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Commission de réforme du droit du Canada

access to information independent administrative agencies

ADMINISTRATIVE LAW SERIES

STUDY PAPER

ACCESS TO INFORMATION
Independent Administrative Agencies

ACCESS TO INFORMATION
Independent Administrative Agencies

A Study Prepared for the
Law Reform Commission of Canada

by
Robert T. Franson

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Foreword

In its Research Program, the Law Reform Commission undertook "to study the broader problems associated with procedures before administrative tribunals". In fulfilling this mandate, the Commission has, among other research activities, been engaged in a series of studies of particular administrative agencies. These studies amply reveal that one of the "broad problems associated with procedures before administrative tribunals" is that of disclosure of information and confidentiality. To obtain a broader perspective on this problem, the Commission in 1976 engaged Professor Robert Franson to make an in-depth study of the subject. The research for this study largely reflects the situation existing between September 1976 and May 1977, although some further developments are referred to in the footnotes.

The views expressed in the Paper are those of Professor Franson and are not necessarily shared by the Commission. It is right to say, however, that the Commission is committed to a philosophy of openness in the administrative process. We look at the Paper as a contribution to the on-going debate on freedom of information. Although it focuses on the independent administrative agencies, it has implications for a more generalized policy on freedom of information.

The Paper will obviously play a role in shaping the Commission's views and eventual proposals for reform of administrative law and procedures. Comments on this Paper are therefore welcome and should be sent to:

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Preface

The questions posed in this study relate to how independent administrative agencies should deal with information they receive, who they should share it with, and when they should keep it to themselves. They are very basic to the administrative process and have plagued scholars, administrators and jurists alike. The comments offered here are not presented as any final answer, but rather as stimuli for debate.

The research described here was performed between September, 1976 and May, 1977. The study itself was written during the following year, after I had returned to the full-time occupation of teaching law. I am writing this preface in December, 1978, one and one-half years after having completed the research.

Important changes have taken place during that time involving some of the agencies and practices that are mentioned here. For example, when data was being collected for this paper the Atomic Energy Control Board had no obligation to hold hearings or share information in any way. Since then, the government has introduced a bill that will impose substantial obligations of this sort on the Board. Other agencies covered in the study have already been affected by recent legislation. Moreover, recent decisions of the Supreme Court of Canada and the Federal Court of Appeals indicate that our courts may be prepared to look at judicial review and information access in new ways.

It would be nice to be able to revise this paper and take these developments into account. But time and resources are simply unavailable. Moreover, new developments would take place while that was being done.

We live in a dynamic system, one that is always changing, but only have the capacity of representing it at some point in time. To use a metaphor, we take still pictures. Even if we could take motion pictures, they would represent the past, not the future. Moreover, as scientists will recognize, we can't observe a state without affecting it.

The very act of examining a system alters its physical reality. When researchers ask bureaucrats about their information-sharing policies those same bureaucrats can be expected to re-examine their policies.

The picture presented here is dated 1976. Hopefully, it is reasonably accurate for that time, but the details will have changed by now. Nonetheless, the issues portrayed here are still with us and still deserve our attention.

I wish to thank those who have contributed to this paper in one way or another. The following individuals deserve special mention: Tom Anderson, David Cohen, Howard Eddy, Pierre Issalys, Dr. G. V. La Forest, Q.C., Alan Leadbeater, Charles Marvin, Christopher Morgan, and Gaylord Watkins. Naturally, many others contributed by discussing the issues with me, by generously making time available for interviews, and in numerous other ways. I wish to thank them all.

R. T. Franson

I

Introduction

The administrative process has an enormous impact on Canadian society. Within its confines, important decisions are made about the nature and direction of Canadian life. Independent administrative agencies make basic decisions about the marketing of natural products, the development, import and export of energy resources, transportation and telecommunications, and many other matters. They also make basic decisions concerning the rights and privileges of individuals, for example, the right to pension benefits or unemployment insurance compensation.

Information is a vital ingredient in the administrative process. When individuals, groups or corporations are denied access to information by an agency, they are denied their right to participate in the administrative process and also their democratic right to exercise control over it. The fairness of a decision-making process, and the accuracy and wisdom of decisions that are made depend on the effective participation by all those who may be affected. Yet, other values may be adversely affected by full disclosure, among them, the individual's right to privacy, the competitive position of a business, and the interest we all share in efficient and effective government. The administrative process involves a compromise between these competing interests.

This paper is addressed to how and where the compromise between confidentiality and disclosure should be made in the administrative process. It was undertaken because non-disclosure of information has been a frequent cause of litigation, and because the Law Reform Commission's previous research has indicated that the issue continues to be a source of problems for administrative agencies. The study was limited in its scope to the practices of independent administrative agencies (hereinafter, agencies) and is largely based on the work the Commission has done with the following federal agencies: Canadian Radio-television and Telecommunications Commission (CRTC); Canadian Transport Commission (CTC);[1] National Energy

Board (NEB);[2] Atomic Energy Control Board (AECB);[3] Anti-dumping Tribunal (ADT); Unemployment Insurance Commission (UIC);[4] and the National Parole Board (NPB).[5] It does not deal with the ordinary departments of government, or with Crown Corporations, in any way.

One of the first questions the reader may ask about access to information is whether people dealing with administrative agencies really have difficulty getting information. Of course, the answer varies from agency to agency. Anyone who has been involved with an agency like the NEB knows that it discloses a substantial amount of information during the course of its proceedings. On the other hand, the AECB continues to operate under a regulation prohibiting the disclosure of information in its possession.

In general terms, the agencies make an honest effort to disclose as much information as they feel they can during the course of their proceedings. They probably do a much better job than other organs of government. Many of the functions they perform are basically judicial functions, and are subject to review by the courts. If adequate information were not disclosed, the decisions might be overturned by the courts, with the result that the agencies are very conscious of the need for adequate disclosure.

However, despite all of the care that is taken, there is evidence that non-disclosure of information continues to be a source of irritation in the administrative process. During this study complaints were received from participants that they were unable to determine the procedures that would be followed in matters that affected them; intervenors in regulatory matters complained that they did not have information that was crucial to the issue before the agency; other participants complained that staff inspection and research reports affecting their operations were not shared with them prior to proceedings affecting them; a leading scholar said that he had been denied basic information concerning the policies followed by one of the agencies; and other examples could be cited.

In a sense, these are all symptoms of a larger problem. Until recently, access to information has not been subjected to enough careful analysis. However, the current debate in Canada concerning freedom of information has led many agencies to consider the problems of disclosure and to attempt to find solutions. In addition, legal academics, the courts and many individuals and groups in the public, have contributed helpful suggestions. It seems timely to attempt to con-

solidate some of the gains that have been made and to identify the directions that might profitably be pursued.

Recent events outside of the administrative process also dictate a close examination of disclosure and confidentiality. While this study was being done, two parallel activities were taking place at the federal level. First, a private member's bill was introduced in the House of Commons that would have given private citizens a general right of access to documents contained in government files, subject to certain exemptions. The bill, Bill C-225 (1974), was referred to the Joint Standing Committee of Parliament on Regulations and Statutory Instruments (hereafter, the Statutory Instruments Committee), and that committee held a series of hearings concerning the bill.[6] It is fair to say that the bill and the Committee's hearings have attracted a great deal of interest. The bill was modelled on legislation in the United States known as the *Freedom of Information Act*,[7] which has apparently been very successful in opening government files to the public. A growing lobby urges the enactment of similar legislation here.

The Government of Canada was also studying access to information at the same time, but I was not able to co-ordinate my efforts with theirs as fully as I would have liked because their study was intended to produce government policy and therefore had to be kept confidential. However, a "Green Paper" has now been issued and an attempt has been made here to take its contents into account[8].

It is obvious that the two topics overlap considerably. In many respects, administrative agencies and ordinary departments of government are very similar. In fact, they are often assigned similar, or even identical functions. It would not be surprising, therefore, to find that many of the same considerations arise with respect to disclosure by agencies as arise with respect to disclosure by government departments.

For an administrative lawyer, one important question is whether such "Freedom of Information" legislation should apply to the independent agencies. In the United States, the legislation does apply to agencies and has been widely used by regulated industries for a variety of purposes, some legitimate and some not so legitimate. First, the legislation has been used by regulated industries to gain access to information relating to matters pending before agencies, sometimes circumventing normal discovery mechanisms. More serious are the charges that requests for information are being used to harass agency staff, making it impossible for them to carry out their regulatory

functions and the charges that the Act is being used by many companies to obtain information about their competitors.[9] Whatever the truth is about corporate use of the United States *Freedom of Information Act*, it is clear that such legislation will have a substantial impact on the administrative process.

II

The Values at Stake

It is not possible to evaluate any field of administrative activity without having some idea of the criteria against which performance should be measured. To put it another way, one must know what values are affected by different ways of organizing our administrative structures. Below is a list of the values that may be affected by disclosure policies. The list is tentative in nature, and the values overlap to some extent. Hopefully, however, it will provide a starting point for analysis.

A. General Values

1. Fairness

Historically, lawyers and courts have been concerned chiefly with the fairness of the administrative process. Legal rules have been developed to protect participants from bias and to guarantee a minimum standard of procedural fairness in certain kinds of proceedings.

Basically, fairness requires that someone who is affected by a decision should have an effective opportunity of bringing his side of the case to the attention of the decision-maker. As it applies to disclosure of information, this value dictates that enough information be disclosed to anyone who will be affected by an agency's decision to allow him to formulate and present his response.

2. Accuracy

We all want administrators to make accurate decisions, in the sense that their predictions about future needs and about the effects of their decisions should be correct. Obviously, the more complete the

information an agency has, the more accurate its decisions will be. The disclosure policies of an agency can affect the completeness of the information the agency receives in two different ways — one beneficial and one detrimental.

In one way, disclosure can enhance accuracy. Accurate information about the impact of a proposed decision or policy can only be submitted by those who will be affected if they know the nature of the proposed decision or policy in advance. The same people can only correct any inaccurate information in the agency's files if they are aware of its existence.

However, disclosure can also impair accuracy. This might happen, for example, if the person providing information was likely to be less candid with the agency if he knew the information might be disclosed.

3. Accountability

Few would argue with the general principle that all organs of government must be accountable for their decisions and actions. The contentious question is: how should they be accountable?

The traditional view in the British Parliamentary tradition, and reflected in Canadian practice, is that accountability is best achieved through ministerial responsibility. That view was explained this way by the recent government green paper on access to government documents:

> The practice of our Cabinet government requires that the public service (politically neutral and publicly anonymous) be answerable to Ministers, that the Ministers be responsible to Parliament, and that each member of Parliament be answerable to his constituents.[10]

In practice, there are numerous difficulties with this theory. Put simply, our society has become too complex, and our governments too large, for the system to work well. But these problems are beyond the scope of this study.

More to the point, however, the theory of ministerial responsibility does not apply to independent agencies in a straightforward manner.[11] They are supposed to be independent of the ministries, at least to some extent, in order to allow them to apply their expertise to problems within their jurisdiction, free from political interference.

A modest amount of Cabinet control is allowed through two formal mechanisms: first, the parties to an administrative proceeding may sometimes appeal the agency's decision to either the responsible Minister or the Governor-in-Council; and second, some statutes give the Cabinet power to issue policy directives that are binding on the agency. Aside from these two controls, agencies are expected to operate free from ministerial interference.

What, then, assures that agencies will be accountable for their decisions? How are agency decisions corrected by the public if they are not publicly acceptable? The answer can only be that an informed public will draw its complaints to the attention of the agency itself and to the attention of their member of Parliament. There are then two principal mechanisms for correction. First, the agency may change its own policies. Second, Parliament may change the legislation under which the agency operates to achieve the desired corrections. Of course, where the Cabinet has the power to issue policy directives this approach can also be used.

But all this depends upon an informed public. Only if the public is aware of the decisions that are made, only if it can find out what information the agency had at its disposal, can it make its views known in a meaningful way. Obviously, the disclosure policies of the agency have a very important impact on public accountability.

4. Administrative Efficiency

The efficiency of our decision-making structures can obviously be affected by disclosure policies. It will clearly cost more to operate agencies if they must respond to any request for information that they receive. Moreover, we must be careful not to impose requirements that are too time-consuming because that could prevent agencies from doing the job they were established to do.

On the other hand, it does not follow that an agency is always more efficient if it operates in a closed way, refusing to share any of its information. More and more frequently, government agencies make decisions and commit resources to policies that are subsequently overturned by an angry public. This is not an efficient way to operate. In such cases, it would be better to spend more time and effort making the decision in the first place, to share information more broadly in order to test public reaction, and to design a policy that is acceptable.

One of the reasons administrative agencies are given tasks instead of ordinary courts is that they can take into account a broader range of interests than courts and can be more sensitive to the people who will be affected by their decisions. They are intended to identify the various impacts of their policies before they act. They can often do this most effectively if they are open and share their information widely.

5. Acceptability

The decisions of agencies must be acceptable to those segments of society who are affected by them. Otherwise, they will be impossible to implement. This is often a matter of maintaining public confidence, of making decisions in such a way that all those affected believe them to be fairly made, to be based on complete information, and so on. It should be emphasized here that it may not be enough for the decision to be fair, or the tribunal's information to be complete. It must also be *seen* to be fair and complete.

Disclosure policies definitely do affect the acceptability of decisions. Every time an agency refuses to share information concerning a decision-making task it risks the ultimate rejection of the decision by those affected. This is so even though the agency is being scrupulously fair. An example may help. Suppose an agency is deciding whether to issue a licence, and suppose further that it receives a negative report which it does not believe. It can refuse to share that information with the applicant without treating him unfairly simply because the agency is not using it against him. But if it decides against the applicant on other grounds he is likely to believe that there was something in the undisclosed report that unfairly influenced the agency.

B. Values Specifically Relating to the Information

In addition to the values discussed above, which all relate to the administrative process in general, there are other values that may be affected and seem to relate more specifically to the kind of information that is requested.

1. Personal Privacy

Government has a great deal of information about each of us in its files. Administrative agencies also possess a great deal of this data, and they have access to other data held by regular departments. Clearly, release of this information can have an adverse impact on personal privacy.

2. Public Safety

The release of certain kinds of information can have an adverse impact on public safety. Some examples are information relating to national security, like the precise plans of defence installations, or to nuclear shipments, or shipments of other hazardous substances that might be hijacked, and so on. Another example concerns informants, who may forward negative material to a parole board concerning an applicant for parole. If the identity of such an informant is known, reprisals are possible. A final example concerns public safety information itself. In the course of its business, an agency may learn of a potentially serious health hazard. One's immediate reaction is that such information should be disclosed, and quickly. But what if the information could cause panic that might be more harmful?

3. The Competitive Economy

Agencies possess information about the operations of many enterprises that form a part of our business economy. If their affairs are disclosed, they may be subjected to unfair competition. Or worse, competition may actually be inhibited as a kind of conscious parallelism develops. Other economic effects of disclosure can readily be identified. Market studies, and product development are costly activities. Presumably companies would not undertake such activities if there was a substantial risk that their competitors could obtain the information free simply by asking a regulatory agency. The importance of this point is underscored by the fact that most requests for information received by regulatory agencies under the United States *Freedom of Information Act* were made by corporations attempting to find out about their competitors.[12]

Disclosure policies may also have a valuable impact on the competitive economy because they may contribute to the information the consumer has about the available products. An agency may, for

example, learn about the cleanliness of competing food suppliers. If that information were available in the marketplace, consumers could exert beneficial pressure on the inferior suppliers — or at least they could intelligently decide how much they were willing to pay for cleanliness. The economic decision would be made by a fully informed market.[13]

4. Prevention of Private Harms

Finally, government also has an obvious interest in preventing the release of erroneous information that could harm the reputation of a person or of a business.

III

Existing Law and Practice

The existing situation regarding access to information is very complex, not because of the law relating to the subject, but because Canada's administrative structure itself is very complex. For this reason, it is very difficult to draw general conclusions that are valid. There are, for example, many different kinds of agencies that exercise many different functions. At one end of the spectrum are the independent regulatory agencies, like the NEB and the CRTC, that have a large permanent staff and make decisions concerning very complex areas of human activity. These agencies often hold formal hearings and require an elaborate exchange of information to take place during the process. At the other end of the spectrum are agencies that are created solely for the purpose of hearing one dispute, that have no staff, and no permanent life.[14] Some agencies make decisions of broad applicability, for example, the CRTC, when it promulgates rules that apply to the broadcast industry generally. And some deal with very limited and specific questions, affecting only one individual, for example, the UIC, the Immigration Appeal Board or the National Parole Board when they hear appeals relating to whether one applicant should be granted or deprived of a benefit.

In the following pages we will describe first the different variables or factors that must be taken into account and then the approaches taken by the courts and by the agencies themselves.

A. The Independent Variables

To understand the complexity of information access it is necessary to reflect on the variety of ways in which a request for information can arise. There are three basic dimensions, or independent variables, involved. First, and most obvious, is the identity of the requester. The request may be made by someone whose interest may be vitally

affected by some proceeding before the agency; or it may be made by an individual or group interested in the operations of the agency but with no special stake in the outcome of any of its proceedings over and above the interest all citizens share in effective government. Many different individuals, groups, corporations and even other governments, may desire agency information, and a decision as to whether or not to disclose that information will take account of the identity of the requester.

The second dimension, or variable, concerns the context in which a request is made — that is, the kind of function the agency is performing. Does the request come in the context of some particular proceeding? The tribunal may, for example, be deciding some question concerning the rights of the requester in a formal hearing. Or it may merely be attempting to formulate general policies that might, or might not, relate to the requester. Finally, the request might not form a part of any particular function. It might be a general request, made by a member of the public, concerning the agency's functions.

The final dimension, or variable, concerns the kind of information that is requested. Who prepared it, or provided it? What does it concern? And what does it say? The requested information may relate to some private individual, and its release may cause harm to that individual. It may relate to some business enterprise, and disclosure might put that business at a competitive disadvantage. The information may have been prepared by the staff of an agency, and may contain advice that the staff member intended to give in confidence. Or the information may relate to the management of the agency, and its release may be embarrassing only because it would reveal waste or inefficiency.

One other consideration deserves mention: namely, the purpose for which information is sought. It may, for example, be helpful to know whether the information is sought for scholarly research purposes, for delay or harassment, for industrial espionage, for adequate preparation of a party's case, and so forth.[15] However, this consideration appears to overlap the others discussed above and does not appear to have been a key factor in Canadian decisions. For these reasons, it will not be discussed separately in the materials that follow.

Quite obviously, the reaction one has to a request for information depends upon each of these variables — on the interest of the requester, on the context within which the request is made and on the nature of the information itself.

B. The Approach of the Courts

The courts appear to have approached problems of access to information primarily from the point of view of the context of the request. They have assumed that all administrative actions can be divided into two categories: (1) those that are "judicial" or "quasi-judicial" in nature; and (2) those that are "administrative" in nature. When an agency is conducting a "judicial" function, it is required to give anyone whose interests would be directly affected by its decision an opportunity of being heard.[16] In legal jargon, the agency must not violate the so-called "rules of natural justice". The agency is required to disclose enough information to enable the participant to know the essentials of the case he must meet, so that he can prepare his presentation. In contrast "administrative" decisions will not be reviewed by the courts, the rules of natural justice do not apply, and the agency is not required to disclose any information.[17]

The words "administrative" and "judicial" as used in this context, are terms of art. Extensive jurisprudence exists defining each, and any general statement will be inaccurate. However, in broad general terms the courts have defined as "judicial" those decision-making functions that affect private rights in a determinative way.[18] In other words, if the tribunal is adjudicating an individual's rights, the function is likely to be classified as judicial and disclosure will be required. The "administrative" category includes functions that merely lead to recommendations rather than determinative decisions,[19] functions that are legislative or are ruled by considerations of expedience rather than by an evaluation of individual rights,[20] and functions that merely involve an individual's privileges rather than his rights.[21]

There is one other situation in which an agency may be required to disclose information; namely, when the statutes provide for a hearing. In such a case, the Federal Court of Appeal has held that the hearing must be meaningful, and that therefore the agency must disclose enough information to give participants an effective opportunity of presenting their views.[22]

The kind of protection given to the participants may be illustrated by a 1972 decision of the Federal Court of Appeal, *Re Magnasonic Canada Ltd. and Anti-dumping Tribunal*.[23] The case arose under a statute that required a hearing, so the court did not need to characterize the function as either administrative or judicial. Nevertheless, the case also illustrates the approach that would be taken by the courts

in the latter situation. Once a court decides that a decision-making process is subject to review and to standards of procedural fairness, it does not appear to matter much whether a hearing is required by statute or by the rules of natural justice.

The issue before the Anti-dumping Tribunal in *Magnasonic* was whether the dumping of foreign-made television sets in Canada was likely to cause substantial injury to Canadian manufacturers. During the course of its proceedings the Tribunal received evidence from Canadian manufacturers, which it withheld from other parties because the manufacturers felt that disclosure would harm their competitive positions. As Chief Justice Jackett noted: "[W]hile the 'parties' had full knowledge of the evidence adduced at the public hearing, they had no opportunity to know what other evidence and information was accepted by the Tribunal and had no opportunity to answer it or make submissions with regard thereto."[24]

The Tribunal's decision was set aside because the Tribunal had failed to disclose the information to the participants. Chief Justice Jackett reasoned that the statute gave the parties a right to be represented at the Tribunal's hearings, and that such a right

> at a minimum includes a fair opportunity to answer anything contrary to the party's interests and a right to make submissions with regard to the material on which the Tribunal proposes to base its decision. A right of a party to "appear" at a "hearing" would be meaningless if the matter were not to be determined on the basis of the "hearing" or if the party did not have the basic right to be heard at the hearing.[25]

It is interesting to note that he reached this conclusion despite a section of the Act that required the Tribunal to protect confidential information. He reasoned that the two sections — the one requiring a hearing and the one protecting confidential information — had to be read together. The Tribunal was required to find some way of complying with both.

While existing law adequately protects the parties to judicial proceedings, it suffers from a number of serious deficiencies. First, it applies to too limited a range of administrative activities. Second, the courts have failed to work out predictable tests for determining when proceedings are "judicial" and when, therefore, minimum standards of procedural fairness apply. And third, the jurisprudence does not provide adequate guidance to agencies that face situations where interests in disclosure and openness are directly opposed by equally compelling interests in confidentiality and non-disclosure.

The first difficulty with the existing law is that it provides no protection at all for individuals or corporations whose information needs do not arise in the context of a "judicial" type proceeding. Thus, for example, a private citizen who requests information from an agency for the purpose of reviewing its general policies will find that he has no right to review that information. Individuals or corporations that may be affected by the exercise of recommendatory powers or investigatory powers do not have any right to procedural fairness, apart from express statutory provisions, despite the fact that the agency's conclusions may severely affect their interests. A large gap is left in the law. The value of accountability is not recognized at all because the private citizens have no right to information unless they are directly involved as a party in a particular proceeding. The fairness and acceptability of the agency's decisions also seem to be impaired because the agency is free to undertake so many actions affecting private interests without proceeding judicially. In fact, the bulk of administrative action, probably eighty to ninety percent of it, does not fulfill the requirements of a judicial function and is therefore not covered by existing law regarding disclosure of information.

The second difficulty concerns an underlying premise of the existing law — namely, that all administrative action can be divided into two neat categories, those actions requiring review and procedural fairness, and those that require neither. Experience seems to show that this assumption is erroneous. In fact, courts have been struggling with the issue for a very long time and have failed to articulate any clear tests for determining whether a function is administrative or judicial. This single issue has produced most of the litigation in administrative law. R. F. Reid, then a practising lawyer and now a judge of the Ontario Supreme Court, summed it up this way:

> The law, far from being certain, is not even existent, the decisions of the courts are almost wholly discretionary and we are presented with the spectacle of administrative law bumbling blindly off in all directions in the jet age.[26]

Perhaps one reason the courts have had difficulty in developing a clear approach to characterization of function is that they themselves are unwilling to accept the harshness of their own logic. One suspects that the rules are often bent to allow review in particularly compelling cases even though, on existing authority, the function probably should have been classified as administrative. There is some evidence of this. First, the courts have consistently refused to name any one criterion as a definitive test for "judicialness", leaving future courts unbridled discretion. Second, even in cases where the courts have refused to

apply the rules of natural justice, individual judges have often made comments like the following one taken from a judgment of Chief Justice Jackett of the Federal Court of Appeal:

> As a matter of sound administration, as such decisions touch in an intimate way the life and dignity of the individuals concerned, they must be, and must appear to be, as fair and just as possible.[27]

Additional evidence may be found in recent English cases. The courts there appear either to be abandoning the characterization approach, or to be developing a new rule that covers administrative actions as well as judicial actions and requires them to be conducted fairly.[28]

These difficulties are exacerbated by section 28 of the *Federal Court Act*,[29] which provides the principal basis for review of federal administrative tribunals by giving the Federal Court of Appeal jurisdiction to review any decision or order "other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis. . .". The meaning of this last clause is notoriously unclear and has not yet been adequately clarified by the courts.[30] This is not the place to review the jurisprudence respecting this provision; however, it must be noted, first, that section 28 of the *Federal Court Act* is unclear, making the characterization problem more difficult than it was before, and second, that it probably has the unfortunate effect of further entrenching the characterization approach into federal administrative law.

The final deficiency to be noted in the approach the courts have taken to disclosure of information is that judicial decisions, with some exceptions, simply do not analyze the values to be protected by confidentiality and therefore do not provide much assistance to administrators faced with the necessity of making difficult decisions between disclosure and confidentiality. The rule is stated in very absolute terms: if the rules of natural justice apply, the agency must disclose enough information to the party who will be affected by the decision to enable him to state his case effectively. How much is enough? Is the rule really that absolute? If so, how is the supplier or the subject of the information to be protected? Can an agency ever refuse to disclose information in order to protect the person who has supplied it from possible retribution and at the same time go ahead and make a decision affecting rights? Unfortunately, judicial decisions do not analyze these key questions. All too often, the courts avoid these difficult questions by simply characterizing the function as administrative and not requiring disclosure, or as judicial and requiring disclosure, without ever discussing the different interests at stake or exploring

the possibility of some compromise between disclosure and confidentiality.[31]

C. The Approach of the Independent Agencies

Not surprisingly, the practices of administrative agencies vary widely. Agencies with a long experience in conducting hearings demonstrate a high level of concern for the parties' rights to information. The NEB, for example, takes the position that all the materials submitted by one of the parties to a hearing should be placed on the public record and should be made available to all other parties. The CRTC, on the other hand is prepared to recognize that some of the information submitted by the parties may be so sensitive that it should not be released to the other parties, even though it may be relevant to the inquiry. At the time when this study was being conducted the AECB never held hearings, and never disclosed information.

The reader must recognize, too, that administrative practices are always changing. When data was being collected for this study, the AECB was reviewing its information access policies and was considering moving to a format that would include public hearings and more open access to information, perhaps partly as a result of an earlier study by the Law Reform Commission.[32] A bill incorporating these reforms is now before Parliament and it seems likely that the AECB's practices will be changed significantly.[33] Often, the very act of studying an agency changes its behaviour. This is not simply because the agency may respond to the researcher's observations. The fact that a study is being done, or the questions that are being asked, may cause agency staff to examine their own role critically.

Because of the variability of agency practices it is very difficult to present an accurate picture. The most accurate way of proceeding would be to discuss each agency separately, but that approach would obscure any useful generalizations that might be drawn. In the following pages current practices will be reviewed by examining the approach certain agencies have taken to each of the key variables identified above — the context of the request, the interest of the requester, and the kind of information requested.

1. The Context of the Request

Just as it was for the courts, the context of the request is a very important factor in determining how an agency will respond to a request for information. For example, in one recent case where the CRTC was faced with a request for information that had been submitted by Bell Canada, and was regarded by it as confidential, the Commission observed:

> The Commission is of the view that the effectiveness of the regulatory process, based as it is in large measure upon public hearings, can be greatly enhanced or diminished depending on the participation of intervenors. It follows that intervenors must, in principle, have as much relevant information as possible in order properly to discharge their role. A limitation to this principle would arise, however, when the disclosure of certain information would be likely to cause specific direct harm to the Company.[34]

The CRTC believed that it was necessary to strike a balance between the advantages of maintaining confidentiality and the requirements of an effective hearing. The context of the request was very important.

Context is also very important to the NEB. It draws a distinction between its regulatory role and its advisory functions. Requests for information that are received in the context of the former are generally honoured. However, the Board takes the position that any information developed by the Board for the purpose of advising the Minister on energy policy is confidential and cannot be disclosed. Interviews with Board officials revealed that they would respond differently to requests for information that formed a part of the hearing process and those that do not. In the former case there are elaborate disclosure requirements imposed on each party to the hearing, requiring that notice be given to the other parties of the witnesses that will be called and the testimony they will give, disclosure of any documentary evidence, and so on. A request for information that is unrelated to a hearing will usually be answered by letter, if possible, but it is clear that the Board feels no obligation in such a case to disclose information that it has in its files apart from making published reports and transcripts available.

These examples seem to be typical. The agencies I studied appear to give serious consideration to requests for information that are received in the context of a public hearing and try to make adequate disclosures. But they are less inclined to respond favourably to requests in other contexts. This should come as no surprise. Generally,

a decision to withhold information made during the course of a public hearing is reviewable by the courts, and, in such cases, courts have frequently compelled disclosure. It should be noted, however, that agencies do not always make adequate disclosures in these cases, as the *Magnasonic* case discussed above illustrates.

2. The Interest of the Requester

The particular interest of the requester is also very important. The UIC and the Parole Board both recognize some obligation to share information with the person whose rights or benefits they are determining. The NEB and the CRTC are very careful to assure that people intervening in their hearings have adequate information. Many other examples could be cited.

To some extent, the willingness of agencies to share information in the situations cited above depends on the context of the request. However, there is evidence that the agencies consider the interest of the requester apart from the kind of strict view of the context that the courts have adopted. At the time of this study the Parole Board recognized some obligation to share its information with an applicant for parole despite the fact that decided cases established that there was no legal obligation for it to do so.[35]

So far, distinctions are not often drawn between different classes of participants in hearings. The CRTC, for example, does not appear to distinguish between public interest intervenors and intervenors that have a direct interest in the outcome of the matter, for example, other applicants for a licence.

Finally, what of the individuals who have no direct interest in any proceeding before the agency? Will the agency provide them with information they request? In general, members of the public are not recognized as having any right to information that is contained in agency files.[36] Agencies do, of course, make a conscientious effort to answer their mail, just as anyone would do. And they do attempt to answer questions about their functions. Also, published reports will be provided, when available. But they do not recognize that the average individual has any right to information, and that is important because it may mean that information is denied simply because release of the information is not required anywhere. Like all public servants, most agency personnel take an oath of office that compels them not to disclose information unless authorized. No doubt the staff member

is authorized to release information when the context or the particular interest of the requester compels disclosure. But this is not the case when a request is received from a member of the general public. The cautious staff member will refuse such a request.

3. The Kind of Information

The final variable, or dimension, considered is the kind of information. This heading includes a collection of factors that appear to be important: Who provided the information? Must his identity be protected? What does the information deal with? Would its disclosure give another firm a competitive advantage? Would it harm an individual by revealing personal aspects of his life? These are key questions that ought to influence our decisions about whether to release or withhold information. Yet, surprisingly, decided court cases rarely discuss these factors.[36a] It is particularly encouraging that agencies do recognize the importance of the particular kind of information that has been requested and have begun to develop their own guidelines and jurisprudence concerning when information must be protected.

Certain kinds of information appear to pose particular difficulties. These include: staff manuals and other interpretative materials; staff reports; information that has a competitive value; personal information; and the identity of informants. Each of these will be discussed below.

IV

The Sensitive Information

A. Policies and Procedures — The Secret Law Problem

The policies and procedures of any administrative agency should be readily accessible to both participants in the administrative process and to members of the general public. This is both a matter of fairness and accountability. It is unfair to expect someone to participate in an administrative proceeding without disclosing to him all the rules of the game. If, for example, a participant is unaware of the policies followed by the agency, he will be unable to present the arguments that the agency would find most persuasive. The general public should also have access to this material to enable them to assert their democratic right to assess the performance of the agency and cause their representatives to make any necessary corrections in legislation administered by the agency. Informed criticism of agencies is impossible unless their policies and practices are known.

Nevertheless, both participants and members of the public complain that agencies often won't release documents containing statements of the policies and procedures of the tribunal. The documents that cause the most trouble are staff manuals, prepared to guide agency staff in making decisions and often treated as confidential by the staff. The effect of non-disclosure is to create a kind of secret law, known only to the agency and those fortunate participants who either have a great deal of experience with the particular agency or have been lucky enough to receive some "inside information". Not only is the disadvantaged participant likely to feel that he has not been given a fair chance of persuading the agency, he may be treated unequally with other participants, because some of them may have obtained the documents that he has been refused. As K. C. Davis has observed:

> Secret law, whether in the form of precedents or in the form of rules, has no place in any decent system of justice.[37]

A number of agencies conscientiously try to interpret their practices and policies to the general public, and take effective measures to assure that participants are well aware of their procedures. For example, the Canadian Radio Television and Telecommunications Commission publishes both its procedural rules and its decisions in the *Canada Gazette*. In addition, its decisions are published periodically by Supply and Services. A mailing list is also maintained and copies of decisions and notices of hearings are sent to all those on the mailing list, free of charge. The Commission also publishes a bulletin known as the *Telecommunications Bulletin* that keeps people informed of major developments in the Telecommunications field and of the Commission's initiatives in that area. It includes a chronological table of CRTC telecommunications orders. Furthermore, the Commission has adopted the practice of holding public hearings with respect to its major policy initiatives. These are held in major centres in Canada, and the public is invited to comment on the proposed rules.

In singling out the CRTC at this point, we don't mean to imply that it is the only agency engaged in these activities. A number of other agencies adopt similar practices. For example, the National Energy Board has published its rules of practice and procedure and will send these to any interested person. Its decisions are published in the *Canada Gazette* without reasons; but the reasons are published by the NEB and are circulated to individuals and firms on a mailing list maintained by the Board. The Canadian Transport Commission also publishes both its procedural rules and its decisions in the *Canada Gazette* and will send both to interested persons as well.

However, no central registry or index appears to exist for these materials, making it very difficult for the uninitiated user to find them. Moreover, practices vary widely and the general picture is quite disturbing. It is often difficult to determine what information is published and, perhaps more importantly, what information the law requires to be published. This is particularly so outside of Ottawa, where agency personnel often do not know what is published and do not know whether unpublished materials may be made available when requested. Furthermore, the agencies themselves are often under no legal duty to formulate rules of procedure. Numerous agencies have not done so with the result that participants have no way of determining, in advance, what procedures will be followed with respect to matters that concern them.

Below, an attempt will be made to identify the kinds of information that might be sought, the legal requirements with respect to each,

and to suggest needed changes in the law. The discussion is organized around the particular kinds of documents that may be involved; namely, delegated legislation decisions and orders, guidelines, staff manuals and directives. But care should be taken to distinguish between publication and availability of the information. As a matter of general principle, those rules or policies of general application that may be of general interest should be published. It would probably be burdensome to require publication of all interpretative materials. Some decisions, because they deal with very specialized situations, should not be published. Other interpretative documents, like staff manuals, might be too bulky for publication. These materials should be made available for inspection in the various offices in the tribunals concerned, and, of course, adequate indices of these materials should be prepared.

1. Delegated Legislation

It is now common practice for Parliament to delegate legislative power to various organs of government, including agencies. Such delegation of authority is usually contained in each act that Parliament passes. As one of the leading commentators has observed, "in the exercise of this power subordinate parties have enacted by-laws, and produced orders-in-council, orders, rules, regulations, rulings, designations, directions, directives, and other documents having statutory effect under yet other names".[38]

Delegated legislation has been the subject of a great deal of study. One of the most important documents is a report by a special committee of the House of Commons, known as the MacGuigan Committee, which was issued in 1969.[39] That report reviewed both the scrutiny given to delegated legislation and the publication requirements with respect to it. Among other recommendations, it urged the creation of a Joint Standing Committee of Parliament with a power to scrutinize regulations and compliance with publication requirements. That recommendation resulted in the passage of the *Statutory Instruments Act*[40] and in the establishment of a Joint Standing Committee. The Committee has now reviewed its jurisdiction under the *Statutory Instruments Act*, has reviewed the practices under that act and has issued its own report covering the subject.[41]

The *Statutory Instruments Act* is designed to require the publication of delegated legislation. It is supposed to achieve this purpose by defining a technical term, a "Statutory Instrument" that is presum-

ably intended to include all delegated legislation. However, as the Statutory Instruments Committee has noted, the definition is very complex, contains a number of exclusions, and is apparently quite restrictively interpreted by the various legal offices of government. In the result, as the Committee has noted,

> The Committee is faced, then, with a situation in which undoubtedly many Statutory Instruments are "issued, made or established," to use the language of the act, but are not published in the *Canada Gazette* or in some other central location, and are nowhere registered . . . The Committee must report that in the absence of any legal requirements that all Statutory Instruments be either separately registered and published or sent to the Committee by those who make them, the Committee is not able effectively to carry out the functions assigned to it by statute and by the two houses.[42]

The situation is this: delegated legislation is supposed to be published and is supposed to be scrutinized by the Statutory Instruments Committee. That Committee confesses that it cannot do its job properly because of inadequacies in the *Statutory Instruments Act* and because of lack of cooperation on the part of government. The Committee has made numerous recommendations concerning needed amendments to the legislation. It would be pointless to review the same ground here. For the purposes of this study, the point to be made is that existing publication requirements are inadequate.

There are other deficiencies. Even assuming that delegated legislation is in fact published, no adequate indices exist by which that legislation may be found. So called "comprehensive indices" are issued periodically but these indices only list each regulation issued by name under the heading of the appropriate Act. They do not in any way provide an index to the subject matter of the regulations. Moreover, the most recent consolidation is dated 1955.[43]

The difficulty in obtaining a consolidated copy of regulations is alleviated, to some extent, by the practice of some agencies of issuing office consolidations. However, it must be noted that these are often unavailable for one reason or another: either the agency has never prepared them; or the agency has prepared them but is in the process of issuing new procedural rules and has discontinued the old set in the meantime. This is often not merely a temporary delay but a very substantial one. Another reason for unavailability may simply be that the office consolidation is out of print. Again substantial delays, on the order of a year or so, can be encountered in attempting to obtain the materials.

2. Decisions and Orders

The formal decisions and orders issued by an administrative agency, in the adjudication of cases, can often be a helpful aid to interpretation of the agency's policies. As a part of the study it was attempted to determine the degree to which these decisions are published and are available to participants. Unfortunately, there does not appear to be an overall guide to the publication of decisions by agencies. An unpublished report prepared for the Canadian Association of Law Libraries in 1972 reviewed some of the major agencies.[44] It did not attempt to reach any conclusions or make any recommendations. However, Professor Hudson Janisch, writing the introduction to the report concluded:

> [T]he report clearly indicates that the present situation is not satisfactory. A few boards are really struggling to ensure that their decisions are published and made readily available; most are making ineffectual and disorganized attempts at publication, a few seem pervertly determined to hide their decisions . . . Now that the present system of publication, or more accurately lack thereof, has been clearly described, it is up to all concerned, be they the board themselves, the responsible government, the legal profession, law publishers, Law Reform Commissions or concerned academics to get together in mutual venture for improvement.[45]

The situation does not seem to have improved since that report was written. There is no central directory indicating what agencies publish decisions, and which do not. Law librarians experience difficulty both in determining what is available and in acquiring materials for their collections. Some agencies publish all of their decisions and maintain mailing lists of people likely to be interested. Some publish their decisions in the *Canada Gazette*, without reasons. Others publish some but not all of their decisions. And some agencies do not publish decisions at all. Often, when an agency does not publish all of its decisions, its personnel cannot explain the basis on which decisions are either published or not published. Opinions differ concerning whether unpublished decisions are confidential documents or may be inspected by members of the public.

3. Guidelines and Interpretative Bulletins

Some agencies issue guidelines and general interpretative bulletins that are not intended to have any force of law. They believe, evidently, that it is useful to offer guidance to the public concerning the interpretations that will be adopted by the agency, but that it would be

unwise to issue these policies in the form of regulations or binding rules because of the inflexibility that would result. Since such guidelines do not have the force of law, they do not necessarily fulfill the definition of a statutory instrument and may, therefore, not be published in the *Canada Gazette*. The result is that they are very difficult to locate by any traditional legal research technique. Indeed, the only way that one can be sure of finding such guidelines is to write all the departments that might possibly have an interest in the subject matter. On the positive side it should be noted that these materials do not usually cause a confidentiality problem, *per se*, because they are usually intended for public consumption and are made available when requested.

4. Staff Manuals and Directives

Agencies often issue manuals to their staff personnel to guide them in reaching decisions and to outline the procedures to be followed in the cases dealt with by the agency. These documents can and do have an impact on the determinations made respecting people who deal with the agencies. Unfortunately, they are usually treated as confidential by the agency staff and are not released. This practice has a number of adverse impacts on the administrative process. First, it is simply unfair not to disclose to the participant the rules of the game before he is asked to participate. Second, the practice of non-disclosure creates inequality because some participants are lucky enough to receive copies of the "confidential" documents, while other participants are not so fortunate. Finally, non-disclosure of these kinds of materials hides the policies of the agency from the general public and from potential critics. For example, the Unemployment Insurance Commission has refused to give one of Canada's leading experts on social legislation access to its procedural manuals, which do outline in great detail the policies and practices followed by the agency. Yet, we have learned that some of the people dealing with the Commission have in fact obtained those same materials.

The procedures of the Unemployment Insurance Commission provide another illustration of the problem. The Commission has prepared an elaborate manual interpreting the unemployment insurance program for members of their staff. The document is mainly intended as an instructional device, to aid new staff members in learning their job. One part of the manual deals with what is called an "Active Job Search Program". It provides a great deal of detail concerning when recipients shall be expected to conduct a job search, how many contacts they

must make, and so on. It also provides that applicants who fail to live up to the obligations of the program will be disentitled to benefits retroactively. Although the document has no binding effect on appeal, it is quite clear that it can influence the initial decisions that are made about particular applicants and their entitlement to benefits. It seems most unfair that such a document should be used internally, even for the purposes of training agents, without complete disclosure to those who may be affected by the standards established within it.

There does not appear to be any adequate justification for the continued refusal of agencies to make staff manuals and directives available to the public. It is possible that publication of these documents, lengthy as they usually are, would be too expensive. Surely, though, in that case the answer is to make them available for inspection and copying. Facilities would have to be provided but the expense involved in providing facilities for such a well-defined purpose would be far less than the costs of secrecy outlined above. No doubt participants, armed with the policies expressed in staff manuals, would be more effective in their advocacy, and might, therefore, make the agency's job a little bit more difficult. Discretion might also be reduced because the agency would not be able to get away with overlooking policies that do relate to the case at hand. But these observations only reinforce the case for disclosure. It is not the legitimate aim of confidentiality to protect public servants from valid arguments about the application of policies to individual cases.

5. Summary

At this point, it may be beneficial to summarize some of the conclusions that can be reached regarding access to policies and procedures.

1. Agencies are under no obligation to prepare rules of procedure and often do not prepare such rules of procedure, leaving participants in the dark about the procedures that will be followed in cases that affect them.
2. Although regulations are published in the *Canada Gazette*, they are not consolidated and are not adequately indexed. Thus they are extremely difficult to use.
3. The *Statutory Instruments Act* has a number of serious defects which have been outlined by the Statutory Instruments Committee.

4. Apart from the *Statutory Instruments Act*, it is very difficult to tell what is published and where it may be obtained.

5. Too few of the agencies adopt a regular practice of publishing their decisions and orders and reasons for decisions.

6. Certain kinds of interpretative materials, notably staff manuals and directives, are generally treated as confidential and are not even available for inspection and copying.

B. Staff Reports

Unlike the courts, administrative agencies usually have large staffs assigned to them. The staff of an agency is intended to conduct investigations and studies necessary to assure that the agency has all the information it needs to make fully informed decisions. The reports prepared by the staff are, or should be, a valuable source of information about subjects within the agency's jurisdiction. Because of this, members of the public and participants in the administrative process often request disclosure of staff reports.

Reports prepared by an agency's staff can cover a wide variety of subjects. Some reports deal with inspection of firms that are subject to regulatory control. These might cover such subjects of public interest as safety, pricing, and profitability. Other reports might describe general studies of particular industries, perhaps seeking to identify important trends and problems that might emerge in the future. Some reports will simply summarize the evidence and submissions made at public hearings for the convenience of the members of the agency. The CRTC, for example, follows the practice of having its staff submit a report following each hearing summarizing the material put forward at the hearing. In other cases, the staff may actually prepare a draft decision following a hearing, which the agency may ultimately accept as its own.

Such information may clearly be of great interest to both participants in administrative matters and to the general public. For example, a firm that is subject to disciplinary action is very likely to want to see any inspection reports that may have been filed about its operations. Similarly, the consuming public, and particularly consumer interest organizations, will be very anxious to see any inspection reports relating to the safety or quality of products or services they buy.

Participants in the administrative process argue that they should be entitled to see any staff documents bearing on the matter under consideration. Their arguments are well taken for two reasons. First, information that might assist them in preparing their submissions may be effectively denied if they do not have access to staff reports. The result is to diminish the value of their participation and, therefore, to diminish the usefulness of the hearing to the agency itself. Second, the confidence that the participants have in the fairness and impartiality of an agency is undermined when participants become aware that staff submissions have been received in confidence. They have no opportunity to correct what may be erroneous information and can easily fear that staff biases have entered into the decision-making process.

The issue of disclosure of staff reports has been before the courts in a number of recent cases. It appears clear that the courts are unwilling to accept an absolute claim of privilege for all staff documents. In *Re Blais and Andras*, for example, the Federal Court of Appeal rejected the claim that a report addressed to the Registrar General of Canada by the Superintendent of Bankruptcy should be exempt from disclosure where the report had formed the basis of a cancellation of the applicant's licence.[46] In contrast, non-disclosure of staff documents was upheld in *London Cable Systems v. CRTC* because it was not demonstrated that the CRTC's refusal to disclose staff documents prevented the requesters from exercising their rights to participate in a public hearing.[47]

In general, the courts take the same approach to disclosure of staff documents as they take to disclosure of any other documents. If the agency is required to act judicially it will be required to disclose enough information to enable the parties to prepare and present their case. Thus, for example, in *Lazarov v. Secretary of State of Canada*, the Federal Court of Appeal held that certain security reports should have been disclosed to an applicant for citizenship, where those reports had formed the basis of a denial of citizenship, because the Court believed that the decision-maker was required to act judicially when exercising his discretion.[48] Yet, in an earlier Ontario High Court case, non-disclosure of confidential information was upheld in nearly identical circumstances because the court was unwilling to hold that the decision-maker had to proceed in a judicial manner.[49]

Most agencies take the position that staff reports are confidential, and will not disclose them. They do, however, recognize exceptions to the general rule. I was told, for example, that information would not be used against someone in a proceeding that would affect his

rights in a substantial way, unless it could be disclosed to him. However, there is no guarantee of this, except in those cases where the rules of natural justice apply, as was discussed above. Moreover, situations have clearly arisen where staff reports have been used against people even though they were not disclosed.[50] Sometimes, in such situations, the reports are not officially disclosed, but the participants get to see them anyway through some informal leak, often too late to use effectively. Needless to say, such abuses are very difficult to document. There may be many cases where secret reports have been used but the participants never became aware of the fact. What is important to note, in this context, is that staff reports are not disclosed as a matter of general practice, and participants believe that they are influential and feel that the proceedings are unfair. This fact adversely affects the acceptability of agency decisions.

Public interest representatives also argue that staff reports and documents should be made available to the public. They assert two interests. First, they say that it is not possible to assess the performance of the agency and its staff unless it is possible to see what information the staff has access to and also its analysis of that information. One can be much more critical, for example, of an agency that failed to take action against a known peril, or of an agency that was caught by surprise because it did not enter into sufficient investigations, than one can be of an agency that conscientiously tried to obtain all the information necessary for its tasks but has been caught by a surprising turn of events.

The second reason disclosure of staff reports has been urged by public interest representatives is simply that the public is entitled to have much of the information contained in staff reports because it affects the public. The best example again involves inspection reports. These often deal with matters of health and safety, for example the cleanliness of eating establishments and food processing plants. It is argued that the public is entitled to this information simply to enable individuals to protect themselves and bring pressure to bear on the proper authorities to cure the existing deficiencies.

Although staff reports are generally not disclosed, there are cases where agencies have recognized the public interest in disclosure. One of the most noteworthy involves railway accident reports. Until 1973 these were treated as confidential documents by the Railway Transport Committee of the CTC. However, in that year the Committee reversed its policy. In a landmark decision, David Jones, Chairman of the Committee, recognized the public interest in disclosure of such information:

> The real issue involves the extent to which the causes of railway accidents, and their investigation, should be open to public scrutiny. In my view, the public has a right to know what is going on in this important area. The families of those involved in train wrecks, and who may be killed or injured, do not, at present, have any way of knowing what happened, beyond what they may be told by the railway company, or, in some cases, where there is a public inquiry. Nor do railway employees, or the unions representing them, have the full benefit, in terms of their own work habits or practices, of knowing all the results of a vigorous and impartial investigation of train wrecks by the Commission. Furthermore, the public generally, particularly those who are users of the railways as passengers or shippers of freight, have a legitimate concern with the question whether the nation's railways are being operated safely. Finally, the managers of the railway companies do not now feel the additional spur that exposure of the causes of train wrecks to the cold light of day will bring to them, in their efforts to operate trains more safely.[51]

A number of concerns have been voiced by administrators concerning disclosure of staff documents. First, there are two general concerns that have been expressed in the hearings conducted by the Standing Joint Committee on Regulations and Other Statutory Instruments. These include the arguments that ministerial responsibility would be undermined by disclosure of staff documents and that disclosure would serve to politicize the public service. Neither of these arguments are persuasive, at least as they apply to agencies. In the first place, agencies have, and should continue to have, some measure of independence from the government of the day and from the ministers responsible for their area. For this reason, the arguments that have been offered concerning ministerial responsibility have less force when applied to agencies than they have when applied to the departments of government. The ministers are not supposed to run the agencies and their staffs. Second, while we probably shouldn't politicize the Public Service unduly, or subject individual public servants to political embarrassment, we should try to assure that the agencies are publicly accountable for their action and for their inaction. To this extent politicization, if that's the proper word for it, is desirable.

More particular concerns were voiced when research for this paper was being conducted. First, fear was expressed that disclosure requirements would force the agencies to make public each and every draft of their decisions. Obviously this would lengthen every decision-making process unduly. Fear was also expressed that every scrap of paper in every file would have to be made public, including the handwritten analysis that a staff member might work up concerning a particular proposal. These are legitimate concerns, but it should be

possible to include, in any disclosure legislation, exemptions that would adequately protect draft decisions, day-to-day operating notes, and so on. The *Freedom of Information Act* in the United States has not required disclosure of these kinds of material.[52]

A final concern relates to the candour of advice that is offered to the agency by its staff. It is argued that disclosure requirements would result in the staff being less candid in its advice. There is probably some truth to this although it can be argued that advice that has to be disclosed is likely to be more well thought out and more carefully based on accurate information. On its face, the candour argument seems to have some merit, but it has to be weighed against the legitimate interests in disclosure mentioned above.

The courts have had an opportunity of considering the candour argument in the context of claims for Crown privilege, and they appear to have rejected it. In *Blais and Andras*, referred to above, the Minister sought to assert Crown privilege for all communications between the Superintendent of Bankruptcy and the Minister concerning the administration of the Act on the grounds:

1. that the candour and completeness of the information, comments and remarks contained in such communications would be prejudiced, if they were liable to be made public, and
2. that the reports of an investigation into the character, fitness, reputation or conduct of trustees are generally from many sources and if such information and sources are liable to disclosure it would be difficult for the Superintendent to obtain such information and would seriously hamper him in the performance of his duties.

Mr. Justice Thurlow rejected the claim that the entire class of documents should be exempt from disclosure and held that the claim of privilege had to be examined on the basis of the contents of the particular document. He analyzed the claim in the following terms:

> In my view, with due respect for the contrary view expressed by the Minister's affidavit, neither the public interest in securing candour and completeness of information and comments in all such communications nor the public interest in protecting confidential information and its sources, which may at times appear in some of such communications, is of sufficient importance to warrant protecting from production the whole class of such communications as defined by the affidavit without regard to whether the content of the particular communication is such as to require such protection. There may be communications between the

> Superintendent and the Minister which do require protection but the definition is a broad one embracing every sort of communication on a very broadly defined subject. It may be important to protect such communications on questions of general policy for the purpose of ensuring candour and completeness of information and comment but I find it difficult to conceive of the report of a Superintendent in Bankruptcy, made in the course of his statutory duties on the conduct by a trustee of the affairs of a bankrupt estate, being less candid or complete by reason of his knowing that his report might be subject to disclosure. Moreover, whenever confidential information or its sources are likely to be endangered by production it is open to the Minister to claim privilege in respect of the contents of the particular document on that basis.[53]

Mr. Justice Thurlow's reaction to the claim of privilege was no doubt influenced by the context of the request. He was dealing with a situation in which an individual was denied a licence on the basis of an undisclosed report. Although he appears to be willing to concede that the government has some interest in assuring candour and completeness of information, he did not find it very compelling in comparison to the individual's need for the information in the context of the case. He might have reached a different conclusion about the merits of the request if it had been made by a member of the public with no particular interest in the outcome. He would have reached a different legal result, because the law does not recognize any public right to information.

This theme keeps repeating itself as one examines the question of disclosure in different contexts: the answer always depends on balancing the needs for confidentiality against the needs for disclosure. No one answer seems to fit all circumstances.

Whether, and to what extent, staff reports should be disclosed is an important policy question. The usual practice is non-disclosure. Broader disclosure will probably have an important impact on the relationship between the staff and the agencies, but this impact could be minimized. The approach that seems to offer the best balance between the competing interests is to distinguish between the factual portions of staff documents and the actual advice given. The factual portions should be available to any requester, regardless of the context of the request, unless the particular context of the document must be withheld on some other ground (*e.g.*, protection of privacy, etc.). The advice should be regarded as confidential, in order to protect the agency's interest in obtaining candid staff advice, unless, in the particular context of the request, the interest of the requester or the public interest in disclosure becomes paramount. There may be situations,

for example licence revocations, where the parties affected should have the right to challenge the construction placed on facts and conclusions drawn from those facts by the staff, as well as the right to challenge the facts themselves, and therefore where the whole document should be released. Such a policy would recognize the agency's need for candid advice by protecting the actual advice that is given; it would recognize the public's need for information about agencies by requiring the release of the factual portions of reports; and it would recognize the overriding interest in fairness by allowing the release of the staff advice if the interest of the requester and the context made this essential.

C. Commercial Information

Many difficult issues arise with respect to business data. Regulatory agencies, particularly, receive a great deal of potentially very sensitive business data. Many of the regulated companies take the position that the release of financial data or data relating to cost of production could harm them competitively, and therefore should not be released. Yet, these data are often crucial to the decisions that must be made by the agency. In these situations, the effectiveness of other parties' participation can be severely impaired unless the data are released.

In the course of this study much of the literature was reviewed relating to commercial information; discussions were also held on this issue with numerous people who have participated in the regulatory process, including those who have served on agency staffs, those who have represented public interest intervenors, and those who have represented businesses.[54] Based on this information, it appears that very few generalizations can be made concerning the specific categories of data that need to be exempted. The decision of whether to exempt data from disclosure requires a weighing of the interests of the enterprise that provided those data against the interests of other participants. It is a decision that must, of its nature, be made on the basis of the particular facts of each case. Moreover, the interests of all parties can often be accommodated in various ways by avoiding the "all or nothing" approach that is so often taken of either disclosing or withholding the whole document.[55]

As has been indicated above, when the issue of disclosure arises in the context of a formal hearing the courts favour disclosure. The

discussion in such cases nearly always focuses on the context of the request — that is, on the requirements of the hearing process. There is very little discussion of either the interests in confidentiality that might need protection, or the techniques that might be used to protect the confidentiality of the information while, at the same time, giving parties to a hearing enough information to participate effectively.[56] The *Magnasonic* case, discussed above, is one of the rare instances in which a court has considered how the interests in confidentiality might be protected.

In *Magnasonic*, Chief Justice Jackett had to deal with the issue because of section 29(3) of the *Anti-dumping Act*[57] which provided:

> Where evidence or information that is in its nature confidential, relating to the business or affairs of any person, firm or corporation, is given or elicited in the course of an inquiry . . . the evidence shall not be made public in such a manner as to be available for the use of any business competitor or rival . . .

The Chief Justice reasoned that this section had to be read together with the section providing for a public hearing, and concluded:

> . . . we do not think that s. 29(3) requires a departure from the pattern of hearings dictated by the other provisions of the statute. What it does require, on that view as to its meaning, is that, when information of a confidential character is tendered at a hearing, a decision must be made as to what steps are required to comply with s. 29(3). The obvious first step in the ordinary case would seem to be that the evidence be taken *in camera*. What further steps require to be taken would depend on the circumstances. The most extreme step that might be required would be, we should have thought, to exclude all competitors or rivals while the evidence is being taken and to provide such parties afterwards with the sort of report of the evidence taken in their absence that is contemplated for the parties with reference to confidential evidence taken under s. 28.[58]

The response of the Anti-dumping Tribunal to the *Magnasonic* decision is particularly interesting. The Tribunal had to find some way of fulfilling its obligation to disclose adequate information to participants in its hearings while, at the same time, protecting the confidentiality of information it received from the parties. The approach it has taken is to disclose the information *in camera* to independent counsel on their undertaking not to disclose the information to anyone else. The parties, who might make competitive use of the information cannot see it, but counsel who are representing them can. It is also interesting to note that a distinction has been drawn between independent counsel and so-called "house-counsel", those employed directly by

the parties. The latter would not be entitled to participate in the *in camera* sessions.

The ADT's practice is a unique and creative approach to the problem of finding a balance between the benefits of confidentiality and disclosure. However, the limitations that are placed on the *in camera* procedure reduce its effectiveness. In the first place, firms that rely on in-house counsel are denied the opportunity of participating. The distinction drawn between independent counsel and in-house counsel seems dubious and fails to recognize that all lawyers owe high obligations to the courts and the profession. The second difficulty with the practice is that lawyers participating in an *in camera* session may not be able to digest the data that is submitted without the aid of experts from other disciplines. No provisions are made for allowing such experts to participate. A final point concerns information that the ADT receives from sources other than the parties themselves. The Tribunal receives data from the Deputy Minister of Revenue and also obtains information in the form of two questionnaires it sends all firms in the industry being examined. These are treated as confidential and are not disclosed even in the *in camera* sessions referred to above.

A number of other agencies have also found compromise solutions that attempt to serve all interests adequately. Professor Janisch discusses one interesting example in his review of the Canadian Transport Commission.[59] The case involved the review, by the CTC's Telecommunication Committee, of a proposed rate for microwave facilities. One of the intervenors requested a copy of the agreement under which the facility was to be operated, and CN/CP Telecommunications, one of the parties to the agreement, objected on the grounds that the intervenor was one of its competitors and an unsuccessful bidder on the transaction. The Committee ruled that the agreement should be made available to the intervenors, but protected CN/CP's interest by withholding one appendix dealing with the techniques CN/CP planned to use in order to meet the performance criteria required by the agreement.

Commissioner David Jones has also discussed the CTC's position in the *Rapeseed* case. While the case did not involve commercial information, his reasoning is relevant to the issue. He said:

> We have concluded that the Commission may receive any information it requires in the course of its investigation leading to its decision as to whether there is prejudice to the public interest by the reason of acts, omissions or the effect of rates of railways.
>
> We have also concluded that while as much information as is possible should be obtained in open court in the interests of fairness and justice,

> those same interests require the Commission to use the other means of obtaining information that are at its disposal, whenever the circumstances make this necessary. For to do otherwise, would be to defeat the public interest . . .
>
> Where information is relevant to a case under section 23 and is essential for its determination by the Commission, but its disclosure at a public hearing may clearly cause actual and substantial damage to the party giving it, then the information, we think, must be given to the Commission in confidence.
>
> . . . What the witness will have to demonstrate to our satisfaction is that it will cause him actual and substantial harm . . . if he is required to disclose it.[60]

Commissioner Jones also recognized the possibility of protecting the interests of all parties by taking special measures:

> 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, and I understand there is at least one precedent for this . . . [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 would be no disclosure.[61]

The CRTC has also considered the issue on a number of recent occasions, and its decisions are instructive. One of the key decisions involved a proposed tariff for the use of support structures filed by Bell Canada in 1976.[62] Ontario's Minister of Communications, one of the intervenors, requested the production of an economic analysis performed by Bell. Bell took the position that the economic analysis was not necessary to the Commission's investigation and, also, included information of a confidential nature. After hearing argument, the Commission decided that the analysis was both relevant and necessary to its determination and ordered Bell to furnish a copy to the Commission.

The Commission was then faced with the question of confidentiality. Bell argued that the information was exempt from disclosure under section 331 of the *Railway Act*,[63] applicable to Bell Canada in rate regulatory matters by virtue of s. 320(12) of the Act. Section 331 provides:

> Where information concerning the costs of a railway company or other information that is by its nature confidential is obtained from the company by the Commission in the course of any investigation under this Act, such information shall not be published or revealed in such a man-

ner as to be available for use of any other person, unless in the opinion of the Commission such publication is necessary in the public interest.

In the Commission's view a balance had to be struck "in the public interest between the advantages of maintaining confidentiality and the requirements of a proper determination" of the matter before it. It reasoned that the effectiveness of the regulatory process depended upon the quality of the participation of intervenors in public hearings and therefore that "the intervenors must, in principle, have as much relevant information as possible in order properly to discharge their role". However, the Commission recognized that this principle should not be applied where disclosure would be likely to cause specific direct harm to the Company.[64]

There were four distinct elements contained in the requested economic analysis, the methodology, data relating to productivity, unit labour costs, and estimates of the annual cost increases for labour that Bell expected to encounter. The methodology had already been described publicly and could not be considered to be confidential any longer. The Commission was not satisfied that release of the productivity data would cause Bell any specific harm because the support structure area was not substantially competitive.

Much of Bell's concern evidently focused on the unit labour costs. Bell's argument was that these cost data could be used by firms competing against Bell in areas like data communications. By knowing Bell's average costs, these firms could determine which areas were most profitable to Bell and could then "cream-skim" this business. The Commission was not persuaded by this argument because there were so many other factors that would enter into pricing decisions. These other elements would not be known to the competing firms and, therefore, no specific harm would result to Bell from disclosure. However, the Commission was impressed by Bell's argument that disclosure of the forecasted increase in labour cost would have an adverse impact on the Company's negotiating position in the collective bargaining process and therefore ordered deletion of these data from the document. In the end, one column of figures was deleted from each of ten pages. The rest of the 46 page document was disclosed.

In the *British Columbia Telephone Company rate* case of 1977, the intervenors were not so successful in getting information.[65] The Government of British Columbia, one of the intervenors, sought disclosure of certain cost, revenue and marketing information, relating to B.C. Tel's competitive services. The information was very specific

and included information about the number of units out to the public, the past growth rates of the service, the projected future growth rates, price levels and profitability, and maintenance costs and service life of the equipment. The Commission distinguished this kind of specific information from the general information that had been involved in the earlier support structures case and concluded that it could be very useful to competitors and that there was, therefore, a "possibility of causing specific direct harm" to the Company.[66]

It should be noted that the CRTC has concluded that it is justified in withholding information that is relevant to the proceedings. In the *B.C. Tel. rate* case the Commission seemed to feel that the information was very relevant to the matter before it. In fact, the information dealt with the issue of cross-subsidization — that is, whether or not the competitive activities of the company were being subsidized by its regulated monopoly business — a topic of great concern in regulatory practice. When the intervenors were deprived of access to this information, they were effectively prevented from addressing this very important issue. To that extent, the fairness of the proceedings and the public confidence in the result were undermined. Perhaps the information involved in this case had to be protected, but one wonders whether a procedure like the one followed by the Anti-dumping Tribunal of disclosing the information only to counsel might not have resulted in a better accommodation of all the interests involved.

A number of lessons may be drawn from the agency practices discussed above. First, several of the agencies have adopted a fairly sophisticated approach to the problem of confidentiality, involving a careful weighing of all the interests. The same general approach seems to have been taken in the more carefully reasoned decisions. For example, the reasoning of the CRTC in the *Support Structures* case and the reasoning of Commissioner Jones in the *Rapeseed* case are remarkably similar. In both cases, the agency had to satisfy itself that the information being sought was relevant to the inquiry. The party seeking to keep the information confidential then has to show that specific harm would result from disclosure. If the agency is satisfied on that point, it will maintain the confidentiality of the information, although Commissioner Jones recognized that there might be some further obligation to assist the party requesting the information, perhaps by sharing the information with his counsel in confidence. The *Magnasonic* case and the practices of the Anti-dumping Tribunal underscore this last point. However, it should not be assumed that agency practices are uniform. Professor Janisch has pointed out, for example, that shortly after the decision of the Telecommunications

Committee referred to above, another committee of the CTC denied a request for similar information without really analyzing it in detail.[67] Also, the Anti-dumping Tribunal appears to accept claims for confidentiality somewhat uncritically. It takes the position that any cost data is information of a confidential nature, and should be exempt from disclosure if the firm providing it requests confidentiality. The Tribunal does not examine the particular situation in order to determine whether any specific harm will result from release.

A second observation that can be made is that it is often possible to accommodate the interests in confidentiality as well as the interests in disclosure. The practice the Anti-dumping Tribunal has of disclosing confidential information to independent counsel, on an undertaking that it not be revealed, is one example. Another example is the action the CRTC took in the *Support Structures* case, of deleting the information that would cause specific harm if disclosed and releasing the rest of the information. A third approach would be to summarize the nature of the information and the conclusions to be drawn from it in a general way without actually disclosing anything that is confidential. These three examples appear to cover most of the approaches that have been tried to date. No doubt improvements are possible. For example, the ADT's practice of limiting participation in *in camera* sessions to independent counsel seems unduly restrictive, as has been suggested above. Moreover, with further experimentation agencies may well be able to develop better techniques for accommodating the needs for confidentiality and disclosure. The point to be made here is that compromise is often possible and effective.

Finally, while it is possible to identify commercial information that might be sensitive, it is not possible to identify classes of information that should always be withheld, apart from the context of the request and the need of the requester. Information about the unit costs of particular business seems to be among the most sensitive of commercial information, as the *B.C. Tel.* case and the practice of the Anti-dumping Tribunal illustrate. Yet, the CRTC was able to release this information, with only minor deletions, in the *Support Structures* case. This has a particular significance for anyone attempting to draft so-called freedom of information legislation. It appears that such legislation could include provisions identifying sensitive commercial information and exempting it from *automatic* disclosure, but a final determination of whether to release the information in a particular case would have to be based on a careful balancing of all the interests involved.

D. Personal Information

1. Requests by the Subject

Personal privacy is highly valued in our society. It may seem ironical therefore that the only federal legislation guaranteeing access to information deals with personal information. The recently passed *Canadian Human Rights Act*, Part IV, gives an individual a right of access to government files concerning him.[68] It was enacted, in part, to protect personal privacy by giving the individual some control over the information on file about him.

The scope of the act depends on some very technical definitions.[69] For example, it only applies to federal information banks. The term "federal information bank" is a defined term under the Act, and means:

> a store of *records* within the control of a *government institution* where any of the records comprised therein are used for *administrative purposes* [Emphasis added]

The italicized words, contained in the definition above, are also defined terms. The term "record" simply includes "an item, collection or grouping of personal information recorded in any form". The term "government institution" includes any department of the federal government, or any "board, commission, body or office" that is listed in a schedule to the Act. In fact, the schedule appears to cover a great many departments, boards and agencies. It includes, for example, the NEB, CRTC, CTC, the National Parole Board, and the Law Reform Commission of Canada. It does not appear to include either the Canada Labour Relations Board or the Anti-dumping Tribunal. So the Act does not apply to all boards or agencies; whether a particular agency is covered depends upon whether it is included in the schedule.

The key definition is the definition of an "administrative purpose". It is defined "in relation to the use of a record regarding an individual" and "means the use of that record in a decision-making process that relates directly to that individual". In other words, an individual only has access to information in federal government files that is used for the purpose of making decisions about him. Examples include income tax returns, public service employment records, and licence applications. Investigatory files probably would not be covered

by the Act because they are not used in a decision-making process that relates directly to the individual.

The Act gives an individual the right to examine any government records concerning him that are maintained for administrative purposes as defined above.[70] He also has the right to request correction of the contents of the records and the right to require notation of the requested correction where the contents are not changed.[71] To make these rights more meaningful the Minister responsible for the *Canadian Human Rights Act* is required to publish an index periodically, setting forth the name of each federal information bank and a description of the records stored in it and the uses that are made of them.[72] It is important to note that these rights are only given to the person to whom the data relates. The rights of others are not dealt with at all, but presumably information of this kind would be treated as confidential by all tribunals and departments and would not be revealed to third persons.

Before any personal information may be used for purposes that are inconsistent with the purposes for which it was originally provided, the individual to whom it relates must consent.[73] But this right is limited to use of the data for administrative purposes. Presumably the government could use such data for investigatory purposes without obtaining consent. It might also be able to sell or give such data to outside agencies for any purpose at all without complying with the consent requirements.

However, there are a number of important exemptions. First, the responsible Minister may, with the approval of Cabinet, exempt entire federal information banks from both the indexing and the access requirements. This exemption covers material, the disclosure of which:

(*a*) might be injurious to international relations, national defence or security, or federal-provincial relations; or

(*b*) would be likely to disclose information obtained or prepared by any government institution or part of a government institution that is an investigative body

(i) in relation to national security,

(ii) in the course of investigations pertaining to the detection or suppression of crime generally, or

(iii) in the course of investigations pertaining to particular offences against any Act of Parliament.[74]

Several of the terms included in this section are very broad. A great many files relating to joint federal-provincial programs might contain material that might be injurious to federal-provincial relations, for example. And most of the enforcement activities of administrative agencies could conceivably be brought under the exemption for materials obtained "in the course of investigations pertaining to the detection or suppression of crime generally".

Broader exemptions are available for particular records. The responsible Minister may, for example, refuse to provide information that might reveal personal information concerning another individual, or that might "impede the functioning of a court of law, or a quasi-judicial board, commission or other tribunal".[75] Information relating to an individual under sentence for an offence may be withheld if its disclosure might:

(*a*) lead to a serious disruption of that individual's institutional, parole or mandatory supervision program,
(*b*) reveal information originally obtained on a promise of confidentiality, express or implied, or
(*c*) result in physical or other harm to that individual or any other person.[76]

Legal opinions or advice provided to a government institution are also exempt.

A final class of exemptions concerns a transitional problem. The Minister is empowered to exempt any information banks where, in his opinion, the costs that would be incurred by making them subject to the Act are greater than the benefits that would be derived.[77] However, in this case the information base may not be used for an administrative purpose after two years have expired.

The Act also provides for the appointment of a Privacy Commissioner with broad powers to investigate and report upon complaints from individuals who feel that they have not been accorded their rights under the Act.[78] The Commissioner does not have any power to order release of records, but is required to report his findings to the complainant and to the responsible Minister. He is also required to make an annual report to Parliament.

The *Canadian Human Rights Act* can be expected to have an impact on administrative agencies. For example, the Act will apparently require the Unemployment Insurance Commission to change its

current practices respecting disclosure of the claimant's file. In a study prepared for the Law Reform Commission of Canada, Issalys and Watkins noted that the claimant had no definite right to view his file.[79] The *Canadian Human Rights Act* would change that, assuming that UIC files are not made exempt from disclosure. In deciding a case before it, the UIC is clearly using its files for an administrative purpose since the decision-making process directly relates to the individual. The information contained in such files clearly is personal information within the *Canadian Human Rights Act*, and none of the exemptions would seem to cover the kinds of information that should be expected in UIC files.

This is particularly interesting in light of the UIC's present practices and concerns. In their study, Issalys and Watkins concluded that the UIC allowed claimants fairly broad access to their files. However, this has to be qualified in two respects. First, it appears that access is usually given only when an appeal is filed. Thus, when the first, and perhaps most influential decision is made, the claimant may not have access to the material in his file. Second, there are certain materials that the UIC will not normally disclose. Below is a statement of UIC policy contained in its internal procedural manual. It is quoted extensively because of its importance.

> Private information contained in the claimant's file may be disclosed to the claimant, his representative, other persons and organizations specifically designated in this guideline, or by a minute of the Commission. However, each request for information must be explicitly stated and be limited to one of the following:
>
> (*a*) an explanation of a disqualification, disentitlement, denial of benefit, benefit paid or to be paid; or
>
> (*b*) to provide data for the preparation of an appeal to the Board of Referees or the Umpire; or
>
> (*c*) to provide essential data to another federal or provincial government agency for determination of the claimant's eligibility for benefit under another program.
>
> Notwithstanding the above, information regarding diagnosis of sickness, disability, quarantine or maternity, cannot be divulged to any party except where it is part of an exhibit to a Board of Referees or the Umpire. In such cases, release of this information will be at the discretion of the Medical Advisor. In addition, medical information issued by the treating physician may be disclosed to the claimant or his lawyer for the preparation of an appeal, if prior written consent is obtained by the claimant from the treating physician.
>
> Requests to inspect original documents containing private information, such as the reason for separation from employment given by the employer without the knowledge of the claimant, or a statement regarding

dependency status obtained from a third party and similar matters, shall be denied.

Under no circumstances, shall information involving controversial points relating to labour disputes or reason for separation from employment given by the claimant be disclosed to the employer, or vice versa, when disclosure of such information may have unfavourable repercussions on the informant.[80]

In its statement, the UIC identifies a number of classes of information that will not be disclosed. The Commission is particularly concerned about disclosure of reports filed by independent medical examiners. According to the UIC's chief medical advisor, it is very important to protect the independent medical examiners. They usually have very little time to see the claimant and don't know him very well. Moreover, the work is not financially rewarding. It is feared that disclosure of the reports might make the work too unattractive, and doctors would no longer be willing to undertake it. Fear was also expressed that the number of requests for medical reports would increase greatly if claimants were allowed to request them. It was also pointed out that the district offices don't have doctors on their staff, so any requests would have to be referred to Ottawa, which would be an expensive and time-consuming process.

Apparently, the reports filed by medical examiners often contain sensitive material. Sometimes, for example, examiners include critical remarks reflecting on the adequacy of treatment that the claimant is being given, the accuracy of the diagnosis, or the competence of the treating physician. Some reports may indicate the presence of a serious illness that has not been diagnosed. Consider, for example, a situation in which the family physician has said that the claimant is suffering from severe sinus headaches, while the independent medical examiner concludes that he really has a brain tumour. Such a report would not be released, but the medical advisor would probably contact the treating physician and suggest that he look at the possibility of a brain tumour.

Another situation that causes concern arises when an independent medical examiner states in his report that the patient is malingering and should return to work. Naturally, the disclosure of such a report would often lead to a dispute, so disclosure is avoided. In such cases, the UIC agent might adopt the opinion as his own and take the position that the claimant hadn't proven his case.

A claimant who is able to appeal his case all the way to an umpire would not be severely handicapped by this policy of non-disclosure,

because the Umpire's decisions are all made on the record. The UIC would probably still not release the information, but this would not prejudice the claimant because the Umpire would not be aware of or rely on the information. But, of course, not everyone has the personal resources necessary to pursue an appeal that far, and the UIC probably couldn't cope with all the appeals if they did.

Whether medical reports should be made available to the claimant is a difficult question and involves such basic questions about the practice of medicine as whether the patient is entitled to know the truth about his condition. It would be presumptuous to offer a definite conclusion here, but it can be observed that the contents of medical reports may be crucial to a claimant's case. It would be very difficult indeed for a claimant to counteract a negative report that he has not even been able to examine. And a decision-making process that denies him that right must seem very unfair. At the very least, a careful study of the costs and benefits to be expected from disclosure of medical reports is indicated.

Would the *Canadian Human Rights Act* compel disclosure of medical reports? To answer the question it is necessary to examine one of the exemptions. Paragraph 54(*f*) of the Act exempts from disclosure any information, the disclosure of which might impede the functioning of a court of law, or a quasi-judicial board, commission or other tribunal, or any inquiry established under the *Inquiries Act*. Given a very broad construction, this provision could exempt the information being considered. It might be argued that the Commission would be inconvenienced if it had to disclose medical examiners' reports, but it seems unlikely that mere inconvenience would be enough to call the exemption into play. If the clause were interpreted that broadly it would cover literally everything. A more telling argument would be that the candour of the reports would be adversely affected by a disclosure requirement, and that this would impede the functioning of the Commission. However, a general argument of this nature is probably also too broad, and the Privacy Commissioner would probably react as the courts have reacted when the candour argument has been advanced in support of a claim of Crown privilege. In order to make the Act meaningful, a more specific showing of harm should be required.

Although it seems likely that the *Canadian Human Rights Act* will have a significant effect on the way agencies react to requests for personal information made by the subject, it is too early to assess its

impact. The Act is now barely in force. It does contain a number of exemptions, many of which are quite broad and vaguely worded, but the real test will be how these are interpreted by the agencies themselves and by the Privacy Commissioner. Given a wise and liberal interpretation, the Act could significantly open up the administrative process as it relates to individuals.

2. Requests by Others

The protection of personal privacy is beyond the scope of this paper. In fact, the topic has been dealt with extensively elsewhere.[81] However, personal privacy and access to information are closely related. It is therefore necessary to consider here whether and under what circumstances personal information relating to one individual can be made available to another.

One of the principles of the *Canadian Human Rights Act* is that an individual ought to be able to control access to personal information about himself. Normally, therefore, the person who is the subject of personal information contained in a government file should have the right to prevent its disclosure to others. However, it is not possible to say that personal information should never be divulged to a third person. The Government Task Force on Privacy recognized this in its report and noted that "personal information about an individual may (sometimes) be of such vital concern to society that the individual's privacy must be sacrificed".[82] An example from agency practice might involve an individual who is applying for a valuable public licence, where his personal affairs might reflect on his ability to carry out his obligations as a licensee. In such situations, personal information may be highly relevant to the decision-making process and it may be necessary to reveal it to intervenors.

A somewhat similar situation can arise under current CRTC policies. The CRTC requires cable television firms that are applying for a rate increase to file, for public disclosure, a copy of their annual financial statement.[83] Although most cable TV operations are now publicly held companies, there are undoubtedly a few that are still essentially one-man operations. Disclosure of the financial statements of such a company arguably amounts to disclosure of personal information, yet it is justified by the public interest in the performance of publicly licensed carriers.

The development of the CRTC's policy of disclosure with respect to the financial statements of cable TV operations is an interesting example of the way such agencies function. Until recently, the CRTC's policy was not to disclose such information; however, it reversed its policy in a statement issued on October 28, 1975. As the Commission noted in its statement, most cable TV operations started as one-man operations. Their instinct was to preserve their privacy, and they frequently requested confidentiality for their filings, which the CRTC usually granted. However, in recent years, more and more of the companies became publicly held. In addition, requests for rate increase were becoming frequent because of the inflationary spiral. Consumer groups were intervening and were hotly demanding that financial information be made available. In fact in the *London Cable* case, one intervenor, the Consumers Association of Canada, sought judicial review of the CRTC's decision to refuse its information.[84] Faced with this pressure the Commission re-examined its policy and decided in favour of disclosure. When the CAC's application for judicial review was finally heard, about a year later, the Federal Court of Appeal overturned the Commission's decision in the *London Cable* case because of its failure to disclose adequate information. The Commission's own concern for its procedures, the potential for judicial review (despite the fact that it had not yet taken place), and the arguments of public interest intervenors all appear to have played a part in the Commission's decision to change its policy in favour of greater openness.

The *Canadian Human Rights Act* recognizes an individual's right to control access to personal information in two ways. First, as was mentioned above, it requires that the individual be consulted before unexpected uses are made of the information for administrative purposes. However, because of the particular definition of "administrative purposes" it seems unlikely that this provision would apply to the situation in which someone else has requested disclosure of the information. The second provision is more relevant. It allows the appropriate Minister to exempt from disclosure any record that might reveal personal information concerning another individual.[85] But it should be noted that this provision only really applies to requests made under the *Canadian Human Rights Act*, that is, to requests made for disclosure of files relating to an individual by the person to whom they relate. It does not necessarily apply to requests made by intervenors in regulatory matters, for example. Moreover, the Act does not provide for notice to the subject of the information when a request for information is made by a third person, so the subject will not necessarily have any opportunity of making his views known to the Minister. Finally, it

should be noted that the exemption is not mandatory — the Minister can release the information if he wishes. However, that is probably appropriate because there may be situations where an individual's interest in privacy must be sacrificed because of overriding public concerns.

Agencies are aware of the need to protect personal information from disclosure, although most do not appear to have worked out specific policies relating to the issue. Perhaps they have failed to do so because they don't have very much personal information in their files or because their policy of non-disclosure of all information except in a formal decision-making context minimizes the risk of interference with personal privacy. As greater openness becomes common, the agencies will be forced to face the question of disclosure of personal information and will have to develop specific policies as they have in other areas. Their awareness of the issue indicates that they will not shrink from this responsibility.

The UIC has already had to face the issue and has developed a policy toward the disclosure of personal information.[86] It provides for access to certain information by the subject himself, or his personal representative, and outlines the steps that should be taken to confirm the identity of the requester. It also provides for access by officials of the Department of Manpower and Immigration, Welfare agencies, Canada Pension Plan representatives and various other government agencies. Employers are entitled to certain information, for example, the reasons for separation given by the claimants. Finally, when subpoenaed, UIC employees may disclose any information necessary to the court in a criminal matter; otherwise they are directed to answer that section 114 of the *Unemployment Insurance Act 1971* does not permit release of information contained in the claimant's file.

The UIC's policies will undoubtedly be reviewed in light of the new *Canadian Human Rights Act*, and may be changed. Whether that policy is appropriate and effective in protecting personal privacy depends upon many factors that are beyond the scope of this study. For the moment, however, the UIC should be commended for having developed a definite policy concerning the disclosure of personal information. The development of definite policies like this one not only assists agency staff personnel in dealing with requests for information, it also provides a sound starting point for the ongoing analysis of disclosure problems that is clearly necessary.

E. Other Sensitive Information

Time and space do not permit identifying and discussing all of the information contained in agency files that might be sensitive. It is hoped that the foregoing discussion has given the reader some idea of the issues and problems involved. However, before proceeding to a discussion of our recommendations we will briefly mention two other kinds of information that also appear to cause problems.

The first of these concerns labour relations. Many of the cases that have arisen under the United States *Freedom of Information Act* have involved documents held by the National Labour Relations Board.[87] There are special reasons for protecting such files. For example, it would not be desirable to give a firm access to union membership lists because of the possibility of reprisals against employees who were union members. The Law Reform Commission has not yet completed its study on the Canada Labour Relations Board, so it would be inappropriate to comment further on this area. It is noted however, that files relating to labour relations may require special treatment.[88]

The second kind of information we want to mention concerns prison and parole files. In a study of the National Parole Board prepared for the Law Reform Commission, Carrière and Silverstone noted the inadequacy of information made available to applicants for parole prior to their parole hearing.[89] Two principal reasons are given for not disclosing this kind of information. First, the files might reveal the source of adverse information, and reprisals might therefore result. Second, if confidential sources were disclosed, these sources might dry up and become unavailable to prison and parole authorities. Carrière and Silverstone examined approximately 120 files to determine whether they contained such information. They concluded: "Not one did, even by stretching our imaginations, with the possible exception of a number of psychiatric reports."[90] Parole officials, themselves, concede that very few files — less than five percent — contain sensitive information. Most could safely be released.

The National Parole Board is listed in the schedule to the *Canadian Human Rights Act*, so the disclosure requirements listed in the Act will apply to parole files unless they are made exempt from disclosure by ministerial action. There are two possibilities. First, the whole bank, or certain parts of it, could be made exempt from the

indexing and disclosure requirements. Section 53 of the Act allows the Minister, with Cabinet approval, to exempt information that:

> would be likely to disclose information obtained or prepared by any government institution or part of a government institution that is an investigative body
>
> (i) in relation to national security,
>
> (ii) in the course of investigations pertaining to the detection or suppression of crime generally, or
>
> (iii) in the course of investigations pertaining to particular offences against any Act of Parliament.

While this exemption appears to relate more to police files than to prison and parole files, the latter might contain some information from police files that could be covered by the exemptions.

More directly related to parole files is paragraph 54(*d*), which appears to have been drafted with the parole situation in mind. It allows the responsible Minister to refuse to release any information that:

> might, in respect of any individual under sentence for an offence against any Act of Parliament
>
> (i) lead to a serious disruption of that individual's institutional, parole or mandatory supervision program,
>
> (ii) reveal information originally obtained on a promise of confidentiality, express or implied, or
>
> (iii) result in physical or other harm to that individual or any other person.

It is difficult to argue with either the first or the third grounds for exemption contained in paragraph 54(*d*). However, the second ground seems far too broad. It would allow information that was used against an individual to be withheld on the sole ground that the supplier requested confidentiality and the receiving government agency impliedly agreed. The supplier may thus be able to provide inaccurate information and insulate it from challenge by someone who might be harmed by it. This seems inherently unfair and unrelated to the legitimate needs of government. It is, of course, too early to tell how the *Canadian Human Rights Act* will be administered, but it is to be hoped that undertakings of confidentiality will not be freely given and that subparagraph 54(*d*)(ii) will not be relied upon unless some legitimate interest exists in protecting the confidentiality of the information.

V

Statutory Provisions Relating to Confidentiality

Parliament has included provisions in at least fifty Acts relating to confidentiality (See Appendix). The more obvious are the *Official Secrets Act*[91] and the *Public Service Employment Act*[92], but there are numerous other provisions scattered here and there relating to particular government organizations or particular kinds of information.

The *Official Secrets Act* is obviously intended to cover spying in the generally understood sense of that word. But section 4 is drafted so broadly that it could prohibit the communication of any form of information obtained in confidence from any person holding office under Her Majesty. Prosecutions under the Act are rare but public servants are conscious of its existence and are no doubt influenced by it. The size of the penalties involved — a maximum sentence of fourteen years — must serve to make public servants cautious.

Also vitally important is section 23 of the *Public Service Employment Act*. It provides that every employee who is appointed to the Public Service shall take the following oath of secrecy:

> I _____ solemnly and sincerely swear that I will faithfully and honestly fulfill the duties that devolve upon me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment.

The practices of the agencies with respect to the oath are not clear. It appears that some agency staff are required to take this, or a similar oath, and others are not.

The oath of secrecy that public servants are required to take undoubtedly can have a very strong influence on them, and therefore must greatly inhibit the flow of information from the public service to

the citizenry. It should be noted that the oath allows the public servant to disclose information when he has authority to do so. Unfortunately, no clear specification of authority for disclosure appears to exist in most departments or agencies. The public servant is left to make his own decision respecting disclosure and must therefore face the risk that he will, on review, be found to be without authority to disclose if the information proves embarrassing.

The secrecy or confidentiality provisions that are contained in various other Acts appear to make it difficult for agencies to strike an appropriate balance between disclosure and confidentiality. Subsection 29(3) of the *Anti-dumping Act* is one example.[93] It provides that

> where evidence or information that is in its nature confidential, relating to the business or affairs of any person, firm or corporation, is given or elicited in the course of any inquiry . . . the evidence or information shall not be made public in such a manner as to be available for the use of any business competitor or rival of the person, firm or corporation.

This section does not provide any guidance concerning whether or how the need for confidentiality should be balanced against the need for disclosure in a hearing. It is misleading because it gives one the impression that this kind of information must be kept confidential no matter how compelling the need for disclosure.

Such provisions are unwise, as is illustrated by the *Magnasonic* decision, discussed above, in which the Federal Court of Appeal overturned a decision of the Anti-dumping Tribunal because the Tribunal had withheld information from one of the parties.[94] The Tribunal has, of course, taken steps to assure that its procedures comply with the *Magnasonic* decision. But the fact remains that the section did mislead the Tribunal. Similar criticisms could be made of sections contained in the *Atomic Energy Control Act*[95] and in the *Railway Act*[96]. They should be modified to protect the rights of participants, or the problem should be dealt with by general legislation of the sort recommended later in this paper. Many of the more than 46 other sections of the *Statutes of Canada* dealing with confidentiality probably suffer from the same deficiencies, and should be repaired in the same manner.

Finally, section 41 of the *Federal Court Act* also deals with the disclosure of documents in government files.[97] It relates specifically to the production of documents in court and allows a Minister of the Crown to refuse to produce documents that would be injurious to international relations, national defence or security, or federal-provincial relations, or that would disclose a confidence of the Queen's Privy Council for Canada. This section has been dealt with in other Law Reform Commission papers and will not be discussed further here.[98]

VI

Recommended: A Public Right of Access

My review of existing law and practice persuades me that agencies do not share information as widely as they should. It must be conceded that Canada's administrative structure is very complex, and that practices vary widely from agency to agency. Moreover, a number of agencies appear to be trying very hard to develop sensible information access policies. Nonetheless, the following general observations may be drawn from the data:

1. Members of the public, as distinguished from participants in particular proceedings, have no right of access to information held by agencies, except for certain files relating specifically to themselves.

2. Both members of the public and participants in the administrative process experience difficulty in obtaining information about the policies and practices of agencies.

3. The jurisprudence laid down by the courts fails to articulate satisfactory tests either for determining when rules of disclosure should apply or what they should require.

4. While some agency decisions achieve a satisfactory approach to the question of disclosure, practices are far from uniform and other agencies appear either to disregard or to be ignorant of these leading precedents.

A number of important policy questions are raised by this review. Among them: should the public have access to information in agency files, apart from any specific interest in the matter? When should agencies be required to make their decisions "on the record", without relying on any undisclosed information? What information should be

disclosed to parties? What is the proper forum for an appeal when information is denied? The agency itself? The courts? Some other agency? Each of these questions will be dealt with below.

A. Should the Public Have Access?

One of the overriding policy questions that must be faced is whether and to what extent the public should have access to information contained in agency files. There seem to be three options: First, we could leave matters as they stand. In other words, we could leave the public without any recognized right of access to information. Second, we could require agencies to make information about their policies and practices available, but allow them to withhold any other information. This would have the effect of giving the public access to various interpretative materials like staff manuals, agency decisions, and so on. The third option is to give the public a general right of access to any material that could be released without causing harm. This would reverse the current presumption of secrecy and would therefore be a significant departure from existing practice. In essence, it amounts to the application of freedom of information principles to administrative agencies.

The status quo should be rejected. At the very least, interpretative materials should be made available to the public. This should include staff manuals and directives, as well as decisions, orders, regulations and guidelines. As has been said above, there does not appear to be any adequate reason for failing to make these materials available. On the other hand, there are two important reasons for disclosing these materials. First, information about agencies' policies and practices must be widely available to ensure that they are publicly accountable for their actions. Second, it is unfair to deny this information to people who may be affected by an agency's decisions.

The principle that all legal rules be publicly available ought to be beyond question. Some might argue that it need not be extended to documents like staff manuals because they do not have a binding effect and therefore cannot be regarded as law. Such arguments overlook the fact that most people involved in the administrative process do not have the expertise, the resources, or the will to appeal decisions affecting them. For them, the key and operative decision is the one made at the lowest level, where the staff manual has undoubted and substantial influence.

I would go further than this, however, and would recommend legislation giving any member of the public a right of access to information in agency files, subject to certain exceptions designed to protect particularly sensitive information. Broadly speaking, exemptions might be included for information relating to the security of the state, international relations, relations with the provinces, pending negotiations, Cabinet debates and policies, staff advice, valuable commercial information, and personal information. Under such an approach, agencies would be required to disclose any information contained in their files that could be released without causing harm, even though the requester might have no particular interest in the subject matter or in any matter pending before the agency.

Unfortunately, most of the legal literature about administrative agencies in Canada focuses on either adjudicatory hearings or on judicial review, and most suggestions for reform have also focussed on these two parts of the administrative process. This study, and other studies of the Law Reform Commission, indicate that this emphasis is misplaced. The administrative hearing is but a small part of administrative practice. Reforms that relate solely to the formal hearing context cannot be expected to achieve the overall level of openness and accountability that should exist. In order for public accountability to be a realistic hope, basic information concerning all aspects of agency operation should be publicly available.

There are two concerns that must be borne in mind when designing disclosure policies for independent administrative agencies. First, the information needs of participants in adjudicatory hearings (*i.e.* parties or intervenors) may require quite different treatment from the information needs of the general public. And second, the "information profile" of each agency is, in many ways, unique because of the tremendous variety of tasks that have been delegated to the agencies. For these reasons, some have concluded that disclosure policies will have to be specially tailored for each agency. If this approach were followed any general legislation would merely set out guidelines to be followed by agencies in developing their own specialized disclosure policies.

The information collected in this study emphasizes the need for approaching each request for disclosure on its own merits. However, it has also indicated that it is possible to identify the kinds of information that are likely to be sensitive. This suggests that it is possible to formulate general rules of disclosure that can be embodied in legislation applying to most or all agencies. Such a legislative scheme

would take into account the great variety of agency information profiles by including a number of broad exemption categories of the kind that have commonly been included in such a legislation in other jurisdictions. Certain of these exemptions might not be mandatory, in the sense that the agency might have a discretion to disclose the information even though it technically might fall within one of the exemptions. One criteria that might be relevant to the agencies' decision is whether or not the requester is a participant or potential participant in a formal agency proceeding. Other relevant considerations have been discussed above.

The approach that is recommended here has the virtue of simplicity and clarity. It avoids the necessity of distinguishing between different kinds of administrative action, at least in so far as most requests for information are concerned. It also avoids the necessity of distinguishing between different applicants for information. And if general freedom of information legislation were also enacted, it would not be necessary to distinguish between agencies and the ordinary departments of government. This, in itself, would be a substantial benefit because the drawing of such distinctions has been one of the most fruitful sources of litigation in the administrative law field over the years.

The above recommendation involves the assumption that sensitive information can readily be identified and exempted from disclosure — an assumption that seems to be borne out in practice. If one looks at the exemptions in the United States legislation, and the lists in the proposed Canadian and Australian legislation, one is struck by their similarity.[99] A reasonable consensus seems to exist concerning the kinds of information that should not be subject to a principal automatic disclosure. That is not, of course, to say that it is easy to determine what should be exempt from disclosure. A great deal of intellectual effort will be required to identify the information that should be protected and to draft the exemptions. But it does appear to be reasonably feasible.

Cost is, of course, a factor that must be considered. If freedom of information principles were applied to agencies they would have to establish procedures for handling requests, and they would have to hire and train staff. Each request would require the staff to search for the document, examine it in order to determine whether an exemption applied, and copy and send out the portions that could be released. Unfortunately, it is very difficult to determine how much all of this would cost.

The Government Green Paper attempted an estimate of the cost of freedom of information legislation based on experience in the United States.[100] The report concluded that the average cost for processing each request under the United States *Freedom of Information Act* was between $150 and $300; that approximately one million requests were processed; and, therefore, that the total cost in the U.S. was a minimum of $150 million. It was thought reasonable to divide this figure by ten to estimate expected Canadian costs. Thus, the cost to Canada would be about $15 million.

However, this estimate must be qualified in a number of respects. First, independent administrative agencies, which are the subject of this report, would probably contribute a very small part of that total. Second, these estimates were based on a brief study of experience under the U.S. Act. Because of the quality of data available relating to administration of the U.S. Act, they can be considered little better than guesswork. Our own studies have shown that the incremental costs reported by U.S. agencies include activities like discovery that would be carried on whether or not a *Freedom of Information Act* existed. Moreover, data are very sparse. Some agencies report large incremental costs, but do not report the number of requests received. Other agencies report no incremental costs. The average costs per request varies from figures in the tens of dollars to figures in the hundreds.

The relevant data for the year 1975 have been summarized in a report prepared by Dr. Harold Relyea for the Library of Congress.[101] Dr. Relyea's report includes a table listing the incremental cost reported by each of the departments and agencies of the U.S. federal government. When these figures are summed, the total comes out to approximately $12 million, about one-tenth of the figure reported in the Green Paper. One paragraph of Dr. Relyea's report is particularly interesting:

> With regard to costs incurred by the Executive Branch entities in FOI Act administration during 1975, those reporting the highest expenses were the Treasury Department ($3,337,000), the Department of Health, Education and Welfare ($2,365,000), the Veterans Administration ($1,631,400), and the Central Intelligence Agency ($1,392,000). *However, many agencies reportedly realized costs not in excess of $500,000 and quite a few cited "negligible" expenses which were absorbed by the normal operating budget of the unit.*[102] [Emphasis added]

These figures correspond to an average cost per request of $158 for the Treasury Department and $254 for the Central Intelligence Agency.

The data were incomplete for the other two agencies mentioned; however, the Department of Health, Education and Welfare filed a report covering 1976 that indicated an average cost per request of $137. By way of contrast, the Department of Defence received more requests than any other agency in 1975 and processed them at an average cost of approximately $9 per request. One can only conclude that the Government Green Paper disregarded all of the agencies that reported small or negligible costs.

The only generalization that one can feel confident in making, based on the data available, is that the independent agencies report much smaller incremental costs than are reported by the executive office of the President and the executive departments. Many agencies reported no incremental cost and were apparently able to cover freedom of information requests with existing staff. The agencies reporting the highest incremental cost were the Federal Energy Administration, with an incremental cost of $175,300.31; the Federal Trade Commission, with a cost of $420,000.00; the National Labour Relations Board, with a cost of $495,000.00; the Securities and Exchange Commission with a cost of $204,093.00; and the U.S. Civil Service Commission, with an incremental cost of $178,628.00.

Whatever the true costs are in the United States, it does not seem likely that people will come forward in great numbers to seek information from administrative agencies. Most of the requests can be expected to come from people participating in administrative procedures. And most of these requests must be answered now. The disclosure provision that we are suggesting can be expected to add little additional cost. I believe the benefits to be gained by disclosure — greater understanding of the administrative process and more democratic control of it — far outweigh the cost that will result.

B. Should Agencies Decide "On the Record"?

The approach suggested above will assist both participants in the administrative process and the general public by making information about agencies more widely available. However, participants need more information than the general public. They cannot properly prepare and present their cases unless they have access to all of the information that will be before the agency. Disclosure requirements of the kind suggested above will ensure the release of all information that can be disclosed without creating harm. But we must also be concerned

about the information that cannot be released without creating harm. How can the interests of a participant be protected when the agency must consider information that cannot be released without creating harm to others? Sometimes this issue can be avoided by disclosing the information to counsel, or by deleting particularly sensitive portions and disclosing the rest, as the practices of several agencies illustrate. But what if the issue can't be avoided? What if the agency decides that the information cannot be disclosed and its use by the agency will prejudice one of the parties? What must the agency do then? Is it entitled to rely on the information? Or must it ignore it?

In other words, are there situations in which an agency must make its decision "on the record"; that is, strictly on the basis of evidence submitted to it in open hearing? To answer this question it is necessary to draw some distinctions between the kinds of functions that agencies perform. Let us consider two broad categories. The first comprises what might be called adjudications — that is, decisions concerning the rights of particular parties that are similar to decisions that courts make. The second involves legislative functions — that is, situations in which the agency is issuing some rule or regulation that is to be applied to many parties in future cases. Most regulatory functions fall somewhere in between these two extremes.

Few would argue that legislative decisions should be made strictly on the basis of the record, even when hearings may be required under applicable statute law. The facts and interests in such a case may be too diverse for on the record decision-making. Moreover, the general situation faced by the agency is usually known to all, and the expertise of the agency and of its staff is expected to play a dominant role in such decision-making.

Adjudications present the strongest case for on the record decision-making. When adjudicating individual rights an agency is performing a task that is very similar to those performed by courts, and it is reasonable to argue that the same standards of fairness should apply as in the judicial process. However, we must remember that agencies are not created to perform the same functions as courts. Even in adjudications the agency's expertise will be called into play, and, as one commentator has pointed out, it is most reasonable to suppose that the agency's expertise resides in large part in the staff.[103] We must be careful to avoid over-judicializing the administrative process, lest we lose its benefits.

One approach that might be taken is to draw a legal distinction between adjudicatory functions and all the other functions that are performed by agencies, and to require complete disclosure in all adjudicatory proceedings. It is unclear whether existing law goes this far. Certainly the agency decisions mentioned above all asserted the right of an agency to rely on undisclosed information. Recall the observation of Commissioner Jones:

> We have also concluded that while as much information as is possible should be obtained in open court in the interests of fairness and justice, those same interests require the Commission to use other means of obtaining information that are at its disposal, whenever the circumstances make this necessary.[104]

The rules of natural justice seem, at first glance, to require agencies to comply with a stricter standard when performing a judicial function. But on closer examination it is not clear. The rule is that the agency disclose enough information to enable each party to meet the case against it. That is not equivalent to saying that all information must be disclosed.

I do not recommend requiring complete disclosure in all adjudicatory proceedings. In the first place, there may be information that is so sensitive that it should not be disclosed under any circumstances. Information relating to the security of the state is one example. Information relating to the safety of individuals is another. Perhaps the problem is presented in its clearest light in parole situations. When a parole board makes a decision about an individual's right to parole it is adjudicating his rights. It is sophistry to hold otherwise. A parole board may have before it information that is vital to the case, but can't be released in any form. Consider, for example, a situation in which a fellow inmate has told the authorities that the applicant for parole is planning further crimes. Release of the information might well jeopardize the life of the informant. Yet denying the Board the right to use the information would seriously hamper the administration of justice and would jeopardize the safety of the public. Complete disclosure is not required in such cases now because the courts have held that they are not "judicial" functions,[105] but the only thing that really distinguishes them from licence applications or other judicial functions is the sensitivity of the information involved. We would be far better off, and our jurisprudence would be clearer, if that fact were acknowledged openly.

Another reason for not requiring all adjudicatory decisions to be made on the record is simply the difficulty in drawing lines between

the different kinds of functions performed by agencies. As we have noted above, the main approach taken by the courts has been to distinguish between differing kinds of administrative decision-making, and it has failed to produce coherent principles that have any analytical value. Part of the problem may be that we are really dealing with a continuum, and questions of disclosure are really questions of degree, not questions of kind. Another part of the problem may be that other factors are more important than the kind of decision-making function being performed. For example, in the parole situation, the most important factor appears to be the sensitivity of the information, not the kind of function being performed by the decision-maker. Legal tests based on the kind of function being performed can't be expected to yield valid or consistent results in such cases. If this is right then our legal rules would make more sense if they recognized that the question is one of degree and required the decision-maker to weigh the interests of the party seeking disclosure against the interests requiring confidentiality.

A final concern relates to the expertise of the agencies. It is feared that a rule requiring "on the record" decision-making would either deprive the agencies of much of the benefit to be gained from the staff, or would make administrative proceedings too complex and costly. Certain agencies in the United States are required to decide matters before them on the record. This has meant that staff members are required to lead their evidence in open hearings. Moreover, because of concern that staff biases might enter the decision-making process, the principle of separation of functions has been developed. It holds that staff members who play an investigatory or prosecutorial role before the agency may not be involved in a decision-making role. That is, they may not advise the agency or even consult with staff members that do. We think this involves a costly duplication of staff and makes agency hearings more complex than they need to be.

Another approach that might be taken is to distinguish between adjudicative facts and legislative facts. As Professor Janisch has noted:

> The issue of fairness comes sharply into focus where so-called adjudicative facts, that is particular facts about particular parties, are involved. When the facts are of a more general nature, so-called legislative facts, the danger is not as great as these facts are used in assessment rather than in fact adjudication.[106]

One might, therefore, imagine a scheme in which agencies were required to disclose all adjudicative facts. However, while the distinction is useful and should be borne in mind by the decision-maker, it seems

likely that any legislative scheme based on the distinction would be subject to the objections discussed above.

C. What Should be Disclosed to the Parties?

If it is unrealistic to require agencies to make their decisions on the basis of the record, what measures should be taken to protect the parties? I believe that adequate protection can be obtained by following the approach that was described by Commissioner Jones in the *Rapeseed* case and by the CRTC in the *Support Structures* case, and therefore recommend that parties with standing before an agency be given access to information even though it is covered by the exemptions mentioned above, unless it can be shown that release would cause specific and direct harm outweighing the benefit that would be gained by releasing the information. The first step is for the agency to satisfy itself that the information that has been requested is relevant to the inquiry, and is therefore needed by participants. The presumption should then be that the information will be released unless the party requesting confidentiality can show that some *specific harm* will result from release of the information. If it will, the agency's obligation is to weigh the competing interests between disclosure and confidentiality. If these interests can be accommodated by partial disclosure, or by disclosure to counsel only, then those actions should be taken. But if it is impossible to find some compromise solution, and if the public interest would be better served by non-disclosure, the agency should be empowered to receive the evidence in confidence and rely on it. It should be remembered that, unlike courts, agencies have staffs that can subject the confidential evidence to scrutiny.

The question of who should bear the burden of proof is a particularly important one. In the scheme described above the burden of showing that the requested information is relevant to the inquiry would first fall on the requester. This would only require a general showing of relevance. The requester would not be able to deal with the issue in detail because he would not yet have access to the material. Once general relevance is established, the burden would shift to the party seeking to have the material kept confidential. This is only reasonable because that party presumably has access to the information and knows more than anyone else what impact it will have. It would be unreasonable to expect the requester to show that no harm would result from release because he would not yet have access to the information.

D. What is the Proper Forum for Appeal?

It seems reasonable to assume that, in the first instance, the agency itself will decide whether or not to release information that has been requested. However, in order to assure public confidence in the impartiality of such decisions, it will be necessary to provide some sort of appeal to an independent agency. The question is: what is the best forum for such appeals? The Government Green Paper on access to government documents reviewed five alternatives. These included:

1. A Parliamentary Scrutiny Committee;
2. An Information Auditor, who would make an annual report to Parliament but would not decide individual cases;
3. An Information Commissioner with powers to investigate individual complaints and issue advisory opinions with respect to them;
4. An Information Commissioner with powers to review individual cases and order release of documents; and
5. Judicial Review.

The reader is referred to the Green Paper for a discussion of each of these alternatives.[107]

The general topic of freedom of information is beyond the scope of this study, and so I will not express any firm conclusion concerning the merits of each of these alternatives. Nonetheless, I cannot help but note that it seems unlikely that the public would have much confidence in the first three of the alternatives. I would also think that the procedures chosen should be fast and inexpensive, in order to encourage public access. This suggests that the fourth alternative may be the best.

What is important for this study is how the appeal procedures under general access legislation would relate to the agencies. It has been suggested above that the agencies should be subject to a general right of public access to information. It would be desirable, from the point of view of public understanding and access, for the agencies to be subject to the same review procedures as will be applied more generally. Therefore, if freedom of information legislation is enacted applying to all administrative authorities, independent agencies should also be covered and be subject to the same appellate authority as applies to other administrative authority.

However, with respect to parties that have standing before an agency, different considerations arise. In these cases it is important to preserve access to the courts, for a number of reasons. First, individual rights may be affected, making judicial review desirable. Second, the courts have experience in reviewing the procedures of administrative agencies, and may therefore provide the best forum for reviewing some of the more complex matters that come before agencies. Third, other issues, in addition to access to information, may arise in the course of an agency's proceedings and may be subject to court review. It would be very inconvenient if disputes concerning access to information could not be dealt with in the same appeal.

E. Implementation

Above, I have recommended that interpretative materials, including staff manuals and directives, be made available to the public. To accomplish this objective, agencies should be required to identify and index these documents and either to publish them or provide facilities where the public may inspect them.

I have also recommended that the public be given the right to any information in the files of administrative agencies, as long as the information can be released without creating harm. Operationally, this would have to be accomplished by legislation requiring the disclosure of any information that does not fall within certain statutorily specified exemptions. The particular interest of the requester would not be relevant to the decision.

Finally, I have recommended that parties with standing before an agency should have the additional right to information covered by the exemptions unless it can be shown that release would cause specific and direct harm. The burden of proving this would be on the party seeking confidentiality. If specific and direct harm could be shown, the agency would be required to weigh the interests favouring confidentiality against those favouring disclosure and make its decision concerning release accordingly. It would be permitted to rely on confidential information if the interests favouring confidentiality were more significant than those favouring disclosure, but should try in such a case to find some way of assisting the party disadvantaged by non-disclosure.

It is clear that legislation will be required to implement these proposals. They represent too large a departure from existing practice to expect them to be accomplished in any other way. In addition to incorporating the features mentioned above, the legislation will have to deal with such matters as the right to appeal, inspection of the documents by the appellate authority, the proper forum for appeal, the remedies that should be available, how documents that contain exempt and non-exempt material should be handled, time limits for compliance with a request, and sanctions. Many of these are difficult technical matters that would carry us well beyond the scope of this study. They should be resolved by a group or task force that has broadly based input from the agencies, not by an academic working alone in the framework of a study like this one. To the extent that a decision to implement the proposals made here would depend upon an examination of the matters mentioned above, my recommendations would have to be regarded as tentative.

Two matters deserve special mention at this point. The first concerns the exemptions that would be included in legislation of the sort outlined above.

The exemptions will be one of the most important parts of any disclosure legislation, for they will determine the breadth and effectiveness of the right to information. For this reason, they should clearly define the interests that need to be protected by non-disclosure and the other factors that should be taken into account by an agency when it is deciding whether or not to release information. I have not attempted to draft the exemptions that might be used because I only examined the operations of a narrow sample of agencies and because I am convinced that agency personnel must be involved in the process of drafting. Since the subject is such an important one, it might be useful for the Law Reform Commission to establish a committee including representatives from various agencies for the purpose of preparing a usable set of exemptions. Such a committee would find ample guidance in the U.S. legislation, the private member's bill introduced in the House of Commons, the Proceedings of the Statutory Instruments Committee, the Australian proposals and in numerous other documents.[108]

The approach taken to drafting the exemptions should be examined closely. One approach, not one I favour, is to list the classes or categories of documents that should not be disclosed. Unfortunately, it is not possible to make final decisions respecting the disclosure or non-disclosure of a particular class of documents in advance. Any class of documents will contain many documents that could be released

without causing harm. Therefore, any reasonable classification will include many documents that should not be exempt.

A second approach is to focus on the interests to be protected by non-disclosure. A set of draft exemptions was prepared for the Statutory Instruments Committee, basically following this principle, and is published in its proceedings.[109] The difficulty with this approach is that it results in very vague guidelines that do not provide much assistance to judges or administrators.

An approach that seems to offer greater promise was included in the minority report of the Royal Commission on Australian Government Administration.[110] Basically it involves a combination of the two techniques mentioned above. As the draftsman explained it: "The exemptions first define the classes of documents and interests that have to be protected by non-disclosure, and then they define classes of documents which should be disclosed and the interests that favour disclosure."[111]

A second subject worthy of mention concerns the rights of people or firms that supply or are the subject of information contained in agency files. If such information falls within one of the exemptions, and if the agency proposes to exercise its discretion in favour of disclosing the information, anyone affected thereby should be given an opportunity of defending their interests in confidentiality. The United States *Freedom of Information Act* did not provide such an opportunity for parties to be heard with respect to disclosure. This was clearly an oversight. One of the most active areas of litigation concerning that Act has involved what are called reverse freedom of information actions — essentially court actions brought by those who have supplied or are the subject of information seeking to block its disclosure by the agencies of government.

It also does not appear that this problem was dealt with in the *Canadian Human Rights Act* or by the Government Green Paper on Access to Information. I think these are serious oversights and suggest that access legislation should include the requirement that persons or firms that supply or are the subject of information should be notified of any request for disclosure and should be given an opportunity of being heard with respect to the request. It should be noted that this will pose less of a problem with respect to agencies than with government departments because most of the requests will probably arise in the course of regular hearings, when the supplier or subject will probably be present.

VII

Conclusion

Information is a vital ingredient in the administrative process. Without it, individuals and firms cannot participate effectively. Without it, the public cannot exercise its democratic right of control. The reforms suggested above would, I believe, significantly open up the administrative process and make it more accessible to the public and participants alike. I hope they will receive favourable consideration. However, we need not wait for legislation. Earlier in this study it was noted that the procedures of independent administrative agencies, particularly as they relate to access to information, have not received adequate attention. A number of agencies have made significant contributions in recent years by developing techniques for accommodating both the interests in confidentiality and disclosure. If more attention is paid to those developments, and to administrative procedure in general, and if agencies continue to experiment with new techniques, significant advances toward a more open administrative process will result.

Endnotes

1. H. N. Janisch, *The Regulatory Process of the Canadian Transport Commission* (1978: Law Reform Commission of Canada) (hereinafter cited as CTC Report).

2. A. R. Lucas and T. Bell, *The National Energy Board: Policy, Procedure and Practice* (1977: Law Reform Commission of Canada) (hereinafter cited as NEB Report).

3. G. B. Doern, *The Atomic Energy Control Board: An Evaluation of Regulatory and Administrative Processes and Procedures* (1976: Law Reform Commission of Canada) (hereinafter cited as AECB Report).

4. P. Issalys and G. Watkins, *Unemployment Insurance Benefits: A Study of Administrative Procedure in the Unemployment Insurance Commission* (1977: Law Reform Commission of Canada) (hereinafter cited as UIC Report).

5. P. Carrière and S. Silverstone, *The Parole Process: A Study of the National Parole Board* (1976: Law Reform Commission of Canada) (hereinafter cited as *Parole Process*).

6. Proceedings of the Standing Joint Committee on Regulations and Other Statutory Instruments, 1st Session, 30th Parl. (1974-75), Nos. 13, 15, 17, 19, 22, 32, 41, 47, 48, 50-53, 61, 62, 64, 66, 69, 70-73, 76, 79, 80, 81 (hereinafter cited as SIC Proceedings).

7. 5 U.S.C. §522. A good general description of the Act and the experience under it may be found in "Project: Government Information and the Rights of Citizens" (1975), 73 Mich. L. Rev. 971.

8. *Legislation on Public Access to Government Documents* (1977: Government of Canada) (hereinafter cited as Green Paper).

9. *Id.*, at 8. See also Patten and Weinstein, "Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations" (1977), 29 Admin. L. Rev. 193; Wallace, "Proper Disclosure and Indecent Exposure: Protection of Trade Secrets and Confidential Commercial Information Supplied to the Government" (1975), 34 Fed. Bar J. 295; O'Reilly, "Government Disclosure of Private Secrets Under the Freedom of Information Act" (1975), 30 Business Lawyer 1125.

10. Green Paper, p. 4.

11. For an excellent discussion of the political accountability of tribunals see Janisch "Political Accountability for Administrative Tribunals" (paper presented to Conference on Administrative Justice, University of Ottawa, Jan. 26, 27, 1978).

12. See authorities cited *supra*, note 9.

13. This sort of information is not released at this time. SIC Proceedings, no. 64, pp. 13-14.

14. For example, review boards established under the *Hazardous Products Act*: R.S.C. 1970, c. H-3, s. 9: or under the *Environmental Contaminants Act*: S.C. 1974-75-76, c. 72, s. 6.

15. The leading U.S. case concerning the necessity of considering each of these variables is *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It arose under the personal and medical files exemption clause of the United States *Freedom of Information Act*, USCA §552 (b)(6), and involved a request by student law review editors for case summaries of Air Force Academy honors and ethics hearings involving cadets. After balancing the various factors mentioned above, the court concluded that a "public benefit" would be served by disclosure. The precise purpose of the requester was relevant to this determination, but not critical.

16. *E.g., Toronto Newspaper Guild and Globe Printing Co.*, [1953] 3 D.L.R. 561, [1953] 2 S.C.R. 18. See generally, R. F. Reid, *Administrative Law and Practice* (1971) pp. 4-39.

17. *E.g., Calgary Power Ltd. and Halmrast v. Copithorne* (1959), 16 D.L.R. (2d) 241, [1959] S.C.R. 24. See generally, Reid, *supra* note 16, at 39-52. The reviewability of "administrative" decisions according to some standard less stringent than "natural justice" appears to be a developing trend as indicated in the judgments of Laskin C.J. in *Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311 and Le Dain J. in *Inuit Tapirisat of Canada and the National Anti-Poverty Organization v. The Governor in Council* (1979), 24 N.R. 361 (F.C.A.)

18. *E.g., Cooper v. Wandsworth* (1863), 14 C.B. (N.S.) 180; *Ridge v. Baldwin*, [1963] 2 All E.R. 66: [1963] 2 W.L.R. 935; *Wiswell v. Winnipeg*, [1965] S.C.R. 512.

19. *E.g., R. v. Bd. of Broadcast Governors, ex parte Swift Current* [1962] O.R. 657.

20. *Re Brown & Brock and the Rentals Administrator*, [1945] O.R. 554; *Giese v. Williston* (1963), 37 D.L.R. (2d) 447, 41 W.W.R. 331; *Calgary Power Ltd. and Halmrast v. Copithorne* (1959), 16 D.L.R. (2d) 241, [1959] S.C.R. 24.

21. *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66; In *Re Foremost Construction Co. and Registrar of Companies* (1967), 61 D.L.R. (2d) 528; *Dowhopoluk v. Martin* et al. (1971), 23 D.L.R. (3d) 42.

22. *In re CRTC and London Cable TV, Ltd.*, [1976] 2 F.C. 621 (F.C.A.). *But see Seafarers International Union v. Canadian National Railway Co., et al.*, [1976] 2 F.C. 369 (F.C.A.).

23. (1973), 30 D.L.R. (3d) 118, [1972] F.C. 1239.

24. *Id.*, at 123.

25. *Id.*, at 125.

26. Reid, *supra* note 16, at 129.

27. *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board* (1976), 12 N.R. 150, 170-71.

28. See D. J. Mullan, "Fairness: The New Natural Justice?" (1975), 25 U.T.L.J. 281. A majority of the Supreme Court of Canada appears to have taken the same approach in a decision handed down as this paper was being edited. See *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

29. S.C. 1970-71-72, c.1.

30. Law Reform Commission of Canada, *Federal Court: Judicial Review* (1977: Working Paper 18), pp. 16-17, 35.

31. H. Janisch, "Fairness: Confidentiality and Staff Studies" in H. N. Janisch (ed.), *Current Issues in Administrative Law* (Halifax: 1975, Dalhousie Continuing Legal Education Series, No. 7) at 14, 21-22.

32. AECB Report, *supra* note 3, pp. 41-46.

33. Bill C-14 (30th Parl., 3d Sess.). See particularly ss. 32-36 (1st reading).

34. *Bell Canada, Confidentiality and Other Preliminary Matters Concerning Support Structures Tariff Proceeding* (1976): Telecom. Decision CRTC 76-2, pp. 7-8.

35. See *Howarth v. National Parole Board* (1974), 3 N.R. 391, 50 D.L.R. (3d) 349 (S.C.C.); *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board* (1977), 14 N.R. 285 (S.C.C.)

36. The Nuclear Control and Administration Bill which has been placed on the Parliamentary Order Paper includes a provision giving a general, public right of access to information in the possession of the Atomic Energy Control Board (Bill C-14, s. 36, Nov. 1974).

36a. But see *Seafarers International Union v. Canadian National Railway, et al.*, [1976] 2 F.C. 369 (F.C.A.).

37. K. C. Davis, *Discretionary Justice* (1969), p. 110.

38. Reid, *supra* note 16, at 255.

39. House of Commons: Third Report of the Special Committee on Statutory Instruments (1968-69 Sess.) (MacGuigan Report).

40. S.C. 1970-71-72, c. 38.

41. Second Report of the Standing Joint Committee on Regulations and Other Statutory Instruments, Minutes of Proceedings of the Senate (30th Parl., 2nd Sess.) 3 Feb. 1977, pp. 206-319, (hereinafter cited as SIC Report).

42. *Id.*, at 234.

43. A new consolidation was being prepared when this paper was in press.

44. A. H. Janisch, "Publication of Administrative Board Decisions in Canada" (1972) (unpublished report prepared for the Canadian Association of Law Libraries).

45. *Id.*, at viii.

46. (1972), 30 D.L.R. (3d) 287 (F.C.A.).

47. [1976] 2 F.C. 621 (F.C.A.).

48. (1974), 30 D.L.R. (3d) 738.

49. *Dowhopoluk v. Martin* (1971), 23 D.L.R. (3d) 42 (Ont. H.C.).

50. See, *e.g.*, authorities cited *supra*, notes 46, 48 and 49.

51. In the Matter of the Public Disclosure of Railway Accident Investigation Reports, File No. 49581, May 10, 1973, as quoted in CTC Report, *supra* note 1, at 79.

52. 5 U.S.C. §552 (b)(5).

53. (1972), 30 D.L.R. (3d) 287, 291.

54. See authorities cited, *supra*, notes 9, 22, 23, 34. The issue has been before several agencies, and the transcripts contain extensive argument. See Bell Canada amended rate application "B" (1974), CTC File No. 955.182.1, transcripts, v. 33, pp. 4738-60, v. 35, pp. 4915-57; Transcripts of CRTC Hearings re Financial Disclosure relating to Cable Television Undertakings (June 10, 1975), pp. 930-1035; Bell Canada, Tariff for the Use of Support Structures by Cable Television Licences, Telecom. Decision CRTC 77-6, Transcripts, pp. 108-344; Transcript of Hearings re Telecommunications Regulation — Procedures and Practices (25 October, 1976), pp. 16-19, 92-108, 767-70.

55. See CTC Report, *supra* note 1, at 77.

56. See Janisch, *supra* note 31, at 21-22.

57. R.S.C. 1970, c. A-15.

58. (1973), 30 D.L.R. (3d) 118, 124.

59. CTC Report, *supra* note 1, at 76-77.

60. In the Matter of the Saskatchewan Wheat Pool, File No. 30637.2 June 27, 1973, Transcript, May 10, 1972, pp. 1692-97, as quoted in CTC Report, p. 81. It is interesting to note that an "actual and substantial harm" test is more stringent than the accepted test under Exemption 552(B)(4) of the United States *Freedom of Information Act*. That exemption refers to: "Trade secrets and commercial or financial information obtained from a person and privileged or confidential". The leading cases interpreting this provision are *National Parks Conservation Association v. Morton*, 498, F. 2d 765 (D.C. Cir. 1974) ("*National Parks I*"); and *National Parks and Conservation Association v. Kloppe*, 547 F. 2d 673 (D.C. Cir. 1976) ("*National Parks II*"). The general test for determining whether information is confidential is set out in the *National Parks I*, as follows:

" . . . commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information 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 those from whom the information was obtained".

Two years later the case came on appeal for the second time (The *National Parks II* case) and the general test was reaffirmed. In addition, the court discussed the type of evidentiary showing which must be made to establish that the disclosure is likely "to cause substantial harm to the competitive position". It concluded that detailed economic evidence was not necessary to prove that the objector faces competition. It also concluded that no *actual*, adverse effects on competition need be shown. The court felt that where "extremely detailed and comprehensive" financial records were at issue, the likelihood of substantial competitive harm was "virtually axiomatic".

61. CTC Report, *supra*, note 1, at 81-82.

62. Telecom. Decision CRTC 76-2, *supra* note 34.

63. R.S.C. 1970, c. R-2.

64. Telecom. Decision CRTC 76-2, pp. 7-8.

65. British Columbia Telephone Co., Increase in Rates, Telecom. Decision CRTC 77-5 (May 17, 1977).

66. *Id.*, at 12-13. See also Transcripts pp. 2037-38.

67. CTC Report, *supra*, note 1, at 77-78.

68. S.C. 1976-77, c. 33.

69. *Id.*, s. 49.

70. *Id.*, s. 52(1)(*a*)-(*c*).

71. *Id.*, s. 52(1)(*d*), (*e*).

72. *Id.*, s. 51.

73. *Id.*, s. 52(2), (3).

74. *Id.*, s. 53.

75. *Id.*, s. 54(*f*).

76. *Id.*, s. 54(*d*).

77. *Id.*, s. 55.

78. *Id.*, ss. 57-59.

79. UIC Report, *supra* note 4, 257.

80. Unemployment Insurance Canada: Insurance Policy Guidelines, Subject 20, "Privacy of Information Contained in the Claimant's File" (Oct. 1975), Commission Minutes 75-52, pp. 4-5.

81. *Privacy and Computers* (1972), Report of the Joint Task Force, Dept. of Communications and Dept. of Justice.

82. *Id.*, at 121.

83. CRTC Public Announcement, "Financial Disclosure Relating to Cable Television Undertakings" (Oct. 28, 1975).

84. *In re CRTC and London Cable T.V. Ltd.*, [1976] 2 F.C. 621 (F.C.A.).

85. S.C. 1976-77, c. 33, s. 54(*e*).

86. UIC Minutes 75-52, *supra* note 80, at 5-10.

87. See "Developments Under the Freedom of Information Act — 1976", (1976) Duke L.J. 532, 547-51; "Access to Information? Exemptions from Disclosure Under the Freedom of Information Act and the Privacy Act of 1974" (1976), 13 Willamette L.J. 135, 154-58; and cases cited therein. The NLRB reported the highest incremental cost for administering the Act of any of the independent agencies during 1975. See page 60.

88. The special nature of information in the possession of the Canada Labour Relations Board is further attested to by the fact that the Board is not listed in the schedule to the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as being one of the government bodies subject to the Part IV privacy provisions.

89. *The Parole Process*, *supra* note 5, at 104-107.

90. *Id.*, at 106.

91. R.S.C. 1970, c. O-3.

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

93. R.S.C. 1970, c. A-15.

94. See part III B, *supra*.

95. R.S.C. 1970, c. A-19, s.18.

96. R.S.C. 1970, c. R-2, s. 331.

97. R.S.C. 1970, c. 10 (2nd Supp.).

98. Law Reform Commission of Canada, *Report on Evidence* (1975) pp. 32-33, 82-83.

99. Compare authorities cited in note 108, *infra*.

100. Green Paper, *supra* note 8, at 26.

101. H. C. Relyea, "The Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1975" (1976, Library of Congress). See also, (1977) 20 Can. Pub. Admin. 317.

102. *Id.*, at 23.

103. Janisch, *supra* note 31, at 27.

104. In the *Rapeseed* case. See note 60, *supra*.

105. See *Howarth v. National Parole Board* (1974), 50 D.L.R. (3d) 349 (S.C.C.); *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board* (1977), 14 N.R. 285 (S.C.C.).

106. Janisch, *supra* note 31, at 27.

107. Green Paper, *supra* note 8, at 15-19.

108. *Freedom of Information Act*, 5 U.S.C. §552 (b); Bill C-225 (30th Parl., 1st Sess.), S.4; SIC Proceedings, *supra* note 6, no. 32, pp. 52-55, and no. 81, pp. 65-72; Australia, Attorney General's Department, Policy Proposals for Freedom of Information Legislation — Report of Interdepartmental Committee (1976), pp. 24-71; Royal Commission on Australian Government Administration, Appendix 2A, Vol. 2, pp. 41-46, 106-41.

109. SIC Proceedings, *supra* note 6, no. 81, pp. 65-72.

110. Royal Commission on Australian Government Administration, Appendix 2A, Vol. 2, pp. 1-156.

111. *Id.*, at 107.

APPENDIX

List of Acts Containing Provisions Relating to Confidentiality

Anti-Inflation Act
S.C. 1974-75-76, c. 75, ss. 14, 34, 40

Atomic Energy Control Act
R.S.C. 1970, c. A-19, s. 18

Anti-dumping Act
R.S.C. 1970, c. A-15 s. 29(3),
as am. c. 1 (2d Supp.), s. 7

Bank Act
R.S.C. 1970, c. B-1, s. 68(2)

Bank of Canada Act
R.S.C. 1970, c. B-2, s. 16

Bridges Act
R.S.C. 1970, c. B-10, s. 19

Canada Elections Act
R.S.C. 1970, c. 14 (1st Supp.),
s. 44(1)

Canada Labour Code
R.S.C. 1970, c. L-1,
s. 93(2), (3)

Canada Pension Plan
R.S.C. 1970, c. C-5, s. 107(1);
as am. c. 33 (2d Supp.), s. 1;
1974-75-76, c. 4, s. 49

Canada Shipping Act
R.S.C. 1970, c. S-9, s. 412 (3)

Canada Temperance Act
R.S.C. 1970, c. T-5, ss. 71, 72,
84, 85

Canadian Human Rights Act
S.C. 1976-77, c. 33, pt. IV, ss. 49-62

Central Mortgage and Housing
Corporation Act
R.S.C. 1970, c. C-16, s. 14

Combines Investigation Act
R.S.C. 1970, c. C-23, s. 19(5)
as am. 1974-75-76, c. 76, s. 7

Corporations and Labour Unions
Returns Act
R.S.C. 1970, c. C-31, ss. 15(1), 18(2)

Criminal Code
R.S.C. 1970, c. C-34, ss. 162, 178.2;
as am. 1973-74, c. 50, s. 2; 1976-77,
c. 53, s. 11

Criminal Records Act
R.S.C. 1970, c. 12 (1st Supp.),
s. 6(2)

Currency and Exchange Act
R.S.C. 1970, c. C-39, s. 19

Customs Act
R.S.C. 1970, c. C-40, s. 172

Defence Production Act
R.S.C. 1970, c. D-2, s. 23

Department of Industry, Trade and
Commerce Act
R.S.C. 1970, c. I-11, s. 6.1; as am.
1974-75-76, c. 59, s. 1

Environmental Contaminants Act
S.C. 1974-75-76, c. 72, s. 4(4)

Explosives Act
R.S.C. 1970, c. E-15, s. 23

Expropriation Act
R.S.C. 1970, c. 16 (1st Supp.),
s. 4(3)

Family Allowances Act, 1973
S.C. 1973-74, c. 44, s. 17(1)

Federal Court Act
R.S.C. 1970, c. 10 (2d Supp.),
ss. 41(1), (2)

Foreign Investment Review Act
S.C. 1973-74, c. 46, s. 14(1)

Hazardous Products Act
R.S.C. 1970, c. H-3, ss. 9(6), 10(3)

Income Tax Act
S.C. 1970-71-72, c. 63, s. 241(1), (2)

Industrial Research and
Development Incentives Act
R.S.C. 1970, c. I-10, s. 13

National Defence Act
R.S.C. 1970, c. N-4, s. 65

National Film Act
R.S.C. 1970, c. N-7, s. 13

Official Languages Act
R.S.C. 1970, c. O-2, ss. 29(3), 33(2)

Official Secrets Act
R.S.C. 1970, c. O-3

Old Age Security Act
R.S.C. 1970, c. O-6, s. 19(1)

Patent Act
R.S.C. 1970, c. P-4, ss. 20(4),
(5), (11), (16), 74(1)

Pension Act
R.S.C. 1970, c. P-7, s. 11.1; as am.
c. 22 (2d Supp.), s. 6

Petroleum Administration Act
S.C. 1974-75, c. 47, s. 92

Post Office Act
R.S.C. 1970, c. P-14, ss. 6, 56

Public Service Employment Act
R.S.C. 1970, c. P-32, s. 23

Quebec Savings Banks Act
R.S.C. 1970, c. B-4, s. 59

Railway Act
R.S.C. 1970, c. R-2, ss. 254(2),
255(5), 331, 331.1, 331.3, 334 as am.
1974-75-76, c. 41, s. 2.

Royal Canadian Mounted Police Act
R.S.C. 1970, c. R-9, s. 25

Statistics Act
S.C. 1970-71-72, c. 15, ss. 16(1),
17(1), (2), 33

Surplus Crown Assets Act
R.S.C. 1970, c. S-20, ss. 7(11), 9

Tariff Board Act
R.S.C. 1970, c. T-1, ss. 5(10), 6

Telegraphs Act
R.S.C. 1970, c. T-3 ss. 2, 3, 5

Textile and Clothing Board Act
S.C. 1970-71-72, c. 39, s. 23

Trade Marks Act
R.S.C. 1970, c. T-10, s. 49(6)

Unemployment Insurance Act, 1971
S.C. 1970-71-72, c. 48, s. 114; as am.
1976-77, c. 54, s. 60.1

Yukon Quartz Mining Act
R.S.C. 1970, c. Y-4, s. 95(14); as
am. 1972, c. 17, s. 2.