters: the sections relating to third party information (s. 20), Cabinet discussion papers and other Cabinet documents (s. 21), and policy advice to a Minister (s. 22). Concern is expressed at the breadth of certain exemptions from disclosure, particularly given the tendency of such an Act to establish the norm for information disclosure throughout the government. It should be understood that an access to information regime that is appropriate when the requester has no expressed need or interest in the information, is not necessarily appropriate when other interests are involved.

These other interests are examined in the Chapter dealing with Information and the Regulated Firms. The systems for dealing with confidential documents and the criteria for disclosure in situations in which other interests, e.g., the "public interest", and the needs of an applicant or intervenor before a regulatory agency, are considered. Confidentiality at common law and equity are examined to indicate some criteria that have been established to balance the needs of those requesting disclosure and those desiring confidentiality. The role that disclosure can play in ensuring the accountability of regulators

for their decisions is discussed. Certain attempts to improve or rationalize data collection by government bodies and how they are related to the perceived "regulatory burden" on the private sector are noted.

The following conclusions are presented to the Council for their consideration.

(1) A Freedom of Information Act should be passed in Canada that would be the first tier of a disclosure system. It would provide access when no specific interest (including the "public interest") has been declared to balance against the interest in favour of confidentiality. The pending Bill C-43, the Access to Information Act, has flaws that may allow a greater degree of confidentiality than is appropriate to maintain accountability of regulatory schemes, given the reality that an Act will set the normative tone for disclosure. The appropriate tests for competitive harm (including interference with negotiations and contracts) should be "substantial harm" or "significant harm".

(2) A second tier of criteria for information disclosure should be developed by individual departments and agencies to meet requests for disclosure that go beyond the limits of an access act. The circumstances of the request, the need and identity of the requester are issues here, with a balancing of interests required. It is in this context that the particular attributes of a firm, such as its competitive position and the type of regulation it is subject to (such as restricted entry) should be considered. Disclosure policies should not be developed in response to the inadequacies of other government policies, such as competition and foreign investment.

(3) Explicit and public guidelines need to be developed for agreements to maintain or consider confidentiality of information. It may be appropriate for each department or agency to develop its own guidelines, but certain common procedures are advisable: the submitter should make the initial identification of the documents for which confidential treatment is desired; the actual determination of confidentiality should be made at the time a request for disclosure is made; notification and opportunity for argument should be available.

(4) Government attempts to rationalize and increase the sharing of information should be intensified. To encourage this, specific rules on interagency sharing should be developed and made public to meet the concerns of submitters that sensitive information will be subject to the same consideration as would be given by the original receiving government body. The confidentiality agreement guidelines noted above should consider this aspect of information sharing, notice, and disclosure.

INTRODUCTION

Finagle's Laws of Information

(1) The information you have is not what you want.
(2) The information you want is not what you need.
(3) The information you need is not what you can obtain.
(4) The information you can obtain costs more than you want to pay.

Government has become increasingly involved in the activity that we refer to as "regulation."[1] Much regulation has occurred in response to changes in the social perception of what the role of government ought to be and what risks people ought to be exposed to in our society. Thus much of the recent growth in regulation can be accounted for in the area of "social regulation," i.e., health, safety, fairness or environmental regulation.[2] At the same time, concern has been expressed about regulation imposing a burden on the private sector. The reference from the Prime Minister to the Economic Council[3] or the creation of the Parliamentary Task Force on Regulatory Reform[4] illustrate this concern. While the degree or severity of the regulatory "burden" may not yet be determined, it is clear that the resources available to both government and the rest of society have become more scarce. It is becoming more critical, therefore, that regulatory decision making be of the highest quality.[5] While it may be difficult to define "quality" in this context, it is likely that a better decision will be made when more information of greater accuracy is available to the regulators.[6] The availability of information in a regulatory scheme will depend on the ability of regulators to determine and ask for what they need and the capacities and cooperation of the regulated firms in responding. A further issue is the accountability of regulators and the role information may play in ensuring accountability.

Chapter 1 of this paper will explore some of the needs of regulators for information and some of the difficulties they may experience in either obtaining or using it. Having obtained the information, however, the regulators may or may not use it well. How much of this information should be available to the general public so that they may examine the "track record" of the regulators? How much should be available to the regulated firms so they may learn more about the decision-making process to which they are subject? These issues cannot be totally divorced from those discussed in other sections, but the main emphasis will be placed on them in Chapter 1.

In Chapter 2, issues relating to information will be explored from the point of view of the regulated firm. The concern that too much information is required by the government or that it is collected in ways that appear wasteful, duplicative or even silly will be examined, as well as the response of governments to the issues of "paperburden" and duplication. The major concern of regulated firms, however, is that by supplying the government with certain business information, they may ultimately be supplying their competitors with the same information. Businesses worry about the capacity of government to understand their needs and keep sensitive information confidential. Others argue that too much information is being kept secret and insist that the government is far too willing to make confidentiality agreements with businesses. This section will explore the nature of "confidentiality" and the approaches to disclosure of confidential information that have been taken at common law and in equity. Some guidelines for confidentiality agreements will be discussed. Distinctions between guidelines for those firms subject mainly to direct regulation and those subject mainly to social regulation will be made.

Chapter 3 will provide a short analysis of the recently introduced Bill C-43, the Access to Information Act. The application of the Bill to disclosure of business information and its

implications for some of the more prominent suggestions for regulatory reform (especially those that relate to accountability of the regulatory process) will be discussed.

The Conclusion, Chapter 4, will deal with some suggestions that the Council may care to consider. These would include formal guidelines for dealing with requests for confidentiality. The question of whether certain types of regulated firms should be treated differently will be explored and some suggestions relating to firms in natural monopoly situations or other situations in which entry is highly regulated will be made.

Chapter 1

INFORMATION AND THE REGULATORS

There are several issues involved in the matter of regulators and information. The first relates to the quality and quantity of information that regulators deal with in the course of performing their mandate. A second issue relates to the availability of this information to others, including regulated firms, potential competitors, and the public. Inherent in these issues are the questions of the quality of regulatory decision making and the accountability of the decision makers for that quality (or lack of it) to regulated firms, the public, the executive, and Parliament.

(1) Collection of Information by Regulators

Regulators collect information in different contexts. They collect it on an on-going basis to provide background for the making of general policy; they receive information on which they may base a particular decision; they may acquire information in response to complaints or statutory requirements to investigate and report; and they may collect information as part of their enforcement and administration responsibilities.

Not all regulators operate in all these contexts. Distinctions can be made between agencies and departments and between those engaged in direct regulation and those engaged in social or "new" regulation. Indeed, generally direct regulation, i.e., regulation of price, entry, exit, output, rate of return, is carried out by agencies. Examples are the Canadian Radio-television and Telecommunications Commission (CRTC), which controls, inter alia, broadcasting licences, and rates of return on telephone service; and the Canadian Transport Commission (CTC), which has authority over inter alia, airline routes, levels of

service and fares, railway rates and route abandonments. Social regulation, the health, safety and environmental regulation, is generally carried out by departments, at least at the federal level. Consumer protection, for example, is the responsibility of the federal Department of Consumer and Corporate Affairs. The pollution control orders under the Ontario Environmental Protection Act[7] are negotiated by the Ontario Ministry of the Environment. The line is not hard and fast. The federal Department of Fisheries and Oceans undertakes direct regulation when it imposes quotas or restricts the catch through gear or time limitations. The National Energy Board regulates and monitors safety and environmental matters in connection with pipeline construction and maintenance. The CRTC is concerned with the content of broadcasting, especially with "Canadian content."

There are several implications of this distinction between direct regulation by agencies on the one hand and social regulation by departments on the other. The regulators may have different types of information requirements and the regulated firms may be subject to different pressures with respect to disclosure, competitive positions, and sensitivity to harm by disclosure. Furthermore, the direct regulators usually make their decisions in a quasi-judicial capacity, which means that the rules of natural justice or fairness may apply to their actions. These administrative law considerations will reflect on the type and quantity of information that may be made available to the regulated firm, to third party intervenors, and to the general public. The combination of administrative law requirements and the characteristics of firms subject to direct regulation may mean that particular information collection and disclosure requirements will be unique to the agencies. The semi-independent nature of Canadian regulatory tribunals may also determine special information disclosure requirements in order to judge the quality of the tribunals' decision making and hold them accountable. The type and flow of information relating to an agency's activities are critical to determining the form of

accountability suitable for a particular agency. In other words, an agency that retains a fair degree of independence from the government of the day, i.e., the executive, may appropiately be required to provide more information to Parliament and/or the public. The nature of information disclosure is thus closely related to other issues of agency accountability, the locus of responsibility for policy making and political control of agency policy or decisions.[8]

The decisions of the social regulators in departments are subject to the same sorts of accountability controls (or lack of them) as other departmental decisions. Creating accountability for regulation in this area means improving accountability controls for all departmental decision making. Accountability regimes for regulatory decision making may be especially critical, however, because of the lack of focus on regulatory effects vis à vis the effects of expenditures programs. Most regulatory costs are imposed on the private sector; the actual costs to governments of a regulatory program (administration, enforcement, etc.) appear relatively small in comparison to both the private sector costs and the costs of government expenditure programs.[9] Internal accountability controls in government are generally aimed at expenditures, i.e., the envelope system, the budget process, program evaluations, Auditor General's reports, and appropriations. The full effects of regulatory activities are not assessed or appreciated in these expenditure control systems. There is no parallel system, such as the still theoretical regulatory budget, in place for regulatory programs, and accountability in any sort of broad sense is still, therefore, diffuse. Nonetheless, for both regulatory and expenditure decisions, increased availability of information - to the public and to parliamentarians - can only make more concrete the rapidly vanishing practice of ministerial responsibility. Other avenues of direct accountability, such as that proposed for deputy ministers by the Lambert Commission,[10] will also depend for effectiveness on information available, particularly to Parliament.

Social regulation generally affects many industries, unlike direct regulation which is industry specific.[11] Disclosure and information requirements for firms subject to social regulation will likely be different from those subject to direct regulation - although the same firm may be subject to both types of regulation, of course. The broad effects of social regulation must be considered when disclosure requirements are discussed, especially with respect to the comparative competitive positions of firms.

The direct regulators, i.e., the agencies, are not generally as concerned as the social regulators with the on-going collection of data as an enforcement device, although certain regular filings of information may be required. The monitoring of effluent levels, the inspection of work sites or food processing plants are carried out by departments.

In some cases, as discussed below, the collection and (usually) the dissemination of information is a type of regulation in itself. In one form, the government does not act as the distributor of the information, but requires that the regulated firm make the information public. Labelling of various products is the most obvious example of this. Securities regulation represents a somewhat more sophisticated version, with information about public corporations disclosed to encourage investor confidence and fluidity in capital markets. The variations in functions betwen departments and agencies does not appear to hold absolute here, possibly because of associated functions. For example, labelling requirements are tied, philosophically and in practice, with the functions of consumer protection and standards-setting for consumer products, which are social regulatory functions performed by departments. Securities regulation includes licensing and quasi-judicial decision making, and is performed by provincial securities commissions.[12]

(2) Issues in Deciding to Collect or Disclose Information

What the regulators need to know depends, of course, on their function. Direct regulators need to know (or should know) levels of costs, profits and returns, revenues by product level, existence or degrees of cross-subsidization, allocation and distributional effects, etc. This sort of information is generally collected straight from the specific firm being regulated, often in the context of a hearing before an agency. The collection process is passive: the regulated firm, i.e., the applicant for the licence, rate increase, certificate of public convenience and necessity, or whatever, lays the information before the agency. The regulatory agency can request, indeed demand, that certain information be put before it. The CRTC, for example, has directed that models or studies of price elasticity of demand for long distance services be filed and that studies on off-peak discount schemes be undertaken.[13] An agency may also address interrogatories to an applicant specifying that certain information be filed. It can structure a hearing in advance so that parties will be aware of the issues that the agency expects to hear addressed.[14] As a general rule, however, an agency will not actively seek information on its own initiative to supplement or counteract the information provided.[15] This does not necessarily imply that an agency uncritically accepts information that is placed before it. An expert tribunal is expected to apply its own expertise and experience (or that of its staff) to assessments of information provided to it. For example, the CRTC found that Bell Canada's suggested revenue loss of $235 million if CNCP were allowed to inter-connect to Bell's system was overstated; the Commission believed that a maximum loss of $45.7 was more likely.[16].

Social regulators are concerned with such matters as dose-response relationships, emission rates, particulate

absorbtion rates, or risk assessment.[17] This type of information is developed through assessment of a wide assortment of records collected across an industry. There is an on-going information collection function. There is also industry-specific and even firm-specific information that is required since social regulation deals, for example, with methods of production or conditions of employment. Quality control procedures, personnel records, product recipes or formulae, and sales or distribution practices are of interest to the regulator. Both the development of a data base for specific regulations and the enforcement function are served by this information collection. For example, an environmental regulator will require information on a plant's production process in order to determine appropriate emission levels and the best available technology; ideally, information on neighbouring emission levels should also be available.[18] On-going inspection and monitoring of emission levels will then enforce the original regulation. The regulator takes an active role in demanding and collecting data; inspection is a major function of the social regulators.

The above paragraphs point out some differences between the information collection activities of direct regulators and those of social regulators. It may also indicate a further[19] reason why social regulation in particular is seen as imposing a "burden" on regulated firms. The direct regulators may set detailed criteria for the information they require,[20] but their passivity means that the original decision to collect and submit the information belongs to the regulated firm. The need for a licence renewal may dominate the timing and stimulate the application, but the decision is still the firm's and the benefits of the collection and submission of the information are clearly connected to the activity: a licence renewal, approval to build a pipeline, a rate increase. The cost of information collection for a licence application can be much more clearly seen as a cost of doing business. In this respect, one might differentiate between the <u>cost</u> of information collection and the <u>burden</u>. A

requirement for information that is costly to collect or organize may not be perceived as burdensome if the benefits of the requirement are easily recognizable. This may be true whether the benefit is directly associated to the requirement (the rate increase) or whether the benefit is some further use of the information itself (data about product markets derived from the aggregation of many firms' information). In general, information provided to direct regulators will be perceived as less burdensome than that required for social regulators.

The social regulators require on-going information collection and information about specific firm activities in the micro sense. The firm derives no quickly discernable benefit from supplying information about its processes: it already knew that information and the result of the submission is likely to be regulation that intervenes in those processes. Some information may be collected to allow regulators to derive long-term data: health records provided to epidemiologists. The information is supplied knowing that it could provide the base not only for some still unknown regulation, but also to the possibility of extensive tort liability. The decision on when and how the information is supplied is made by the regulator: the sense of an imposition on the firm is likely greater in areas of social regulation.

While the "motherhood" statement has been made in the Introduction that better or more information should lead to better decision making, the actual collection or disclosure of information should further specific policy goals. Information collection or dissemination is not costless, yet in its broadest sense it can be quite useless. If, in Dr. Finagle's words, "the information you need is not the information you've got," then you might as well have no information at all. Furthermore, if the information you need is mixed with a wide variety of other information and not easily identifiable, you also might as well not have it at all.

Macdonald and Weir state that "disclosure of information should not be considered in the abstract but only in relation to specific need and potential use.... [D]isclosure must always be related to specific policy objectives and assessed within the context of those objectives."[21] The same points apply with equal strength to the decision to collect information.

The policy objectives we are concerned with are first, the need of regulators to make specific decisions that further the broader regulatory policy goals of government. Adequate information is required to make the decision. In the simplest sense, this objective of "adequate" information is already met since the decisions are being made. The time constraints placed on regulators, particularly direct regulators who are subject to the perception that a speedy decision is an attribute of fair decision making, work against the wider collection of information. Furthermore, regulators are aware of the costs of requiring more data and may be sensitive to that (although not as sensitive as some private firms may desire). They are also aware of their own capacity to process and assimilate data - another costly activity.

There are several reasons for the optimal (need balanced with cost) data not being available to regulators. In some cases they may not be aware that they "require" it. In some cases there may be disagreement on whether it is required for the final decision. The CRTC recently heard an application by Bell Canada, B.C. Tel and Telesat Canada for approval of changes in long distance rates. Information on revenues, costs, and investments of other provincial telephone companies was refused to the CRTC since those companies are under provincial jurisdiction.[22] The point of disagreement here was not necessarily whether it would be factually or intellectually useful to CRTC to have this information, but whether the CRTC applicants had the right to supply it. Applications were made by various parties to both the Governor in Council and the Federal

Court. The information was ultimately supplied to the CRTC, but in confidence.

In other cases, the regulators may appreciate the need for certain information, but also recognize the impossibility or impracticality of obtaining it.[23] Social regulators in particular face this dilemma: too little at present is known about the hazards of certain products or long-term effects of some modern industrial practices. In other cases the need for the information may be appreciated, and quite specific steps may be taken to obtain it. The Cost Inquiry being carried out by the CRTC will attempt to determine the existence and degree of cross-subsidization in telecommunications, for example. The next phase of the Inquiry will be concerned with service costing information.

In one sense, however, the regulator is always at a disadvantage in decision making. The regulator can never know the industry or its processes as well as the industry itself does. This is particularly critical when it is the industry processes themselves that are being regulated, as in certain environmental control situations.[24] The National Energy Board has always been at a disadvantage with respect to information derived from the industry on the extent of oil and gas reserves. One of the stated purposes of government activity in the industry, through Petrocan, has been to provide a "window" for the government on industry information.[25] In at least once instance, the industry or firm may be so complicated that it is questionable if it can be truly regulated at all, let alone effectively or efficiently. The activities of AT&T in a rapidly changing technological environment defy the capacity and understanding of even the most dedicated and expert regulator.[26]

All these points illustrate that the regulators may not be regulating with optimal information or that, at the very least, there is room for disagreement on what information is

required and whether it is available or has been or can be submitted. This leads to a second policy objective, one that may be met by disclosure of information. The objective is the accountability of the regulator and the question is not only whether the "right" decision has been made - often something about which reasonable people may differ - but whether the process of decision making was appropriate and whether the decision has a reasonable basis. Disclosure here is of interest to the regulated firm to determine whether all appropriate information has been considered, whether representations should be made to counter some information, and whether the regulator has an appreciation of the costs or consequences of the regulation. The Socio-Economic Impact Analysis[27] performed for mattress flammability standards, for example, revealed that the regulator's figures for the costs and benefits of the proposed standard differed widely from those of the industry. The availability of the regulator's figures allowed the industry to argue its point and it appears that industry and government are working to reach an agreement on acceptable standards.

Regulated firms may also want to know more about the behaviour of the regulator to assure themselves that the regulation is being applied even-handedly. This may be a particularily sensitive issue when one of the regulated firms is a crown corporation, e.g., Air Canada. Knowledge of what information is required in one decision may also allow a firm to be better prepared when involved in a similar decision situation. It may also be that it is cheaper or less burdensome to collect data at the time it accrues rather than go back later and cull it from masses of other information.

Third parties are also concerned with the regulatory decision-making process. They may be involved in a narrow sense as intervenors representing a particular interest. They may be actual or potential competitors, suppliers or customers of the regulated firm. Or their involvement may be more disinterested,

deriving from a general interest in accountability. Parliamentarians should be particularly concerned about access to information in this context.

It has been pointed out that there is too little policy making on regulation in Canada.[28] The relationship between the agencies and the government is not clearly defined and the responsibility for the policy making is most frequently unresolved in these areas. That is the disadvantage with respect to publicly-articulated policy relating to the agencies, the direct regulators. The policy responsibility lines of the department, the social regulators, are more clear. The disadvantage there is the extra incentive for secrecy within departments. Organizations, like humans, do not want to expose their uncertain first efforts or their errors and ignorance. The mystique of ministerial responsibility and the neutral and anonymous civil service, however, acts as a strong reinforcement to secrecy in a parliamentary system.[29] If the minister is the appropriate person to answer for a department's activities, then there is a strong incentive against giving out information that may embarrass a minister. If a civil servant is to be considered neutral and anonymous, then there is a strong incentive against disclosure of departmental information and especially against information that is or will lead to policy advice. In sum, activities relating to policy making within both agencies and departments tend to be hidden rather than open.

Third party assessment of policy is thus more difficult. This may be a partial explanation for the relatively low level of independent policy development by universities or "think tanks." In any event, one of the strongest policy objectives that might be served by greater disclosure on regulatory matters is the stimulation of independent criticism and advice.

(3) Regulation by Disclosure of Information

One of the primary rationales for the regulation of private firms by government is inadequacy or unavailability of information in the marketplace. The "perfect market" of the ideal competitive system depends on the participants' possessing full information. In the real world, however, full information seldom exists or, even if it exists in the abstract, all participants are not equally knowledgeable. The long-term effects of certain chemicals on the ecosystem or the dose-response relationships of benzene are simply not known, for example. In some cases, only highly-trained technicians understand the information available. In many cases, however, obtaining information is simply too costly or time-consuming for the average person. He engages in what might be called "rational ignorance", learning only what appears justifiable in the light of immediate decision-making needs.

The government can take several different regulatory approaches to inadequate information. One is a complete ban on the product or activity when the risks, although not necessarily completely quantifiable, appear too high or the likelihood of an uninformed user being hurt is high. The bans on certain pesticides or the 1.5 litre pop bottles are examples. The government can also set standards for the use of a substance, e.g., requiring that certain drugs be prescribed only by approved authorities or in approved circumstances. Standards can be set for the product itself: purity of drugs, crash resistance of automobile bumpers, flame resistance of fabrics, building codes.

The most direct approach to inadequate information is regulation that requires disclosure, either to the public directly or to the government, which in turns informs the public.[30] This alternative may be chosen when it is appropriate to help a buyer make a more informed choice, but when the risks associated with the wrong choice are not so high as to be socially unacceptable. Buying a toaster that lasts two years instead of five may

be a disappointment and a financial inconvenience, but that is all. This is to be contrasted with the rationale for production standards: a toaster that electrocutes a fair proportion of its buyers is unacceptable.[31] One might note that regulating by disclosure when the risks are "acceptable" may have an historical or moral component. Probably the best known disclosure is the warning placed on every cigarette package by order of Health and Welfare Canada; it is likely that a new substance with the health hazards of cigarettes would be banned. Both federal and provincial governments carry out information and public education campaigns on the possible hazards of drinking, but experience has shown that a complete ban is unworkable.

The most common disclosure requirement is labelling, e.g., the content of food products or textiles, the use of certain products, proper storage or disposal instructions, antidotes for accidental poisoning. In some case, the label may give information about product life or quality attributes such as energy consumption ("Energuide"). A producer might be required to provide information to the consumer to correct previous misleading advertising.[32] The regulation of the securities market is based on either regular disclosure of mandated information or ongoing disclosure of "material changes" in the situation of the issuer. These disclosure regimes are generally backed up, of course, by sanctions against known inaccuracies or fraud.

The advantages of regulation by disclosure[33] include greater flexibility for the private sector firms and more choice for the consumer. Arguably, competition will be enhanced since informed buyers can better compare products, assess substitutability and select products with the desired characteristics at a given price. A preference for the combination of high quality with low cost pressures sellers to innovate and compete with different product characteristic combinations.[34] Furthermore, the cost of regulating by disclosure are likely to be less for

both government and the private sector since there are fewer or less elaborate on-going inspection and enforcement mechanisms required.

Nonetheless, many of the same problems remain for the regulator who requires disclosure as for the regulator who sets standards or makes other types of regulatory decisions. Which areas are suitable for regulation by disclosure and what information should be disclosed? If some sort of product life or quality standard is to be disclosed, how should it be set?[35] What information is likely to be useful to the consumer? How can that information be best communicated to the consumer?

The regulator still requires an understanding of the industry or a firm's processes in order to answer some of these questions. Furthermore, an assessment of consumer response to the information is required if the purpose is to affect behaviour by providing information. People are poor natural statisticians and often tend to underestimate their personal risks even when information on risk is available. Purchasing decisions may be affected by a variety of factors: status (designer jeans); convenience (store close by); availability of credit; habit and brand loyalty. Consumers may be subject to information overload at some point or may prefer ignorance, particularly about certain health risks. On the other hand, knowledge and hence avoidance of some risks may result in ever higher risks for some consumers. Some argue that information about drug side-effects may lead people to ignore medical advice, at even greater risk to their health. Publicity about the side effects of contraceptive pills may have led some women to choose less effective techniques, although the risks of childbirth or abortion were higher than those associated with pills for their particular age group.

Mandated disclosure may be a preferable and appropriate form of regulation in many cases, but one should not underestimate the information and analytical needs of the regulatory decision maker.

(4) Price Effects of Information Disclosure

It should be noted that disclosure of more information about regulation (and regulators) will have effects on the usefulness of regulation as a policy instrument. In many cases, regulation performs functions that could also be performed by other policy instruments, including subsidies, taxes or tax expenditures.[36] Regulation of rates that results in cross-subsidization, for example, is a substitute for a direct subsidy to the cross-subsidized market. Regulation that transfers income from consumers to producers, such as that of supply management marketing boards, is a substitute for a direct subsidy to the producers.[37] One of the major attributes of regulation, as compared to a subsidy, for example, is that these transfer effects are hidden. The government does not appropriate money for these hidden "subsidies," nor does it have to explain the hidden "taxing" effects of regulation as it does for the regular tax system when the Budget is introduced.[38]

For those who argue that regulation should be used more sparingly or that regulators should be more aware of the effects and costs of their activities, then disclosure of more information will serve those ends. From the regulators' point of view, however, a change in the weight of the policy instrument may be a strong incentive to secrecy, irrespective of need for confidentiality in certain sensitive areas or ministerial accountability or any other incentives for reticence. In other words, issues of disclosure have broader implications than might be identified by examining a particular situation or regulatory action. Information disclosure in the context of regulation may act as a regulatory "birth control" device. Unlike some other devices, such as moritoriums on new regulation, broad "sunset" requirements or requirements for extravagent evaluations,[39] it may be a more selective tool.

(5) Conclusions

The first conclusion to be drawn from this discussion is that the direct regulators have different types of information needs than the social regulators and that generally, the former take a relatively passive role to information collection, while the latter are more active. The perceived burden of the data requirements of each are also different, with the nature of information collection by social regulators being perceived as more intrusive and likely as more burdensome by the regulated firms. This is the result of the perception that direct regulation extends benefits to the regulated firms whereas social regulation does not (except perhaps indirectly, e.g., curbing nonprice competition, reducing likelihood of tort liability, or enhancing the corporate image).

Because information collection, submission, disclosure and assimilation is not costless, a decision to engage in any of these activities must be in the context of the furtherance of a specific policy objective. Better decisions by regulators, greater public or regulated sector confidence in regulatory decisions, enhanced accountability of regulators and stimulation of policy development within and outside government are valid policy objectives that might require a change in information policy.

A differentiation may also be justified between the disclosure policies of direct regulators and those of social regulators based on the characteristics of the industries they regulate. When entry into a market is regulated then information about competitive positions may not be (or should not be) as sensitive as in markets where entry is unregulated. The CRTC, for example makes a policy of disclosing the financial statements of cable companies since they occupy a monopoly position in their geographic area. Relative competitive sensitivity should be of greater concern to the social regulators who deal with a wide

variety of firms, only a few of which are protected from competitors by entry restrictions. The comparative competitive position of a firm, however, is a factor that is properly considered in the context of determining the degree of harm that disclosure might cause. These matters are discussed in Chapter 2, infra.

Some argue, however, that relative secrecy is necessary for Canadian firms because of their vulnerability to foreign competition and takeovers. To the first point, one might ask why then it is still considered necessary to disclose so much less information than is done by the firms of our major trading partner, the United States. To the second, query why an information policy is being required to undertake the function of an adequate foreign investment policy or competition policy? Surely those are objectives that could best be met straight on, with policies developed specifically for that purpose.

The last conclusion of this chapter is that changes in collection, but more particularly disclosure, policies with respect to regulation in general will change the political and social cost of regulation as a policy instrument. To the degree that this opens the process and allows for competing policy advice to government, it should improve the likelihood of efficient regulation. The change in the political cost of regulation may also be the biggest obstacle for any far-reaching changes in information policies.

Chapter 2

INFORMATION AND THE REGULATED FIRMS

The opposite side of the coin to the regulator's need for information is the requirement that the regulated firms provide information. This raises two issues that will be discussed below: costs of collection and confidentiality. In many situations, the firms may provide information willingly since a regulated business environment may be a shelter from harsh market forces.[40] Compliance with the regulatory process, including data collection and submission, is a small price to pay for the benefits. Yet businessmen complain about the costs of providing information to the government and insist that much of the data they must provide is duplicative or useless. The major worry of firms, however, is that information they provide to the government may be released and used to harm them. They worry that they may be put at a disadvantage in union or contract negotiations; this argument was made by Bell Canada in 1976 before the CRTC in a hearing on a proposed tariff.[41] The most frequent concern is that competitors will use the information to spot weak points or highly profitable lines.[42] Disclosure of product hazards or accident reports, for example, might lead to unfavourable publicity, decreased profits or litigation. Certain disclosures might trigger enforcement efforts by another regulator.[43] In an effort to ensure that their data will not be disclosed, firms negotiate, often on an *ad hoc* basis, confidentiality agreements with the government. Blanket confidentiality may also be guaranteed by statutes, the *Income Tax Act*[44] and the *Statistics Act*[45] being the most prominent examples at the federal level.[46] Many of these statutes protect against disclosure even in court under subpeona. Regulated firms also receive protection against disclosure of the information they provide from the *Public Service Employment Act*[47] and analogous provincial acts[48] that require civil servants to swear that they will

not disclose information without authorization.[49] These statutory restrictions not only restrict disclosure to other parties, but they also prevent sharing of information within the government. While this lack of co-operation accounts for some of the apparent duplication of information-gathering about which businessmen complain, it also provides certain protections for them. It is interesting to note that interagency or interdepartment information sharing is seen by some businessmen as having greater potential for harm to them than disclosure to business competitors.[50]

This chapter will explore the issues of data collection and confidentiality in greater detail. The problems encountered by firms in collecting and submitting information to the government will be noted, as well as the attempts by government to rationalize or streamline data collection. The impediments to lessening this alleged burden on firms will also be noted. The discussion on confidentiality will include the approaches taken by agencies and by the courts at common law and in equity, objective and subjective tests for the confidentiality of business information, and the use of formal or informal confidentiality agreements are discussed.

One might note that, by examining case law that has developed from the personal communications of human beings and extended to the communications of a corporation, one is implicitly making certain assumptions about the corporate personality. A corporation in general does not have the same right to privacy as an individual in the sense that there is some higher ethical interest that must be protected.[51] Nonetheless, there is an assumption that companies, especially those not publicly traded, are entitled to some protection for their "thoughts."[52] The irony is that this anthropomorphic character is most inappropriate in those large organizations whose corporate veil is so opaque and in which responsibility is so difficult to assign. In any event, the confidential nature of corporate information

should not be thought of as being determined by some overriding right to privacy. The protection of information developed by a corporation is based on the belief that the information represents an asset. There is a recognition both of the fact that the collection or generation of information is seldom cost-free and the fact that the information can be used to further the corporation's interests. The protection of an asset is what is at stake in the following discussions of confidentiality that relates to corporations. The commentary based on human privacy is valid, however, since the anthropomorphic approach has been so often accepted by the courts and commentators.

(1) Data Collection From Regulated Firms

Governments collect information from the private sector in several contexts. In some cases, the information collection - and disclosure - is itself a form of regulation. Much disclosure under companies acts or securities acts, for example, is aimed at informing the public and preventing fraud. Some data collection is aimed at providing bases for specific government policy-making; for example, the Bank of Canada requires banks to submit information concerning monetary developments so that it can formulate monetary policy. Much of the data provided to Statistics Canada by the private sector is collected to provide a background for more general government policy making. And finally, departments and, more frequently, regulatory agencies, may require that a party submit specific information to support a regulatory decision. Information about financial stability and forecasts are required when a monopoly licence is granted or a rate is established.

All this information collection appears very reasonable - of course governments should have the best possible information on which to base their decisions and policies. Furthermore, when a firm seeks a benefit from the government, such as a monopoly licence or an all but guaranteed profit, it is reasonable that it

provide some information and assurances in exchange. Firms that are, in effect, regulated monopolies may be in a different position than other firms when it comes to assessing the "burden" they bear or the amount of information they should be required to provide and/or make public. However, the regulated monopolies are special cases and most firms do not receive a direct benefit such as a licence in exchange for disclosure. As a result, many firms (including some monopolies) complain that they are required to fill out too many forms, many of which duplicate each other in whole or in part, and send them to too many different agencies. Approximately 100 federal departments and agencies collect data on a regular basis.[53] The Royal Bank of Canada has estimated that it is required to make between 55 and 65 statutory statistical returns and this involves approximately 450 returns to the federal government in any one year.[54] A company doing business across Canada may have to file reports in each of the ten provinces and probably also to the federal government. Generally, the reporting requirements for corporations, for instance, are sufficiently different that a company cannot produce one report and then file it in the eleven jurisdictions. Resources must be devoted to producing eleven reports.

A useful distinction has been made between real and apparent duplication of reporting requirements. "Real duplication exists when two or more units within the same department or two or more departments collect from the same respondent identical data for the same time frame using similar data definitions. Apparent duplication exists for all other situations."[55] In many cases, companies may be complaining about duplication that is apparent rather than real. The question then is whether the apparent duplication is necessary, that is, could one report satisfy all the requirements?

Statistics Canada is charged with promoting "the avoidance of duplication in the information collected in the departments of government."[56] Some attempt has been made to

fulfill this mandate. Statistics Canada clears the forms and purposes of surveys made by government departments if there will be more than ten respondents (the "Rule of Ten").

The Canadian Human Rights Code requires the designated Minister to coordinate the collection of information, "eliminating, wherever possible, any unnecessary collection ... and increasing utilization of information already stored."[57] One response to this requirement is the Administrative Policy Manual, Chapter 410, of Treasury Board Canada (TBC) (December 1978). TBC administers the inventory of information banks and the review and approval process. The review requires that information banks be "periodically evaluated from the perspective of costs of inputs, including respondents' time, and the benefits to be derived from outputs." Directives indicate that data banks shall be maintained only when "the benefit to be derived from the use of the information outweighs the cost to the government institution and the response burden placed on data sources." Furthermore, "Government institutions shall design the collection of information ... to meet as many federal government uses as possible..." and "the collection of information shall be designed to minimize response burdens." An awareness of the particular burdens that may be placed on small business is indicated in discussions of response burden.

Similar matters have been dealt with by the Office of Management and Budget (for executive agencies) and the General Accounting Office (for independent agencies) in the United States. In both countries, the attempts to limit or rationalize the collection of statistical data have been circumvented.

> Private agencies were hired to prepare the surveys or to undertake a broader project of which the survey formed an integral part. Departments were able to avoid the rule by characterizing the desired information as administrative rather than survey data. They succeeded in their efforts because of their

> autonomous nature and because no controlling or coordinating unit was established with necessary enforcement powers.[58]

Very few departments, however, are likely to have attempted these end runs on the survey clearances simply because they enjoy forcing people to fill out forms. The fact is that much of the data collected by government is treated as confidential - usually at the request or desire of the respondent - and very little of it is shared by the different departments.[59] There has been no attempt to compile a central storage system.

There have been some institutional attempts to deal with uncoordinated data collection. In Canada the Office of Paperburden, which was "sunsetted" in August 1980, attempted to deal with unnecessary or overly burdensome reporting and survey requirements. The first Action Program for the Reduction of Paperwork was approved by the Board of Economic Development Ministers in February 1979. It included recommendations that, if implemented, would reduce the reporting burden on business by, for example, using different sampling techniques for employment surveys and increasing the use of voluntary surveys. Plans are being developed that would allow the use of tax data to substitute for statistical reporting. The principle that smaller firms should bear a smaller response burden was endorsed. Amendments to several Acts are required to implement these recommendations, but they have not yet been passed.[60] The Corporations and Labour Unions Return Act, for example, requires amendment to permit the exemption of an estimated 80,000 smaller firms.[61]

A second Report from the Office containing recommendations relating to record-keeping requirements was submitted to the Economic Development Ministers in late 1980. The present requirements reflect a confusing array of retention periods that increase storage and administrative costs. The recommendations are aimed at rationalizing and reducing the variety of retention

periods. Amendments to statutes and regulations will also be required before these recommendations can be fully implemented. A bill to authorize the statutory amendments will be placed before Parliament early in 1982. The Ontario government recently completed a review intended to simplify and clarify record-keeping requirements.

In the United States, Executive Order 12174 (November 30, 1979), entitled "Paperwork," has attempted to control the reporting and record-keeping requirements imposed on the public. The Order does not apply to some of the major independent agencies, such as the Securities and Exchange Commission. The proposed rules under the Order[62] would require agency heads to ensure that existing information does not satisfy the need, that the least burdensome method (e.g., sampling, reduced frequency of reporting) is used, that standard classifications and definitions are used and that the information collected will meet minimum standards for statistical validity and reliability. A sunset review is imposed on each information collection every two years and the role of the Office of Management and Budget (OMB) in clearing information collection is enhanced. A very interesting aspect of the proposed rule is that it would impose a "paper-burden budget" on the agencies. The agencies must submit an estimate of the person-hours of reporting they will impose on the private sector. The intent is to ensure that agencies become more aware of the costs they impose when they ask for information.

The Paperwork Reduction Act of 1980, passed in November 1980, provides for the establishment of an Office of Information and Regulatory Affairs in OMB. The Office would have authority over both executive and independent agencies and requires them to assess and justify the time that filling out their forms will require.[63] The Regulatory Flexibility Act, passed in September 1980, is aimed at providing certain considerations for small business, i.e., that regulation should be flexible to take

account of the size of the regulated firm. The Act requires that a "flexibility analysis" be performed that includes "a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record."[64] These are both examples of attempts by the government to assess and reduce the costs of information collection.

There have also been in Canada at least a few industry-specific attempts to rationalize and coordinate reporting requirements. In 1966, the Canadian Bankers' Association formed a Chief Accountants' Committee to consult with the various government departments (e.g., the Bank of Canada and the Inspector General of Banks) about reporting requirements. The industry appears to be happy about the outcome of these consultations,[65] but this process may not provide a model for other industries. The banking industry has relatively few members, and has formed close relationships with government and regulators.

The apparent lack of pressure from other industry groups to establish cooperative reporting relationships or centralized reporting may not necessarily be the result of diffuse industry interests or lack of initiative by industry lobbying groups. There is a real fear on the part of industry that the sharing of data among departments (or among governments) will lead to disclosure of confidential information. The more cautious information submitters may worry about computer espionage or other unauthorized access to a central data bank. The Department of the Environment, for example, has an elaborate security system in its main office to guard confidential information received from the private sector. Yet some of this same information is held in open files in branch offices.[66] The general concern, however, is that widespread dispersal of information

will allow greater numbers of people to have access to it. Not all of those people may understand the sensitivity or value of the data and, therefore, may be more willing to release it to a potential competitor.

Some of this concern could be met by what is, in effect, better management. While no information collection or retrieval system is fail-safe, problems relating to carelessness or ignorant decisions to release information could be minimized. Requirements that firms be made aware of which departments (or governments) have access to data would allow the companies to make their views on confidentiality known to the appropriate people. Any department or agency sharing data might also be required to agree to whatever restrictions the original receiving department has put on the data. For example, the new U.S. Federal Trade Commission Act approved by Congress would require that any agencies receiving data from the FTC abide by the restrictions applicable to the FTC. The core of the issue, however, is the balancing of the need and right of confidentiality against other needs and rights such as the public's right to know what is happening within government or a party's right to know the case he must meet in a judicial hearing or the right of an individual to have the best possible information about matters that affect him, such as his work environment, food or financial investments. The next section will examine confidentiality and some of the approaches that have been taken to balance these competing interests.

(2) Confidentiality

The major concern of firms that supply information to the government, and particularly to regulators, is that the information will be released to another party and give that party some advantage. Naturally this concern does not necessarily apply to all information provided to the government - certain matters have long been considered appropriate for widespread

public disclosure. Indeed, the very purpose of certain legislation is to require such disclosure; the public interest in the information is so great that the government will not permit the business to continue without public disclosure. The Joint-Stock Companies Registration Act[67] of 1844 was an early example of legislation providing for broad disclosure, including a prospectus, annual financial statements and shareholders' list.[68] While corporate reporting requirements, particularly in the United States, are becoming more detailed and involve more sensitive information,[69] there is a basic core of public information that is outside a discussion of confidentiality.

It should also be noted that confidentiality in this context is not necessarily coterminous with privileged confidential communications in the laws of evidence.[70] A matter might be considered confidential by the parties involved, might be exempt from disclosure by a government body (either under a Freedom of Information Act with usual exemptions or at equity), but would be compellable in court or in discovery.[71]

Another category of information is not normally disclosed to the public, but not for reasons of secrecy. That is to say, this information would not be published, as in an annual report, but might be available upon request. If unavailable, it may be because of difficulties or expense to the firm or the government in gathering the data. Yet if the need were great enough or the cost were defrayed, the same information would be provided. The inconvenience and the lack of demand result in nondisclosure.

The information we are concerned with here involves information that is either a "trade secret"[72] or is confidential in the sense that keeping it secret gives the company some advantage, specifically a competitive advantage. One might add that it is a competitive advantage in the sense that the form of competition is permitted legally; i.e., a firm that withholds

information on a fraudulent scheme may have a competitive advantage, at least temporarily, but disclosure would be required on the public interest. Nondisclosure could not be justified on grounds of "confidentiality."[73]

(a) Confidentiality at Common Law and in Equity[74]

Common law evidentiary rules govern the power of the court to compell disclosure of confidential communications in court. The privilege against disclosure under these circumstances is quite narrow. Only communications between a solicitor and his client or between a married couple are privileged at common law. Only in these areas does a judge lack the power to compel testimony on the pain of contempt.[75] In some jurisdictions statute has enlarged the category of privileged communications to include for example, priest-penitent[76] or doctor-patient communications.[77] Indeed, in practice, few judges would care to cite a priest for contempt for refusing to testify about a communication in the confessional.[78] There is no general privilege for confidential communications per se. The element of confidentiality, however, may be an important consideration in determining whether a communication is privileged.[79]

Where confidential communications involve the state, disclosure may also be prevented by the invocation of what has been called "Crown privilege" or "executive privilege"[80]. At common law the Crown could refuse to produce documents or make discovery, but this has been modified by statute and case law. The privilege does not automatically apply to any information held by or involving the government, but must be claimed - usually by the government, although a judge could invoke it on the government's behalf. The usual procedure is to have a minister present an affadavit to the effect that disclosure of certain information would not be in the public interest. Probably the most common, and most respected, ground for the claim of

Crown privilege is national security,[81] although the claim has been made on the grounds that disclosure of government documents would inhibit the candour of advice from civil servants to the government.

The wartime English case of Duncan v. Cammel, Laird & Co.[82] set the unfortunate precedent that the decision of a minister that a document must be kept confidential is not reviewable by a court. The Duncan holding was overturned in England in 1968 by the decision in Conway v. Rimmer[83], which held that the minister's decision was not final, and the court could inspect the documents to determine the adequacy of the minister's reasons for refusal to disclose. As the court stated (with what Raoul Berger[84] refers to as "British understatement") "the fact that the privilege was sought shows that it is not easy for the department concerned to make an objective appraisal of the matter."[85] In general, the more recent Canadian approach has been to follow Conway in that the court has the authority to inspect documents to determine if the claim is justified and overrides the public interest in the administration of justice.[86] The Canada Law Reform Commission has recommended that a judge should have a final say on a claim of Crown privilege,[87] but it should be noted that the Federal Court Act[88] provides some statutory limits on review of the claim. While most claims of privilege may be reviewed by the Court, section 41(2) provides that the Court cannot question a minister's decision if he certifies that production of a document would injure national security, international relations, federal-provincial relations or Cabinet confidences. The exemption list does not include information whose disclosure would allegedly interfere with the candour of advice given to the government or the "candid interchange" among civil servants and the courts have often rejected such a claim.[89]

Situations involving information privileged against disclosure in court are a relatively narrow category, i.e., solicitor-client and marital communications. For our purposes we are

more concerned with out-of-court disclosure of information, more specifically, information provided to the government by private sector firms. This would involve the equitable doctrine of confidence when a party might ask for equitable relief to prevent disclosure of information that would not be privileged at common law. The essence of such a request is that it would be "unfair" to disclose the information. For example, the courts may restrain disclosure of information acquired in the course of certain relationships (fiduciary, trust or marital) or acquired under a contractual relationship.[90] The equitable doctrine of confidence may also be invoked where fiduciary or contractual relationships are not involved; this may include the situation when information is obtained pursuant to statutory powers (of a regulatory agency, for example).[91] Disclosure of the information will not necessarily be a breach of the obligation of confidence in certain circumstances, such as when a fraud or crime is contemplated or committed or when the public interest requires disclosure. "There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret."[92] To avoid a breach of confidence, however, it is necessary that disclosure be to a person who has a proper interest to receive the information.[93] The basic purpose of the disclosure cannot be to harm the party who originally provided the information,[94] although the fact that that party's position might be worsened does not in itself prevent the disclosure from being proper.[95]

In determining whether the receiver's interest is "proper," or whether it is in the public interest to release information, the courts have used a balancing approach that involves a subjective element that has been abandoned in the interpretation of the American Freedom of Information Act.[96] The more objective American approach will be discussed below, but we should first examine the balancing approaches that Canadian agencies or courts have taken to requests for information in a regulatory context.

(b) Present Approaches of Agencies to Information Disclosure

Requests for information occur in two basic circumstances - (1) during a hearing or decision-making process or (2) in some other situation. Administrative law may govern requests during a hearing in that the rules of "natural justice" or some form of procedural fairness must be followed. This indicates that a party in a hearing should have access to information that would allow the party to present its own case and answer opposing arguments. This does not necessarily require that a party must have access to all information that an opposing party, for example, provides to the agency hearing the matter. Different agencies take different approaches to the question of how much information is enough to ensure a fair hearing.[97] It may also be noted that particular agencies are not always consistent in their approach. In some cases, an agency will refuse to allow a party to introduce documents unless the opposing party (or intervenors) can have access to the documents. The Ontario Energy Board, for example, requires that information or documents presented to the Board at hearings be available to all parties and intervenors; staff studies or reports must also be introduced and available for inspection if the Board is to rely on them in its decision.[98] The Board weighs the dangers of disclosure against the probative value of the information in deciding whether to admit (and thus disclose) the evidence. It takes an "all or nothing" approach. The National Energy Board will make public information submitted by a party in a hearing; the NEB, however, will not necessarily provide staff reports to the parties.[99]

In other cases, an agency will entertain a request that it keep confidential information submitted to it although the agency intends to use the information in reaching its decision. Natural justice or procedural fairness favours disclosure, but the use of such administrative law rubrics has often directed inquiry on the appropriateness of confidentiality or disclosure to the nature of the hearing ("administrative," "judicial," or

"quasi-judicial")[100] rather than the nature of the information for which confidentiality is sought.

Since disclosure of all information is not necessarily required in order to provide a fair hearing, agencies (or reviewing courts) appear to weigh the need of the party that provided the information against the need of the party that desires disclosure. A relatively sophisticated approach is to first require the party requesting disclosure to satisfy the agency that the information is relevant. Where an agency intends to consider the information in making its decision, one would assume that the relevancy of the information was established - if it did not intend to consider the information, then one might ask why the approach of the Ontario Energy Board is not followed and the information excluded from the hearing. However, the relevancy test is useful when a party contends it needs information from an opponent in order to adequately meet the opponent's arguments or that the agency requires the information in order to reach its decision. This test would also apply to intervenors who may desire information to which the subjects of the hearing already have access. If relevancy is established, the party resisting disclosure must satisfy the agency that it would be harmed by the disclosure.[101] The Railway Transport Committee of the CTC in the Rapeseed case further established that the harm must be "actual and substantial" before disclosure is refused.[102] If such harm would result, then the information will usually be kept confidential.

It is still possible that an agency may disclose information even when it may harm a party. The Anti-Dumping Tribunal has formulated a procedure in which confidential business information is disclosed only to counsel, who undertake not to reveal the information to their clients. In-house counsel or directors are excluded and all confidential material is returned at the end

of the hearing.[103] In the Rapeseed case, the Railway Transport Committee considered the possibility of using a similar procedure:

> Now there may be rare instances where the Commission faces this kind of a dilemma where evidence is essential and relevant, and where its disclosure would clearly cause actual and substantial harm, but the Commission, for one reason or another, may not be of the opinion that it can be properly tested by its own resources, by its own staff. We may in such circumstances ... [exclude] all but counsel, for the purposes of the giving of the evidence and the cross-examination on it, on the usual understandings between counsel that there be no disclosure.[104]

In the situation in which a hearing involves broad public participation, such as certain environmental or land development hearings, the use of in camera testimony with only counsel present may result in two classes of participants: those with counsel who have access to all evidence and those without counsel who thus are denied access. This would accentuate the disadvantage of those who attempt to participate without (expensive) counsel. The issue of counsel's responsibility to his client and the right of the client to instruct counsel on the conduct of the case is raised when counsel cannot disclose matters to the client.

Some agencies have also found that they can meet the need for disclosure by disclosing most of the information requested but deleting a particularly sensitive portion. The CTC, for example, deleted an appendix from a document requested by an intervenor in a case involving rates for a microwave facility.[105] Similarly, the CRTC allowed Bell Canada to delete a column of figures from some cost data requested in a 1976 hearing.[106] In some cases a nonconfidential summary might be prepared.[107]

The CRTC, in fact, has developed a relatively elaborate policy on confidentiality. It is embodied in its Rules of Procedure,[108] and is the result of a process of public hearings and reactions to draft rules. A document filed with the Commission is placed on the public record unless a claim of confidentiality is asserted at the time of filing.[109] The Commission will release the information if it is of the opinion that no "specific direct harm would be likely to result from disclosure, or where any such specific direct harm is shown but is not sufficient to outweigh the public interest in disclosing the document."[110] The Commission may also order disclosure of an abridged version of the document or order disclosure to parties in camera.[111] The CRTC rules have been considered a model for other agencies and appear to be working well.[112] Indeed, the CRTC rules have been drawn on by the Canadian Transport Commission in the confidentiality provisions of the Draft General Rules published June 1, 1981. The Railway Transport Committee's ruling in the Rapeseed case formed the basis for the criterion of "specific direct harm" to be applied. Provisions are made for partial disclosure, abridgement or disclosure in an in camera hearing.

One can list, however, cases in which many would consider that regulatory agencies have refused to allow parties or intervenors to a hearing to have access to data that they considered necessary to meet opposing arguments or which the agency used in its decision making. These arguments would also include denial of reports or studies made by agency staff and background information (which may include confidential business information submitted by a firm not directly involved in a hearing).[113]

Agencies are more likely to be reluctant to disclose information when the request is made outside the context of a hearing. The rules of natural justice or requirements for procedural fairness do not compell such disclosure. Some reasons

for the agencies' reluctance have been discussed in Chapter 1, above, but the information requested may also be confidential business information. Presumably, in deciding whether information should be released, agencies engage in a balancing operation that considers the nature of the information requested, the party making the request, and the reason for the request. The attitude of the NEB appears typical:

> A request for information that is unrelated to a hearing will usually be answered by a letter, if possible, but it is clear that the Boards feel no obligation in such a case to disclose information that it has in its files apart from making published reports and transcripts available.[114]

There is no overriding presumption in favour of disclosure in this situation. Much seems to depend on what the agency perceives as the proper or politic thing to do - what good manners requires (i.e., answer its mail). The focus on the subjective elements of the nature of the request or identity of requester may also predispose the decision against disclosure.

(c) A Subjective vs. An Objective Approach to Confidentiality

The Law Reform Commission of Canada has analyzed requests for information according to three "independent variables": the identity of the requester, the context in which the requests made (the function the agency is performing), and the kind of information requested. A further consideration is the purpose of the request.[115] The Freedom of Information Act (FOIA) in the United States, in contrast, focuses on the kind of information requested - it is the nature of the information that generally determines the way in which a request for confidential business information is handled.[116]

The approach taken in the Law Reform Commission study reflects the approach taken by Canadian courts and agencies, which in turn reflects the equitable doctrine of confidentiality

and the application of rules of natural justice to administrative hearings. The American Freedom of Information Act specifically exempts some of these factors, such as identity of the requestor, from consideration. The American courts, however, used a similarly subjective balancing test in their early interpretation of the scope of the Act's confidential business information exemption.[117]

The fourth exemption from disclosure under the FOIA is "trade secrets and commercial or financial information obtained from a person and privileged or confidential." This covers two categories: trade secrets and confidential business information. In early cases involving business information, the courts applied a promise of confidentiality test:

> [T]he exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential.[118]

The difficulty with this test (as will be discussed in the context of confidentiality agreements) is that it does not set standards for promises of confidentiality and leaves the decision on confidentality to the discretion of the agency.

The next test to be applied by the American courts was that of the expectation of confidentiality. The question was whether the information was of a sort that would "customarily not be released to the public by the person from whom it was obtained."[119] As noted above the mere fact that a firm does not customarily release information to the public does not make that information confidential in the sense that sensitive interests of the firm are being protected by nondisclosure. The test does represent an attempt to approach a more objective standard of confidentiality, i.e., the custom of the firm or possibly, what a "reasonable" firm would do. When applied to the individual firm, however, the subjective element is still present. A

secretive firm would customarily release less information than a more open one: the decision may then become a question of management style. The test was clearly a source of inconsistency.

In National Parks and Conservation Association v. Morton,[120] the District of Columbia Court of Appeal directed the inquiry to why information should be withheld. While the expectation of confidentiality test was not completely abandoned since the Court deemed it to be relevant in deciding whether the information might fall within the fourth exemption (business records), the expectation of the submitter that the information would be confidential was not sufficient to justify the exemption. The Court also required that the purpose for nondisclosure be met. To determine this, a two-fold test was developed.

> The court found that exemption 4 has a dual purpose: to protect the interests of the Government and to protect the interests of persons from whom information is obtained. Commercial or financial information is confidential under exemption 4 if disclosure is 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.[121]

It is important to note (because of approaches taken by Canadian agencies or the government) that the first effect, i.e., impairing the government's ability to collect information, does not apply when the submission of the information is required by statute.[122] The second effect, the substantial harm to competitive position, has become the major test for exemption of business information under the FOIA.

The test has been subject to criticism. Some argue that it is too difficult to prove such harm, that harm may depend on the information already held by a competitor and that it is impossible to predict the consequences of disclosure. Furthermore, it may be possible that a competitor receives some benefit

from the information although the submitter's competitive position is unchanged. Arguments about competitive position may require analysis about the market and competitive positions that are too sophisticated for most submitters to make and too expensive for those equipped to make them.[123]

The U.S. House Committee on Government Operations heard such criticisms, and acknowledged that the test may present some difficulties, but felt that it still provided the best formulation of criteria for exemption that has been established to date. The courts have added detail to the test that further meets some of the criticisms noted above. On appeal in National Parks the Court held that an actual adverse effect on competition does not have to be proved; a court may exercise its judgement on the likelihood of such an effect.[124] Furthermore, the court may receive opinion evidence on competitive positions and alleged competitive harm. An agency will make similar determinations.

By looking at substantial harm, the U.S. courts are applying a test that is similar to part of one used by some Canadian agencies (see discussion above). The American test does not balance the harm against the need for information, however. The identity or need of the requester and the intended use of the information are not factors in determining release of business information.[125] As the House Committee notes:

> Inquiries into the purpose of the requester are costly, time-consuming, subjective, and irrelevant. It is likely that a request for any business document ... could be framed to satisfy any purpose test.... [D]istinguishing between requesters would require controlling the use of the information by a successful requester in order to prevent its use by an unsucessful requester. Such regulation by the Government of information in the hands of private citizens would be a complete reversal of the principals of freedom of information.[126]

(d) Confidentiality Agreements

Confidentiality agreements exist when an agency or government department agrees with an information submitter that the information will be kept confidential or will be presumed to be confidential, or will receive special attention to determine confidentiality. These agreements may be made at the time of a request for disclosure or at the time the information is provided. Such agreements exist on both informal and formal bases in Canada and the United States. In the United States, they may take the form of an agreement to exempt from disclosure under the FOIA. In other words, the existence of an FOIA, even one with relatively narrow exemptions, does not eliminate such agreements. When an FOIA exists, the agreements clarify the applicability of an exemption to particular information or may guarantee that government discretion is not exercised in favour of release even though exemption is permitted (as provided in the American Act).

There are few formal guidelines in Canada relating to such agreements, although the CRTC and CTC have developed procedures to deal with this.[127] Without guidelines, agreements suffer from the same disadvantages as were noted with respect to the American promise of confidentiality test. The agency or department has complete discretion in deciding if an item is confidential. Since the discretion will usually be invoked at the request of the submitter, the particular management style or competitive fear of a given firm may determine a confidential label as much as the sensitivity of the actual information.[128] The inclination will be to label as confidential a wide range of material. The incentive to disclose that would offset this inclination is slight.

Because the scope for the labelling of information as confidential is narrower in the United States, more effort has been devoted to the development of guidelines. Some agencies, such as the Securities and Exchange Commission, have developed

relatively formal guidelines that they attempt to apply on a consistent basis. Other agencies may have informal internal guidelines.

The procedure proposed by the SEC in 1979[129] embodies the principle that the onus is on the submitter to substantiate any claim to confidentiality (this is consistent with the FOIA). When records are submitted to the SEC, a request for confidentiality may accompany them. If no request is made, the information will be presumed to be suitable for disclosure; the exemptions will be presumed not to apply. If a request is stated too broadly, the Commission will not honour it. Any document or portion that the submitter wishes to single out in this manner should be labelled and submitted separately from other documents. The request should state the reasons for the request, with reference to the FOIA and any other statute, and the length of time for which confidential treatment is requested. When the request is based on exemption four of the FOIA, the competitive business information exemption, the requester must also state the adverse business consequences of disclosure, the measures already taken by the business to protect the confidentiality and the ease or difficulty of a competitor's obtaining or compiling the information.

The SEC will then acknowledge the confidentiality request, but will not make an actual determination until it receives a request for disclosure under the FOIA. If upon receiving an FOIA request the Commission decides that the confidentiality request is not valid, both the person requesting access and the person requesting confidentiality will be notified. This would allow the person requesting confidentiality an opportunity to appeal the decision to the Commission.[130] If he does appeal, the other party will be notified of the appeal.

If the Commission determines that confidential treatment is justified, it will also notify both parties and inform the requester of his right to appeal under the Act.

The CRTC rules indicate a formal example of confidentiality arrangements in Canada and are basically similar to those proposed by the SEC. As with its determination of "confidentiality," the CRTC developed this method after notice and public hearings on proposed rules. Under section 19 of the Telecommunications Rules of Procedure,[131] a party may assert a claim for confidentiality for a document filed with the Commission. The claim must be asserted at time of filing, or the material is deemed to be available to the public. The claim must be accompanied by reasons and if specific direct harm is alleged to result from disclosure, details must be provided of the nature and extent of the harm. The party claiming confidentiality must state whether he objects to the disclosure of an abridged version of the document; if so, reasons must be given. The claim for confidentiality is itself placed on the public record.

If another party then desires access to a document for which a confidentiality claim has been filed, he must request disclosure. The request must give reasons, "including the public interest in the disclosure of all information relevant to the Commission's regulatory responsibility," and may file material supporting the reasons. The party that originally submitted information and desires confidentiality is notified by the Commission of the request for disclosure. The submitter has ten days to file a reply to the disclosure request; the reply in turn is served on the requester.

The Commission may then determine whether the document will be disclosed (using the confidentiality criteria discussed above) on the basis of the filings or it may require more information. It may require a deposition to be taken as evidence, or it may even convene an oral hearing on the matter. The CTC has adopted similar procedure in its Draft General Rules published June 1, 1981.

The procedures of both the SEC and the CRTC illustrate an explicit attempt to deal with the issue of confidentiality when large quantities of often complex information must be submitted and the submitter is deeply concerned that confidentiality be maintained. While it is true that submission may be required by statute, it is usually in everyone's interest to develop a system to deal with the concerns of the submitter. Both procedures have certain items in common and attempt to meet certain needs.[132] The requirement that the submitter identify the confidential documents at the time of submission places the initial burden of selection on the party who will benefit the most from confidentiality. The confidential label is not binding on the agency, but it creates a residual category, the unlabelled documents, that are available to the public simply on request or are part of the public record. This eliminates some problems for the agency or department. It also means that the party most familiar with the documents has the first opportunity to classify them. Of course, some private firms would be tempted to label nearly everything confidential - while this would not necessarily result in all those documents being exempted from disclosure, it does make the classification exercise nearly useless. The experience of the American Environmental Protection Agency is instructive on this matter. The EPA required businesses to assert a confidentiality claim at the time of submission and tied the claim to later notice to the business if the document were requested under the FOIA. At first (for a year or two) businesses made very broad claims, but they later became more selective as they realized that they would be required to justify their claims. The Committee on Government Operations noted:

> When marking is tied to notice, as EPA has done, there is an incentive to mark only those items that are in fact confidential. A business that marks all submitted documents may find that it is asked to justify its claims with great frequency. Not only will this require extra effort, and expense, but unless able to make a good argument in favour of the need for confidentiality, the submitter may find the credibility of its confidentiality stamp severely diminished.[133]

Under both systems the submitter is notified at the time a request is made for information marked "confidential." This notice feature is considered an important part of the system since it allows the submitters to present their arguments for confidentiality - or even to waive them in some cases. Since the issue of competitive harm may be complex, the submitter's arguments may aid the agency in making its decision. For example, a given item of information may appear innocuous in itself, but it may be a "piece in a puzzle" that would give a competitor an advantage.[134] The requester can also make arguments.

The differences in the systems reflect both the fact that one is part of a broader freedom of information system and that the CRTC rules apply specifically in a hearing while the SEC rules apply in many contexts and more likely to a wider variety of information. The critical point is that a systematic approach has been taken to disclosure, confidentiality and the competing interests involved.

This is to be contrasted with the all-too-common Canadian approach, in which a confidentiality label on a submitted document appears to mean that the classification has been made. The critical and core issue, of course, is what are the criteria for granting confidentiality. However, the timing and the other features of the system (notice and requirement of justification) will affect the amount of information ultimately deemed to be confidential. Information frequently loses its confidential character over time. If an objective test for confidentiality were applied, it may not be met at a later date. A balancing test (e.g., is disclosure in the public interest?) would require knowledge of the requester, his need and the intended use. Furthermore, a determination that is made in advance of a request for disclosure may needlessly consume government resources. It is likely that only a relatively small proportion of the information in government hands will ever be subject to a request for disclosure. Since a confidentiality determination may never be

required and since it may be outdated by the time a request is made, it appears inefficient to make it at the time of submission.

(3) Conclusions

The treatment of confidential information by government departments and agencies has evolved in a fragmentary ad hoc fashion. Different tests for confidentiality have developed and few clear guidelines are available to either the regulated or the regulators. Aside from some information that is protected from disclosure by statute (e.g., income tax data), data is treated in an inconsistent manner that leads to uncertainty and complaints. Indeed, the uncertainty of treatment may be a major factor in business demands for continued control over their information after submission to the government. The ad hoc determinations of confidentiality may occasionally lead to disclosure that disproportionately harms firms or individuals, but generally the result is too much secrecy. The internal incentives of the bureaucracy are against disclosure. While firms may not have consciously calculated the cost trade-offs between duplicate reporting requirements and the possibility of disclosure by a second information requester, they appear to fear disclosure more than they object to duplication (although that should not be underestimated).

Several conclusions can be drawn from this examination:

(a) The government should develop explicit rules on confidentiality agreements. Both sides (and third parties) should be aware of the provisions of the rules before information is submitted. The confidentiality agreement provisions of the CRTC provide one model and the rules of some American agencies, such as the Securities and Exchange Commission, provide another. It is not necessary that a single model be adopted throughout the government; indeed, a variety

might be more useful. The SEC rules, for example, are more complex than those of the CRTC, yet this might be appropriate for an agency whose major function is regulation by information disclosure. There are common factors, however, such as requirements that the submitter be responsible for identifying the documents for consideration as confidential, and that the confidentiality determination not be made until a request for disclosure is made. Notification of the submitter that a disclosure request has been made and the opportunity to waive the confidentiality request (when time has passed, for example) or to argue in favour of a confidentiality determination is provided. The preferred tests of confidentiality are discussed below, but in this context one might note that the rules for the confidentiality agreement per se are independent of the rules for determining confidentiality. A freedom of information act might contain some provisions, such as notification, of agreements, but are unlikely to cover the entire area.

(b) Information sharing among agencies and departments should be encouraged and indeed perhaps required. Data collection should be in a form that permits the widest possible use of the data in order to alleviate real or apparent duplication of collection. In other words, if a few more questions on a survey would make that survey useful to more government bodies, then adding those few questions is likely to impose less of a burden on the submitter than separate surveys would. Rationalization of collection needs would also permit greater sharing.

There must be some protection afforded to the firm or individual who submits information, however, to prevent inappropriate disclosure. The submitter should be told which bodies will share the data. The explicit confidentiality arrangements (if any) that were made with the original collecting body should be honoured by the sharing

bodies. Determination of confidentiality may require the cooperation of the original collecting body and the sharing body in order to meet the concerns of submitters that some parts of government will not understand or appreciate the submitter's concern for confidentiality. For example, one government body may lack the technical expertise to appreciate the implications for a company's competitive position if certain technical data were released. Indeed, ignorance of possible effects of release may be just as likely to engender inappropriate secrecy as it is inappropriate disclosure.

(c) The test for confidentiality should be two-tiered, with criteria under a freedom of information act providing the first tier. The first tier would apply an objective test, focusing on the nature of the information requested and not on the identity or need of the requester or the context of the request.

The second tier would apply a subjective balancing test and would be triggered in those circumstances in which first tier criteria for confidentiality would normally determine that information be kept secret. In this situation, the identity and need of the requester, the context, and the possibility of an overwhelming public need or right to know should be considered. Such tests should be applied to both departments and agencies. Although the subjective test is based upon equity and judicial and quasi-judicial procedures, it should be extended to other situations as well. Consideration of any special matters relevant to judicial and quasi-judicial proceedings will be made when the need of the requester and the context are examined. The fact that administrative law principles ("audi alteram partem") would not require disclosure is not the proper criterion here since disclosure might be appropriate in contexts where such principles would not otherwise apply.

Chapter 3

BILL C-43, THE ACCESS TO INFORMATION ACT

(1) Introduction

Access to information is important in three areas for those who are interested in regulatory oversight or better regulatory decision making. The first occurs during the process in which a decision is made to institute a regulatory scheme. This scheme may be authorized by new legislation or, increasingly, by regulation under a broad enabling act. The concern here is that there be public access to representations made to decision makers during the early consultation period and a later notice and comment period (if any). The second important area is access to evaluations and criteria for subsequent assessment of regulatory programs. The third is the public's access to information on which regulatory decision makers base their decisions. This third area is the most complicated since the decisions include both the judicial or quasi-judicial decisions of a regulatory tribunal and the decisions of a bureaucrat in a department or a tribunal in a nonjudicial capacity. It may be very difficult to separate policy advice to a minister from information that forms a background to or forms the basis for a decision. The line is not a hard or fast one. In all cases, the issue of sensitive information obtained from the public may be an issue.

Bill C-43, the Access to Information Act, was given first reading in the House of Commons on July 17, 1980 and referred to the House Committee on Justice and Legal Affairs. It was given second reading on January 29, 1981. This Bill was introduced to replace, in effect, Bill C-15, which was introduced by the previous Conservative government on October 24, 1979. The Conservative Bill was the result of a long-standing commitment to greater openness of government and the generally warm reception

it received (with some exceptions) apparently convinced the new Liberal government that it too should introduce an act that would provide the individual with greater access to the information in the control of government.

The Bill is viewed by the government as providing the bare minimum of access to information. In other words, it purports to set a standard that would apply to persons who request information in which they have no apparent interest or need. Since, quite sensibly, the Bill does not require that a need be stated, it is assumed that none exists. The criteria for release of information, then, are based on a balance that is weighted in favour of the interests that compete against the requester's interest. This is the apparent justification for rather broad exemption clauses, the scope of which will be discussed below.

(2) Commercial Information Disclosure

The section of the Bill that appears to be most critical in the context of regulation is section 20, which sets out exemptions from disclosure for information obtained from third parties.

> 20. (1) Subject to subsections (2) and (3), the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> (a) trade secrets of a third party;
> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competition position of, a third party; or

> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.
>
> (2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose any record that contains the results of product or environmental testing carried out by a government institution unless
>
> (a) the testing was done as a service and for a fee; or
> (b) the head of the institution believes, on reasonable grounds, that the results are misleading.
>
> (3) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

Section 20 would relate to any information obtained from a third party. This would include representations made to government in the course of consultation before regulatory statutes or regulations are approved. If a regulatory impact analysis, such as those performed on major health, safety and fairness regulations under the SEIA (Socio-Economic Impact Analysis) policy,[135] includes data supplied by the industry, the release of that data, and possibly the analysis surrounding it, would be governed by section 20. Program evaluations generally deal with data collected within and about the program being evaluated. If, however, data were obtained from nongovernment third parties, for example, a survey were taken of a client population, then that data would only be released if section 20 did not apply.[136]

The primary application of section 20, however, is in the context of general information gathering by government to provide a background for regulatory or policy decisions or in the context of a specific regulatory decision. Firms provide all sorts of information to Statistics Canada, as noted above, that

the government draws on. A regulated utility applying for a rate increase will supply data on its costs and profits to the regulator.

Section 20 provides a mandatory prohibition ("shall refuse to disclose" [emphasis added]) on release of any information that meets its exemptive criteria. This is to be contrasted with other exemptive provisions in Bill C-43, such as section 17: "The head ... may refuse to disclose ... information the disclosure of which could reasonably be expected to threaten the safety of an individual" [emphasis added].

It has been contended that this mandatory language is necessary in order to give meaning to the so-called "reverse freedom of information" action to prevent disclosure provided for in sections 29 and 45. In fact, the mandatory nature of section 20 may simply confuse the issue when read in conjunction with section 29. The latter section requires that notice be given to the affected third party when an agency head "intends to disclose any record ... [he] has reason to believe might contain (a) trade secrets ... (b) information described in paragraph 20(1)(b) ... or (c) information the disclosure of which ... might effect a result described in paragraph 20(1)(c) or (d)...." If an agency head has sufficient reason to notify any third party under section 29, then in most cases he will not have the discretion to release the contested information under section 20. It may be noted that, technically, section 20 applies when the information contains such matters as trade secrets, while section 29 is invoked when the head believes the information might contain such matters. Presumably, the head will use section 29 when he is not sure of the sensitivity of the information he controls or when the need for confidentiality has been reduced by the passage of time. However, the broad nature of the exemptions (discussed further below) and the psychological impact of the mandatory provisions will likely lead uncertain agency heads to refuse to disclose. Section 29 will prove most useful when the head

sincerely does not believe that information contains trade secrets, etc., but believes the third party may sincerely feel otherwise and wants an opportunity for more input and possibly another forum for the decision about release. In most other instances, the mandatory nature of section 20 and the lack of guidance for heads on when they should invoke section 29 would likely result in few organization heads exploring the nature of the information they control much beyond what is provided for in the section 20 exemptive criteria.

The inclusion of a right to a reverse action is a fine addition (since it was missing from Bill C-15), but query whether the restrictive mandatory exemptions are required to give effect to sections 29 and 45. The Canadian Bar Association Model Bill[137], for example, provides discretionary exemptions in section 26 for certain commercial and financial information. The Model Bill then provides for notice to persons who may be affected by disclosure (s. 6(4)) and the right to be heard by the agency on the matter of disclosure (s. 18(1)), and review by the Federal Court on the agency's decision (s. 18(3)).

The full implications of the mandatory refusal to disclose under section 20 cannot be appreciated, however, until the nature of the exemption criteria is explored. The section exempts trade secrets from disclosure. This is a relatively narrow category,[138] and has always been considered private, yet a great deal of information that may have value to a business may not be considered a "trade secret." We must look to the other subsections to determine the full breadth of this exemption.

Subsection 20(1)(b) exempts "financial, commercial, scientific or technical information that is confidential ... and is treated consistently in a confidential manner by the third party." To give meaning to the word "confidential," one must look to the factors that were discussed in Chapter 2, supra. Under U.S. caselaw, for example, the treatment that the third

party accorded the information was a factor to be considered in whether or not the label "confidential" applies. In other words, if a firm made information freely known throughout the company (and, a fortiori, outside the company), then its claims of confidentiality are unlikely to be upheld. Presumably the conjunctive part of this section ("and is treated consistently in a confidential manner") is intended to incorporate this consideration explicitly into the definition of "confidential." One can only hope that it will not be read as a disjunctive so that the treatment by the third party determines the confidential nature. It may have been preferable to draft the section stating the criteria that are to be applied to determine confidentiality, and include this as one criterion.

Subsection 20(1)(c) is a critical section; it exempts "information the disclosure of which could reasonably be expected to result in material financial loss or gain to ... a third party." "Reasonably" is presumably interpreted according to its usual legal meaning, in that it is what the reasonable person ("the man on the Clapham omnibus") might foresee in the circumstances. No definition is given of a "material" financial gain or loss, but perhaps one can extrapolate and borrow from securities laws. For example, a "material change" in the affairs of an issuer is "a change ... that would reasonably be expected to have a significant effect on the market price or value of any of the securities...."[139] The adjective "material" in that context implies within it a level or degree of significance. A trivial or perhaps even moderate loss or gain would not trigger the application of this exemption.

There is no similar qualifier in the next portion of subsection 20(1)(c), however. The subsection also exempts "information the disclosure of which ... could reasonably be expected to prejudice the competitive position of a third party...." This is separate from the material financial loss or gain; that is, both are not required. Unlike the Canadian Bar

Association Model Bill, the U.S. Freedom of Information Act, or Bill C-15, there is no requirement that there be some degree of competitive harm established. The Bar Association Model Bill, for example, speaks of unreasonable disadvantage in competitive activity (s. 26(1)(b)), and Bill C-15 refers to disclosure that would "prejudice significantly the competitive position" of a person, etc. (s. 20(b)). The American approach, developed by the courts, has been to require substantial harm.[140] In comparison to all these models, Bill C-43 allows far greater restrictions on the dissemination of information.

Subsection 20(1)(d) provides for a similarly broad exemption for "information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party." This form of an exemption was first seen in Bill C-15, although there it was also qualified - "interfere sigificantly." This exemption meets the sort of need expressed, for example, by Bell Canada in 1976 before the CRTC with respect to cost information and future union negotiations. The inclusion of such a section in both C-15 and C-43 may be applauded on the grounds of greater certainty, but was probably not required. Disadvantage in negotiations is an element of competitive harm or disadvantage and information has been successfully exempted from disclosure on these grounds (such as the Bell cost data). However, since there is no qualifying adjective applicable to "interfere" and since that word does cover a wide range of activity, making this particular application of the competitive harm exemption explicit may only increase the breadth of the entire exemption. Even a firm that might have difficulty arguing the applicability of a competitive harm exemption (such as a regulated monopoly) would surely have some contractual or other negotiations in progress that could trigger the exemption. Any attempt to apply a stricter standard of disclosure to firms that are relatively sheltered from competitive harm by government regulation will have to contend with this subsection. Stricter standards could apply, of course, but they will not result from

any examination of competitive positions, such as might be implied by section 20(1)(c). Any special standards will have to deal explicitly with the ramifications of section 20(1)(d).

Section 20 relates to information that was originally generated outside of government but, for one reason or another, has come under the control of a government institution. Yet much of the information that concerns us is generated within a government institution to meet its own requirements and/or for its own use. Program evaluations or analyses of the impact of a proposed regulation or regulatory scheme would be examples, as would any other internal assessments collected in the course of developing a regulation or scheme. Bill C-43 does not explicitly refer to such evaluations or assessments. This is to be contrasted to an Australian Draft Freedom of Information Act and the CBA Model Bill which provide that a report or study on the performance of efficiency of a department or regulatory agency or a technical study, including a cost estimate, relating to a proposed government policy or project are subject to disclosure.[141]

At the date of writing, the Bill is still being considered by the House Committee on Justice and Legal Affairs. The government has tabled an amendment to section 20:

> "(4) The head of a government institution may disclose any record or part of a record requested under this Act that contains information described in paragraph (1)(b), (c) or (d) if such disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party."

This subsection has not yet been voted on, but as a government motion, it is likely to become part of the Bill. The subsection does permit a public interest balancing test in the

relatively narrow areas of health, safety and environment. The words "health" and "safety" are qualified by the word "public". Query whether the criterion would apply, for example, in a situation in which workers in a specific workplace desired information on the health conditions in the workplace. Would people in the neighbourhood of a nuclear waste disposal site be permitted access to information about potential hazards under this test? The public interest test, even with the health, safety and environment focus, does not apply to trade secrets, although they may figure prominently in certain health and safety testing information, e.g., approval of new drugs, food additives, and pesticides.[142] The subsection is consistent with the view that the personal concerns and needs of the individual applicant are not in issue in deciding to retain or disclose information.

(3) Cabinet Discussion Papers and Deliberations

Sections 21 and 22 of C-43 relate to exemption from disclosure of certain information relating to operations of government. Section 21(1) provides a mandatory exemption for Cabinet documents, including briefing notes to Ministers. There is a twenty-year limitation on this exemption and the Prime Minister may also authorize disclosure. The deliberations of Cabinet and the documents relating to the deliberations (either preparing for them or recording them) have always been considered sacrosanct and no existing act or bill has ever suggested that the deliberations of the most senior officials in a government should not be private.

Section 21(1)(b) originally read as permitting the release of background discussion papers once the decision to which they relate has been made. The subsection stated that disclosure shall be refused for "discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions, before such decisions are made...." The

drafting was ambiguous in that it was not clear whether the phrase "before such decisions are made" was part of the description of a discussion paper or whether it indicated that a discussion paper shall not be released "before such decisions are made" - and presumably could be released thereafter. There is no similar phrase modifying the description of a memorandum in subsection 21(1)(a), so one might argue for the second interpretation. Since Cabinet discussion papers are sometimes released even now (including the one relating to Bill C-43), the section is likely intended to require such release.

Section 21(1)(b) has been amended in Committee to permit the release of background papers once the Cabinet decision has been announced. This clarifies the above point: it obviously applies after the decision is made. It may, however, narrow the category of discussion papers that will be publicly available, as not all Cabinet decisions are announced. This would indicate that some unspecified exemptive criteria are being applied at an earlier stage.

(4) Advice to the Government

Section 22 is the section we must examine to determine whether access is available to program evaluations or analyses of the impact of a regulation or scheme. Under this section, the head may refuse to disclose any record that contains "advice or recommendations developed by or for a government institution or a Minister...." Like Cabinet documents, the "policy advice to a Minister" area has been widely accepted as secret, but Cabinet documents are distinctly identifiable items, while "policy advice" is not. Furthermore, the section speaks of records that "contain" policy advice; it is not clear whether this refers to records that essentially document policy advice and only policy advice or whether the literal words apply and the document need only contain policy advice to trigger the exemption. While section 26 does permit severability, it will be interesting to note

the spirit in which section 22 is applied. At the present moment, most departments keep their program evaluations private, but the Office of the Comptroller General has determined that program evaluations would be available to the public under C-43. The portions that outline advice to the Minister (or Deputy) based on the evaluation would be severed. The OCG is attempting to devise a format that would make severing easier, since some departments are apparently somewhat careless at present about mixing the factual evaluations with the policy advice/suggestions for action.

Subsection 22(2)(b) raises an interesting point. It states that subsection 22(1) does not apply "in respect of a record that contains ... a report prepared by a consultant or adviser who was not, at the time the report was prepared, an officer or employee of a government institution."[143] This is logical enough in that policy advice from a civil servant or a Minister only cover advice given by one who is, in fact, a civil servant. In practice, however, the government has made extensive use of outside consultants at various times and then recommendations would not be subject to exemption under this section. It will be interesting to note whether this has any effect on the use of outside consultants to carry out special projects, whether or not they relate to regulatory assessments.

The most formal and complex impact analyses of regulations now being done by the government, the Socio-Economic Impact Analyses (SEIA) required under Chapter 490 of the Treasury Board Administrative Policy Manual, are made public. However, few regulations are covered by this policy: only three analyses have been completed by 1981. Some departments engage in a similar but less complex form of analysis for regulations that do not meet the SEIA threshold, but there is no requirement that such analyses be made public. Since the form of such analysis may be, in effect, a simplified SEIA, it might be clear that it is not policy advice and thus not exempt under section 22(1)(a).

Ironically, the more casual (or sloppy) the analysis is, the easier it might be to characterize it as advice - "Joe, I think we ought to go with this one because it looks cheaper." In any event, unless departments begin to think in terms of doing a specific analysis of this sort, it may be difficult to obtain access to whatever sort of regulatory analyses they do do (short of SEIA) using section 22(1)(a). The approach used by the Australian Draft or the CBA Model Bill at least identified a class of records that included feasiblity and cost studies. Absent other requirements to do such analyses, the ability of the public to request and pinpoint existing analyses might improve their quality and/or identify their absence. Whether this section will achieve this is unclear.

In the same sense, staff studies done by an agency, the NEB for example, are covered by section 22. Willingness to sever policy recommendations from factual material will determine how much is available. Furthermore, where the role of an agency is advisory (such as the NEB in certain capacities), staff studies that form the background to the agency advice may be characterized by the agency's role and exempted.

With respect to certain types of decisions, however, it should be noted that subsection 22(2)(a) states that there is no exemption for a record that contains "an account of, or a statement of the reasons for, a decision made in the exercise of a discretionary power or in the exercise of an adjudicative function affecting the rights of a person."[144] This section does not require an agency or department to give reasons for an exercise of a discretionary[145] or adjudicative power, but if a reason exists on paper, it will be available. One hopes that the government is reviewing relevant statutes to require the existence of written reasons - though, of course, if that is done, then they should also be required to be published and one would not need to use subsection 22(2)(a).

(5) Other Exemptions

Another section that may be applied to exempt regulatory information from disclosure is section 14. This provides that a head may refuse to disclose "information the disclosure of which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs...." As regulation has become more widespread and complex and as more formal or informal arrangements are required between and among the different governments to sort out jurisdictional questions, this exemption may cover more information than one would first expect. It is impossible to say at this stage how this might be applied. One can only note that the possibilities for broad exemptions exist under section 14.

(6) Conclusions on Bill C-43

A comparison of Chapters 2 and 3 of this paper will show that Bill C-43 does not in all cases represent a great improvement in the status of access to information. The test used by the CRTC, for example, to determine whether information deemed confidential should be released is far more sophisticated than any approach in C-43. It is argued that C-43 provides only the bare minimum for requirements for disclosure and that it thus should not be the guide for all situations. Bill C-43 applies when the requester has no stated or apparent interest and would not necessarily be determinative when other interests are at stake. Individualized regimes for disclosure would develop that would provide for the balancing of competing interests. The CRTC could, and should, continue to apply its test for confidentiality and other agencies could develop their own procedural rules and confidentiality tests to meet their own needs.

Such an approach may or may not be legally possible after Bill C-43 comes into effect, but it is submitted that it is highly unlikely to occur. The degree of disclosure permitted

under C-43 will become the norm. For many departments, this will require greater access to information under their control. But for other departments and agencies, adherence to the standards of C-43 would represent a retrograde step with respect to disclosure. It may be difficult to maintain an individual regime of disclosure in the face of a cultural norm within the government. An example, the Draft CTC Rules of Procedure, section 130, provides that:

> Subject to statutory provisions against public disclosure, and unless the Commission has, pursuant to the procedure described hereinafter, ruled otherwise, every pleading or other document filed with the Commission in respect of an application made pursuant to the jurisdiction of the Commission shall constitute part of the public record of the Commission. [Emphasis added.]

The explanatory note accompanying the section states that "This section establishes the public character of all documents filed with the Commission in the course of the C.T.C.'s quasi-judicial functions, subject to certain exemptions under federal statutes and subject further to Commission rulings." Bill C-43 is referred to: "It is designed also to provide for the exemptions from access whlich will be incorporated into the Freedom of Information Act, currently Bill C-43...". As explained in Chapter 2, supra, it is particularly true that in the course of a quasi-judicial hearing, the criteria for disclosure must be broader than in an access statute based on the premise that an applicant for disclosure has no need for the information. Although there is as yet no experience with the CTC's rulings in light of an established Access to Information Act, this section would indicate the tendency for the Bill's exemptions to become the norm.

Nonetheless, certain agencies have experience with established disclosure criteria and the balancing of the various interests involved. For those that lack such experience,

however, it will be even more difficult to provide incentives to encourage active development of more sophisticated criteria. Agencies and departments have a great deal of work to do, usually with declining resources. It is difficult enough to encourage the development of long-range policies in an atmosphere of crisis management. If the government provides criteria in an area and creates a cultural norm, a standard of what is acceptable behaviour, few will have the inclination or resources to go beyond those criteria.

It may also be argued that an organization cannot go beyond the scheme developed by C-43 without specific statutory authorization. The Official Secrets Act[146] and the Public Service Employment Act[147] provide penalties for disclosure of information if there is no authorization for the disclosure. Query whether the regime developed by the Access to Information Act would not then be seen to be the factor in determining whether release is "authorized," absent other statutory authorization. The first agency or department that releases information saying, "Yes we agree it would be exempt under the Access Act, but we believe other factors - rights of intervenors, public interest, etc. - override," will very likely face a court challenge. It may be that the agency or department will prevail in such a case, but the possibility will likely provide a psychological disincentive to provoke the challenge. Furthermore, Bill C-43 does not contain a section allowing disclosure in the overriding public interest, although the tabled amendment to section 20 permits the balancing of certain public interest considerations. Such sections are found in the CBA Model Bill,[148] for example. This indicates that Canadian draftsmen could have provided for the consideration of other factors in some situations. The requester with no declared interest is only entitled to a certain degree of access, but where certain interests are apparent, discretion is available to allow further access. This form of discretionary power was excluded from the Bill and one might therefore conclude that its exercise is not encouraged and may even be prohibited. Generally speaking, the

existence of a discretionary power is not to be implied and its exercise is discouraged unless provided for explicitly.

The spirit of Bill C-43 may be ultimately its greatest weakness. As a first step, the Bill is not bad, but it should not be seen as providing a complete regime for information access or ending the need for further legislative and executive action on the matter. Because of the strong likelihood that the Act will be seen as the complete government policy (and indeed it might truly be the complete government policy), specific statutory authorization for the development of other access criteria might be required. This could be included in Bill C-43 itself or, since the need is greatest with the regulatory agencies, it could be included in individual enabling acts or in a general administrative procedure act. Given the difficulty of developing legislation and the time constraints in Parliament, we are unlikely to see a series of individual amendments being tabled. The government could also request agencies and departments to develop criteria to deal with situations in which competing interests are at stake and the basic "disinterested" criterion of C-43 are inadequate. The simplest method, of course, is to write Bill C-43 properly the first time and include such authority in the Act. Such a suggestion focuses on the political will and policy behind the Bill - it is unlikely that such matters were excluded by accident.

Chapter 4

CONCLUSIONS

The importance of information and the costs associated with collecting, submitting, receiving and assimilating information are being given greater recognition. The rights of the citizen to know more about the activities of the government and the need for enhanced accountability of the government has also been recognized as the government has grown in size and influence in our lives. Indeed, the growth of institutions in general has been an impetus to the collection (and publication) of more information by the government, as governments are seen by increasing numbers as the only possible countervailing force to large multinational corporations.[149]

Evidence of concern about information collection and disclosure in general can be found in the introduction of a Green Paper on Information, the institution of a Royal Commission in Ontario, the introduction of two federal government bills on access to information, and the increasing amount of literature on the subject. The problems of the costs of collecting or assimilating information are being addressed by various government efforts on paperburden, record retention, rationalization of collection procedures and data banks. There is an increasing awareness that disclosure for its own sake may be a poor policy objective, but that it can further other specific objectives, not least of all greater accountability.

With respect to the context of regulation, more disclosure of information about the regulators, the regulated firms, the activities of each, and the effects of these activities will likely enhance accountability on both sides. More important, however, is the likelihood that availability of information will change the political cost of regulation as a policy. The size of

the benefit and the burden of a regulatory scheme will be more apparent. The distribution of the benefit and the burden will be more apparent - and this may be the critical information for those who wish to reveal the full effects of regulation. More information disclosure may result in less regulation because the distributive effects of much regulation may become more clear to the public and make such activity less popular politically.[150] Thus a flow of information may stem the flow of regulation that has prompted so much concern recently. On the other hand, such an effect may present the greatest obstacle to more openness.

With the objective of more effective or finely tuned regulation by accountable regulators in mind then, the following points can be made:

(1) A Freedom of Information Act should be passed in Canada that would be the first tier of a disclosure system. It would provide access when no specific interest (including the "public interest") has been declared to balance against the interest in favour of confidentiality. The pending Bill C-43, the Access to Information Act, has flaws that may allow a greater degree of confidentiality than is appropriate to maintain accountability of regulatory schemes, given the reality that an Act will set the normative tone for disclosure. The appropriate tests for competitive harm (including interference with negotiations and contracts) should be "substantial harm" or "significant harm."[151]

(2) A second tier of criteria for information disclosure should be developed by individual departments and agencies to meet requests for disclosure that go beyond the limits of an access act. The circumstances of the request, the need and identity of the requester are in issue here, with a balancing of interests required. It is in this context that the particular attributes of a firm, such as its competitive position and the type of regulation it is subject to (such

as restricted entry) should be considered. Disclosure policies should not be developed in response to the inadequacies of other government policies, such as competition and foreign investment.

(3) Explicit and public guidelines must be developed for agreements to maintain or consider confidentiality of information. It may be appropriate for each department or agency to develop its own guidelines, but certain common procedures are advisable: the submitters should make the initial identification of the documents for which confidential treatment is desired; the actual determination of confidentiality should be made at the time a request for disclosure is made; notification and opportunity for argument should be available.

(4) Government attempts to rationalize and increase the sharing of information should be intensified. To encourage this, specific rules on interagency sharing should be developed and made public to meet the concerns of submitters that sensitive information will be subject to the same consideration as would be given by the original receiving government body. The confidentiality agreement guidelines noted above should consider this aspect of information sharing, notice, and disclosure.

FOOTNOTES

1. Some say that nearly all the activities of government are "regulation." Douglas Hartle, Public Policy Decision Making and Regulation (Montreal: Institute for Research on Public Policy, 1979) at 1. We will define regulation more narrowly, however, See Priest et al., "On the Definition of Economic Regulation," in W.T. Stanbury, ed., Government Regulation: Scope, Growth, Process (Montreal: Institute for Research on Public Policy, 1980).

2. Margot Priest and Aron Wohl, "The Growth of Federal and Provincial Regulation of Economic Activity, 1867-1978," in W.T. Stanbury, ed., Government Regulation: Scope, Growth, Process (Montreal: Institute for Research on Public Policy, 1980).

3. See letter from the Prime Minister to the Chairman of the Economic Council of Canada, July 12, 1978, reproduced in Reponsible Regulation: An Interim Report on the Regulation Reference, Economic Council of Canada (Ottawa: Minister of Supply and Services Canada, 1979) at 119.

4. Order Paper, May 23, 1980, 1st Sess., 32nd Parl.

5. The question of whether even the highest quality decisions in a particular regulatory scheme will result in the "best" use of society's resources is a question few, if any, can answer, and is certainly beyond the scope of this paper.

6. Remembering, however, Cooke's Law: In any decision situation, the amount of relevant information available is inversely proportional to the importance of the decision.

7. S.O. 1971, c. 86, as amended.

8. For further discussion of issues of agency accountability see, Economic Council of Canada, Interim Report on the Regulation Reference, Responsible Regulation (Ottawa: Minister of Supply and Services Canada, 1979) at Chapter 5 and Hudson Janisch "Policy Making in Regulation: Toward a New Definition of the Status of Independent Agencies in Canada (1979), 17 Osgood Hall Law Journal 46.

9. W.T. Stanbury, "Restraining the State: The Role Of Deregulation" in Peter Aucoin, The Politics and Management of Restraint in Government (Montreal: Institute for Research on Public Policy, 1981) at 149-50.

10. Royal Commission on Financial Management and Accountability, Final Report (Ottawa: Minister of Supply and Services Canada, 1979) at 189, Recommendation 9.2.

11. While social regulation is not industry-specific, it does effect some industries more than others. Banks, for example, are less concerned with pollution than steel companies; both may be concerned with the requirements of affirmative action programs.

12. This is true in those provinces that have substantial activity in the trading of securities, e.g., Ontario, Quebec. In Prince Edward Island, New Brunswick, Nova Scotia and Newfoundland, however, securities regulation is carried out by a minister (Nova Scotia), an appointed official (Newfoundland, P.E.I.) or the Board of Commissioners of Public Utilities (New Brunswick).

13. CRTC Telecom Decision 81-13 at 145.

14. See for example, CRTC Telecom Public Notice 1978-18 at 11-12, in which the Commission listed seven issues to be addressed at the TCTS rate hearing.

15. One exception to the general statement in the text is the contract made by the CRTC with Peat Marwick and Partners to study the revenue settlement practices and procedures of the members of the Trans Canada Telephone System (TCTS). In addition to reasons of shortage of expert agency staff, it is likely that an independent contractor was requested to make this study because of the potential jurisdictional conflicts and sensitivities in this area. Only three members of TCTS are regulated federally; the others are provincially regulated and, indeed the prairie telephone systems are owned by the provinces.

    A regulatory agency, such as the National Energy Board, that also performs an advisory function is likely to seek information in that context. Regulatory functions are the only ones considered here, however.

16. CRTC Telecom Decision 79-11. The actual loss appears to be under $10 million.

17. J. Sturdy et al., "An Adaptive Information Policy for the Management of Chemical Risks in the Environment" (Montreal: Institute for Research on Public Policy, 1980).

18. Brian E. Felske and Assoc. Ltd., Sulphur Dioxide Regulation and the Canadian Non-Ferrous Metals Industry, Technical Report No. 3, Regulation Reference, Economic Council of Canada, January 1981.

19. The benefits of regulation are spread relatively widely, while the costs are narrowly focused with most social regulation (e.g., environmental, health and safety). With

direct regulation, however, the benefits are apt to be narrowly focused on the regulated firms while the costs are spread more widely.

20. The National Energy Board Rules of Practice and Procedure, C.R.C. 1978, c. 1057, Schedule, Parts I-IV, set out information required to be filed by various applicants. An applicant for a gas pipeline certificate, for example, must file, inter alia, details of markets to be served, copies of all sales contracts entered into by the applicant, a summary by provinces of gas revenues and detailed deliverability schedules (Part I).

21. W.A. Macdonald and E.K. Weir, "The Disclosure of Corporate Information," in P.K. Gorecki and W.T. Stanbury, eds., Perspectives on the Royal Commission on Corporate Concentration (Montreal: Institute for Research on Public Policy, 1979) at 242.

22. CRTC Telecom Decision 81-12 at 11-15. See also Telecom Decision 80-3.

23. The uncertainty of the information was a critical issue in the recent cases on benzene regulation by the Occupational Health and Safety Administration in the United States; Industrial Union Dept., AFL-CIO v. American Petroleum Institute (Benzene), 48 U.S.L.W. 5022 (July 2, 1980), affirming American Petroleum Institute v. OSHA, 581 F. 2d 493 (5th Cir. 1978).

24. Brian E. Felske and Assoc. Ltd., supra note 18.

25. An Energy Strategy for Canada (Ottawa: Minister of Supply and Services Canada, 1976) at 27.

26. U.S. General Accounting Office, Report to the Congress of the United States by the Comptroller General, Legislative and Regulatory Actions Needed to Deal with a Changing Domestic Telecommunications Industry, September 24, 1981.

27. A requirement for analysis of the effects of certain health, safety and fairness regulations; the SEIA program is administered by Treasury Board Canada and outlined in Administrative Policy Manual, Chapter 490, December 1979.

28 Janisch, supra note 8; testimony before the Parliamentary Task Force on Regulatory Reform, October 17, 1980, Proceedings, Issue No. 17.

29. Kenneth Kernaghan, Freedom of Information and Ministerial Responsibility, Research Publication 2, prepared for the Commission on Freedom of Information and Individual Privacy (Toronto: September 1978).

30. This area is not necessarily so neatly divided into these two catagories. The basic thrust of securities regulation, for example, is public disclosure and it may be regarded as the prototype. A public corporation is required to disclose certain information in annual reports to shareholders (a public document), and make certain filings annually or in the event of a material change in its affairs to a regulator. Some of these regulatory filings may be public documents and some may serve to alert the regulator in its oversight capacities - which may in turn stimulate public disclosure or action by the regulator.

31. For a discussion of production standards and mandated disclosure, see Ron Hirshhorn, "A Case Study of the Proposals for Energy Consumption Labelling of Refridgerators", Working Paper No. 1, Regulation Reference, Economic Council of Canada (Ottawa, 1979).

32. In the United States, for example, the Federal Trade Commission required the makers of Listerine Mouthwash to advertize that their product had no known medicinal qualities that would prevent colds. Surveys indicated, however, that approximately as many people believed in the cold-preventing qualities of the mouthwash after the corrective advertizing as before. In re Warner-Lambert, FTC Docket 8891 (December 1975).

33. Regulation by disclosure is being approached with some enthusiasm by the current Administration in the United States as an alternative to the more traditional form of regulation by setting mandatory standards. Project on Alternative Regulatory Approaches, Book 5: Information Disclosure: A Practical Guide to the Use of Information Disclosure as a Regulatory Alternative, September 1981.

34. Robert Pitofsky, "Mandated Disclosure in the Advertising of Consumer Products", in Harvey J. Goldschmid, ed,. Business Disclosure: Government Need to Know (New York: McGraw-Hill, 1979) at 312.

35. Stephen Breyer, for example, outlines the difficulties faced by the U.S. National Highway Traffic Safety Administration in setting tire disclosure standards: what was the combination of stopping distance, treadwear, and blowout resistence characteristics that should be disclosed? "Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives and Reform" (1979), 92 Harvard Law Review, 549 at 570-74, 580.

36. D.H. Hartle et.al., The Choice of Governing Instruments (Ottawa: Economic Council of Canada, Regulation Reference Working Paper, 1981).

37. In the United States and the United Kingdom, for example, the same policy objective of stabilization of farmer's incomes is met through a direct subsidy.

38. An analysis of tax expenditures has accompanied recent budgets. Experience in the fall of 1981 indicates, however, that most attention is likely to be paid to tax expenditures when they are eliminated or reduced, not when they are added to the tax system.

39. See, for example, U.S. Senator Schmitt's Regulatory Reduction and Congressional Control Act (S.104, introduced January 18, 1979), which would require, for "major" regulations: cost-benefit impact statements on the effects on consumers, wage-earners, businesses, markets, federal, state and local governments; effects on productivity, competition, supplies of important manufactured goods or services, employment, energy resources supply and demand, paperwork burdens (including the effects on the operation and efficiency of federal courts); an index of all rules pertaining to the same subject matter and data on the compliance costs of those rules.

40. For argument that regulated firms seek regulation for their own benefit, see George J. Stigler, "The Theory of Economic Regulation" (1971), 2 Bell Journal of Economics and Management Science 3; Richard A. Posner, "Theories of Economic Regulation" (1974), 5 Bell Journal of Economics and Management Science 335; Sam Peltzman, "Toward a More General Theory of Regulation" (1976), 19 Journal of Law and Economics 211.

41. A description of this episode may be found in Robert T. Franson, Access to Information, Independent Administrative Agencies, a study prepared for the Law Reform Commission of Canada (Ottawa: Minister of Supply and Services Canada, 1979) at 37-8.

42. Examples of this concern are too frequent to cite, but Bell Canada also made this objection, id. A recent example can be seen in Bell's contention that release of its expected costs would harm its own and its supplier's competitive position. The occasion was a request for a 26-35 percent rate increase. Globe and Mail, May 28, 1980. The sensitivity of firms to the possibility of product line reporting is illustrated by the extensive litigation in the United States over the Federal Trade Commission's attempts to inaugurate such reporting requirements. The FTC's attempts were upheld by the courts in 1978, but it has given an undertaking that it would not release the data supplied by individual firms.

43. This can best be seen in the context of corporate disclosure in the United States. The Securities and Exchange Commission requires disclosure of environmental policy "which is

reasonably likely to result in substantial fines, penalties, or other significant effects on the corporation." SEC Release No. 34-16224, Sept. 27, 1979, [1979] CCH Fed. Sec. L. Rep. 23,507B. One would assume that environment regulators would take an interest in such disclosures. The SEC, in fact, reports violations to agencies responsible for enforcement. Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, submitted to the Senate Banking, Housing and Urban Affairs Committee, May 12, 1976 and SEC Release No. 6111, Aug. 23, 1979.

44. S.C. 1970-71-72, c. 63.

45. R.S.C. 1970, c. S-16, as amended.

46. For a list of 124 Ontario statutes that provide for secrecy, see Appendix A of Timothy G. Brown, Government Secrecy Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law, Research Publication 11, prepared for the Commission on Freedom of Information and Individual Privacy (Toronto: November, 1979). A list of federal acts contained provisions relating to confidentiality can be found in Franson, supra note 41, Appendix. One might note, however, that the courts have rejected the notion that information obtained by virtue of statutory authority can only be disclosed if the enabling statute expressly permits disclosure. Alfred Crompton Amusement Machine Ltd. v. Commissioners of Customs and Excise (No. 2), [1973] 2 All E.R. 1169 (H.L.); Canadian Javelin v. Sparling (1979), 4 B.L.R. 153 (F.C.T.D.); Norwich Pharmacal Co. v. Commissioners of Customs and Excise, [1974] A.C. 133, [1973] 2 All E.R. 943 (H.L.).

47. R.S.C. 1970, c. P-32.

48. E.g., The Public Service Act, R.S.O. 1970, c. 386, s. 10.

49. Secrecy oaths are discussed in Brown, supra note 46. He points out that the scope of such oaths, particularly the Ontario oath, is very broad; the Hon. J.C. McRuer called the Ontario oath "a legal absurdity" (id. at 15). While such oaths are seldom invoked, they provide an atmosphere inimical to disclosure and nurturant of secrecy. Such an atmosphere would be enhanced by the rare, but controversial, invocations of the Official Secrets Act, R.S.C. 1970, c. O-3. A short readable account of the charges against publisher Douglas Creighton, and editor Peter Worthington in 1978, and the secret trial of Peter Treu in 1978 can be found in Edgar Z. Freidenberg, Deference to Authority (White Plains, N.Y.: M.E. Sharpe, Inc., 1980).

50. Concern about information exchanges between departments or agencies appears to stem not only from fear of other regulating or enforcement efforts being triggered, but also that a second department might not understand the sensitivity of particular information. See "Concern Grows Over Trade Between Government Units," Legal Times of Washington, Vol. II, No. 51, Monday, May 26, 1980, p. 1.

51. The Ontario Commission on Freedom of Information and Individual Privacy rejected the claim for a corporate right to privacy. Report, Vol. 2 (Toronto: J.C. Thatcher, Queen's Printer, 1980) at 313. The Australian Senate Standing Committee on Constitutional and Legal Affairs stated that "there is no right to total corporate privacy. Business corporations are created under Federal and State laws and are properly subject to regulation for the common good. A corollary of this is the public's right to know how well that regulation is being carried out on its behalf." Australia, Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978, Freedom of Information (Canberra: Australian Government Publishing Service, 1979) at 268.

52. The American Supreme Court, however, has recently decided that corporations enjoy the right of free speech under the First and Fourteenth Amendments to the Constitution: Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 48 U.S.L.W. 4783 (June 20, 1980) and Consolidated Edison Co. of New York Inc. v. Public Service Commission of New York, 48 U.S.L.W. 4776 (June 20, 1980). The Court specifically noted that a company's monopoly position does not alter the constitutional protection for its commercial speech (48 U.S.L.W. at 4786). These cases may be read as extensions of the concept of commercial speech, however, rather than an extension of the rights of the corporate entity.

    See Christopher D. Stone, Where The Law Ends: The Social Control of Corporate Behavior (New York: Harper Colophon Books, 1975). Stone's basic thesis is that the application of laws developed for humans to corporations has led to inappropriate or ineffective mechanisms for dealing with them in modern society.

53. Dleap S. Hall, "Continuing Disclosure and Data Collection" in Consumer and Corporate Affairs Canada, Proposals for a Securities Market Law for Canada, Vol. 3, Background Papers (Ottawa: Minister of Supply and Services Canada, 1979) at 472.

54. Submission to the Parliamentary Task Force on Regulatory Reform by the Royal Bank of Canada, September 19, 1980. The Bank must file statistical returns to the Minister of Finance, the Inspector General of Banks, the Bank of Canada, Statistics Canada, the Canada Deposit Insurance Corporation, Central Accounting & Control, Department of Indian Affairs and Northern Development, Department of Labour, Canada Mortgage and Housing Corporation, and the Superintendent of Insurance.

55. See Hall, supra note 53, at 477.

56. Statistics Act, S.C. 1970-71-72, c. 15, s. 3(d).

57. S.C. 1976-77, C. 33, s. 56(2).

58. Hall, supra note 53, at 474

59. Id. at 472.

60. Amendments are required for the Customs Act, R.S.C. 1970, c. C-40; the Statistics Act, R.S.C. 1970, c. S-16; the Corporations and Labour Unions Returns Act, R.S.C. 1970, c. C-31; and the Adult Occupational Training Act, R.S.C. 1970, c. A-2.

61. The Amendments to the CALURA Act (Bill C-3) were originally introduced in October 1978 and died on the Agenda March 26, 1979; Bill C-12 reintroduced the Amendments in October 1979, but died on the Agenda December 18, 1979. The Bill was again reintroduced on July 14, 1980 (Bill S-10) and as of September 1980 was before the Senate for Second Reading.

62. 45 Fed. Reg. 2586 (1980). It may be interesting to note that this proposed rulemaking is considered "major" and would be subject to a regulatory impact analysis under Executive Order 12044, "Improving Government Regulations." See the preliminary analysis at 45 Fed. Reg. 2596 (1980). Both the Carter Executive Order on Paperburden and E.O. 12044 have been superseded by President Reagan's Executive order 12291 of February 17, 1981.

63. 44 U.S.C., s. 3501 et seq.

64. 5 U.S.C.. s. 603 (b)(4).

65. Submission by Royal Bank of Canada, supra note 54.

66. Hearings of the Parliamentary Task Force on Regulatory Reform, October 9, 1980.

67. 7 & 8 Vict., c. 119 (1844) (U.K.).

68. Warren M.H. Grover and James C. Baillie, "Disclosure Requirements" in Consumer and Corporate Affairs Canada, Proposals for a Securities Market Law for Canada, Vol. 3, Background Papers (Ottawa: Minister of Supply and Services Canada, 1979). The 1844 Act represented an advance over earlier experienced with disclosure (or lack of it). The paradigm was the description of a company formed during the South Sea Bubble craze "for carrying out an undertaking of great advantage; but nobody to know what it is." The capital was subscribed completely within hours. C. Mackay, Extraordinary Popular Delusions and the Madness of Crowds (New York: Noonday Press, 1932 (1st ed. 1841).

69. The SEC requires information relating to environment protection, supra note 29, civil rights or affirmative action, illegal or questionable corporate payments (foreign bribes or compaign contributions) and compliance with other regulatory requirements. Forward projections ("soft data") is also desired since some believe it is more useful in predicting economic performance. See Homer Kripke, The SEC and Corporate Disclosure: Legislation in Search of a Purpose (New York: Law & Business, 1979).

70. Privilege is limited to solicitor-client communications and marital communications, although practical considerations will be given to priest-penitent or doctor-patient communication. See Edward Koroway, "Confidentiality in the Law of Evidence" (1978), 16 Osgoode Hall Law Journal 361. This is discussed in greater detail infra.

71. Litigation might be brought for the sole purpose of acquiring information in discovery. While the sheer cost of such a tactic (particularly in jurisdictions, such as Canada, where costs are paid by the loser) would make it rare, it is possible. On the other hand, where a reasonably generous Freedom of Information Act exists, as in the United States, it may be used to augment traditional discovery, particularly in litigation with the government. Freedom of Information Act Requests for Business Data and Reverse - FOIA Lawsuits, Twenty-fifth Report by the Committee on Government Operations, House of Representations, 95th Cong. 2nd Sess., House Report No. 950-1382 (Washington, D.C.: U.S.G.P.O., 1978). See also, David I. Levine, "Using the Freedom of Information Act As a Discovery Device" (1980), 36 Business Lawyer 45.

Third parties may also benefit from the general public character of evidence in court proceedings. Cf. "Public Loses in Record Sealing," Legal Times of Washington, Vol. II, No. 30, Dec. 31, 1979, p. 1, which details the court-ordered sealing of court records: "[I]t is virtually the norm for civil litigants to ask federal courts to seal part of the case record, typically arguing possibility of economic harm by loss of trade secrets or other confidential corporate information." This does not appear to be a common practice in Canada.

72. One definition of "trade secret" that usefully distinguishes it from the broader category of "confidential business information" may be found in United States ex rel. Norwegian Nitrogen Products Ltd. v. United States Tariff Commission, 6 F.2d 491 at 495 (D.C. Cir. 1925), rev'd on other grounds, 274 U.S. 196 (1927) and quoted in Consumer Union v. Veterans' Administration, 301 F. Supp. 796 at 801 (S.D.N.Y. 1969):

> An unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used in the making, preparing, compounding, treating or processing of articles or materials which are trade commodities.

73. Disclosure in this case refers to disclosure of the usual "material information" in corporate reporting. The firm's lawyer or accountant might argue that he or she could not be required to disclose information about the fraudulent scheme because of a confidential relationship. See discussion infra. Even this claim for confidentiality has received some question recently, particularly in the United States and by the SEC. The role of the lawyer and accountant in "whistle blowing" was emphasized first in SEC v. National Student Marketing, 360 F. Supp. 284 (D.D.C. 1973), 402 F. Supp. 641 (D.D.C. 1975); settlement with law firm of White & Case and its partner, Marion J. Epley III, C.C.H. Fed. Sec. L. Rep. 96,027 (D.D.C. 1977). A settlement was also reached with Peat, Marwick, Mitchell & Co., C.C.H. Fed. Sec. L. Rep. 80,217 (D.D.C. 1975). A good summary of relatively recent U.S. activity in this area can be found in Simon M. Lorne, The Corporate and Securities Adviser, The Public Interest, and Professional Ethics (1978) 76 Mich. L. Rev. 425. The SEC has published proposed rules on the role of the corporate lawyer: Securities Exchange Act Release No. 16045/July 25, 1979 (File No. 4-210, comment period to November 30, 1979). The proposed rules were based on a submission by a public interest group, the Institute for Public Representation. The American Bar Association has published drafts of a new Code of Professional Responsibility that shows the influence of these trends. There is no apparent movement to revise the traditional solicitor-client relationship in this context in Canada.

74. Discussion drawn in part from opinion of Gibson J., in Canadian Javelin Ltd. v. Sparling, supra note 46. See also Koroway, supra note 70.

75. Evidentiary privilege, of course, can be waived by the party who is privileged. In solicitor-client privilege, the privilege today belongs to the client and only he can waive it to permit the solicitor to offer testimony. The spouse who is a party in the action is the one who holds the privilege; if the privilege is waived, the other spouse is

considered competent to testify (originally at common law a spouse was not considered competent to offer testimony in a case involving the other except in narrowly defined circumstances).

76. For example, The Evidence Act, R.S.N. 1970, c. 115, s. 6.

77. For example, R.S.Q. 1964, c. 249, s. 60(2).

78. See Koroway, supra note 70, at 398-403, for a discussion of this issue.

79. Alfred Compton Amusement Machines Ltd. v. Commissioners of Customs and Excise (No. 2), supra note 46. The four tests proposed by Wigmore to determine if a communication should be privileged against disclosure in court are:

(1) The communication must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

The Supreme Court of Canada adopted these criteria in Slavutych v. Baker (1975), 55 D.L.R. (3d) 224 at 228.

80. See Brown, supra note 46, for a discussion of crown privilege. Also Koroway, supra note 20; S.I. Bushnell, "Crown Privilege" (1973), 51 Can. B. Rev. 551; Raoul Burger, Executive Privilege (Cambridge: Harvard University Press, 1974). The state need not necessarily be a party to the communication; the requirement is that the interests of the state be involved. Asiatic Petroleum Co. v. Anglo-Persian Oil Co., [1916] 1 K.B. 822, [1916-17] All E.R. 637.

81. The claim has been made several times in the past few years, frequently to royal commissions. A request for documents relating to an international agreement with Australia and New Zealand to set prices on skim milk powder was refused by External Affairs Minister Mark MacGuigan, "MacGuigan acts to block papers on skim-milk deal," Globe and Mail, March 14, 1980, p. 8. Documents relating to an international uranium cartel were withheld from production in U.S. courts by an Order-in-Council that makes it illegal even to discuss the cartel (although it was discussed in Parliament). The MacDonald Commission of Inquiry into RCMP wrongdoings and the Keable Commission in Quebec have both been subject to government's stonewalling of their attempts to carry out their mandated investigations.

82. [1942] A.C. 624, [1942] 1 All E.R. 587 (H.L.).

83. [1968] A.C. 910, [1968] 1 All E.R. 874 (H.L.).

84. Berger, supra note 80, at 220.

85. Supra note 83, at 910 (All E.R.).

86. The High Court of Australia has recently stated that a Minister's certificate of exemption is reviewable by the court. The court will determine the matter after balancing two aspects of the public interest: interest in the efficient conduct of government and interest in the administration of justice, Sankey, v. Whitlam, (1978), 53 A.L.J.R. 11.

87. Law Reform Commission of Canada, Report on Evidence, 1975, reproduced in (1976), 34 C.R.N.S. 26.

88. S.C. 1970-71-72, c. 1. Bill C-43, the Access to Information Act, discussed in Chapter 3, infra, provides for the repeal of s. 41 of the Federal Court Act. The Canada Evidence Act is then to be amended to replace s. 41; the Evidence Act would allow the court to review the claim of crown privilege and "order the disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest."

89. Re Blais and Andras (1972), 30 D.L.R. (3d) 287 (F.C.A.). For a fascinating account of the development of these doctrines in the United States, see Raoul Berger, supra note 80. For example, the "candid interchange" argument was accepted in England in Smith v. East India Co. in 1841, extended by Cammel, Laird and finally repudiated in Conway v. Rimmer (id. at 231). It developed in the U.S., however, as the result of a directive of President Eisenhower's in 1954 to prevent Senator McCarthy from eliciting details of a meeting from a witness (id. at 234-36).

> The Eisenhower directive ushered in the greatest orgy of executive denial in American history. From June 1955 to June 1960 there were at least 44 instances when officials in the executive branch refused information to Congress on the basis of the Eisenhower directive - more cases in those five years than in the first century of American history.... What had been for a century and a half sporadic executive practice employed in very unusual circumstances was now in a brief decade hypostatized into sacred constitutional principle.

Arthur M. Schlesinger Jr., The Imperial Presidency (Boston: Houghton, Mifflin, 1973) at 158-59, quoted in Berger, id. at 236, n. 16a.

90. See, for example, CanAero Services v. O'Malley, [1974] S.C.R. 592, 40 D.L.R. (3d) 371; Argyll v. Argyll, [1967] Ch. 302, [1965] 1 All E.R. 611.

91. The Court in Javelin, supra note 46, at 168, outlined the elements of confidentiality and breach:

> [T]hree elements normally are required to bring the obligation into being, and in order that a case of breach of confidence may be proven. First, the information must be of a confidential nature; second, the information must have been communicated in circumstances importing an obligation of confidence; and third, there must be an unauthorized use of the information to the detriment of the person communicating it.

The Court, at 172, then held that:

> [T]he obtaining of confidential information by the exercise of statutory powers imports upon the persons who obtained the information the obligation sufficient to satisfy the second element, above noted, to bring the obligation of confidence into being namely, that "the information must have been communicated in circumstances importing an obligation of confidence."

92. Fraser v. Evans, [1969] 1 All E.R. 8 at 11. Lord Denning is not necessarily a champion of disclosure; in a recent case he referred to the individual who disclosed an internal study of British Steel as a "traitor." "Open Secrets," Wall Street Journal, July 8, 1980, p. 26.

93. Canadian Javelin, supra note 46, at 169.

94. Slavutych v. Baker, supra note 79.

95. Canadian Javelin, supra note 46, illustrates this. Disclosure of the information would worsen a party's position where it aided prosecution for a crime; in this case, the public interest in the prevention of crime would be the basic purpose of the disclosure. The discomfiture or distress of the party concerned would be incidential.

96. 5 U.S.C., s. 552 (1977). The accepted test for confidentiality of business records can be found in National Parks and Conservation Association v. Morton, 498 F.2d 765

(D.C. Cir. 1974). Some courts have considered the nature of the requestors' interest to be relevant where the issue is disclosure that would violate personal privacy. The Supreme Court has held that the public interest may be weighed against interest in privacy (the sixth exemption under the FOIA): Rose v. Dept. of Air Force, 425 U.S. 352 (1976).

97. Franson, supra note 41.

98. Larry M. Fox, Freedom of Information and the Administrative Process, Research Publication 10, prepared for the Commission on Freedom of Information and Individual Privacy (Toronto: September 1979).

99. This is particularly true when the staff reports form the basis of advice that the NEB provides to the Minister under section 22(2) of the National Energy Board Act, R.S.C. 1970, c. N-6.

100. Martineau v. Matsqui Institution Disciplinary Board. (1979), 30 N.R. 119 (S.C.C.). These distinctions are becoming outmoded.

101. Franson, supra note 41.

102. H.N. Janisch, The Regulatory Process of the Canadian Transport Commission, a study prepared for The Law Reform Commission of Canada (Ottawa: Minister of Supply and Services Canada, 1978) at 80-82; Franson, id. at 36-39. The lack of consistency in approach is noted by Janisch, id. at 77-78, in a decision of the Water Transport Committee in which the Committee rejected disclosure without analyzing any of the issues involved.

103. Philip Slayton, The Anti-dumping Tribunal, a study prepared for The Law Reform Commission of Canada (Ottawa: Minister of Supply and Services Canada, 1979) at 47; Franson, id. at 35-36.

104. In the Matter of the Saskatchewan Wheat Pool, [1972] C.T.C. 164 at 174-77, quoted in Janisch, supra note 102, at 821. Note that the Committee appeared to feel this procedure was appropriate when it could not itself adequately test the evidence but required the help of opposing counsel in cross-examination. The reliability of the evidence appear to be a greater consideration then the ability of a party (including intervenors) to meet opposing arguments.

105. Janisch, id. at 76-77; Franson, supra note 41, at 36.

106. Franson, id. at 37-38.

107. See Frank Palmay, Trade Secrets and the Environmental Assessment Act: A Discussion Paper (Ontario Ministry of the Environment, 1976), discussed in D.P. Emond, Environmental Assessment Law in Canada (Toronto: Emond-Montgomery Ltd., 1978) at 98-102.

108. CRTC Rules of Procedure, SOR/79-554, s. 19.

109. See discussion of confidentiality agreements, infra, section 2(d).

110. CRTC Rules of Procedure, supra note 108, s. 19(10).

111. Id., s. 19(11)(b)(c).

112. One should contrast, however, the CRTC Telecommunications confidentiality provisions with those in the Broadcast Rules of Procedure, C.R.C. 1978, c. 375, s. 20:

> The Commission may, at the request of an applicant, if in the opinion of the Commission the public interest will best be served by so doing, treat as confidential the following material or information, if such material or information can be separated from the application and is marked "Confidential", namely
> (a) financial statements of an applicant who holds a licence;
> (b) evidence of the financial capacity of any person participating in an application; and
> (c) the names of prospective employees of an applicant.

113. For example, the B.C. Tel rate case cited in Franson, supra note 41, at 38-39, the long-distance rate case cited in supra note 22.

114. Franson, id. at 18.

115. Id.

116. See note 96 supra. The FOIA exemptions from disclosure authorize, but do not require, the withholding of information. It is possible that an agency, upon being informed of the need for the information, may choose to disclose what is otherwise exempt. Chrysler Corp. v. Brown, 47 U.S.L.W. 4434 (April 18, 1979).

117. This history of court interpretations is derived from the Report by the Committee on Government Operations, supra note 71.

118. General Services Administration v. Benson, 415 F.2d 878 at 881 (9th Cir. 1969).

119. Report on FOIA, United States Senate, Rep. No. 813, 89th Cong., 1st Sess. at 9 (1965), quoted in the Report by the Committee on Government Operations, supra note 71.

120. Supra note 96.

121. Report of the Committee on Government Operation, supra note 71, at 20, quoting from National Parks, id. at 770.

122. Commission on Federal Paperwork (U.S.), Confidentiality and Privacy (1977) as quoted in the Report by the Committee on Government Operations, id. at n. 52.

> The need for agencies to guarantee confidentiality is particularly significant in the field of statistical or research activities, where the Government must generally rely on the cooperation of the private sector to obtain comprehensive and reliable data. Where mandatory collection authority exists or where business entitles submit information voluntarily in order to qualify for some Government benefit, such as a license, grant, or contract, it is obviously not as significant a factor.

123. Arguments such as these were made in hearings before the U.S. House Committee on Government Operations, Id.

124. National Parks and Conservation Association v. Kleppe (II), 547 F.2d 673 at 683 (D.C. Cir. 1976). Cf. the Rapeseed case, supra note 104, where the Railway Transport Committee required "actual and substantial" harm.

125. See note 96, supra.

126. U.S. House Committee on Government Operations, Report, supra note 71 at 23.

127. An example of a less satisfactory procedure can be found in The Rules of Practice and Procedure (August 17, 1981) of the Restrictive Trade Practices Commission Inquiry into Petroleum Industry. A Statement by the Commission provides that the Director identify documents to be tendered as evidence and that the owner of the documents notify the Director which documents he objects to being publicly disclosed. The Commission will then deal with the confidentiality claim in an "orderly manner". The only criterion established by the Commission is Rule 3.12:

> All testimonial and documentary evidence will be received by the Commission in open public hearings except to the extent that it can be demonstrated to the satisfaction of the Commission that the interests of justice require that certain evidence be given *in camera*.

128. Different approaches of different firms can be seen by the attitudes of conglomerates to product line reporting on the SEC's 10-K form. ITT, for example, breaks its revenues into three categories: manufacturing, consumer and business services, and divestible operations. Transamerica, on the other hand, provides income statements to the subsidiary level. Mark V. Nadel, "Corporate Secrecy and Political Accountability" (Jan.-Feb. 1975), *Public Administration Review* 14 at 19.

129. Securities Act Release No. 6172, *Requests for Confidential Treatment of Records Obtained by the Commission*, C.C.H. Fed. Sec. L. Rep. 82,413; Text of Proposed Reg. 200.83, C.C.H. Fed. Sec. L. Rep. 66,483. The SEC has asked for comments until March 5, 1980.

130. In *Chrysler Corp.* v. *Brown*, *supra* note 116, the U.S. Supreme Court held that the *Administrative Procedure Act* confers jurisdiction on federal district courts to review proposed release of information by federal agencies.

131. SOR/79-554.

132. See Report of Committee on Government Operations, *supra* note 71.

133. *Id.* at 33, footnotes omitted, although the Committee at n. 100 cites the Commission on Federal Paperwork to the effect that "the overuse of the confidentiality classification by agencies collecting information may also serve to perpetuate duplicate reporting and the paperwork burden for agencies and industry by limiting the share of information between agencies."

134. *Westinghouse Electric* v. *Schlesinger*, 542 F.2d 1190 (1976).

135. See Administrative Policy Manual, Chapt. 490, *supra* note 27.

136. The Office of the Comptroller General, however, is in the process of developing guidelines that would permit the easy severability of confidential advice.

137. *Freedom of Information in Canada: A Model Bill* (Ottawa: Canadian Bar Association, 1979).

138. See note 72, *supra*.

139. The Securities Act 1978, S.O. 1978, c. 47, as amended, s. 1(21).

140. See text accompanying notes 120-22, supra.

141. Royal Commission on Australian Government Administration, Minority Report, Report Appendix, Vol. 2 (Canberra: Australian Government Publishing Service, 1976), A Draft Bill for a Freedom of Information Act, s. 31(2)(f)(g), A Model Bill, supra note 137, at s. 22(2)(f)(g).

142. See Thomas O. McGarity and Sidney A. Shapiro, "The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies" (1980), 93 Harvard Law Review 837; the authors argue that virtually all test results should be disclosed, but that competitors should generally be forbidden for some period of time from making use of test results.

143. This subsection has been amended in Committee to read "officer or employee of a government institution or a member of the staff of a Minister of the Crown".

144. This section has also been amended in Committee to clarify the point that both the phrase "exercise of a discretionary power" and the phrase "exercise of an adjudicative function" are intended to modify "affecting the rights of a person".

145. For a discussion on the nature of discretionary powers and an indication of their prevalence in federal statutes see, Philip Anisman, A Catalogue of Discretionary Powers in the Revised Statutes of Canada 1970 (Ottawa: Law Reform Commission of Canada, 1975).

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

147. R.S.C. 1970, c. P-32.

148. Supra note 137.

149. E.g., John Kenneth Galbraith, The New Industrial State (Boston: Houghton Mifflin, 1967); Christopher Stone, supra note 52. Even the Royal Commission on Corporate Concentration, Report (Ottawa: Minister of Supply and Services, 1978) at 332, recognizes that very large private companies may have an obligation to make more information public than is normally required of a closely held company.

150. This is not a necessary result. For example, the cost of tax expenditures has been made public in the United States for several years and there is no apparent decrease in the use of this policy instrument. There was no outcry for the

elimination of tax expenditures in Canada after the Department of Finance released a tax expenditure budget in December 1979. This is in spite of the fact that the distributional effects of most tax expenditures are perverse, with the greatest benefits going to the higher income taxpayers. Even where this is not the case, the mechanism is usually an inefficient one for income redistribution. Indeed, recent experience with budgets in both the U.S. and Canada indicate the difficulties of eliminating tax expenditures.

151. The case law and experience do not appear extensive enough to determine what, if any, difference exists between "substantial" and "significant" harm.

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