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Freedom of Information: Will Blair Be Able to Break the Walls of Secrecy in Britain?

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FREEDOM OF INFORMATION: WILL BLAIR BE ABLE TO BREAK THE WALLS OF SECRECY IN BRITAIN?

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INTRODUCTION

Britain is one of the most secretive democracies in the world today.¹ The results of health checks on cruise liners,² the length of the queue at the local post office,³ and inspections of British pharmaceutical plants are all considered official secrets.⁴ Since the 1970s, the

1. See 219 PARL. DEB., H.C. (6th ser.) 584 (1993) (statement of Mark Fisher [hereinafter Fisher Arguments]) ("Britain is still one of the most secretive societies in the western world and one of the few democracies not to have some form of freedom of information legislation."); see also Des Wilson, 1984 . . . and Onwards? *The Level and Effects of Secrecy in Britain Today*, in THE SECRETS FILE: THE CASE FOR FREEDOM OF INFORMATION IN BRITAIN TODAY 1, 1-12 (Des Wilson ed., 1984) (stating that Britain is "probably the most secretive" of democracies while advocating for greater freedom of information in Britain today). See generally CLIVE PONTING, *SECRECY IN BRITAIN* (1990) (discussing the extent and nature of official secrecy in Britain).

2. See Richard Norton-Taylor, *Secret Society: Bill Would Open Whitehall Closet*, GUARDIAN, Feb. 19, 1993, at 9 (stating that reports of cockroaches found in the cruise ship QE2's kitchens in 1989 and 1991 were available in the United States under its Freedom of Information Act but were not available in Britain under its secrecy laws).

3. See 219 PARL. DEB., H.C. (6th ser.) 635 (1993) (statement of Kate Hoey) [hereinafter Hoey Arguments] (citing the length of the queue at her local post office as an example of an official secret).

4. See Norton-Taylor, *supra* note 2, at 9 (describing how Britons use the United States Freedom of Information Act to learn about inspections of British pharmaceutical and poultry plants). "By using the United States' Freedom of In-

United States,⁵ Canada,⁶ Australia⁷ and many other countries⁸ have introduced a freedom of information law⁹ that grants statutory rights

formation Act, Britons can find more about British policy from the U.S. than from British archives." *Id.*

5. See OFFICE OF INFO. AND PRIVACY, U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW (Sept. ed. 1996) [hereinafter FOIA GUIDE] (noting that Congress enacted the Freedom of Information Act, 5 U.S.C. § 552, in 1966). Congress amended the act extensively in 1974 and 1996. See *id.*; see also *Congress Enacts FOIA Amendments*, FOIA UPDATE, (DOJ/Office of Info. and Privacy, D.C.) Fall 1996, at 1 [hereinafter FOIA UPDATE] (detailing "Electronic Freedom of Information Act Amendments of 1996"); *infra* note 351 and accompanying text (providing the United States' amended Freedom of Information Act's new definition of agency records).

6. See generally STANDING COMM. ON JUSTICE AND SOLICITOR GENERAL, 33RD PARL., 2D SESS., OPEN AND SHUT: ENHANCING THE RIGHT TO KNOW AND THE RIGHT TO PRIVACY, REPORT ON THE REVIEW OF THE ACCESS TO INFORMATION ACT AND THE PRIVACY ACT (March, 1987) [hereinafter OPEN & SHUT] (detailing the date of enactment of Canada's Access to Information Act and explaining the statute's roots in the late 1960s and 1970s). Specifically, Canada's Access to Information Act, R.S.C., ch. 111 (1980-1983) (Can.), was enacted by Parliament in June 1982 and came into force in July 1983. See *id.* at 2-3; see also *infra* note 335 and accompanying text (stating that Liberals enacted Canada's Access to Information Act as a result of pressure from the Conservative opposition party).

7. See generally AUSTRALIAN LAW REFORM COMM'N & ADMIN. REVIEW COUNCIL, FREEDOM OF INFORMATION, ISSUES PAPER NO. 12, at 3-8 (1994) [hereinafter ISSUES PAPER] (explaining how Australia's FOI legislation was finally passed in 1982 despite the fact that it was first considered in the 1960s, following the introduction of FOI legislation in the United States). Australia's Freedom of Information Act, 1982, ch. 3 (Cth), was specifically enacted in December 1982, and substantively amended in 1983, 1986, and 1991. See *id.* at 6. On July 8, 1994, Acting Attorney-General of Australia, Duncan Kerr MP, asked the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) to review the Commonwealth's freedom of information (FOI) legislation to determine if further reform was necessary. See *id.* at 1; see also *infra* note 343 and accompanying text (discussing the Acting Attorney General's Order to the ALRC to conduct its FOI inquiry).

8. See Tom Riley, *News From Canada and Abroad*, ACCESS REPORTS, June 9, 1993, at 9 (noting that Manitoba's Freedom of Information Act came into force in 1988); see also IAN EAGLES ET AL., FREEDOM OF INFORMATION IN NEW ZEALAND 1-3 (1992) (observing that freedom of information became a political issue in New Zealand in the mid-1970s, which led to a review of the country's Official Secrets Act and the enactment of the "Official Information Act" on December 17, 1982); cf. Tom Riley, *News From Canada and Abroad*, ACCESS REPORTS, Sept. 28, 1994, at 5 [hereinafter *September Report*] (affirming the news of a draft freedom of information bill in India). Tom Riley also reports that "[i]n early 1994 the European Commission brought into effect its Code of Conduct on Access to government information." *Id.* at 4. The Code applies to all European Commission Institutions, not to any member country. See *id.*

9. See PATRICK BIRKINSHAW, FREEDOM OF INFORMATION: THE LAW, THE

of access to the above information. Britain, however, has opted for new secrecy legislation instead.¹⁰

Pledging to curtail the excessive government secrecy that exists in Britain, Prime Minister Tony Blair included a Freedom of Information Act in the New Labour Party's 1997 election manifesto. He stated: "We are pledged to a Freedom of Information Act, leading to more open government"¹¹ On the first of May, 1997, the British electorate demonstrated its preference for Blair and freedom of information legislation at the polls, allowing Blair to capture a commanding majority in the Parliament.¹²

PRACTICE AND THE IDEAL 1 (2nd ed. 1996) (defining freedom of information as "having access to files, or to information in any form, in order to know what the government is up to"); see also Richard A. Chapman, *Introduction to OPEN GOVERNMENT: A STUDY OF THE PROSPECTS OF OPEN GOVERNMENT WITHIN THE LIMITATIONS OF THE BRITISH POLITICAL SYSTEM* 11 (Richard A. Chapman & Michael Hunt eds., 1987) (advancing basic principles underlying freedom of information legislation). Three basic principles are: (1) Disclosure of official information as a right; (2) Exemptions prohibiting the release of certain kinds of information deemed necessary to be kept secret in the nation's interests; and (3) Machinery for appeal against denials by administrators to supply information. See *id.* In general, freedom of information laws grant rights of access to government held documents, except for certain categories of information which are protected from disclosure by statutory exemptions. See *infra* Part III (detailing the access statutes of the United States, Canada and Australia).

10. In 1989, Britain's "Official Secrets Act" was amended yet again. See Official Secrets Act, 1989, ch. 6 (Eng.) [hereinafter OSA 1989]; see also *infra* notes 31-32 (discussing the Official Secrets Act amendments of 1989). See generally Michael Cassell, *Fears of Severe Curbs on Freedom of Expression; Official Secrets Act*, FIN. TIMES (London), Dec. 20, 1988, at A10 (discussing the severe curbs on freedom that the "Government's new official secrets laws" have in Britain).

11. New Labour, *Because Britain Deserves Better: The Manifesto* (visited Nov. 3, 1997) <<http://www.labour.org.uk/views/manifesto/britain/politics%5F1.html>> [hereinafter New Labour].

12. See Fawn Vrazo, *Britain's Historic 'Ta-Ta' to the Tories*, NEWS & OBSERVER (Raleigh, NC), May 4, 1997, at A25 (stating that the "Labor Party didn't just win the general election Thursday, it swallowed it whole . . . Labor leader Tony Blair and his party ended 18 years straight of Conservative rule"); *Toasting the Tories*, STAR TELEGRAM (Fort Worth, TX), May 6, 1997, at 10 (stating "[t]here is winning, and then there is kicking the tea and crumpets out of the opposition [T]he latter is what the Labor Party did to the Conservative Party in the recent British elections"); David S. Broder, *After Victory, The Job Begins Across the Ocean, Clinton's Record Shadows Blair*, REC. (Northern New Jersey), May 5, 1997, at A15 (comparing the electoral success of Tony Blair to United States President Clinton and emphasizing how Blair, like Clinton, competed successfully for "information-age" votes).

Blair promised a White Paper on proposals for a freedom of information bill during the Queen's Speech at the opening of Parliament.¹³ The lack of an identifiable time table for a bill, however, has led many to question the New Labour Party's commitment.¹⁴ Since 1974, a Freedom of Information Act has permeated Labour manifestos, only to be dropped once the Party was in power.¹⁵ The govern-

13. *Queen's Speech on the Opening of Parliament, Wed. May 14, 1997* (visited Aug. 3, 1997) <<http://www.open.gov.uk/coi/qs97/speech.html>>. In general, a white paper is an official government report prepared on any subject.

14. See Ann Clwyd, *End Secrecy Before It's Too Late Again*, *GUARDIAN*, May 20, 1997, at 17 (lamenting that a Freedom of Information Act is not among the measures the Labor Party has brought forward in the first session of Parliament and arguing that "[i]f we wait two or three years before legislating, ministers will have slipped into the traditional, cosy, protected way of making decisions"); *Leader: Don't Keep us in the Dark*, *INDEP.*, May 11, 1997, at 22 [hereinafter *Leader*] (stating that "the absence of a freedom of information Bill is disappointing" and asking whether the Government regards people's involvement in politics as being restricted to periodic elections). But see Nicholas Timmins, *Delay on Freedom of Information*, *FIN. TIMES* (London), May 15, 1997, at 10 (noting that Mr. David Clark, the Chancellor of the Duchy of Lancaster, has assured that "the government was 'deadly serious' about enacting such a bill"); *infra* note 16.

15. See Clwyd, *supra* note 14, at 17 (reiterating that "[s]ince 1974, the Labour Party has committed itself to freedom of information in manifesto after manifesto"); Fiona Cairns, *Mandelson: Freedom of Information Bill Still On*, *EVENING STANDARD*, May 8, 1997, at A2 (detailing how "[i]n the past, under the leadership of Harold Wilson and Jim Callaghan, Labour promised Freedom of Information legislation—only to drop the idea once in government"); see also The Labour Party General Election Manifesto for 1974, *reprinted in* *THE TIMES GUIDE TO THE HOUSE OF COMMONS OCTOBER 1974* 309 (1974) (stating that "Labour believes that the process of government should be more open to the public . . . We shall: Replace the Official Secrets Act by a measure to put the burden on the public authorities to justify withholding information."); The Labour Party General Election Manifesto for 1983, *reprinted in* *THE TIMES GUIDE TO THE HOUSE OF COMMONS JUNE 1983* 304, 325 (promising to "[i]ntroduce a Freedom of Information Bill, providing for a genuine system of open government and placing the onus on the authorities to justify withholding information"). See generally DAVID BUTLER, *BRITISH GENERAL ELECTIONS SINCE 1945* (2d ed. 1995) (detailing the fourteen general elections that have occurred in Britain since 1945). General Parliamentary elections must be held at least every five years. See *id.* The Labour Party has won seven general elections since 1945 and the Conservative Party has won eight. See *id.* In order to clearly understand the pattern of the British Government's opposition to freedom of information and Labour's attempts, as demonstrated throughout the text it is necessary to have a detailed timeline of the Governments of Britain. The timeline is as follows: 1959-64— The Conservative Government of Harold MacMillan; 1964-66; The Labour Governments of Harold Wilson; 1966-74— The Conservative Government of Edward Heath; 1974-76— The Labour Government of Harold Wilson; 1976-79— The Labour Government

ment claimed that the delay was due to its desire to ensure full consultation on such a complex issue.¹⁶

This comment discusses what makes the enactment of freedom of information legislation so complex in the United Kingdom at the national level. Freedom of information and open government are considered part of an effective democracy. Secrecy breeds inefficiency, lack of accountability, and a general distrust for government. Freedom of information statutes are important because they dismantle governmental secrecy by granting individuals access to information. Part I provides an overview of the secret culture of Britain's government. Part II examines prior attempts to enact freedom of information legislation in Britain. Part III outlines the access statutes of the United States, Australia, and Canada as prototypes for Britain. Finally, Part IV recommends provisions that should be included in Blair's Freedom of Information Act.

of James Callaghan; 1979-92— The Conservative Governments of Margaret Thatcher; 1992-97— The Conservative Government of John Major; and 1997-present— The Labour Government of Tony Blair. See ALAN SKED & CHRIS COOK, *POSTWAR BRITAIN: A POLITICAL HISTORY* (2d ed. 1984) (tracing the Governments of Britain).

16. *Commitment to Freedom of Information Bill and More Open Government Reaffirmed* (Cabinet Office Press Release of 14 May 1997) (visited Nov. 8, 1997) <<http://www.coi.gov.uk/coi>> [hereinafter *Cabinet Office*]; see *Leader*, *supra* note 14 (providing Minister without Portfolio Peter Mandelson's argument as to the delay of a freedom of information bill which was that "Labour 'can't just pull some Bill from the shelf and implement it.'"); see also *Freedom of Information Unit* (visited Aug. 3, 1997) <<http://www.open.gov.uk/m-of-g/foihome.html>> [hereinafter *FOI Unit*] (setting forth the Government's freedom of information legislation schedule). "[T]he Government hopes to publish [a] White Paper this Summer [1997] and to publish a draft bill for consultation early next year [1998]." *Id.* The British Government failed to publish a White Paper during the Summer of 1997; however, to a certain extent, it has advanced its short term goal of "looking at ways in which the existing Code of Practice can best be used to extend openness in the short term." *Id.* Recently, the Lord Chancellor's Department published further information on Open Government, entitled "Open Government – Provision of Information." See *Open Government-Provision of Information* (visited Nov. 8, 1997) <<http://www.open.gov.uk/lcd/open.html>> (stating on Nov. 6, 1997 that [t]he Government is committed to a Freedom of Information Act Pending the introduction of such an act, the Lord Chancellor's Department is committed to providing information in line with the principles laid down in the Code of Practice on Access to Government Information").

I. BACKGROUND

A. THE SECRET CULTURE OF BRITAIN'S GOVERNMENT

Unlike many other parliamentary democracies,¹⁷ Britain does not operate under a written constitution that sets forth the responsibilities and rights of the government and the people.¹⁸ Instead, Britain's law is comprised of parliamentary statutes, common law and judicial decisions, and tradition.¹⁹ In the nineteenth century, it was customary for ministers and civil servants to abide by an internal code of conduct for the dissemination of official information.²⁰ The pervasive underlying premise of this code was that a good government is a closed government. In other words, the public should know only what the government decides it should know.²¹ This concept of gov-

17. See SYDNEY D. BAILEY, *BRITISH PARLIAMENTARY DEMOCRACY* at viii (1958) (defining "parliamentary democracy" as "that system of government in which the rulers are answerable to and dismissible by representatives elected by the people"); cf. David Winder, *Little Known British Tradition: Secrecy*, *CHRISTIAN SCIENCE MONITOR*, Dec. 17, 1986, at 1 (explaining that Britain, in addition to being the "'mother of Parliaments, . . . also laid the foundations for representative democracy and individual liberty with the signing of the Magna Carta in 1215'").

18. See British Information Services, *Britain in the USA* (visited July 11, 1997) <<http://www.britain.nyc.ny.us/>> (differentiating Britain from most other countries because it does not have a written constitution set out in a single document); cf. Chapman, *supra* note 9, at 16 (explaining that Britain's unwritten constitution is the main difference between the United Kingdom and all other countries, as far as freedom of information legislation is concerned); see, e.g., ROBERT PYPER, *THE BRITISH CIVIL SERVICE* 145 (1995) (advancing that the large expanses of the constitution which remain "unwritten" reinforce official secrecy by being "relatively easy to supplement with codes, rules and conventions"). In addition, Mr. Pyper asserts that the lack of any constitutional "right to know" hampers members of the public and their representatives when seeking access to official information. See *id.*

19. See British Information Services, *supra* note 18 (providing internet users with details as to how Britain is ruled); BAILEY, *supra* note 17, at 2 (detailing the "three sources from which the British Constitution is drawn").

20. See PONTING, *supra* note 1, at 1 ("For most of the nineteenth century Britain had no laws to enforce secrecy. Control of official information was exercised through an informal code of conduct among the elite group of politicians and administrators who had a strong interest in treating the conduct of public affairs as an essentially private matter.").

21. See *id.*; see also BIRKINSHAW *supra* note 9, at 25 (describing how, in Britain, political power and survival are inextricably bound with the control of information). Accordingly, if one takes away the government's control of information,

ernmental secrecy was later institutionalized²² by the Official Secrets Act of 1911.²³

1. *The Official Secrets Act of 1911*

Parliament passed the Official Secrets Act in 1911, with little debate, in response to fears of German espionage.²⁴ The Act combines espionage offense provisions with provisions on the disclosure of official information.²⁵ Although members of Parliament presented the bill as a necessary measure to combat espionage and preserve national security, many have argued that "the bill . . . was intended by the Government to have a wider scope."²⁶ Section two of the Official

of when and what to release, one takes away a bulwark of its power. *See id.*; *see, e.g.*, CLIVE PONTING, *WHITEHALL: TRAGEDY AND FARCE* 133 (1986) (characterizing the "information" that the government does disclose as "publicity material" or "public relations material" which masks the real level of secrecy and exposes the public to information that supports the government's activities). *See generally* DAVID LEIGH, *FRONTIERS OF SECRECY: CLOSED GOVERNMENT IN BRITAIN* at ix (1982) (maintaining that people with power have a vested interest not only in hanging on to as much power as possible, but also in obscuring the truth).

22. *See* Wilson, *supra* note 1, at 1 (stating that "[g]overnmental secrecy is institutionalized by the Official Secrets Act"); *see also* PYPER, *supra* note 18 (recognizing the Official Secrets Act of 1911 as the most sweeping secrecy statute in Britain). In addition, Pyper highlights the Thirty Year Rule which is an additional statute contributing to official secrecy by placing a blanket ban on publication of official documents for three decades. *See id.*

23. Official Secrets Act (OSA), 1911 (Eng.) [hereinafter OSA 1911]; *see also* 951 PARL. DEB., H.C. (5th ser.) 1256-61 (1978) (statement of Sir Michael Havers) [hereinafter Havers Statements] (tracing the history of the Official Secrets Act of 1911). The Official Secrets Act of 1911 was not the first Official Secrets Act to emerge; rather, Parliament passed the Breach of Official Trust Bill in 1889. *See id.* at 1256; *see also* BIRKINSHAW, *supra* note 9, at 82 (recounting the historical development of government's control of information and noting in particular that government control of information was not a problem when Parliament passed the first Official Secrets Act).

24. *See* PONTING, *supra* note 1, at 8 (noting that, at the turn of the century, fears of a German invasion and stories of German spies infiltrating Britain began to proliferate); *see also* Havers Statements, *supra* note 23, at 1257 (describing how on August 18, 1911, the Bill passed through "all of its stages" and the Attorney General said that there was "nothing novel in the principle of the Bill").

25. *See* PONTING, *supra* note 1, at 9 (asserting that the Government opted for additional protective cover by combining espionage and disclosure in the same act).

26. *See* BIRKINSHAW, *supra* note 9, at 97-98 (citing Frank Committee, Cmnd 5104, vol. 1 (1972), at 53). The Frank Committee Command Paper reported the circumstances surrounding the enactment of the OSA of 1911:

Secrets Act makes it a criminal offense to disclose official information without authority.²⁷ Under the Act, it is also an offense to receive such information.²⁸ "It is immaterial whether or not the recipient subsequently passes on the information."²⁹ As such, a presumption developed, and continues to exist, whereby all government information is presumed official and secret—not to be disclosed.³⁰ Although

The debates give a clear impression of crisis legislation, aimed mainly at espionage. Closer study, and reference to official sources, reveal a different story. This legislation had been long desired by governments. It had been carefully prepared over a period of years. One of its objects was to give greater protection against leakages of any kind of official information whether or not connected with defense or national security. This was clear enough from the text of the Bill alone. Although section two of the Act was much wider in a number of respects than section two of the 1889 Act, the files suggest that the Government in 1911 honestly believed that it introduced no new principle, but merely put into practice more effectually the principle of using criminal sanctions to protect official information. At all events, the Government elected not to volunteer complete explanations of their Bill in Parliament. And Parliament, in the special circumstances of that summer, did not look behind the explanations offered.

Id. at 97-98.

27. See 919 PARL. DEB., H.C. (5th ser.) 1878-81 (1976) (statement of the Secretary of State for the Home Department, Mr. Merlyn Rees) [hereinafter Rees Statements] (describing the criminal liability under Section two of the Official Secrets Act); Des Wilson, *Information is Power: The Causes of Secrecy*, in THE SECRETS FILE: THE CASE FOR FREEDOM OF INFORMATION IN BRITAIN TODAY 13, 13-15 (Des Wilson ed., 1984) (describing section two). Compare *id.*, with OSA 1989, *supra* note 10, § 1 ("A person who is or has been a member of the security and intelligence services . . . is guilty of an offense if without lawful authority he discloses any information, document or other article relating to security or intelligence . . ."), and OSA 1989, *supra* note 10, § 2 ("[A] person who is or has been a Crown Servant . . . is guilty of an offense if without lawful authority he makes a damaging disclosure of any information, document or other article relating to defense . . .").

28. See Wilson, *supra* note 27, at 15 ("Not only does it [Section 2] make it an offence to disclose official information, but it also makes it an offence to receive it.")

29. See *id.* (clarifying the nature of an offense under the Official Secrets Act of 1911) Under the act, it had to be proved that the recipient knew at the time that he received the information that the information was communicated to him or her "in contravention of the Official Secrets Act." *Id.* If this is shown, what was done with the information subsequently is irrelevant. See *id.* An individual who receives such information can defend himself only by proving "that the information was communicated contrary to his or her desire." *Id.*

30. See PONTING, *supra* note 1, at 1; 219 PARL. DEB., H.C. (6th ser.) 598 (1993) (statement of The Chancellor of the Duchy of Lancaster in 1993, Mr. William Waldegrave) [hereinafter Waldegrave Statement] (conceding that the government "keep[s] too many secrets . . . [W]e make secrets of matters that should not be secret").

the Official Secrets Act of 1911 was amended in 1989,³¹ it still stands as a formidable barrier to the implementation of freedom of information legislation by maintaining Britain's traditional secretive culture and a norm of non-disclosure of information.³²

2. Ministerial Accountability

Comprehending the principle of Ministerial Accountability is germane to understanding Britain's closed government.³³ This con-

31. See OSA 1989, *supra* note 10. See generally Patrick Birkinshaw, *Access, Disclosure and Regulation*, 140 NEW L.J. 1637 (1990) (describing the changes in provisions in the OSA that took place pursuant to the 1989 amendments, including the extensive 1920 amendments). In general, the 1989 legislation ends the broad criminalization of the "disclosure of 'official information without authority.'" *Id.* The OSA limits the application of the criminal law to the "unauthorized 'damaging' disclosures in six areas of protected information[:] security and intelligence; defense; prevention of crime; information obtained under security or interception warrants; information relating to international relationships; and that received from overseas Governments in confidence." *Id.*

32. See Birkinshaw, *supra* note 31, at 1637 (stating that although the legislation appears liberalising[,] . . . certain disclosures are automatically presumed damaging"); 219 PARL. DEB., H.C. (6th ser.) 641 (1993) (statement of Mr. Tony Wright) [hereinafter Wright Statement] (undercutting the reforms of the OSA which were eighty years in the making, while stating "the new legislation not only continued to allow ample scope for continued prosecutions . . . but was emphatically not intended to form part of a widening of access to official information"). But see *infra* notes 277-78 and accompanying text (setting forth the argument against a radical change of the OSA).

33. See LEIGH, *supra* note 21, at 19 ("Ministerial responsibility is stone dead as a justification for bureaucratic secrecy, but it is a pity it will not lie down."); Des Wilson, *The Struggle to Overcome Secrecy in Britain*, in *THE SECRETS FILE: THE CASE FOR FREEDOM OF INFORMATION IN BRITAIN TODAY* 125, 134-35 (Des Wilson, ed. 1984) (providing a copy of a letter written by Prime Minister Thatcher to the 1984 Campaign for Freedom of Information stating that Parliament is the reason why Britain does not need freedom of information legislation). The Prime Minister's letter states:

Under our constitution, Ministers are accountable to Parliament for the work of their departments, and that includes the provision of information. A statutory right of public access would remove this enormously important area of decision-making from Ministers and parliament and transfer ultimate decision to the courts. No matter how carefully the rights were defined and circumscribed, that would be the essential constitutional result. The issues requiring interpretation would tend to be political rather than judicial, and the relationship between the judiciary and the legislature could be greatly damaged. But above all, Ministers' accountability to parliament would be reduced, and parliament itself diminished In our view the right place for Ministers to answer for their decisions in the essentially 'political' area of information is in parliament.

Id.

stitutional doctrine makes ministers, not civil servants, accountable to Parliament for their departments' policies and actions.³⁴ In effect, this doctrine makes ministers responsible for all decisions as to what information can be released to Parliament.³⁵ As such, the minister is

34. See GRANT JORDAN, *THE BRITISH ADMINISTRATIVE SYSTEM* 210 (1994) ("The basic idea of *individual* ministerial accountability is that it is a means of ensuring parliamentary control over individual ministers and departments."). In elaborating on this principle, Jordan notes that individual Ministers are accountable for not only their own actions and decisions, but also for those of civil servants under their authority. See *id.*; see also COLIN CAMPBELL & GRAHAM K. WILSON, *THE END OF WHITEHALL: DEATH OF A PARADIGM?* 11 (1995) (asserting that ministers are the "only legitimate representatives of their departments in public. . . [O]nly ministers could answer to Parliament. . . Civil servants were neither seen nor heard in public . . ."). Campbell and Wilson also compare the principle of individual ministerial responsibility to the principle of collective responsibility, which is generally represented as one of the major doctrines under the British constitution. See *id.* at 10-13. Collective responsibility is based upon the idea of collective decision making; that is, all ministers are responsible collectively for the government's policy. See *id.* at 12. For example, it is a requirement that the Minister of Agriculture be prepared to vote in the House of Commons or speak in the country in favor of the government's defense policy. See *id.* See generally Geoffrey Marshall, *Introduction to MINISTERIAL RESPONSIBILITY* 1, 1-11 (Geoffrey Marshall ed. 1989) (describing the doctrines of ministerial responsibility, the "most general principle of parliamentary government, and collective responsibility, "one of the major conventions of the constitution"). But see DAVID JUDGE, *THE PARLIAMENTARY STATE* 136-146 (1993) (characterizing individual ministerial responsibility as "an erroneous doctrine" and collective responsibility as "old wine in old bottles"); JORDAN, *supra* at 218 (discussing the "incompatibility" of collective and ministerial responsibility in that the delinquent Minister is able to "escape individual ministerial responsibility by sheltering under the probability that the House cannot selectively punish him"); TREVOR SMITH & ALISON YOUNG, *THE FIXERS: CRISIS MANAGEMENT IN BRITISH POLITICS* 3 (1996) (lambasting the concept of ministerial responsibility and describing it as "now accepted as almost totally inoperative"); cf. *POLITICS UK* 430 (Jones et al., 1991) [hereinafter *POLITICS*] (delineating the modern role of ministerial responsibility in the UK; whereby, ministers have to answer for their own conduct but are not deemed to be held responsible for that of their officials "unless this was in the name and cognizance of the minister").

35. See PONTING *supra* note 1, at 44-45 ("[A]lthough in this era of vastly expanded departmental responsibilities it is no longer feasible for a minister to exercise . . . control over . . . his civil servants, he can still control the flow of information provided to MPs through answers to parliamentary questions and the evidence presented to select Committees."). The Prime Minister must stand before Parliament bi-weekly and answer questions. See *id.* The procedure differs, however, for individual departments. See Harold Wilson, *Prime Minister Answerability*, in *MINISTERIAL RESPONSIBILITY* 95, 96 (Geoffrey Marshall ed., 1989). Most departmental ministers face questions only every three, four, or five weeks, and they can

able to control the flow of information pertaining to his department.³⁶ Moreover, under this doctrine, this information may never be placed in the public domain because media access to civil servants is restricted.³⁷ A freedom of information act will curtail a minister's ability to control the flow of information. Such a measure will make the minister more accountable to the public, as well as to Parliament, because the minister's activities will be open to wider scrutiny. In order for Blair to succeed in capturing Parliament's and his Cabinet's support, he must introduce a freedom of information bill that is in harmony with this principle. Particularly, he must focus on the greater accountability that will ensue under such legislation even if ultimate review rests with the courts.³⁸

3. Crown Privilege

Another British tradition that aids in maintaining the culture of secrecy is the custom of using "public-interest certificates" under the doctrine of crown privilege.³⁹ "Crown privilege means that courts have no authority to disclose the workings of government if a minis-

divide the questions for answering among the members of the whole departmental team. *See id.*; *see also* POLITICS, *supra* note 34, at 336 (detailing Question Time). Ministers who oppose Freedom of Information legislation assert that Parliamentary Question Time provides sufficient openness and flow of information. *See id.* They characterize Question Time which occurs every day from Monday through Thursday for fifty-five minutes as an act of "scrutinizing government." *See id.* *But see* PONTING, *supra* note 1, at 45 (criticizing the ineffectiveness of Question Time).

36. *See* PONTING, *supra* note 1, at 45 (indicating that Ministers habitually reply to Parliamentary Questions with only a minimum of information and may decline to answer on the grounds that information is not readily available).

37. *See* CAMPBELL & WILSON *supra* note 34, at 11 (noting that journalists and academic researchers have been denied access to civil servants because of the doctrine of individual ministerial accountability).

38. *See* Wilson, *supra* note 33, at 134 (discussing Margaret Thatcher's strongly held views that any interference by the judiciary will damage the principle of ministerial responsibility).

39. *See* LEIGH, *supra* note 21, at 43 (stating in regard to informational control that "the final loophole stopped up by Whitehall is in the courts"). Specifically, Leigh explains that until 1968, a ministerial certificate was enough to prevent government documents from being disclosed in the courts. *See id.* *See generally* A.P. TANT, *BRITISH GOVERNMENT: THE TRIUMPH OF ELITISM* 25-27 (1993) (contrasting the role of British courts in bringing about Freedom of information legislation and going against the government with the roles of United States and Swedish courts in this area).

ter considers such disclosure to be against the public interest.”⁴⁰ Under this doctrine, many categories of documents, including Cabinet minutes and diplomatic exchanges are barred from the courts.⁴¹ Judges, in the past, did not draw on their official power to compel disclosure of documents or review ministers’ reasons as to why the withholding of the documents is in the public interest. The implications of these withholdings are severe since British judges and juries are only required to review and evaluate the evidence placed before them.⁴² Although the courts of England have narrowed the scope and application of this privilege since the 1970s by reviewing ministers’ reasons for claiming such certificates,⁴³ the government continues to

40. See TANT, *supra* note 39, at 25 (defining Crown Privilege); E.R. HARDY IVAMY, MOZLEY & WHITELEY’S LAW DICTIONARY 216 (11th ed. 1993) (defining public interest immunity as “[t]he right of the Crown to withhold the disclosure and production of a document on the ground that its disclosure and production would be injurious to the public interest”). The Crown can decide either to waive or to claim such a right; however, the person to whom the document relates has no power to assert a claim. See *id.* Only the minister of the government department who seeks the certificate can claim that it should be withheld and/or disclosed on the basis of public interest. See *id.* The court can then either accept or deny the claim based on its discretion. See *id.*

41. See LEIGH *supra* note 21, at 44 (detailing the types of information that Ministers withheld under the doctrine including cabinet minutes, diplomatic exchanges, etc., and highlighting the extreme withholdings, such as an army doctor who was not allowed to testify on a report about a soldier’s condition). The British crown privilege was picked up in the United States as a justification for the governmental “Executive Privilege” or the official information privilege now known as the “deliberative process privilege.” See generally 26 CHARLES ALAN WRIGHT & KENNETH A. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, § 5663 (1992) (documenting the history of governmental privileges in the United States). Both the “executive privilege” and “deliberative process privilege” concern governmental information, the disclosure of which would chill the candor in policy making. See *infra* notes 415-17 and accompanying text (describing Exemption five of the United States’ Freedom of Information Act which protects certain inter and intra agency documents pursuant to the deliberative process privilege).

42. See PONTING *supra* note 1, at 50 (emphasizing that official secrecy affects the process of civil law in Britain, particularly under the doctrine of Crown Privilege because the jury has no responsibility for ensuring that the evidence is complete).

43. See TANT, *supra* note 39, at 26 (describing the narrowing of the scope of Crown Privilege in the principle case of *Conway v. Rimmer*). *Duncan v. Cammell Laird*, 1 All E.R. 587 (H.L. 1939), established two public interest tests under British law: with regard to the content or with regard to the class of document. See *id.* The court held that the minister’s decision was final where a signed affidavit held that the public interest was served by withholding a document falling into either of these categories. See *id.* In 1968, however, the House of Lords “revolutionized the

assert this privilege as a justification for withholding information, even when the disclosure of the information would be in the public interest.⁴⁴

A freedom of information act would require ministers to disclose certain information and provide a more extensive mandatory system of review.⁴⁵ Ultimately, if Blair chooses the courts as the final review mechanism, the judicial system's power over the government will increase.⁴⁶ Accordingly, the British government fights freedom of information statutes and latches on to the traditional Crown Privilege, Official Secrets Act, and Ministerial Accountability as means of retaining control over its information and power.⁴⁷ The next section examines several scandals which have exposed the government's use of these three mechanisms to maintain its power through governmental secrecy.

B. RECENT SCANDALS EXPOSING BRITAIN'S SECRET CULTURE

Four main scandals have surfaced in the courts since the early 1980s that have revealed Britain's secretive culture.⁴⁸ These events

law on Crown Privilege" in *Conway v. Rimmer*, 1968 P.910 (Eng. C.A.). See T. MURRAY RANKIN, *FREEDOM OF INFORMATION IN CANADA: WILL THE DOORS STAY SHUT?* 19 (1977) (explaining how the Canadian judiciary continues to regard English Crown Privilege decisions as very persuasive, if not binding authority, citing celebrated English Crown Privilege cases). Specifically, Conway introduced two new principles: "first that courts did have the right to inspect documents for which Crown Privilege was being claimed, and secondly, that claims of Crown Privilege based upon the class of a document were more likely to be questioned." *Id.*; see also *infra* Part I.B.4 (discussing how five ministers signed public interest certificates under the doctrine of Crown Privilege preventing three British executives from proving their innocence in court in the Matrix Churchill affair).

44. See *infra* Part I.B.4 (describing the Matrix Churchill case).

45. Cf. BIRKINSHAW, *supra* note 9, at 138 (noting that the Local Government (Access to Information) Act of 1985 provides for access to local authorities' information).

46. See *id.* at 24 (suggesting that taking away the government's power to preserve information could establish new centers of power).

47. See *infra* Part II (detailing the strong ministerial reaction against several attempts to introduce freedom of information legislation).

48. Although the four scandals included in the text illustrate the excessive level of secrecy in Britain and the need for freedom of information legislation, another interesting court case and an incident that received public attention are *Regina v. Secretary of State for Defense, ex parte Sancto* and the "apple juice incident." See Roy Edey, *Minister's Outrageous Decision Not Unlawful*, 142 NEW L.J. 1748 (1992) (detailing the "absurdity" of the *Sancto* case); Adam Sage, *The Juice of*

are important because they have stimulated intense criticism over such secrecy, making it more likely that Prime Minister Blair's proposal for a freedom of information statute will reach fruition.

1. *The Sarah Tisdall Case*

Sarah Tisdall,⁴⁹ a 23 year old civil servant, working in the office of the Secretary of State for Foreign and Commonwealth affairs, plead guilty to communicating classified information in violation of Section two of the Official Secrets Act of 1911.⁵⁰ Tisdall sent photocopies of two "confidentially" marked documents pertaining to the arrival of cruise missiles in Britain to the local newspaper.⁵¹ Affirming Tisdall's sentence of six months imprisonment, the appellate court held that such a sentence was unavoidable because "an element of deterrence was required."⁵² Although Tisdall agreed to be prosecuted

This Apple is a British Secret, INDEP., Feb. 14, 1993, at 3 (revealing how the Ministry of Agriculture, Fisheries and Food kept secret their knowledge that "high levels of a carcinogenic chemical, patulin, had been found in some brands of apple juice" and stating that "In Britain, there is no Freedom of Information Act and no way of forcing the Government to disclose such details"). In *Sancto*, the Secretary of State denied Kirk Sancto's parents access to their dead son's Army Board of Inquiry Report, which contained wrongful allegations that their son died due to being the "worse for drink." Edey, *supra*, at 1748. Sancto's parents have no remedy because the "Minister can act as judge and jury in his own cause and protect the Army from embarrassment without impunity," even when there is a pathologist's report saying otherwise. *See id.*

49. *See R v. Tisdall*, 6 Crim. App. 155 (Eng. C.A.).

50. *See id.*; OSA 1911, *supra* note 23, at § 2; *see also* PONTING, *supra* note 1, at 63-64 (describing the trial); Wilson, *supra* note 33, at 146-47 (detailing the case). *See generally* DAVID CAUTE, *THE ESPIONAGE OF THE SAINTS* at ix (1986) (reporting on the punitive measures taken against a Zimbabwean writer, Dambudzo Marechera, and two British civil servants, Sarah Tisdall and Clive Ponting, who in 1984, committed "word-crime").

51. *See R. v. Tisdall*, 6 Crim. App. at 155 (recounting how on Oct. 21, 1983 Tisdall "took the opportunity of a lull in the busy affairs to read the contents of two minutes and she, having read them, decided to make an extra copy of each . . . and take them to the Guardian newspaper). The Guardian Newspaper was subsequently brought to Court by the British Crown in Secretary of State for Defense and another v. Guardian Newspapers Ltd., 3 All E.R. 601 (H.L. 1984) in order to compel the return of the documents. *See* 3 All E.R. 601 (H.L. 1984). At issue in the case was whether the Crown was entitled to order disclosure and whether disclosure was necessary in interests of national security. *See id.* The Court held that the Guardian must disclose the document because "a potential threat to national security was clearly revealed" but Lord Fraser dissented. *Id.*

52. *See Tisdall*, 6 Crim. App. at 155 ("It is of course impossible to run any concern, and certainly not possible to run a government department . . . if confi-

if she published any official information⁵³ when she signed the Official Secrets Act Declaration Form prior to her employment, many felt that her sentence was too severe.⁵⁴ Not only had national security not been compromised by the release of these documents, but Tisdall was not given the opportunity to make a defense on the grounds that she was acting in the public interest.⁵⁵ Furthermore, after her trial, Tisdall criticized her superior's "deliberate attempt to avoid accountability in Parliament" for her wrongful actions.⁵⁶ Interestingly, the Government used the Official Secrets Act to prosecute Tisdall, but it ignored the principle of ministerial accountability because its use would have caused further embarrassment and scandal among the higher echelons of the British government.⁵⁷

2. *The Clive Ponting Case*

The second case to draw national attention to Britain's secretive

dential and secret memoranda are being divulged to outside bodies by members of the staff [T]hose who deliberately break the law in this way will not be treated with much sympathy").

53. See *id.* (citing the Official Secrets Declaration Form) In pertinent part, the form read: "I am aware that I should not divulge any information gained by me [I] understand also that I am liable to be prosecuted if I publish without official sanction any information"

54. See PONTING, *supra* note 1, at 64 (stating that "the unexpected and disproportionate severity of the sentence provoked almost universal condemnation"); WILSON, *supra* note 33, at 147 (providing the arguments asserted by the 1984 Campaign for Freedom of Information about the Tisdall case); CAUTE, *supra* note 50, at 124 (noting that the Leader of the Opposition denounced Tisdall's prison sentence, MP's visited her in jail, and women demonstrated outside Holloway Gaol where she was imprisoned).

55. See *Tisdall*, 6 Crim. App. at 155 (stating that the Court did not allow the introduction of the argument that Tisdall was "incensed by political subterfuge" and that she had not realized that it was common knowledge that these missiles were due to be delivered from America); see also Wilson, *supra* note 33, at 147 (providing the Campaign for Freedom of Information's remarks about the Tisdall case and its argument that Tisdall should have been provided a public interest defense as it exists in the United States).

56. See PONTING, *supra* note 1, at 64 (describing how at trial Tisdall plead guilty but afterwards defended her actions and "spoke of the immorality of the Defense Secretary's deliberate attempt to avoid accountability in Parliament").

57. See generally JORDAN, *supra* note 34, at 210 (characterizing ministerial responsibility and the expectation that a minister step down for the actions of a civil servant as "fruitless" since, "this principle . . . runs into the party political factor that it would be politically embarrassing for the pro-Government majority party . . . to criticize its own leading members").

culture, also for a breach of the Official Secrets Act of 1911, was the Clive Ponting case.⁵⁸ Ponting, as head of a section of the Defense Ministry, had the duty of preparing draft replies and answers on the sinking of the Argentinean battle cruiser "General Belgrano."⁵⁹ Ponting disagreed with his co-workers' interpretation of the event, and furthermore, how they planned to report this information to Parliament.⁶⁰ As a result, Ponting sent two documents to a member of Parliament who was trying to uncover the facts regarding the Belgrano.⁶¹ He was subsequently prosecuted under Section two for communicating official information to a person with whom he was not authorized to share such information.⁶² At Ponting's trial, the first full-scale public interest defense was aired,⁶³ and Ponting was ac-

58. See Godfrey Hodgson, *Why Section Two is Only the Tip of the Iceberg*, FIN. TIMES (London), Feb. 16, 1985, at 25 ("The Ponting case was not only about official secrecy. It was also about openness—or rather the lack of openness—in British Government."); *Official Cleared of Secrets Breach*, FACTS ON FILE WORLD NEWS DIGEST, Feb. 15, 1985, at 109 B1 (indicating that "the case's outcome was considered significant in the current debate over whether the secrets law should be strengthened or liberalized").

59. See BIRKINSHAW, *supra* note 9, at 101-03 (detailing the Ponting case); CAUTE, *supra* note 50, at 157 (providing a thorough discussion of the Ponting and Belgrano affair with the main focus being on the fact that the decision to prosecute Ponting was a political one). The General Belgrano, an Argentine battle cruiser, was torpedoed by a British submarine during the Falklands War with Argentina, and resulted in the death of 368 Argentine men. See *id.* at 153-55 (detailing Britain's role in the sinking of the Belgrano); see also Harvey Morris, *Secrets*, REUTERS, LTD., Feb. 17, 1985 (explaining why Ponting resigned).

60. See CAUTE, *supra* note 50, at 64 (illustrating the ways in which the Government was deceiving Parliament, for example, the different course and position that the Belgrano was in before the torpedoing and the fact that the HMS Conqueror had been shadowing the boat for thirty hours prior); see also Morris, *supra* note 59 (quoting Ponting who said that "his argument and that of the opposition is that the government deliberately misled parliament about the facts of the incident in order to save itself political embarrassment rather than to safeguard national security").

61. See generally CAUTE, *supra* note 50, at 145-211 (detailing the drafts and series of events that resulted in Ponting sending two documents to MP Tam Dalyell).

62. See BIRKINSHAW, *supra* note 9, at 101 (recounting how Ponting was prosecuted for breach of § 2(1)(a), which made it a crime to communicate official information to any person other than to whom is authorized to receive it, or "a person to whom it is his duty in the interest of the state to communicate it"). (emphasis added). Whether or not it was in the interest of the state was a key issue at trial. It resulted in Ponting's public interest defense.

63. See PONTING, *supra* note 1, at 64 (observing that "[t]he ten-day trial in

quitted, even though the crucial rulings in law went against him.⁶⁴ This trial was described by many as a "political prosecution brought by an embarrassed government,"⁶⁵ which marked the death for Section two of the Official Secrets Act of 1911.⁶⁶ Courts refused to allow the "catch-all," blanket prohibitions of Section two to ascertain criminal liability.⁶⁷ Although this case highlights the increasingly active role that British courts are taking to combat excessive secrecy by allowing a public interest defense, it was ultimately the jury who defied the law.⁶⁸

A freedom of information act would further the courts' role in checking the government. Additionally, such an act would allow both the public and officials access to and freedom with information that is in the public interest, like the information in the Ponting case.

3. *The Peter Wright Case*

Commonly referred to as the Spycatcher Affair, this third case illustrating the government's desire to keep its activities secret, did not even take place in Britain.⁶⁹ Peter Wright, a former British Secret

February 1985 provided the first full-scale airing of a public interest defense"); Morris, *supra* note 59 (providing Ponting's justifications for disclosing the Belgrano information, particularly that the information stalled further questioning in Parliament was the most "blatant" and misleading cover-up that he had come across in his 14 years in the civil service).

64. See CAUTE, *supra* note 50, at 166, 173 (describing how part of the trial was held *in camera*, the "best interest of the state" was interpreted as the best interest of the government of the day, and lack of *mens rea* was not allowed as a defense).

65. PONTING, *supra* note 1, at 65.

66. See BIRKINSHAW, *supra* note 9, at 103 (stating that Ponting's acquittal was a death knell for Section two of the Official Secrets Act of 1911); *The Ponting Acquittal: Others May Still Be Caught In the Net*, ECONOMIST, Feb. 16, 1985, at 29 (stating in regard to the OSA that "Mr. Ponting's acquittal has been hailed as its death-knell"); UK: David Hopper and Christopher Capro Look at the Planned Reform of the Official Secrets Act, BROADCAST, Oct. 28, 1988 [hereinafter *Reform*] (advancing that "[t]he move to reform Section 2 arises because it has become unworkable since the acquittal of Clive Ponting in 1985").

67. See *infra* note 101 and accompanying text (discussing the "catch-all" quality of Section two).

68. See *Moles' Lib*, ECONOMIST, Feb. 16, 1985, at 13 (stating that "[e]verybody loves an independent jury . . . the eight men and four women . . . threw out the government's charges").

69. See PONTING *supra* note 1, at 65-66 (titling the excerpt in his book "the Spycatcher Affair" and describing the trial in Australia). Although the main case took place in Australia, the Thatcher Government brought suits in New Zealand,

Service agent published his memoirs in Australia in an attempt to avoid prosecution under the Official Secrets Act.⁷⁰ Accordingly, the British government brought suit in Australia seeking injunctions under the law of confidentiality⁷¹ to prevent subsequent circulation of this information.⁷² The Australian court held that it was not justified in restraining media reports concerning unauthorized disclosures unless there was a risk of further damage to Britain's national security.⁷³ Since this risk had become moot, due to the passage of time and the publication of the novel in the United States, the British government suffered a costly defeat.⁷⁴ The trial helped expose the illegal activities of Britain's Secret Service and "illustrated the government's resistance in allowing the public interest and freedom of the press to override the civil law of confidentiality."⁷⁵

Hong Kong, and Britain to prevent the local papers from publishing Wright's allegations and details of all of the trials. *See id.* *See generally* THE SPYCATCHER CASES (Michael Fysh ed., 1989) (providing all of the Spycatcher Court Judgments that occurred in Australia, Britain, New Zealand, and Hong Kong).

70. *See* BIRKINSHAW *supra* note 9, at 103 (stating that "Wright sought to publish his memoirs in Australia—outside the criminal jurisdiction of [Section] 2").

71. *See* ALISON COLEMAN, THE LEGAL PROTECTION OF TRADE SECRETS 4 (1992) (detailing that in English law, three conditions must be satisfied for a civil action for breach of confidence: first, the information must be confidential, second, the information must have been disclosed in circumstances which give rise to an obligation of confidence, and third, there must be an actual or anticipated unauthorized use or disclosure of the information); Nicholas Rose, *Whistleblowing—Time for a Change?*, 145 NEW L.J. 6680 (1995) ("All civil servants owe the Crown, as their employer, a duty of confidentiality Whether or not the criminal law applies they must protect official information which is held in confidence because it has been communicated in confidence . . ."). In response to the claim that Wright owed a duty to the Crown, his attorney argued that the government's case was an attempt to enforce the OSA in Australia, a separate sovereign entity, in contravention of the recognized principle of international law that "the courts of one country will not enforce the penal or public laws of another." MALCOLM TURNBULL, THE SPYCATCHER TRIAL: THE SCANDAL BEHIND THE #1 BEST SELLER 38 (1989).

72. *See* Attorney General v. Heinemann Publishers, Australia Pty. Ltd. and Wright (1987) N.S.W.S. Ct. Cas., *reprinted in* TURNBULL, *supra* note 71, at 352-53 (explaining that because there was no contract between the parties, the British Attorney General could only succeed by establishing that the disclosure of information would be detrimental to the public interest of the United Kingdom).

73. *See id.* (harmonizing the risk of national security with the public interest).

74. *See* *The Wright Case: Wrong Decision* 137 NEW L.J. 723 (expressing the absurdity of protecting information that has already been released in the United States). Spycatcher had been published in the United States and Canada prior to its release in Australia. *See id.*

75. *See* BIRKINSHAW *supra* note 9, at 103-04 (construing the Spycatcher as a

Although the British government suffered a defeat in this instance, the government might have prevailed in certain British courts. Had a freedom of information act been in place, the expensive trial could have been prevented since most of the information that Wright disclosed would have initially been deemed disclosable in the public interest.

4. *The Matrix Churchill Case*

Three company executives from the machine tools firm, Matrix Churchill, were prosecuted for the illegal export of arms to Iraq in violation of Export of Goods Control Orders.⁷⁶ The executives plead not guilty on the basis that the government was fully aware of these exports and was turning a blind eye to such exportation.⁷⁷ The executives made requests for internal memoranda which would prove their innocence; however, five ministers had signed public interest certificates to suppress the release of this information and the government's knowledge of the exportation.⁷⁸ Thus, these defendants were almost imprisoned because certain ministers thought that the

good example of the government's attempts to remain secret); *see also Reform*, *supra* note 66 (noting that "[f]ollowing the Spycatcher ruling, any intelligence officer seeking to emulate Wright would be held to be subject to a lifelong duty of confidentiality and could not publish his allegations without the consent of Government").

76. *See* PYPER *supra* note 18, at 161 (citing IAN LEIGH, *MATRIX-CHURCHILL, SUPERGUN AND THE SCOTT INQUIRY* (1993)).

77. *See* Richard Norton-Taylor, *The Scott Report: Punches are Pulled Over Blame But Ministers Feel Body Blow*, *GUARDIAN*, Feb. 16, 1996, at 12 (stating that three ministers secretly relaxed export controls to Iraq at the end of 1988 after the cease-fire in the Iran-Iraq war and failed to be forthcoming with this policy); *cf.* *R v. Blackledge and Ors*, 326 Crim. App. (1995) (using the documents and information discovered in the Matrix Churchill case, the defendants plead "not guilty" for the same reason and the court of appeals reversed the lower court's decision holding that the documents should have been made available to the defense before the trial to demonstrate their innocence).

78. *See* PYPER, *supra* note 18, at 161 (emphasizing the government's knowledge); Sally Weale, *The Scott Report: Sir Nicholas Lyell Should Have Told Prosecution of Heseltine's Reservations*, *GUARDIAN*, Feb. 16, 1996, at 15 (reporting on the criticism that Sir Nicholas, the Attorney General, received for preparing the Public Interest Immunity (PII) certificates which were more commonly known as "gag orders"). "The PIIs prevented disclosure to the court of documents which would have shown that guidelines on exports to Iraq had changed and thus that the Matrix Churchill directors were not in breach of government guidelines." *Id.*

withholding of this information was in the public interest.⁷⁹

As illustrated in these four cases, the British Government goes to great lengths to conceal its inner-workings. Although the Official Secrets Act has lost some of its authority, as evidenced by the Ponting trial, the Act still makes it an offense to disclose or receive certain governmental information.⁸⁰ It is important to note that the Tisdall, Ponting, and Wright cases all focus on civil servants—not on the general public. In terms of the general public's comprehensive right of access to government information, little has changed.⁸¹ These cases are important to the freedom of information campaign because they have prompted the public to distrust the government and to request statutory rights of access to information.⁸² Britons fear more scandals. Hence, a freedom of information act is necessary to expose scandals and serve as a check on government officials so that scandals are less likely to occur in the first place.⁸³ Parliamentary debates as to why a freedom of information act is necessary in Britain further highlight this argument⁸⁴ and the Matrix Churchill case in particular.⁸⁵ The next section examines some of these debates.

79. See Maurice Frankel, *Implications of Government Secrecy Over Decisions on Exports to Iraq*, TIMES (London), Nov. 23, 1992, (Features) (charging that "[t]he implication is that ministers used their control of official information to protect themselves from embarrassment, regardless of the cost to the defendants"); Geoffrey Robertson, *Misleading By Example*, OBSERVER, May 25, 1997, at 18 (book review) (summarizing Scott's report and pointing out that "[t]he Matrix Churchill scandal occurred because Ministers and mandarins and lawyers employed by the Government chose to protect the State at the expense of their duty to justice"). According to Robertson, Scott's most important recommendation "is the urgent need for a freedom of information act." *Id.* "His report provides ample evidence that the decisions that were made about arming Saddam would have been better decisions had such legislation been in force." *Id.*

80. See *supra* notes 27, 31-32 (detailing the criminal liability under the Official Secrets Act, as amended in 1989).

81. See *supra* notes 11 & 14 (providing the Labour Government's promise to finally bring a freedom of information statute to Britain).

82. See New Labour, *supra* note 11.

83. See Timmins, *supra* note 14, at 10 (advocating the introduction of a freedom of information act).

84. 219 PARL. DEB., H.C. (6th Ser.) (1992-93).

85. See Frankel, *supra* note 79, (Features).

II. PRIOR ATTEMPTS AT CURTAILING THE SECRECY AND IMPLEMENTING FREEDOM OF INFORMATION LEGISLATION

Despite the scandals, Britain remains without a freedom of information act.⁸⁶ Over the years, however, the government has become more open.⁸⁷ Many argue that this increased openness, non-statutory rights of access,⁸⁸ and voluntary disclosure of official information, however, are not enough.⁸⁹ Before examining the access statutes of other countries and making recommendations as to the form of the United Kingdom's freedom of information act, it is necessary to examine prior acts,⁹⁰ initiatives,⁹¹ and arguments⁹² brought before Parliament.

86. See discussion *supra* Part I.B (detailing the Sarah Tisdall case, the Clive Ponting case, the Peter Wright case, and the Matrix Churchill case all of which expose Britain's secret culture).

87. See *infra* notes 269-76 and accompanying text (discussing five recently enacted statutes that British MPs point to as evidence of the government's increasing openness).

88. See discussion *infra* Part II.C.2 (explaining the non-statutory Code of Practice on Access to Official Information which currently controls information disclosure in Britain, on the national level).

89. See Clwyd, *supra* note 14 (quoting Tony Blair at the 1996 Campaign for Freedom of Information Awards Night). Blair said:

A Freedom of Information Act would signal a culture change that would make a dramatic difference to the way that Britain is governed . . . It is part of bringing our politics up to date, of letting politics catch up with the aspirations of people *and delivering not just more open*, but more effective and efficient government for the future.

Id. (emphasis added).

90. See discussion *infra* Part II.B.2 (discussing the Local Government (Access to Information) Act).

91. See discussion *infra* Parts II.A.1., II.C.2 (discussing Labour Prime Minister Harold Wilson's inquiry into governmental secrecy, the Croham Directive, and Conservative Prime Minister John Major's White Paper on open government).

92. See discussion *infra* Parts II.A., IIB., IIC (providing MPs arguments in favor of and in opposition to freedom of information legislation).

A. 1970-1980⁹³1. *Wilson and Croham*

Just prior to the 1970s, the Committee of the Civil Service, led by Lord Fulton, presented a report to Labour Prime Minister Harold Wilson.⁹⁴ The report argued that the government was excessively secret and that a full inquiry to put an end to this secrecy was necessary.⁹⁵ As a result of this report, Wilson conducted an inquiry and produced a White Paper entitled "Information and the Public Interest."⁹⁶ Many freedom of information advocates assert that Wilson's inquiry was incomplete and unsatisfactory because it was conducted without consulting other governmental departments and his deliberations were confidential.⁹⁷ Critics were also unhappy with the substance of the White Paper. The Paper reported that the government was already releasing more information to the public and that the Official Secrets Act was no barrier to greater openness.⁹⁸

Two years later the Conservatives came to power pledging in their manifesto to curb secrecy and reform the Official Secrets Act.⁹⁹ An-

93. A chronological breakdown was chosen by the author as a means of evaluating the changes concerning access—or lack of it—to information in Britain, in the simplest way possible. This structure will allow the reader to easily match up the time periods with the government of the day.

94. See Wilson, *supra* note 33, at 124-25 (providing a thorough discussion of the Fulton Report).

95. See *id.* at 125. The Fulton report stated:

The increasingly wide range of problems handled by the government, and their far reaching effects upon the community as a whole, demand the widest possible consultation with its different parts and interests . . . It is healthy for a democracy increasingly to press to be consulted and informed. There are still too many occasions when information is unnecessarily withheld and consultation merely perfunctory . . . It is an abuse of consultation when it is turned into a belated attempt to prepare the ground for decisions that in reality have been taken already.

Id. (omissions in original).

96. PONTING, *supra* note 1, at 68.

97. See *id.* (stating, "[t]he Wilson Government's response was an internal inquiry with no outside consultation"); see also Wilson, *supra* note 33, at 125 (undercutting Wilson's inquiry into government secrecy because it was, somewhat ironically, "an internal inquiry, and its deliberations had been confidential").

98. See Wilson, *supra* note 33, at 125 (outlining the White Paper's conclusion that the OSA was no barrier because it "did not inhibit the 'authorised' release of information in any way").

99. See generally The Conservative Party General Election Manifesto for

other report, this time produced by Lord Frank and his committee, recommended that Section one of the Official Secrets Act be transformed into its own espionage act and Section two be "repealed and replaced by narrower and specific provisions"¹⁰⁰ due to its "catch all quality."¹⁰¹ Specifically, the Frank Committee proposed an Official Information Act.¹⁰² The Conservative government agreed with these recommendations but claimed that it needed more time to consider proposals and define the categories of protected information.¹⁰³

Parliamentary debates in 1978 reflected the government's slow approach to implementing the Frank Committee's proposals.¹⁰⁴ Dur-

1970, *reprinted in* THE TIMES GUIDE TO THE HOUSE OF COMMONS JUNE 1970 (1970) (calling for less government secrecy).

100. Wilson, *supra* note 32, at 126 (quoting the Frank Committee's Report); *see also* 951 PARL. DEB., H.C. (5th ser.) 1264 (1978) (statement of Mr. John) [hereinafter John Statements] (reiterating that the government accepts the general thrust of the Frank Committee's argument that the section needs to be repealed and replaced by a narrower and more specific provision).

101. Havers Statements, *supra* note 23, at 1257-58 (quoting the Frank Committee's Report). The report reads as follows:

The main offence which section 2 creates is the unauthorized communication of official information (including documents) by a Crown servant. The leading characteristic of this offence is its catch-all quality. It catches all official documents and information. It makes no distinction of kind, and no distinction of degree. All information which a Crown learns in the course of his duty is "official" for the purposes of section 2, whatever its nature, whatever its importance, whatever its original source. A blanket is thrown over everything; nothings escapes. The section catches all Crown servants as well as official information. Again, it makes no distinctions according to the nature or importance of a Crown servant's duties. All are covered. Every Minister of the Crown, every civil servant, every member of the Armed Forces, every police officer, performs his duties subject to Section 2.

Id.

102. *See* Wilson, *supra* note 33, at 126 (stating that the Franks Committee "proposed an Official Information Act making it an offence to disclose without authorization a more narrowly defined range of information"); *cf.* Rees Statements, *supra* note 27, at 1879 (voicing the government's conclusion that Section two of the OSA should be replaced by an Official Information Act encompassing the broad recommendations made by the Franks Committee).

103. *See* Wilson, *supra* note 33, at 126 (stating that the Heath government agreed); PONTING *supra* note 1, at 68 (stating that government cited the need to consider proposals as a reason for its delay in the production of a bill). The Franks Committee proposed that six categories of information should be protected. *See id.* *See, e.g.,* John Statements, *supra* note 100, at 1265 (detailing the proposed categories that should be protected as: "defence or internal security; foreign relations; the currency or the reserves; law and order; Cabinet documents; and information entrusted in confidence to the Government by a private individual or concern.")

104. *See* 951 PARL. DEB., H.C. (5th ser.) 1312 (1978) (statement of Mr.

ing a Parliamentary session in June of that year, MPs¹⁰⁵ debated the general implementation of any freedom of information bill in the United Kingdom, while examining reforms of Section two of the Official Secrets Act.¹⁰⁶ Most MPs referred to the freedom of information Acts of the United States and Sweden when determining if such an act could be implemented in the United Kingdom.¹⁰⁷ Generally, MPs opposed to the implementation of this bill argued that the constitutional frameworks of the United States, Sweden, and the United

Gardner) [hereinafter Gardner Statements] (complaining that that the government has "done virtually nothing" and that "ministers have been talking in their sleep" in regard to the recommendations of the Frank Committee).

105. MP stands for Member of Parliament. This term incorporates both Ministers and Private Members of the House of Commons. For the purposes of this paper, whenever a Minister is cited to, his or her title will be included in order to differentiate between the government and private members of Parliament.

106. See generally 951 PARL. DEB., H.C. (5th ser.) 1256-58 (1978) (debating how to narrow the provisions of the OSA so that criminal liability is limited to disclosure of specific confidential, official, and damaging information). Most MPs during this June 15th debate and a debate held one month later on July 19th regarding the OSA took the view that reform of Section 2 was a precursor to the implementation of a freedom of information act. See John Statements, *supra* note 100, at 1313 (suggesting that the modernization of Section 2 is an essential precursor to a freedom of information bill); Rees Statements, *supra* note 27, at 542 (voicing that "[r]eform of section 2 necessarily comes first").

107. See Havers Statements, *supra* note 23, at 1259 (referring to the Freedom of Information Acts of the United States and Sweden and noting their deficiencies). See 951 PARL. DEB., H.C. (5th ser.) 1276 (1978) (statement of Mr. Arthur Lewis) [hereinafter Lewis Statements] (welcoming the introduction of freedom of information legislation based on the United States and Sweden's models); 951 PARL. DEB., H.C. (5th ser.) 1280 (1978) (statement of Mr. Emyln Hooson) [hereinafter Hooson Statements] (focusing on the United States FOIA in his rebuttal of Mr. Brittan's views on the benefits of that act); cf. 951 PARL. DEB., H.C. (5th ser.) 1289 (1978) (statement of Mr. Eric S. Heffer) [hereinafter Heffer Statements] (opining that Britain need not follow the freedom of information legislation in the United States and Sweden, but "should seek to lay down freedom of information legislation whose provisions are particular to this country"). Mr. Heffer, continued his speech, speaking on behalf of the Labour party and defending their commitment to freedom of information legislation. The text of his speech is as follows:

The fact is that a committee of the Labour Party is on the point of publishing a freedom of information Bill-legislation on which we have worked at considerable length and which in our view is applicable to British conditions. That is a clear indication that, so far as is humanly possible within certain limits, we want the most open government that we can get. One recognises that there are limits because, for example, one cannot allow total freedom of information on defense, security or foreign diplomatic relations. However, no doubt we could go much further on the subject of foreign diplomatic relations than we do now . . .

Id. at 1290.

Kingdom are dissimilar; thus, the United States and Swedish statutes would not work in the United Kingdom,¹⁰⁸ due to excessive costs,¹⁰⁹ administrative burden,¹¹⁰ and the use of the legislation for business espionage.¹¹¹ At the conclusion of these 1978 debates, Parliament ta-

108. See Havers Statement, *supra* note 23, at 1259 (warning the House of Commons that it must remember that both the United States and Sweden have written constitutions "so that judicial intervention in establishing the rights of the citizen is much greater in the United Kingdom"). In addition, Havers noted that "[a]ny discussion of freedom of information must be in the context of the establishment of a system of administrative courts." *Id.* See also John Statements, *supra* note 100, at 1266 (stating that the government is not hostile to the view of freedom of information legislation, but that it must be aware of "other countries with dissimilar constitutional arrangements . . . to see exactly how such a Bill . . . would fit into [Britain's] constitutional pattern").

109. See 951 PARL. DEB., H.C. (5th ser.) 1274 (1978) (statement of Mr. Brittan [hereinafter Brittan Statements] (expressing his grave doubts about the desirability of a Freedom of Information Act like that of the United States because of its formidable costs, which he cites as 22 million dollars a year, and \$146.67 per request). *But see* Hooson Statements, *supra* note 107, at 1281 (commenting that the 22 million dollar cost of the United States FOIA represents one-tenth of the original anticipated cost).

110. See, e.g., Brittan Statements, *supra* note 109, at 1274 (describing how in the United States, the FBI assigned 400 agents to review 10 million pages of documents, and the United States Food and Drug Administration increased its staff from seven to 40 as a result of the passage of FOIA).

111. See *id.* at 1274 (criticizing the use of the United States FOIA by businesses for purposes amounting to "industrial espionage"). This MP's overall criticism was that the United States Act was not being used by its citizens for the purposes for which it was introduced. See *id.* Citizens were not using the FOIA to scrutinize government operations nor engage in a dialogue about reform. See *id.* Fear that this is how the FOIA would be used by Britons and the fact that once the United States passed the FOIA it had to pass the Privacy Act (access to person's files) and Sunshine Act (requiring Government agency meetings to be open to the public) led MP Brittan to change his views on the benefits of freedom of information legislation in the UK. *Id.* at 1275. *But see* 951 PARL. DEB., H.C. (5th ser.) 1258-1319 (1978) (describing the benefits of freedom of information legislation highlighted by various MPs). One MP argued that freedom of information legislation would provide certainty that information was not being deliberately fed to ministers. See Lewis Statements, *supra* note 107, at 1276 (noting that if the government had an official information act it would not have the daily errors and misleading information it receives from the Treasury and it would be able to ascertain whether information was being deliberately fed into the hands of ministers). In addition, Mr. Lewis argued that members of parliament and the electorate "ought to have the right to know" what the salary is of a chairman of a board. *Id.* at 1277. Mr. Lewis bases the electorate's right to know on the fact that each taxpayer pays the salary of the ministers and civil servants. See *id.* Another MP, Mr. Gardner, argued that freedom of information legislation would protect individuals against the misuse of

bled the enactment of freedom of information legislation.¹¹²

The Labour Government that followed the Conservative Government did even less to advance freedom of information.¹¹³ The year ended, however, with a crucial directive entitled the Croham Directive.¹¹⁴ This directive, which itself was confidential and leaked to the press,¹¹⁵ directed ministers to make background material, both factual

power and position within a democracy. See Gardner Statements, *supra* note 104, at 1310-11 (detailing the positive effects such legislation will have). Furthermore, yet another MP stressed the positive change such legislation causes in the relationship between the government and the community. See 951 PARL. DEB., H.C. (5th ser.) 1297 (1978) (statement of Miss Jo Richardson) (implying that the need for a positive change in the relationship between the government and the governed, which would be fostered by freedom of information, is the reason why the House of Commons is having these debates). Another MP highlighted the amount the government pays now for the release of its information. See Hooson Statements, *supra* note 107, at 1282 (faulting other members for not considering the positive effects of the United States act and harmonizing the amount the United States pays for its FOIA to that which the United Kingdom allots for its federal information budget). Mr. Hooson's statement was as follows:

When one compares the cost of the Freedom of Information Act of 20 million dollars with, for example, the federal information budget— which gives the kind of information which the government wants fed out, as opposed to information that they do not— one can see that it is absolute chicken feed.

Id.

112. See Rees Statements, *supra* note 27, at 539 (explaining how the government does not yet have enough information to proceed in consideration of a freedom of information bill). One MP summed up a central issue concerning the debate of freedom of information that the government must consider when he stated that the proper public interest balance must be struck. See Havers Statement, *supra* note 23, at 1258. Havers stated:

The area where secrecy and confidentiality should be protected must clearly be defined and limited to the extent where it is generally acceptable and compatible with open government. A balance must be struck where the public interest is protected in both ways. I mean by that that the public interest requires that matters of defense, international security and Cabinet minutes . . . may need to be safeguarded against public disclosure. But the public interest also requires that there is no misuse of secrecy to cover up errors or bungling to avoid criticism.

Id.

113. See PONTING, *supra* note 1, at 68-71 (denouncing the method used by the Callaghan government to release government policy studies because the government retained discretion over what information was released and used the OSA to bring criminal charges against the press when unreleased information was made public).

114. See Wilson, *supra* note 33, at 128-29 (publishing most of the text of the Croham Directive due to its importance to the freedom of information debate).

115. See PONTING, *supra* note 1, at 69.

and analytical, available to the public.¹¹⁶ Lord Croham, who initiated the directive, stated that it was time that ministers made more information available.¹¹⁷ He also stated that those who longed for a freedom of information act would be disappointed by his directive since it did not require ministers to release information.¹¹⁸ He chose the directive over an act mainly because of the alleged high costs and administrative burdens associated with such an act.¹¹⁹

2. Freud's Official Information Bill

The new year began with the second reading of Liberal MP Clement Freud's private member,¹²⁰ "Official Information Bill."¹²¹ Since Labour was in power, Freud began his speech to Parliament noting that his bill was consistent with Labour's 1974 election manifesto calling for more open government.¹²² Freud's bill consisted of three

116. See Wilson, *supra* note 33, at 128-29 (directing Ministers to have a more open attitude).

117. See *id.* (quoting Croham as arguing "it is intended to mark a real change of policy"). But see Michael Hunt, *Conclusion* to OPEN GOVERNMENT: A STUDY OF THE PROSPECTS OF OPEN GOVERNMENT WITHIN THE LIMITATIONS OF THE BRITISH POLITICAL SYSTEM 173, 178 (Richard A. Chapman & Michael Hunt eds., 1987) (alluding to the decision of Prime Minister Thatcher in 1979 to rescind the most active part of the Croham directive, putting an end to the experiment in open government).

118. See Wilson, *supra* note 33, at 129 ("[T]here are many who will have wanted the government to go much further on the lines of the formidably burdensome Freedom of Information Act in the USA.").

119. See *id.* (assessing Parliament's "prospects of being able to avoid such an expensive development"). Compare *id.*, with Brittan Statements, *supra* note 109, at 1274 (arguing that a freedom of information act would be very expensive in Britain) and *infra* Part III.B (detailing the fees and costs associated with the access statutes of the United States, Canada, and Australia).

120. See generally DAVID MARSH & MELVYN READ, PRIVATE MEMBERS' BILLS 7-25 (providing a thorough discussion of the three types of Private Members' bills). Bills are either introduced by the Government or through Private Members of Parliament. See *id.* The Private Member's Bill procedure, however, "like cricket, would baffle the intelligent alien" because it is done by ballot, and there are only ten slots up for grabs. See *id.* at 7. Thus, it might take 30 years for a back-bench member to introduce a private member bill. See *id.*

121. See 960 Parl. Deb, H.C. (5th Ser.) 2132 (1979) (statement of Mr. Clement Freud) [hereinafter Freud Arguments] (initiating the debate regarding the Official Information Bill).

122. See PONTING *supra* note 1, at 71 (describing how Clement Freud reminded the House of Commons that his proposals were consistent with Labour's declared policies for many years); Wilson *supra* note 33, at 129 (highlighting how Freud

main parts: (1) establishing access to official information, (2) repealing Section two of the Official Secrets Act, and (3) proposing legislation to replace the security and confidentiality of the Official Secrets Act.¹²³ Ideologically, Freud sought a total change of the government's attitude by advocating that "everything shall be open."¹²⁴

Conceiving that civil servants would place one sentence containing information deemed exempt in a document to prevent the entire document from being disclosed, Freud included a provision mandating that only the exempt portions of that document be withheld.¹²⁵ Freud also included a provision calling for regular inspection of departments' information procedures, which prompted considerable discussion.¹²⁶ Most MPs advocated for a Parliamentary Ombudsman

began his speech reminding the House, and in particular Labour Ministers that what he proposed was consistent with Labour's policies over the years); *see also* Freud Arguments, *supra* note 121, at 2132 (tracing the Labour Party's commitment to openness in the 1974 party manifesto and 1977 and 1978 Queen's Speeches).

123. *See* Freud Arguments, *supra* note 121, at 2132 (ranking the three parts of his bill as stated in the text in order of importance). Specifically, Freud's bill contained twenty-three clauses. *See id.* at 2141. Clause one was designed to repeal the Official Secrets Act, while clause two sought to establish a general right of access to government documents. *See id.* Freud also defines an official document as "a document is not only a piece of paper but a record by whatever means." *Id. Compare id.*, with discussion *infra* Part III.A (describing how Australia, Canada, and the United States define documents under their respective freedom of information acts). Clauses three, four, and five dealt with access to documents, and clauses six through ten dealt with the machinery of giving the public access. *See* Freud Arguments, *supra* note 121, at 2140 (detailing clauses of bill to Parliament). Clauses eleven and twelve detailed, respectively, refusals and exemptions, while clause sixteen limited fees to the costs of photocopying. *See id.* at 2141 (emphasizing that Parliament "do[es] not ask citizens to pay for the research that went into them").

124. *See* Freud Arguments, *supra* note 121, at 2131.

125. *See id.* at 2141 (describing how British civil servants put one exempt sentence in a document so that it will not be seen by the public and indicating that the idea to have a provision that mandates that only exempt material be withheld came from the United States' FOIA). *Compare id.*, with 5 U.S.C. § 552(b) (1994), which is the United States FOIA provision stating "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . ."

126. *See generally* 960 PARL. DEB., H.C. (5th ser.) 2185 (1979) (statement of Mr. Rees) [hereinafter Rees Arguments] (stating that one of the most important questions is that of independent review); 960 PARL. DEB., H.C. (5th ser.) 2186 (1979) (statement of Anthony Buck) [hereinafter Buck Arguments] (expressing his worries for this part of the bill and stating that "[s]ome of us share the misgivings" that Mr. Rees has stated). *But cf.* 960 PARL. DEB., H.C. (5th ser.) 2207 (1979)

to supervise the Act, rather than for judicial intervention.¹²⁷ An ombudsman, they argued, would be directly answerable to Parliament and would compliment the principle of Ministerial Accountability.¹²⁸

Protection of Ministerial Accountability occupied a central role in the debate yet again.¹²⁹ Opponents of the bill claimed that such legislation was at odds with the principle of Ministerial Accountability¹³⁰ while advocates of the bill stated that "the democratic principle goes far beyond doctrines of ministerial responsibility and Parliamentary control."¹³¹ MPs repeatedly highlighted the democratic interests involved in this legislation, such as the public's right to know how policy decisions are formulated and to have the opportunity to challenge them.¹³² Furthermore, the idea that an informed populace

(statement of Christopher Price) [hereinafter Price Arguments] (deciding that he would prefer to have the courts, rather than ministers, make the final decisions about the effects of disclosure with regard to ministerial certificates and the safety and interests of the state).

127. See Rees Arguments, *supra* note 126, at 2185 (stating "[I]n my strong view, Ministers should be responsible to Parliament and to no one else for the exercise of their discretionary power"); Buck Arguments, *supra* note 126 (directing the Commissioner to see to it that when this bill is discussed in Committee, alternatives to a Parliamentary Ombudsman are raised).

128. See 960 PARL. DEB., H.C. (5th ser.) 2195 (1979) (statement of Mr. Percival) [hereinafter Percival Arguments] (noting that Parliament should not underestimate the current procedure of obtaining information from Ministers, and the Ombudsman and that "any new methods . . . must be dovetailed into that concept of ministerial responsibility").

129. See *id.*; Rees Arguments, *supra* note 126, at 2186 (stating "[w]e have to take into account our basic constitutional system, where Ministers are directly answerable to Parliament . . . [T]his is something that we must keep at the forefront of our minds"). But see 960 PARL. DEB., H.C. (5th ser.) 2201 (1979) (statement of Mr. Cook) [hereinafter Cook Arguments] (insisting that the different constitution argument "be thrown out of the window straight away").

130. See, e.g., Rees Arguments, *supra* note 126, at 2186 (stating "[j]udicial review of the merits of decisions to deny documents would raise a profound constitutional issue . . . the major point I am making is that it is this House which should make the final decision . . . not the courts").

131. 960 PARL. DEB., H.C. (5th ser.) 2171 (1979) (statement of Mr. Heffer) [hereinafter Heffer Arguments].

132. See 960 PARL. DEB., H.C. (5th ser.) 2150 (1979) (statement of Arthur Lewis) [hereinafter Lewis Arguments] (questioning why a minister or member of the public does not have the right to know what information government civil servants base their decisions on); 960 PARL. DEB., H.C. (5th ser.) 2164 (1979) (statement of J.W. Rooker) [hereinafter Rooker Arguments] (stating that placing this statute on the books would be in the "interests of democracy"); Heffer Arguments, *supra* note 131, at 2170 (stating that democracy is all about an informed

makes the government more accountable, which in turn creates greater overall efficiency and economy, added another dimension to the debate.¹³³

Unlike earlier debates, there was a strong consensus of support for the aims and exigency of the bill.¹³⁴ In addition to the argument that citizens are taxpayers and thus entitled to governmental information,¹³⁵ as heard in prior debates,¹³⁶ MPs offered new reasons for the bill, which included changes in technology¹³⁷ and the increase in the size of the government.¹³⁸

public knowing what is happening, how policy is formed, and challenging the government's decisions).

133. See, e.g., Freud Arguments, *supra* note 121, at 2144 (proffering that "greater disclosure of information prevents waste of public expenditure").

134. See 960 PARL. DEB., H.C. (5th ser.) 2197 (1979) (statement of Mr. Fraser) [hereinafter Fraser Arguments] (proclaiming that this is a considerable day for the advancement of human liberty and better government, to which honorable members of both sides of the house are committed); see also Heffer Arguments, *supra* note 131, at 2168 (stating that like many other members he welcomes the opportunity not only to debate the question but to support the bill); Lewis Arguments, *supra* note 132, at 2148 (listing all of the organizations and people who support such a bill, such as "[p]eople from the Right, the Left and the Centre of political thought"); Rees Arguments, *supra* note 126, at 2183 (describing how the aim is the same, the only thing lacking is a consensus on the right approach); cf. Rees Arguments, *supra* note 126, at 2181 (recognizing wide support for the measure and thus stating that "we must discuss not why people want a Bill, but what it will be like in practice"). In response, one MP highlighted that such a bill would enable Parliament to scrutinize the Executive. See Cook Arguments, *supra* note 129, at 2201 (comparing United Kingdom's Parliament with United States Congress and arguing that British are bad at controlling the Executive); see also Rooker Arguments, *supra* note 132, at 2162 (denying that the Executive is under constant scrutiny by Back-Bench members). Another MP commented that the bill would not be used as a means of finding fault with the government. See 960 PARL. DEB., H.C. (5th ser.) 2204 (1979) (statement of Mr. Warren) (concluding that the British want more information as an attitude of mind not as a means of finding out what is at fault in government).

135. See Freud Arguments, *supra* note 121, at 2138 (citing Mr. Herbert Morrison who argues that "it is in the national interest that the citizen and taxpayer should be adequately informed by the Government").

136. See, e.g., Lewis Statements, *supra* note 107, at 1277 (stating [s]hould not the electorate have the right to know? Is not the electorate made up of taxpayers who pay the Minister's salary and who pay the salaries of all these top civil servants?").

137. See Fraser Arguments, *supra* note 134, at 2160 (arguing that the basic reason for the bill is a rapidly changing society).

138. See 960 PARL. DEB., H.C. (5th ser.) 2213 (1979) (statement of Mr. Listerick) (stating that the tradition of relying on the discretion of ministers and civil

One MP expressing grave doubts as to the benefits of legislation, offered an alternative approach.¹³⁹ The alternative was a Code of Practice. According to this MP, a Code is better than a statute because it offers more flexibility.¹⁴⁰ Ministers could effectively make changes, while experimenting with the access concept.¹⁴¹ In all, it appeared that Parliament recognized that a democracy requires an "equilibrium between publicity, privacy and secrecy."¹⁴² Freud's bill made it to the committee stage, but died with the fall of the Labour government.¹⁴³

B. 1980-1990

Margaret Thatcher and the Conservative Party took control of Parliament in 1979, and shortly thereafter announced the "Protection of Information Bill."¹⁴⁴ This bill, unlike Freud's, provided no public rights of access,¹⁴⁵ proposed non-challengeable ministerial public interest certificates,¹⁴⁶ and increased the secrecy surrounding British intelligence agencies.¹⁴⁷ Amid controversy,¹⁴⁸ the bill was dropped

servants to decide what is good for the country can no longer work because of the "sheer size of the State mechanism").

139. See Perchival Arguments, *supra* note 128, at 2195 (explaining that there are two ways of tackling a matter such as this one, legislation and the introduction of a code, the first of which Perchival is not wholly committed to).

140. See *id.* (stating there are two ways of tackling this matter).

141. See *id.* at 2196 (arguing "that if we adopt a code of practice the Government will be under constant pressure to make changes to it . . . they would be able to accede to those pressures much more readily than if they were committed to legislation . . .").

142. Freud Arguments, *supra* note 121, at 2144.

143. See 55 PARL. DEB., H.C. (6th ser.) 738 (1984) (statement of David Steel) [hereinafter Steel] (attributing the death of Mr. Ely Freud's Official Information Bill to the General Election in 1979); see also PONTING, *supra* note 1, at 72 (stating that after the government fell, Freud's bill was automatically lost and a Conservative Government under Thatcher returned).

144. See generally Wilson, *supra* note 33, at 131 (reasoning that we should have seen a positive approach to freedom of information from Thatcher since she had earlier introduced a Private Members Bill to create access for citizens to meetings of their local authority; however, her administration announced a Protection of Information Bill).

145. See *id.* (detailing the provisions of Thatcher's Protection of Information Bill).

146. See PONTING, *supra* note 1, at 73 (stating that the bill included proposals for "conclusive ministerial certificates" that were not to be challenged in the courts).

147. See Wilson, *supra* note 33, at 132 (noting that this bill created even more

and freedom of information was "excluded altogether from the government agenda."¹⁴⁹ Thatcher expressed her opposition to freedom of information legislation describing such changes as "inappropriate and unnecessary."¹⁵⁰

Despite the government's opposition, from 1980 onwards, private members of Parliament continued to introduce freedom of information legislation.¹⁵¹ Labour MP Frank Hooley was the first to introduce such legislation, but the government ensured the bill's defeat at its second reading.¹⁵² As the government mounted its offensive during the 1980s against freedom of information legislation, many campaigns developed in its support.¹⁵³ Although a comprehensive national freedom of information statute was not enacted, statutory rights of access to particular types of information were established,¹⁵⁴

secrecy for the intelligence services, when it was designed to undo such secrecy).

148. *See id.* at 132 (asserting that had the Bill become law, "Andrew Boyle would not have been able to publish his book *The Climate of Treason*, which led to the disclosure by Ms. Thatcher . . . that Anthony Blunt (MP) had been a Russian spy").

149. PONTING, *supra* note 1, at 73.

150. Wilson, *supra* note 33, at 134 (quoting Mrs. Thatcher).

151. *See generally* Fisher Arguments, *supra* note 1, at 584 (saluting the members of Parliament who in the past introduced FOI bills, such as Mr. Smith, Mr. Kirkwood, Mr. Henderson and Mr. Shepard).

152. *See* PONTING, *supra* note 1, at 73 (placing responsibility on the government).

153. *See generally* Wilson, *supra* note 1, at preface (explaining that he is the Chairman of the 1984 Campaign for Freedom of Information in Britain). The 1984 Campaign for Freedom of Information [hereinafter the Campaign] was launched in January 1984. *See id.* One of its tactics has been to publish a series of "Secrets Files." *See id.* The Campaign has been influential in drafting bills, awarding individuals with Freedom of Information Act Awards who further the disclosure of information, and creating a movement which would make the demand for FOI irresistible. *See* TANT, *supra* note 39, at 200-46 (tracking the Campaign throughout the 1980s until 1993). In addition to the Campaign, an Outer Circle Policy Unit was formed and Charter 88 advocated for FOI. *See generally* MARK EVANS, CHARTER 88: A SUCCESSFUL CHALLENGE TO THE BRITISH POLITICAL TRADITION? (1995) (detailing Charter 88, which was created in 1988 as a protest to challenge the government's satisfaction with the conditions of Britain's democracy).

154. *See infra* notes 274-76 (discussing Britons' rights of access to health records and computerized and manual personal files information held by the government); TANT, *supra* note 39, at 202 (arguing that the Campaign's tactics for a "Freud-like single FOI Act" have been set aside "in favour of a new piecemeal strategy aimed at gaining a 'toehold', which would subsequently facilitate extension of the FOI principle").

and a Local Government Access to Information Act was passed.¹⁵⁵ Many Britons cannot understand why the Government believes that the public should have a right to information on the local level but not on the national level.¹⁵⁶ This section addresses that question. Specifically, this section examines the Private Member's bill that followed Hooley's bill.¹⁵⁷ Blair should pay close attention to the criticism that this minister received regarding the degree of detail in his speech before Parliament in order to avoid making the same error.¹⁵⁸ In addition, this section examines the Parliamentary debates surrounding the enactment of the local access statute and reviews the public's experience with the Act. Perhaps if Blair frames his statute along the lines of the local statute, his legislation will finally become a reality. Blair might refrain from this action since the local Act does not contain an extensive appellate procedure,¹⁵⁹ and local governments remain criticized for being "unduly closed."¹⁶⁰

1. Steel's Ten Minute Rule

Given Hooley's unsuccessful attempt, David Steel decided to introduce his freedom of information bill in a unique fashion.¹⁶¹ Using the Ten Minute Rule procedure,¹⁶² Steel introduced a bill that was

155. See *infra* Part II.B.2 (detailing the Local Government (Access to Information) Act).

156. See BIRKINSHAW, *supra* note 9, at 138 (depicting the Local Government (Access to Information) Act as a "FOIA for local government" and stating that there "is an immediate irony in the fact that it was passed with the approval of the Government, which had steadfastly refused such legislation for itself").

157. See *infra* Part II.B.1 (reviewing MP David Steel's Ten Minute Rule on freedom of information).

158. See *infra* notes 172-74 (providing MP Dennis Skinner's criticism of the narrow definition Steel provided to Parliament as to the types of information Britons would have access to under his Bill).

159. See *infra* Part II.B.1 (describing how the Act leaves review to the "proper officer" and chairman of a meeting).

160. DAWN OLIVER, GOVERNMENT IN THE UNITED KINGDOM: THE SEARCH FOR ACCOUNTABILITY, EFFECTIVENESS AND CITIZENSHIP 178 (1991).

161. See Steel, *supra* note 143, at 738 (confirming that "it is unusual for a party leader to use the ten-minute rule procedure" and justifying his action on the basis that it was done "in order to draw maximum attention to the measure itself").

162. See MARSH & READ, *supra* note 120, at 12 (stating that Private Members take advantage of Standing Order Number 13, the Ten-Minute Rule, to introduce legislation). Each week, two Members are allowed to make a short speech, usually no more than ten minutes long, asking their colleagues to support the introduction

promoted by the 1984 Campaign for Freedom of Information¹⁶³ and modeled on Freud's defeated "Official Information Bill."¹⁶⁴ Ideologically Steel, like Freud, proposed a "total change of attitude" from his colleagues.¹⁶⁵

Steel differentiated his bill from Freud's by excluding opinions or advice tendered to ministers for policy-making purposes.¹⁶⁶ He did include defense and security matters, relations with foreign governments, law enforcement and legal proceedings, commercial confidences, and individual privacy as exemptions.¹⁶⁷ Additionally, he assigned the role of final review regarding disputes about exemptions to a Parliamentary Commissioner.¹⁶⁸ Steel directed his peers to weigh the costs associated with the Commissioner against the current substantial costs of secrecy when considering this provision.¹⁶⁹

In order to gain the government's support, Steel advanced four main reasons why it should favor freedom of information including the fact that "regardless of which party is in office, the processes of government and the power of the Government over the individual are increasing all the time."¹⁷⁰ Thus, a proper balance between openness and secrecy is necessary.¹⁷¹

Due to the procedural nature of this debate, only one MP re-

of a new measure. *See id.*

163. *See Steel, supra* note 143, at 738 (assigning the promotion of his Bill to the 1984 Campaign for FOI, "a body that is supported by Members of all parties").

164. *See id.* (informing Parliament that the "text of the Bill follows closely the attempt by my hon. Friend . . . Mr. Freud").

165. *See id.* (stating that "[m]y bill proposes a total change of attitude so that everything shall be open unless specific exemption is made").

166. *See id.* (stating that this provision is one important addition to the Bill Freud introduced).

167. *See id.* (listing the exemptions contained in the Bill).

168. *See id.* (accepting that judgment would fall under the Parliamentary Commissioner for Administration).

169. *See Steel, supra* note 143, at 738 (accepting that there would have to be an enlargement of the Parliamentary Commissioner for Administration's office but noting that "open government costs money, that must be measured against the wastefulness of closed government").

170. *See id.* at 740 (pointing out that in addition to this issue extending over party lines, government politics would be more fully considered, better understood, and more acceptable with a freedom of information act).

171. *See id.* (indicating the current imbalance in Great Britain where the Government's privilege to conceal is valued more highly than the people's right to know).

sponded to Steel. According to this MP, Steel failed to detail what information individuals would have access to under the Bill.¹⁷² Additionally, he emphasized that Steel did not mention and “would never wish to mention” how such an act could be used to expose the slush fund of Steel’s Liberal party.¹⁷³ According to this MP, a “pandora’s box” opens and information such as the financial accounts of political parties must be revealed under the premise that the public has a right to know.¹⁷⁴ Ultimately, the debate ended with the MP criticizing Steel for his lack of support of Hooley’s Bill.¹⁷⁵

Parliament ultimately defeated Steel’s bill, even though it had the support of the Labour, Social Democratic, and Liberal Parties, since the Conservative Party followed the lead of Thatcher.¹⁷⁶ Now that Blair controls the government and stands firmly committed to the enactment of such legislation¹⁷⁷ the time is ripe for its implementation.¹⁷⁸ Blair need only maintain the multi-party support for the ini-

172. See 55 PARL. DEB., H.C. (6th ser.) 740 (1984) (statement of Dennis Skinner) [hereinafter Skinner] (expressing his displeasure over the very narrow definition Steel has given of what is needed and what people will be able to get to know if the Bill is passed); cf. *id.* at 741 (arguing that the bill itself is too narrow and stating that “[m]any of us would wish to support a much broader bill, but the narrowly defined one that the leader of the Liberal party is trying to sneak through is a bit of propaganda and gimmickry”).

173. See *id.* at 740 (exposing the existence of a Liberal Party slush fund).

174. See *id.* at 740-41 (explaining how he would use the FOI Bill to examine the Liberal Party’s accounts because “[t]he public has a right to know what makes political parties tick”).

175. See *id.* at 741 (condemning Steel, who was not on “sabbatical,” for his absence from the House of Commons on the day that Hooley’s Freedom of Information Bill was introduced).

176. See Wilson, *supra* note 33, at 135 (describing how the “Prime Minister has given her lead and the Party largely followed” thus failing to make this initiative and positive results an all party issue).

177. See FOI Unit, *supra* note 16 (using the term “The Government’s Commitments” as the initial heading on its home page, and providing under this heading the pledges made in the Labour Election Manifesto and the Queen’s Speech); Cabinet Office, *supra* note 16; Timmins, *supra* note 14, at 10 (providing the Chancellor of the Duchy of Lancaster’s assertion that “the government was ‘deadly serious’ about enacting such a bill”).

178. See Clwyd, *supra* note 14, at 17 (warning that the passage of time before legislating will be detrimental); see also *The Freedom Files*, TIMES (London), May 9, 1997 (indicating that moving such a bill up the “legislative queue” requires “a forceful champion”). Compare *id.*, with ANDY MCSMITH, *FACES OF LABOUR: THE INSIDE STORY* 293-362 (1996) (entitling chapter seven of his book “Calling Tony Blair” and describing him as a man “blessed with a sharp mind,” who “applies

tiative.¹⁷⁹

2. *The Local Government (Access to Information) Act*

Although local governments are not governed by the Official Secrets Act, the "legal regime of secrecy to which the 1911 Official Secrets Act gave rise infected local government too."¹⁸⁰ During parliamentary debates over the local act, one MP described local government as even more secretive than the national government because there is not the same level of pressure for information from the local media.¹⁸¹

Generally, the measure opens up subcommittees to the public, makes the minutes of all committees available, requires reports that are discussed at meetings to be made public, and provides the general public and officials with access to documents like background papers, interim reports, and research data.¹⁸² Although the statute provides Britons with "access" to official information, as its name denotes, this statute primarily deals with the concept of government openness—making government meetings more open.¹⁸³ Nevertheless,

himself with a steady and determined intelligence" and "all the tasks that a modern politician is required to do Blair does well").

179. See Richard Norton-Taylor, *Labour Leaders May Sideline Freedom of Information Act*, GUARDIAN, Feb. 12, 1997, at 11 (detailing the Liberal Democrats backing of a Labour introduced Freedom of Information Act).

180. OLIVER, *supra* note 160, at 176; cf. 72 PARL. DEB., H.C. (6th ser.) 547 (1985) (statement of Sir Bernard Braine) [hereinafter Braine States] (stating "[i]f we suffer from the British disease of excessive secrecy at the top, it is not surprising to find it throughout the administrative structure and operating at local government level").

181. See 72 PARL. DEB., H.C. (6th ser.) 544 (1985) (statement of Mr. Austin Mitchell) [hereinafter Mitchell States] (comparing the level of competition among local newspapers long ago with today).

182. See 72 PARL. DEB., H.C. (6th ser.) 520 (1985) (statement of Robin Squire) [hereinafter Squire States] (stating the benefits of the Local Government (Access to Information) Bill). According to Squire, the Private Member responsible for the Bill, "[p]ublicity is the greatest and most effective check against action." *Id.* (quoting the words of Prime Minister Margaret Thatcher which she spoke in Parliament when she introduced her Public Bodies (Admission to Meetings) Act of 1960). Accordingly, Squire created this measure to address "the important issues which are unnecessarily taken in private" by local government authorities. *Id.* at 522.

183. See BIRKINSHAW, *supra* note 9, at 51-60. Accordingly, the Local Government (Access to Information) Act more closely resembles the United States Sunshine Act, 5 U.S.C. § 552(b) (1994) rather than the Freedom of Information Act.

examination of this statute and the debates leading to its enactment are important because many MPs view the act as a comprehensive freedom of information act.¹⁸⁴

During the debates, MPs argued that such legislation would interfere with the need to retain confidentiality in certain areas,¹⁸⁵ that the measure was too costly, impractical, and unworkable,¹⁸⁶ and that it would have negative effects on the candor of opinion shared between officials.¹⁸⁷ One MP expressed his fear that officials would conduct

"The Sunshine Act . . . is an 'open meeting' law allowing access to the meetings of those agencies within its scope. Its aim is to open up to the public portions of the 'deliberative processes' of certain agencies." *Id.* at 59; *see also* 5 U.S.C. § 552(b) (1994) (stating that "[e]xcept as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation"). In comparison, the Freedom of Information Act addresses public access to agency records, rather than meetings. *See* BIRKINSHAW, *supra* note 9, at 51.

184. *See* 72 PARL. DEB., H.C. (6th Ser.) 554 (1985) (statement of Piers Merchant) [hereinafter Merchant States] (stating that "freedom of information is not just in the interests of the press and the public . . . [i]t is also in the overriding interest of the councils"); *see also* Braine States, *supra* note 180, at 547 (stating "[h]ere is local government moving ahead of Parliament").

185. *See* 72 PARL. DEB., H.C. (6th Ser.) 558-59 (1985) (statement of Mr. Fairburn) [hereinafter Fairburn States] (stating that he is not in favor of secrecy but understands the benefits of confidentiality and trust). Mr. Fairbairn then advances particular examples and reasons why certain matters should be kept confidential. *See id.* The main reason he gives for confidentiality is the need to avoid hurting those members of the public involved. *See id.*; *see also* 72 PARL. DEB., H.C. (6th ser.) 522 (1985) (statement of Mr. Dafydd Wigley) [hereinafter Wigley States] (confirming with Mr. Squire that the Bill gets at the "completely unnecessary privacy" since "[t]here are matters small as well as great which may need to be kept private because of their content"). Specifically, Mr. Wigley indicates the need to keep private personal matters of confidentiality that arise in social services committees. *See id.*

186. *See* Squire States, *supra* note 182, at 526 (providing what he foresaw as the three main arguments against the enactment of such legislation); *see also* Fairburn States, *supra* note 185, at 558 (arguing that the Bill would have "massive manpower implications for local authorities" and the "financial implications . . . are incalculable but inevitably huge").

187. *See generally* Fairburn States, *supra* note 185, at 560 (quoting COSLA as to the negative effects such a measure would have on the interchanges between officials). COSLA stated the following:

It will mean the end of the officers engaging in frank and meaningful written exchanges of view if they are to be the subject of public scrutiny. No officer is going to give a completely open opinion on a matter if he knows he may be called upon to justify his view in public or even in court.

Id.

all business over the telephone, thus increasing secrecy.¹⁸⁸ Diametrical to these arguments were the calls for an extension of the reach of the Bill.¹⁸⁹

As a whole, Parliament and the Government supported this measure, offering many reasons for its enactment.¹⁹⁰ As during the debates on the national level for freedom of information legislation, MPs argued that such a bill must be enacted as a matter of principle because open government is an essential right of all citizens.¹⁹¹ One MP stated that it is generally accepted that information is the "fuel of democracy."¹⁹² As such, legislation providing increased access to information and governmental accountability is central at the local level which "still represents the most immediate form of accountability."¹⁹³

Additionally, MPs argued that because local authorities are the biggest employers, they should set an example of "industrial democracy" by providing employers, workers, and union trade representatives with all known information.¹⁹⁴ MPs argued that disclosure of

188. *See id.* (advising every English local authority if this Bill is passed to "never commit anything to writing—always do business on the telephone"); 72 PARL. DEB., H.C. (6th ser.) 542 (1985) (statement of Charles Irving) [hereinafter Irving States] (describing how one local councillor implemented this strategy in his town). This councillor made all decisions on the telephone, and the committees never met. *See id.* The phone deliberations were later reported to the council and approved. *See id.* Thus, the councillor effectively excluded his colleagues and the public from participation in the deliberations. *See id.*

189. *See* Merchant States, *supra* note 184, at 551 (complimenting Squires on the work he has done, but criticizing him because "in some areas the Bill does not go far enough"); 72 PARL. DEB., H.C. (6th ser.) 569 (1985) (statement of Mr. John Fraser) [hereinafter Fraser States] (stating that he would like the Bill's provisions to be extended).

190. *See* 72 PARL. DEB., H.C. (6th ser.) 576-77 (statement of Mr. William Waldegrave, Parliamentary Under-Secretary of State for the Environment) (noting that there has been near unanimity in the debate and urging that the "Government welcome the Bill").

191. *See* Mitchell States, *supra* note 181, at 543 (declaring that "[o]pen government—the right to know—is basic to democracy").

192. 72 PARL. DEB., H.C. (6th ser.) 548 (1985) (statement of Mr. Michael Hancock) [hereinafter Hancock States].

193. Squire States, *supra* note 182, at 520.

194. *See* 72 PARL. DEB., H.C. (6th ser.) 556 (1985) (statement of Mr. Ernie Roberts) [hereinafter Roberts States] (arguing that because local authorities are the biggest employers in the country, they should set an example in industrial democracy). Roberts added that he learned about industrial democracy from his trade

this information will benefit future government-business negotiations and influence the private sector to act in the same manner.¹⁹⁵ Stating this point on a more general level, one MP said, "We are not just tackling local government in the Bill, but taking on a wide aspect of our society which affects all kinds of relationships."¹⁹⁶

Restructuring of relationships played a central role in the discussion of this measure. Specifically, one of the main reasons advanced for the Bill was the need to improve the local government's status and its relationship with the electorate.¹⁹⁷ According to most MPs, secrecy alienates the electorate, inevitably leading to suspicion and unease and ultimately to a lack of confidence on the part of the public.¹⁹⁸ This bill would remove this suspicion, which is harmful to a good and efficient democracy, and force authorities to be more responsible and clear with their decisions.¹⁹⁹ Local government officials could do a better job because they would have access to all information to which they are currently denied.²⁰⁰

Furthermore, MPs argued that a new, stronger partnership was necessary between the electorate and local government officials to tackle the national government's attack on local democracy.²⁰¹ Addi-

union. *See id.* "All of its members have the right to know everything. The rules provide that members can get any information and find out how anyone voted on any issue. They have real democratic control." *Id.*

195. *See id.* (asserting that both sides should have information on which a decision is being made).

196. 72 PARL. DEB., H.C. (6th ser.) 574 (1985) (statement of Mr. Michael Knowles) [hereinafter Knowles States].

197. 72 PARL. DEB., H.C. (6th ser.) 538-39 (1985) (statement of Mr. Simon Hughes) [hereinafter Hughes States] (charging that such secretive behavior exists in the Southwark Borough Council and does no good to local government, nor "to the status of local government anywhere").

198. Mitchell States, *supra* note 184, at 546 (stating additionally that "[s]ecrecy breeds uncertainty . . . [s]ecrecy breeds rumors, circulates trivia and leads to suspicion, which is harmful to good and efficient democracy").

199. *See, e.g., id.* (arguing that "[o]penness forces authorities to make better, more responsible and more clear-cut decisions").

200. *See, e.g., Hughes States, supra* note 197, at 539 (discussing how his colleague, the leader of the Liberal group on Hackney Council, took the council to court because it denied him access to necessary information). After the court in the Hackney Council case found that the Council had "acted unlawfully" by denying the councillor access to information, the ensuing openness put government officials "in a better position to do [their] job[s] and to advise people." *Id.*

201. *See generally* Roberts States, *supra* note 194, at 527-28 (making the case for open government at the local level "when local democracy is under attack

tionally, highlighted in this debate was the economic relationship between the local and national government.²⁰² Thatcher indicated her concern over the expense of local government, providing insight as to the reasons why the government supported this measure when it is so against its implementation on the national level.²⁰³ Simply, inefficiency on the lower level, stimulated by a lack of accountability, was proving too costly for the national Government.²⁰⁴

Unlike debates on the national level for freedom of information legislation, MPs here could draw support from experiences of certain local authorities who adopted open government policies prior to the enactment of this Bill. For example, the experience of Bradford, which was the first local authority in Britain to adopt an open government policy, dispelled fears of administrative burdens and excessively high costs.²⁰⁵ "Bradford has been operating a freedom of information policy, and it has worked."²⁰⁶

Although MPs could have argued that such a bill was unnecessary

from central Government, with rate capping and threats of abolition"). Furthermore, Mr. Roberts stated, "democratically elected local government must gather strength unto itself to resist the efforts of central Government to interfere more and more in local affairs." *Id.*

202. See Squires States, *supra* note 182, at 520 (noting "the importance of the role that local government plays in the [national] economy").

203. See *id.* at 520 (beginning his speech with a discussion on how Thatcher "was worried about local government expenditure").

204. See *id.* ("underlin[ing], above all, the importance of the role that the local government plays in the economy."); see also THATCHER'S LAW 28 (Andrew Gamble & Celia Wells eds., 1989) (stating that "[I]n short, the Government entirely lost control over local government expenditure").

205. See 72 PARL. DEB., H.C. (6th ser.) 576 (1985) (statement of Mr. Jeremy Hanley) (declaring that "the costs are minimal"); see also 72 PARL. DEB., H.C. (6th ser.) 572 (1985) (statement of Mr. Geoff Lawler) [hereinafter Lawler States] (boasting about the openness of government that his constituency has achieved and negating the arguments of those who say that freedom of information policies are too costly). The cost of implementing the policy in regard to Lawler's constituency, he claims, is "estimated to be a mere £2,000." *Id.* Therefore, he argues, "Some of the fears of the Honorable members are therefore somewhat exaggerated." *Id.* In regard to the administrative burden such policies impose, Lawler stated, "[I]t is the council's view, and mine, that the time that is spent . . . is worth while." *Id.*

206. Lawler States, *supra* note 205, at 573. See generally Anthony Clipson, *Bradford's 'Open Government' Experience*, in OPEN GOVERNMENT: A STUDY OF THE PROSPECTS OF OPEN GOVERNMENT WITHIN THE LIMITATIONS OF THE BRITISH POLITICAL SYSTEM 123-133 (1987) (providing a thorough accounting of Bradford's "Open Government" experience).

because of cities like Bradford, which opened their governments voluntarily; most argued that, left to their own devices, many local governments would never voluntarily accept the freedom of information proposals in Squire's bill.²⁰⁷ Voluntary acceptance would not occur mainly because this "bill is designed to try to make authorities justify secrecy and confidentiality, and secrecy is endemic in our system."²⁰⁸

Despite opposition, Squire's Bill was passed and stands as law today.²⁰⁹ More than ten years after its enactment, the act has improved public rights of access to local authority information and meetings.²¹⁰ Some contend, however, that councils are still "unduly closed"²¹¹ and such statutory intervention has not been "pervasive or necessarily influential."²¹² The bill was passed deliberately without containing a special appellate procedure to resolve certain matters inside the authority.²¹³ Since the bill leaves "important matters of judgment in the hands of the 'proper officer' and the chairman of a meeting," there is growing support for "a new statutory power of assistance for individuals wishing to challenge a decision by their local authority in the court"²¹⁴ Hence, a freedom of information act implemented on the national level might not wish to make the same mistake.

During the debates, one MP realized that, although this Bill probably would not prevent the abuses it was created to decrease, "it should be enacted in order to establish a benchmark of standards and [make] it clear what the criteria of local councils should be."²¹⁵ Blair

207. See, e.g., Hancock States, *supra* note 192, at 548 (contrasting the Bradford experience with those of Portsmouth and Hampshire, two local authorities where there has been "a progressive decline" in information forthcoming to the public).

208. Knowles States, *supra* note 196, at 573.

209. See BIRKINSHAW, *supra* note 9, at 138 (noting the "irony in the fact that [the Bill] was passed with the approval of the Government, which had steadfastly refused such legislation for itself").

210. See *id.* (maintaining that the Act provides greater public access).

211. OLIVER, *supra* note 160.

212. BIRKINSHAW, *supra* note 9, at 194.

213. See BIRKINSHAW, *supra* note 9, at 140 (relating how the Widdicombe report of 1986 recommended "that a new statutory power of assistance for individuals wishing to challenge a decision by their local authority in the court should be made available").

214. See *id.*

215. 72 PARL. DEB., H.C. (6th ser.) 565 (1985) (statement of Mr. Norris) (arguing that the value of the Bill lies in establishing a benchmark of standards simi-

should use this argument to gain support for his measure, although it appears that the legislation succeeded because the national government wished to control the costs and affairs of the local government.²¹⁶

C. 1990-1997

Succeeding Thatcher as Prime Minister, John Major began the 1990s committed to reform. Specifically, he promised to "sweep away many of the cobwebs of secrecy which needlessly veil too much of government business."²¹⁷

Major latched on to Citizen's Charters as a means of attaining his goals. Citizen's Charters were intended to "secure better services to the public by giving 'the citizen a better deal through extending consumer choice and competition.'"²¹⁸ Such charters are now prevalent at all levels of British government.²¹⁹ Essentially, the Charters seek to ensure greater efficiency in service delivery from governmental departments by making officials more accountable.²²⁰ Throughout Parliamentary debates in the 1990s for freedom of information, MPs cited the Citizen's Charters as evidence of the government's commitment to openness, efficiency, and accountability.²²¹ Many MPs

lar to other legislation such as the Race Relations Act of 1976 and the equal opportunities legislation).

216. See *supra* notes 202-04 (discussing the important role that the local government plays in the national economy).

217. Richard Norton-Taylor & Nikki Knewstubb, *Code of Practice to Fight Secrecy*, GUARDIAN, July 16, 1993, at 1 (quoting John Major).

218. J.A. Chandler, *Introduction* to THE CITIZEN'S CHARTER 1, 2-3 (J.A. Chandler ed., 1996).

219. See *id.* (detailing the success of Citizen's Charters).

220. See Howard Elcock, *What Price Citizenship? Public Management and the Citizen's Charter*, in THE CITIZEN'S CHARTER *supra* note 218, at 24, 33-37 (distinguishing three types of accountability and arguing that "accountability downwards" is the main concern of the Citizen's Charter). Elcock defines "accountability downwards" as accountability "to those receiving goods and services, whether as citizens, clients, customers and consumers." *Id.* at 34. This is to be compared with "accountability upwards" to superiors and "accountability outwards" to professionals or colleagues. *Id.* at 33.

221. See 219 PARL. DEB., H.C. (6th ser.) 613-14 (1993) (statements of Mr. John Wheeler) [hereinafter Wheeler Comments] (commending the Government for changing the political culture of government in regards to the release of official information and focusing on the Citizen's Charter as evidence of a move in that direction); 219 PARL. DEB., H.C. (6th ser.) 601 (1993) (statement of the Chancellor of the Duchy of Lancaster, Mr. William Waldegrave) [hereinafter Waldegrave

asserted that a comprehensive freedom of information statute was not necessary because the Citizen's Charters and additional statutes provided access to and efficiency in government.²²² Other MPs, however, were quick with responses to rebuke this sentiment.²²³

Continuing the reform, Prime Minister Major ordered a White Paper on Open Government.²²⁴ The White Paper led to the development of a Code of Practice on Access to Official Information. This code currently controls information disclosure in Britain. In short, the Code provides a non-statutory right of access to government information, except where exemptions apply.²²⁵ Persons with complaints have access to an internal departmental review, with final recourse to an independent Parliamentary Ombudsman.²²⁶

Many argue that the Code was introduced to forestall demands for a freedom of information act and specifically to quell the public support for Mark Fisher's Right to Know Bill.²²⁷ Mark Fisher, a private member of Parliament, brought a bill entitled the "Right to Know" before the House of Commons in 1992.²²⁸ This section examines

Argues] (offering the Citizen's Charter as an example of a "comprehensive campaign for opening up information").

222. See *infra* notes 272-76 (discussing the Local Government (Access to Information) Act, the Citizen's Charter, the Data Protection Act, the Access to Personal Files Act, and the Access to Health Records Act).

223. See *infra* notes 265-68 (providing MPs arguments that a freedom of information act is necessary for Britain's democracy to reach adulthood, to improve other countries views of Britain and to allow Briton's access to daily information that would not endanger national security).

224. See Chris Moncrieff, *Ministers Take New Broom to Whitehall Secrecy*, PRESS ASS'N NEWSFILE, July 15, 1993, available in LEXIS, News Library, ARCNWS File (detailing the origins of the Government's White Paper on Open Government).

225. See generally Cabinet Office, *Code of Practice on Access to Government Information* (visited July 11, 1997) <<http://www.open.gov.uk/m-of-g/codete.html>> [hereinafter *Code*]; *infra* Part II.C.2 (detailing the Code of Practice on Access to Government Information); see also Cabinet Office, *Explaining the Code of Practice on Access to Government Information* (visited July 11, 1997) <<http://www.open.gov.uk/m-of-g/code97.html>> [hereinafter *Code Guide*].

226. See *infra* notes 306-09 and accompanying text (explaining the review process under the Code).

227. See, e.g., Stephen Ward, *Slow Response to Code on Freedom of Information*, INDEP., Mar. 9, 1995, at 8 (stating "it was introduced to forestall demands for a freedom of information act similar to those in the United States and several Commonwealth Countries").

228. See 219 PARL. DEB., H.C. (6th Ser.) 583 (1993).

Fisher's Bill and the debates surrounding its failed enactment. Such review is necessary in order to make recommendations to Blair because this was the last major freedom of information bill to come before Parliament. After this analysis, part two of this section details the Government's White Paper on Open Government and the Code of Practice on Access to Official Information. Generally, this section demonstrates the pattern of Labour's attempt to enact freedom of information legislation and the Government's repeated rejection of such a measure.²²⁹ As it stands in Britain today, ministers still decide what information is placed in the public domain.²³⁰ Many fear that Blair might not be able to break this tradition. Even worse some fear that he or Parliament might merely codify the Code of Practice.²³¹ The disadvantages of such actions are highlighted below.

1. Fisher's Right to Know Bill

Fisher, unlike his predecessors, entitled his bill in a way that highlights the crux of the issue present in freedom of information debates.²³² According to Fisher, the Bill focuses on two key questions.²³³ "The first is, who should know? Should it be the

229. See *supra* Part II.B.1 (detailing the Government's defeat of MP David Steel's Ten Minute Rule on freedom of information because the Conservative Party followed the lead of Margaret Thatcher).

230. See *Minister Hails Move to More Open Government*, PRESS ASS'N NEWSFILE, July 15, 1993, available in LEXIS, News Library, ARCNEWS File (quoting Labour member Dr. Marjorie Mowlam's distaste for the White Paper on Open Government, mainly because "in the end, it will be the Government minister that decides what information is available to the public").

231. See Richard Norton-Taylor, *Commentary: Watch [sic] Out: Secrecy's About (Again)*, GUARDIAN, May 9, 1997, at 21 (noting that "[i]t will be ironic indeed if the F.O.I. Bill which finally emerges amounts to little more than putting in statutory form the Conservatives' code of practice on open government, with its many exemptions").

232. See 219 PARL. DEB., H.C. (6th ser.) 607 (1993) (statement of Mr. Jeff Rooker) [hereinafter Rooker Comments] (stating "[o]ver the years, people who have campaigned for freedom of information have been asked by Ministers what they want to know . . . Turning the title 'round the other way and stating that people have a right to know . . . is a clever means of highlighting the crux of the issue"); see also 219 PARL. DEB., H.C. (6th ser.) 616 (1993) (statement of Mr. Don Foster) [hereinafter Foster Comments] (congratulating Fisher on the title of the Bill).

233. See Fisher Arguments, *supra* note 1, at 583 (stating that his Bill focuses on two key questions).

Government and civil servants, or all of us? The second is, who should decide what we know? Should it be Ministers or a form of independent arbitration?"²³⁴

Fisher answers these questions during the debates by detailing the clauses of his Bill, which had its origins in Freud's Official Information Bill.²³⁵ Fisher leaned heavily on the experiences of Australia and Canada, both of which introduced freedom of information legislation in 1982 and have parliamentary and judicial systems similar to Britain.²³⁶

MPs criticized Fisher's Bill as too large, a "blockbuster Bill" with over 30 clauses.²³⁷ Under the Bill, the public is granted statutory rights of access to "records held by public authorities" and a system for review of decisions denying the assertion of these rights.²³⁸ In addition, the Official Secrets Act of 1989 is reformed and the Companies Act of 1985 is amended.²³⁹ Accordingly, the answer to Fisher's first question is that everyone should know what information the government holds.

Specifically, the Bill requires departments to publish lists of information contained in their departments so that the public will know

234. *See id.*

235. *See id.* at 584 (stating that "[the Bill] has its origins in the Official Information Bill introduced by a former Liberal Member of Parliament, Sir Clement Freud, in 1979, and in several Bills introduced by other hon. Members").

236. *See id.* at 585 (stating that the Bill leans heavily on the experiences of Australia, Canada, and New Zealand for the reasons mentioned in the text); discussion *infra* Part III (discussing the access statutes of Canada and Australia).

237. *See* Waldegrave Argues, *supra* note 221, at 604 (characterizing Fisher's Right to Know Bill as a "blockbuster Bill" and a "Christmas tree of a Bill because it is equivalent to four or five Bills put together"). Mr. Waldegrave questioned whether this bill is the biggest Private Member's bill ever. *See id.*

238. *See* BIRKINSHAW, *supra* note 9, at 337 (quoting the text of the Right to Know Bill).

239. *See* Fisher Arguments, *supra* note 1, at 587 (detailing the provisions of the Right to Know Bill). This Bill would amend the Companies Act of 1985 by requiring companies to publish in their annual reports all instances in which they were found to be in violation of environmental protection laws, health and safety laws, discrimination laws, and other consumer protections. *See id.* The need for this provision was illustrated by Des Wilson and his Campaign for FOI. *See* Maurice Frankel, *How Secrecy Protects the Polluter*, in *THE SECRETS FILE: THE CASE FOR FREEDOM OF INFORMATION IN BRITAIN TODAY* 22-58 (Des Wilson ed., 1984) (looking at the denial of information by factories and companies in regard to the environment).

what information is available.²⁴⁰ When bodies receive requests they have thirty days to produce the documents unless the documents fall within one of the exempted categories detailed in the statute.²⁴¹ The categories of exemptions include: national security, defense and international relations, the enforcement of law, personal privacy, and commercial confidentiality.²⁴² If the publication of the information requested would cause "significant damage" to the above categories, such information can be withheld.²⁴³

Review of decisions would initially take place internally by the department who ordered the withholding and next by an independent Parliamentary Information Commissioner.²⁴⁴ The Commissioner would have to report annually to Parliament,²⁴⁵ and would have the power of the court to call for documents and order disclosure.²⁴⁶ If there is still a conflict, an independent Tribunal would make the final decision.²⁴⁷ Such a mechanism was not present in prior bills.²⁴⁸

240. See Fisher Arguments, *supra* note 1, at 585 (summarizing the provisions of his Bill).

241. See *id.* (describing the obtaining of information under the Bill).

242. See *id.* (listing the categories of protected information contained in his Bill).

243. See *id.*

244. See Fisher Arguments, *supra* note 1, at 587-88 (detailing the review mechanism under the Right to Know Bill); see also BIRKINSHAW, *supra* note 9, at 340-341 (providing a thorough discussion of the Right to Know Bill's review mechanism).

245. See Fisher Arguments, *supra* note 1, at 587 (stating that the "commissioner will lay an annual report before Parliament").

246. See *id.* at 586 (stating that the "Commissioner and tribunal shall have powers of the court to call for information or records and their findings will have the same force as a court order").

247. See *id.* (describing the role of the tribunal). The Tribunal and Commissioner are appointed by Her Majesty, on the recommendation of the Prime Minister, the Leader of the Opposition, and a Select Committee. See *id.* The tribunal has the same substantial powers as the Information Commissioner, in that its recommendations would have the same force as a court order. See BIRKINSHAW, *supra* note 9, at 340 (comparing the levels of power between the tribunal and commissioner). Compared with Canada's Information Commissioner, who can only request but not compel disclosure, the British Commissioner would have increased power. See *id.* (differentiating the review mechanism in Fisher's Right to Know Bill with that of Canada); *infra* notes 371-76 (explaining the review process under Canada's Access to Information Act).

248. See *supra* notes 126-28, 213 (discussing the creation of a Parliamentary Ombudsman to supervise information disclosure under Freud's Official Information Bill and the lack of a special appellate procedure under Squire's Local (Ac-

In order to appease the Government and bring this mechanism in line with the principle of Ministerial Accountability, Fisher argued that the workings of the Tribunal would be subject to the Select Committee, which appoints the Commissioner.²⁴⁹ Fisher stated that an independent mechanism was necessary because "[i]nformation is too powerful and important to place in the hands of any politicians . . . [W]hen Ministers make a mistake, whatever party is in office, there is always temptation to save their embarrassment."²⁵⁰ Thus, the answer to Fisher's second question is that independent commissioners and tribunals decide what information is to be withheld, not ministers.

In order to win the support of civil service organizations, the Bill included an exemption for policy advice.²⁵¹ Unlike other countries where a distinction is drawn between the deliberative process of decision making and the post decision stage,²⁵² Fisher was forced to distinguish between "policy advice" and technical and expert advice that officials receive,²⁵³ the latter of which would be disclosable.

In response to the trials of Tisdall, Ponting, and Wright, Fisher proposed reform to the Official Secrets Act and tailored his provisions according to these incidents.²⁵⁴ Fisher sought to end the absolute offense of any disclosure and provided the possibility of a public

cess to Information) Bill).

249. See Fisher Arguments, *supra* note 1, at 587 (responding to Mr. John Bowis's concern that this Bill would be "taking from Parliament a power that he would not wish to take away—the power to assess, monitor and question the tribunal").

250. Fisher Arguments, *supra* note 1, at 586.

251. See BIRKINSHAW, *supra* note 9, at 344 (asserting that "[t]he Bill has many interesting and useful aspects . . . [b]ut it also has drawbacks which were forced upon the proponents by bodies representing officials in order to secure their support," such as civil service organizations).

252. See *id.* at 345 (comparing the Right to Know Bill's provisions for information containing policy advice with Canada's policy advice provisions); see also *infra* notes 415-25 and accompanying text (detailing the provisions in the United States' Freedom of Information Act that deal with policy advice).

253. See Fisher Arguments, *supra* note 1, at 586 (maintaining that under the Right to Know Bill, policy advice given by civil servants is exempt, but not technical and expert advice they receive).

254. See generally *id.* at 587 (harmonizing the reform of the Official Secrets Act and the defenses of public interest and prior disclosure to the trial of Clive Ponting).

interest defense and defense of prior publication.²⁵⁵

During the debates Fisher told Parliament: "We have everything to gain: better democracy, better debate, better decisions, better efficiency, better accountability, and even greater credibility."²⁵⁶ He also noted that what impressed him most while campaigning for the Bill on the road was its ability to empower individuals.²⁵⁷ Under the Bill, Britons would be able to have greater knowledge with which to make important choices in their lives.²⁵⁸ Specifically, Fisher highlighted a tragic incident in Bradford, which he and many allege could have been prevented with a provision like the Right to Know Bill.²⁵⁹

Certain MPs repeated his arguments while other MPs offered new

255. *See id.* (stating that "[t]he Bill would also reform the Official Secrets Act [of] 1989 . . . by ending the absolute offence of any disclosure"). The Public Interest Defense that Fisher advocated was similar to the one allowed in the Ponting Trial, but not allowed in the Tisdall Trial. *See supra* notes 55, 63 (detailing the lack of a public interest defense at Tisdall's trial and the assertion of such a defense at Ponting's trial). In addition, the defense of prior publication had its origins in the Wright Trial. *See supra* note 74 (explaining how the Australian courts refused to enjoin the publication of Peter Wright's novel in Australia since it was previously published in the United States and Canada).

256. Fisher Arguments, *supra* note 1, at 596. Mr. Fisher stated that the Bill would lead to better public debate because it would be based on information and informed choices. *See id.* at 587. The Bill would lead to better decisions being taken by Ministers because their work would be open to the public for scrutiny. *See id.* at 588. Furthermore, Fisher used a "Thatcherite Argument," contending that freedom of information would help make a "better and more efficient use of whatever Government expenditure was available." *Id.* at 589.

257. *See id.* at 590 (stating that "[m]ore than anything else, the important point is that the Bill would empower the individuals").

258. *See id.* (describing the increased choice and knowledge the public would receive under the Right to Know Bill).

259. *See id.* (stating that choices do "not apply simply to matters of food and safety. . . [t]here are sometimes tragic consequences from not having information and from not making choices"). Fisher explained that the government had known for years that the combination of accumulated rubbish and wood stands was dangerous and had even predicted an accident like Bradford's. *See id.* Yet, they remained silent. *See id.* *See generally*, *Cigarette Probably Caused Bradfire Fire, Inquiry Told*, REUTERS, June 5, 1985 (explaining that a cigarette dropped below a seat onto rubbish which caused a fire that swept through the Bradford City Stadium killing 56 people); Alan Nixon, *I Still Find It Hard to Talk About What Happened . . . I Could See The Fire As I Looked For My Family But Didn't Realise What Was Happening*; Stuart McCall, *on The Bradford Tragedy of 1985*, PEOPLE, May 7, 1995, at 54 (leaving a "lasting scar" on the people of Bradford, this Rangers Star "opens his heart" to relate how that blaze "terrified the world").

arguments.²⁶⁰ One MP argued that this measure would allow individuals access to the courts by providing them with the necessary information to prove their cases.²⁶¹ This MP, like other MPs, spoke of the Matrix Churchill scandal, and concluded that had the Bill been in place, that event might not have occurred.²⁶² Furthermore, an MP noted that Britain's policy of secrecy made things difficult for the men and women of the armed forces during the Gulf War.²⁶³ This MP stated that for far too long the Government has hidden behind the defense of national security.²⁶⁴

MPs also discussed the fact that other countries look in disbelief at the way Britain carries out its affairs and how this Bill would help improve the government's image.²⁶⁵ Additionally, an MP argued that

260. See 219 PARL. DEB., H.C. (6th ser.) 621 (1993) (statement of Mr. Shepherd) [hereinafter Shepherd Comments] (reiterating Blair's arguments for accountable government and better quality of decisions); 219 PARL. DEB., H.C. (6th ser.) 590-91 (1993) (statement of Mr. Bob Cryer) [hereinafter Cryer Comments] (telling of another fire in Bradford and emphasizing that "[i]t is wrong that our constituents should be ignorant of potentially lethal dangers in their communities").

261. See 219 PARL. DEB., H.C. (6th ser.) 626-627 (1993) (statement of Mrs. Barbara Roche) [hereinafter Roche Comments] (detailing the experience of one of her constituents who was unable to bring a suit against a dye company and a hospital that inserted dye into her, because the hospital was not required by law to release the ingredients of the dye).

262. See *id.* (stating that "the documents that might have entered the public domain under the Bill would have shown the great lengths to which Whitehall advisors were prepared to go to keep the secret shifts in defense-related trade policy"); Foster Comments, *supra* note 232, at 618 (stating "many of the Government's difficulties in relation to Matrix Churchill, the miners' debacle or, more recently, the problems with the social chapter, might not have occurred had the Bill been in place").

263. See Roche Comments, *supra* note 261, at 625 (expressing her dismay over the Iraqi invasion of Kuwait and commenting on the role Britain's secrecy played in this event). In addition, Roche said "The fact that there was that secrecy and what was clearly happening was an arms trade with Iraq meant that there was no public debate whatever on the issue and it led to the consequences that resulted." *Id.*

264. See *id.* at 626 (stating that "[f]or far too long, Governments have hidden behind the defense of national security"); *cf.* 219 PARL. DEB., H.C. (6th ser.) 649 (statement of Ms. Glenda Jackson) [hereinafter Jackson Comments] (noting that most of Britain's democratic neighbors "find it perfectly possible to protect their freedom and security without enveloping themselves and their political institutions in a cloak of impenetrable secrecy").

265. See Roche Comments, *supra* note 261, at 627 (quoting an article written by Richard Norton-Taylor which appeared in THE GUARDIAN, in which Britain is described as "Ostrich-like"); Hoey Arguments, *supra* note 3, at 636 (stating that

most Britons wish to use the act for common "daily matters," not to obtain information to endanger national security or find fault with the government.²⁶⁶ MPs received a voluminous amount of postcards from constituents expressing support for the Bill and detailing how they would use the act to obtain general information.²⁶⁷ Also, MPs argued that the Bill was necessary for Britain's democracy to reach adulthood.²⁶⁸

According to the MPs who opposed the Bill, however, Britain's government is doing just fine with its slow piece-meal approach.²⁶⁹ These MPs argued that one of the benefits of having an unwritten constitution is the ability to target reform and not impart on wholesale change.²⁷⁰ Additionally, they advanced the theme of "progressive openness" to demonstrate the extent to which the Government has already created a more open and informed society.²⁷¹ The MPs pointed to the Local Government (Access to Information) Act,²⁷² the

"[w]e are viewed by many people as being liars and cheats who are prepared to cover up all manner of things" and "[w]hen there is no right to know and no freedom of information, it is difficult to disprove that view").

266. Roche Comments, *supra* note 261, at 626.

267. See Hoey Arguments, *supra* note 3, at 636 (stating that "[t]he number of cards and letters shows that there is broad support for the Bill across the political party divide"); see also Foster Comments, *supra* note 232, at 618 (detailing a MORI poll that showed that "77 percent of the British people favored freedom of information legislation, and 74 percent of Conservative Voters favored it).

268. See Fisher Arguments, *supra* note 1, at 595 (noting the need for Britain's democracy to go from childhood to adulthood, where everyone has "the right to share the information which is paid for with taxpayers' money and collected in our name but withheld from us"); see also Rooker Comments, *supra* note 232, at 608 (describing Britain's machinery of government as archaic and analogizing it in the operation of secrecy to be "on par with that of the 19th century high-class whorehouse in terms of protection of its clients").

269. See Wheeler Comments, *supra* note 221, at 614 ("Much of the information that people need and desire, and which the bill is aimed at, is already publicly available . . . There is no doubt that the Government were more open . . . Those moves in specific and targeted areas are far more effective than the Bill's blanket provisions.").

270. See *id.* at 612 (stating the "answer is not wholesale change but targeted reform").

271. See *id.* at 613 (stating after responding to a question, "I return to the theme of progressive openness"); see also Waldegrave Argues, *supra* note 221 (arguing that much more information is now available and listing the measures that give such access).

272. See *supra* Part II.B.2 (providing a thorough discussion of the Local Government (Access to Information) Act).

Citizen's Charter,²⁷³ the Data Protection Act,²⁷⁴ the Access to Personal Files Act,²⁷⁵ and the Access to Health Records Act²⁷⁶ as evidence of openness.

Paralleling the above argument concerning wholesale change was the argument that the Official Secrets Act should not be reformed in the manner in which Fisher envisions because it would be throwing away "years of practical experience" and putting the Nation "at risk."²⁷⁷ Alternatively, MPs believed that the correct way to deal with the secretive culture is to develop it, building on its strengths.²⁷⁸ It appears, however, that this is what has been done for many years, yet problems still exist.²⁷⁹

In addition, MPs argued that freedom of information acts in other countries have added nothing²⁸⁰ and that the Bill would interfere with the public's right to privacy.²⁸¹ As in prior Parliamentary debates,

273. See *supra* notes 218-20 and accompanying text (discussing the Citizen's Charter).

274. See *generally* INFORMATION TECHNOLOGY & THE LAW 22 (Edwards et. al eds., 1990) [hereinafter IT LAW] (explaining how the Data Protection Act of 1984 introduced into UK law a statutory concept of privacy in relation to computerized personal information). Under the Act, individuals are entitled to access to personal data held by users, and are compensated if the data is inadvertently disclosed or incorrect. See *id.* Compare *id.*, with, the U.S.'s *Privacy Act*, 5 U.S.C. § 552a (1994) (regulating the collection, maintenance, use, and dissemination of personal information by government agencies).

275. See BIRKINSHAW, *supra* note 9, at 259-263 (detailing the provisions of the Act and how it provides the public access to manual files which contain their personal information).

276. See *id.* at 264-65 (elaborating on the Access to Health Records Act 1990, which gives access rights to health records). Health records are defined broadly, covering information relating to the physical or mental health of an individual made by or on behalf of a health professional in connection with their care. See *id.* Health care professionals include dentists, midwives, and nurses. See *id.*

277. Wheeler Comments, *supra* note 221, at 612.

278. See *id.* (stating that he believed that Britain should "reform what already exists, examine the areas of information already kept confidential and redefine more of them for the public domain").

279. See *supra* notes 31, 32 (discussing the Official Secrets Act of 1989).

280. See 219 PARL. DEB., H.C. (6th ser.) 648 (1993) (statement of Mr. Trend [hereinafter Trend Comments] (stating "experience from other countries suggests that freedom of information adds nothing to the political response that one might achieve by asking a direct question in the legislature").

281. See Waldegrave Argues, *supra* note 221, at 597 (arguing that "conflicting interests" must be resolved, in particular, "the right to privacy"). Waldegrave alludes to trade union rights and commercial confidentiality, and claims it is the duty

MPs expressed concern over the Bill's interference with the principle of Ministerial Accountability, especially in regard to the appellate mechanism included in the bill.²⁸² In light of the above arguments, this Bill reached the Committee stage but was eventually talked out. A total of eighty-six amendments were attached to the Bill, ensuring its defeat.²⁸³ To Fisher's dismay, most of the amendments were "designed to probe the need for the existence of the commissioner and the tribunal."²⁸⁴

The Committee that reviewed the Bill offered a sole Ombudsman procedure as an alternative mechanism.²⁸⁵ According to this Committee, such a mechanism would be more flexible and speedier and would engender "less of a siege mentality" in those whose attitudes they seek to alter.²⁸⁶ The Committee basically believed that Fisher's Bill, particularly the review mechanism, would not create the right climate for enforcement. Since the Bill's "openness" would be mandatory rather than natural, it would not "foster the right attitude of openness."²⁸⁷ Again, MPs argued that if such measures were forced upon ministers, the candidness of their discussions would decrease

of the government to protect those rights. *See id.*

282. *See id.* at 606 (voicing "one issue of high principle" as being the relationship between Parliament and the Commissioner and the tribunal and recommending against adopting the Bill's structure or approach); Trend Comments, *supra* note 280, at 649-50 (explaining that his "aim would be to find the best way to reconcile the Westminster principle of ministerial accountability to Parliament with greatly increased public rights of information" but arguing further that "the piecemeal approach can be just as profound — perhaps more so than the statutory route").

283. *See* 227 PARL. DEB., H.C. (6th ser.) 1270 (1993) (statement of Mr. Deputy Speaker) (announcing to Parliament some of the 86 amendments); *see also* Nikki Knewstubb, *MPs Angry As Private Members' Bills Succumb to 'Serial Killing'*, GUARDIAN, July 3, 1993, at 8 (detailing how Fisher's Bill had completed 15 hours in committee but was doomed when 90 amendments were tabled by Tory MPs).

284. 227 PARL. DEB., H.C. (6th ser.) 1271 (1993) (statement of Mr. Peter Luff) [hereinafter Luff Remarks].

285. *See id.* at 1273 (suggesting that "an alternative mechanism would better be modeled on the ombudsman procedure").

286. *See id.* In addition, Luff asserts:

We should pass legislation only if we believe that it will assist to alter attitudes as well as the legal framework. If we believe that a particular part of a Bill may have an adverse effect on attitudes and the way in which people conduct themselves, we should pause and think long and hard before passing legislation. Its enactment may make us feel better but it may make things worse in the outside world.

Id. at 1272.

287. *See id.* at 1273.

and more secrecy would entail.²⁸⁸

Fisher objected to the sole Ombudsman, stating that he purposely included a tribunal like that of Australia. He noted that the proposed Ombudsman structure was more similar to the system used in Canada, which "has a much weaker form of enforcement through its Commissioner" under its access statute.²⁸⁹ He then argued with an MP over the wording of two new clauses appended to the bill.²⁹⁰ Fisher was outraged because these "new" clauses were identical to ones that were contained in the original bill.²⁹¹ Fisher accused the Government of deliberately wrecking his bill by attaching so many amendments and conducting such "time-wasting" activities.²⁹² Moreover, Fisher called attention to the Government's alleged actions to inform the public about the techniques the Government uses to kill bills it does not like—particularly bills like his which seek to take power out of the hands of ministers.²⁹³ Fisher relentlessly concluded that it is "very sad and democratically wrong" that private member bills are defeated not on their merits, but by the Government attaching so many amendments.²⁹⁴

2. *The White Paper on Open Government and The Code of Practice On Access to Government Information*

In July of 1993, the Government presented its White Paper on

288. See *id.* (asserting that MPs might rely on nods and winks instead of spoken, and therefore transcribed, words).

289. 227 PARL. DEB., H.C. (6th ser.) 1282 (1993) (statement of Mark Fisher [hereinafter Fisher at Tabling]). In addition, Fisher argues, based on his years in government, that the ability of the Ombudsmen to "deliver decisions that are constrained by the rules and criteria under which they must work, is not great If we leave enforcement . . . to an ombudsman and not to a tribunal or commissioner that enforcement will take 6 months, 9 months" *Id.* The tribunal and Commissioner can function more quickly and "sometimes the speed and accessibility of information . . . is as important as the information itself." *Id.*

290. See generally 227 PARL. DEB., H.C. (6th ser.) 1275-80 (1993).

291. See Fisher at Tabling, *supra* note 289, at 1275 (observing that the wording of the new clause was virtually identical to that of clause 57).

292. See *id.* at 1284.

293. See *id.* at 1276 (stating that "[I]t is no mystery to Members of Parliament . . . what goes on here when private Member's Bills are debated, but it is important for the public to understand the actions of this House").

294. See *id.* at 1283.

"Open Government" to Parliament.²⁹⁵ The Paper begins by stating, "Open government is part of an effective democracy."²⁹⁶ The Paper is then broken down into nine chapters detailing the government's record, providing reasons for confidentiality, advocating and describing a code of practice on government information, and proposing two new statutory rights of access to personal records and health and safety records.²⁹⁷ Included in the appendix is a Draft Code of Practice on Government Information.²⁹⁸

When the government released the Paper, many were not pleased with the recommendation for a Code over statutory rights of access.²⁹⁹ Senior civil servants even privately agreed that the White Paper was a weak document allowing ministers a wide measure of discretion.³⁰⁰ One critic thought that the Paper presented a paradox.³⁰¹ "If statutory rights of access really undermine ministerial accountability, why has the government accepted them in two important areas?"³⁰²

In April of 1994, the Code of Practice outlined in the White Paper took effect.³⁰³ The Code of Practice contains five main governmental commitments. Individual departments are directed to comply with these commitments while responding to requests within twenty

295. See OPEN GOVERNMENT, 1993, Cmnd. 2290 [hereinafter White Paper].

296. See *id.* at 1.

297. See *id.*

298. See *id.* at 72 (Annex A).

299. See Stephen Alderman, *Minister Hails Move to More Open Government*, PRESS ASS'N NEWSFILE, available in LEXIS, News Library, ARCNWS File (reporting how on the day of the unveiling, Marjorie Mowlam, a Labor MP, stated that there "had been a deep failure" to deliver an open government). But cf. PYPER, *supra* note 18, at 159 (reasoning that although the White Paper may not have represented "open government" when measured against the standards of the United States, it was a "progressive measure" by British standards).

300. See Norton-Taylor, *supra* note 231, at 21 (detailing senior civil servants views on the Government's White Paper on Open Government).

301. See Maurice Frankel, *Freedom to Know*, TIMES (London), Aug. 2, 1993, available in 1993 WL10594180.

302. See *id.* The areas to which Frankel referred were the people's right of access to personal files and to health and safety information. See *id.* He argued that if access to this type of information would not undermine ministerial accountability, access to other types of information would not undermine it either. See *id.*

303. See PYPER, *supra* note 18, at 159 (providing April 1994 as the time in which the Code of Practice on Government Information, outlined in the White Paper, "came into force").

days.³⁰⁴ Under the Code, a great deal of information should also "be provided free of charge."³⁰⁵

Fifteen categories of information are exempt from disclosure under the Code.³⁰⁶ If an individual has a complaint, he or she must first contact the body that refused the information for an internal review.³⁰⁷ The next step would be to approach a Member of Parliament who will bring the case to the Parliamentary Commissioner for Administration, also called the Ombudsman.³⁰⁸ The Ombudsman is an independent officer of Parliament who has the power to see the documents and the duty to inform Parliament when government

304. *See Code, supra* note 225, Part I § 3.5 (listing the five code commitments, to supply facts and analysis with major policy decisions, to open up internal guidelines about departments' dealings, to give reasons for administrative decisions, to provide information under the Citizen's Charter about public services; and to respond to requests for information).

305. *See Code Guide, supra* note 225. Information will especially be provided free of charge under certain circumstances:

Where it is necessary to explain: benefits, grants, and entitlements; the standards and performances of services; the reasons for administrative decisions . . . the way in which you may exercise your rights to appeal or regulatory requirements bearing on your business.

Id.

However, "to ensure that the Code does not create extra burdens on the taxpayer, there may be a charge if the information does not come within one of these categories." *Id.* The costs vary by department, so one must contact the appropriate department to find out if there will be a charge for a given request. *See id.*

306. *See Code, supra* note 225, Part II (including the following as exemptions: defense, security, and international relations, internal discussion and advice, communications with the Royal Household, law enforcement and legal proceedings, immigration and nationality, effective management of the economy and tax collection, effective management and operations of the public service, public employment, public appointments and honors, voluminous or vexatious requests, publication and prematurity, research, statistics and analysis, privacy of individual, third parties' commercial confidences, information given in confidence, and statutory and other restrictions).

307. *See id.* Part I, § 11. *See generally* Tom Riley, *News From Canada and Abroad*, 21 ACCESS REPORTS, Apr. 12, 1995, at 8 (noting that the internal review process can be conducted under the Code prior to a complaint going to the Commissioner). In addition, Riley provides a summary of the Internal Review Process after one year of the Code. *See id.* The summary is as follows: "The most oft-cited exceptions quoted were: exemption 2 (internal discussion and advice); exemption 7 (effective management and operation of the public service); exemption 13 (third party's commercial confidence); and exemption 14 (information given in confidence)." *Id.*

308. *See Code Guide, supra* note 225 (explaining the complaint procedure).

agencies and departments are violating the code.³⁰⁹ Final decisions rest with the Ombudsman, who determines whether the departments were justified in refusing to release the documents and the information contained therein. The Ombudsman, however, can only make recommendations; he or she cannot order disclosure.³¹⁰

Since the implementation of the Code, many have complained about the high fees charged for information and their deterrent effect.³¹¹ In addition, individuals have complained that one does not re-

309. See *id.* (explaining the Ombudsman's powers). In 1994, the Parliamentary Commissioner for Administration received twenty-eight complaints. See Riley, *supra* note 307, at 8 (reporting on the Parliamentary Commissioner's activities from the Code's beginning to the date of this source's publication). As of April 1995, the Commissioner had issued five reports and completed six investigations. See *id.* Out of the twenty-eight complaints, seven were ruled out of his jurisdiction. See *id.* Mr. Riley includes in his reports the results of the first three investigations reported to Parliament by the Commissioner. See *id.* They are as follows:

- (i) Two complaints that the Department of Transport had refused to give details of the Inspector's report on the inquiry into the proposed Birmingham Northern Relief Road scheme in 1988. These complaints were upheld, and the Ombudsman recommended release of the Inspector's report;
- (ii) A complaint that the Valuation Office Agency had refused to reveal the identity of a house purchaser. The Complaint was dismissed, on the grounds that the release of the information would breach the purchaser's personal privacy; and
- (iii) A complaint that the Department of Health had refused to give details of contacts with the pharmaceutical industry. The complaint was upheld in part, but the Ombudsman accepted that the identities of representatives involved in the discussions could be legitimately withheld. The Department agreed to give further information about the dates of contacts and the form they had taken.

Id.

310. See Tom Riley, *News From Canada and Abroad*, 19 ACCESS REPORTS Aug. 4, 1993, at 11 (noting that the Parliamentary Commissioner for Administration has only recommendation powers and stating that "experience in other countries has shown that a Commissioner solely with recommendation powers experiences many problems in convincing officials to release information").

311. See Cal McCrystal, *Freedom Fighter Amid the In-trays; Right to Know Comes at a Price*, INDEP., Nov. 13, 1994, at 11 (reporting on the Campaign for Freedom of Information's report that showed that high fees charged under the Code were often a deterrent to the use of the Code); Peter Victor, *Freedom of Information: It Will Cost You; The Facts We Need To Know Have Turned Into 'Government-Held Tradable Information'*, INDEP., June 18, 1995, at 4 (providing examples of large fees certain agencies had charged for general information, sometimes as much as £2,000 or £3,000). The Meteorological Office, for example, has charged exorbitant fees for weather information. See *id.* Victor worries that "many people who ask questions under the code are intimidated by the threat of charges." *Id.* Specifically, Victor reported that in 1994, 9 out of 90 people who asked the Inland Review for information under the Code dropped their requests

ceive the actual "pre-existing" documents, but rather "access to information."³¹² This policy allows the Government to publish information in a manner which it finds appealing, frustrating the very purpose of freedom of information.³¹³ Another significant problem is the fact that citizens often do not know what information is available, nor do they fully understand the role of the Ombudsman.³¹⁴ In fact, most individuals are not aware of the Code's existence due to sparse advertising by the Government.³¹⁵ The Government recently conceded this point and has increased its efforts to educate the public about the Code.³¹⁶

Press releases issued by the Cabinet Office highlight the positive effects that the Code is having in Britain.³¹⁷ Yet, the campaign for freedom of information legislation continues, and Select Commit-

when they were told how much the requests would cost. *See id.*

312. *See* Riley, *supra* note 307, at 12 (relating the Campaign for Freedom of Information's poor marks for the Code's first year in practice and citing the "thorny problem that the Code does not require release of the actual documents containing the information, but only the information itself"). Riley does state that this weakness has not gone unnoticed by the Parliamentary Commissioner for Administrative Complaints, "who in his first case, commented on how onerous and misleading this was and that, in fact, it would be better if the document itself were released". *Id.*; *see also* Code, *supra* note 225, Part I, § 5 (describing access to information).

313. *See* BIRKINSHAW, *supra* note 9, at 202 (explaining that under the code "there would be access to information which would be selected, filleted and presented by officials").

314. J. Ross Harper, *Open Season on the Protection of Privacy*, SCOTSMAN, July 13, 1994, available in LEXIS, News Library, TXTNWS File.

315. *See* Stephen Ward, *Code of Openness Fails To Catch the Public Imagination*, INDEP., Mar. 15, 1995, at 4 (reporting that official government figures confirmed expectations that few people used the open government code in its first year, possibly because there is little public awareness of its existence).

316. *See* Cabinet Office (OPS) Press Office, *Improving Access To Government Information*, Jan. 17, 1996 (visited July 18, 1997) <<http://www.open.gov.uk/coi/ops/5/96.html>> (explaining how the Home Office is circulating over 30,000 copies of a new leaflet explaining the Code as a part of "an ongoing campaign aimed at raising people's awareness . . .").

317. *See* Cabinet Office (OPS) Press Office, *Freeman Welcomes Open Government Momentum: 17,000 More Records Released Since May*, Oct. 23, 1995 (visited July 18, 1997) <<http://www.open.gov.uk/coi/ops/264/95.html>> (relating the increase in amounts of records released under the Code along with a statement by Roger Freeman, the Chancellor of the Duchy of Lancaster, that "release of these files is a further step in our programme to make government more accessible to the public").

tees,³¹⁸ and Blair,³¹⁹ are calling for the implementation of such legislation.

In sum, the concept of freedom of information has gained support from current members of Parliament. The idea of freedom of information legislation went from being strongly criticized in 1970, with concerns over high costs and administrative burdens, to being widely accepted by the time Freud introduced his Official Information Bill in 1980.³²⁰ These ten years are important because they demonstrate the government's hold on Parliament's agenda. Had the Labour Party not lost the election in 1979, Britain might have a freedom of information act today.³²¹

From 1980-1990 one sees further evidence of the government's power over Parliament in the area of freedom of information. Steel's bill died even with multiparty support.³²² Although one saw freedom of information enacted on the local level, it happened because the government wanted it for economic reasons—not freedom of information reasons.³²³

Over the past few years, while the British government has done more to open government, the government remains largely closed.³²⁴

318. See *British MPs Urge Freedom of Information Act*, REUTERS, Mar. 27, 1996, available in LEXIS, News Library, ARCNEWS File (reporting that the Select Committee on the Parliamentary Commissioner for Administration stated that "[w]e recommend that the government introduce a Freedom of Information Act").

319. See New Labour, *supra* note 11 (demonstrating Blair's commitment to FOI).

320. See *supra* Part II.A.2 (providing an overview of Parliament's response to freedom of information legislation since the 1970s).

321. See *supra* note 143 and accompanying text (discussing the death of Freud's Bill with the fall of the Labour Government).

322. See *supra* notes 176 and accompanying text (discussing the fact that Steel's Bill died even though it had the support of the Labour, Social Democratic, and Liberal Parties).

323. Concern on the part of conservative councillors about profligate spending by local constituencies led Prime Minister Thatcher to support local freedom of information acts without endorsing a national one. See Squire States, *supra* note 182, at 520 (noting Thatcher's general concerns about local inefficiency and hoping that greater scrutiny of expenditure would lead to less local spending).

324. See *supra* notes 2-4 (citing examples of "secrets," such as the length of the queue at the post office); see also *supra* note 316 (discussing Government realization of and efforts to increase public awareness of that information to which they actually have access); *Putting the Case For A Freedom of Information Act*, SCOTSMAN, Mar. 8, 1996, at 14 (arguing that the Code "falls short of a Freedom of

Mark Fisher was not able to break down the walls of secrecy, so a new champion is needed.³²⁵ Blair is already one step ahead of Fisher given his position as Prime Minister. If Blair wishes to see a freedom of information act implemented, he must address the main issues that arose in the Parliamentary debates discussed above, issues specific to Britain, rather than relying solely on the access statutes of other countries.³²⁶ Those main issues are: Ministerial Accountability, program costs, administrative burden, confidentiality, and protection of cabinet confidences.

III. ACCESS STATUTES OF THE UNITED STATES, CANADA, AND AUSTRALIA

Although some MPs refuse to look to other countries' Acts as prototypes for Britain, other MPs have recognized the value of these countries' experiences.³²⁷ Accordingly, this section outlines the freedom of information statutes of the United States, Australia, and Canada in order to formulate an appropriate statute for Blair.

The United States has the oldest statute, enacted in 1966.³²⁸ The statute, entitled the Freedom of Information Act (FOIA),³²⁹ provides access to all persons, even the British, and is liberally construed in favor of disclosure.³³⁰ President Clinton³³¹ and Janet Reno,³³² the At-

Information Act" because it only promises "information," not the actual documents, and because it is not enforceable in the courts).

325. See *Leader*, *supra* note 14, at 22 (describing Marc Fisher's Right to Know Bill).

326. See *supra* notes 107-08, 270, 280 and accompanying text (detailing MPs preferences to disregard the experiences of other countries under their access statutes).

327. See *supra* notes 107, 236 (providing MPs arguments that parliament should look to the United States, Australia, Canada, and New Zealand for guidance on freedom of information).

328. See *supra* note 5 (detailing the date of enactment of the United States' Freedom of Information Act).

329. 5 U.S.C. § 552, as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

330. See *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970) (reiterating that the legislative plan for the FOIA creates a liberal disclosure requirement).

331. See President's Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 WEEKLY COMP. PRES. DOC. 1999 (Oct. 4, 1993), reprinted in FOIA UPDATE (DOJ/Office of Information and Privacy, D.C.), Summer/Fall 1993, at 3 (calling upon federal agencies to renew their commitment to the Act). President Clinton stated:

torney General of the United States, recently reiterated this pro-disclosure attitude. In Canada, as well, the Information Commissioner called for a more pro-disclosure attitude among government departments.³³³ Liberals enacted the Canadian Access to Information Act (AIA)³³⁴ in 1982 as a result of strong pressure from the Conservative opposition party.³³⁵ Parliament hotly debated the statute due to

For more than a century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.

Id.

332. See *Attorney General Reiterates FOIA Policy*, FOIA UPDATE (DOJ/Office of Information and Privacy, D.C.), Spring 1997, at 1 (detailing how Reno redistributed a memo that was issued by her and President Clinton in 1993 pertaining to the importance of the FOIA with the direction that they be given to recent appointees). The 1997 memorandum, which accompanied and detailed the 1993 memo, stated in pertinent part, "I urge you to be sure to continue our strong commitment to the openness-in-government principles These principles include . . . applying a presumption of disclosure in FOIA decision making." *Id.*

333. See NOTES FOR AN ADDRESS TO THE CANADIAN ACCESS AND PRIVACY ASSOCIATION, (last visited July 20, 1997) <<http://fox.nstn.ca/~smulloy/capa-eng.html>> [hereinafter NOTES] (asking members of the Canadian Access and Privacy association to remember that "attitudes towards access cannot be legislated The beginning of reform is a will to make this law work" and that will not be accomplished by "offer[ing] more opportunity to insulate records from the right of access"); cf. INFO. COMM'R OF CAN., ANNUAL REPORT INFORMATION COMMISSIONER 1995-1996 (1996) [hereinafter ANNUAL REPORT 1995-96] (denying the principle that "everything is secret unless specifically stated otherwise," the Information Commissioner of Canada states that "the truth is precisely the opposite"). Furthermore, he states:

The onus is plainly upon the government to demonstrate why a record cannot be released, either in whole or in part. Individuals do not have to prove their case for the release of government-held information any more than they need to say why they want the information. Unless the government can demonstrate before an information commissioner or a court a right to withhold a record, it must be released. That's the law. The assumption of this remarkable law is that information belongs to the people. In the British system, that's revolutionary.

Id.

334. See Access to Information Act, R.S.C., ch. 111 (1980-1983) [hereinafter AIA].

335. See Anthony Johnson, *The Frustrating Hunt for Information*, OTTAWA CITIZEN, July 3, 1993, at B4 (reporting that Canada's statute was passed in 1983 by Liberals but that "[i]ronically, it was the opposition Conservatives who pushed the hardest for freedom of information legislation and were harshly critical of the Act's cabinet secrecy provisions").

Canada's Westminster style of government and concerns over Ministerial Accountability.³³⁶ Reports from Canada's Information Commissioner, who is appointed by Parliament, indicate that the Act has proven extremely powerful and effective³³⁷ and that it is able to stand alongside Canada's Official Secrets Act.³³⁸

Australia, like Canada and Britain, operates under a Westminster

336. See 21 PARL. DEB., H.C. 6725 (1980) (statement of Mr. Fox) (thanking all of the members who participated in the debate and stating: "we have given a great deal of thought to reasonable proposals in the area of ministerial responsibility"). Furthermore, Fox stated, "The government decided to take the route of judicial review However, we felt that there was a possible conflict between the principle of ministerial accountability and the principle of judicial review." *Id.*; see also INFO. COMM'R OF CAN., THE ACCESS TO INFORMATION ACT: 10 YEARS ON (1994) [hereinafter 10 YEARS] (emphasizing that Canada has inherited parliamentary sovereignty and that government tradition holds each minister responsible for the actions of his or her department and therefore, "broad access, it was feared, could dilute that responsibility and make ministers less accountable to the public"). Furthermore, "[t]his subtle, yet important, difference [to America] has deeply shaded the discussion of information in this country." *Id.*

337. See ANNUAL REPORT 1995-96, *supra* note 333, at 5 ("Each and every day, in newspapers, on radio and television, we see and hear the power and effectiveness of the access law."). For example, Canada learned about golf trips to Florida for military generals, contracting practices at Natural Resources Canada, and a ten percent pay increase to the Deputy Governors of the Bank of Canada. See *id.*; see also 10 YEARS, *supra* note 336, at 23 (conceding that "no one expected that the most restrictive elements of parliamentary sovereignty and ministerial secrecy would be overturned in a decade").

338. See Official Secrets Act, R.S.C., ch. O-3, § (1985). Chapter O-5, section 3, "Offenses" reads as follows:

3. 1) Every person who is guilty of an offence under this Act, who, for any purpose prejudicial to the safety or interests of the State, (a) approaches, inspects, passes over, is in the neighbourhood of or enters any prohibited place; (b) makes any sketch, plan, model or note that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power; or (c) obtains, collects, records or publishes, or communicates to any other person, any secret official code word, password, sketch, plan, model, article, note, document or information that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power.

Id. at ch. O-5, § 3. This statute, unlike Britain's Official Secrets Act, relates to espionage only. The statute is also rarely used. See *Reform*, *supra* note 66 (discussing how Canada has an Official Secrets Act "but has given up using it"). In addition, other countries have similar legislation but do not use it. See *id.* For example, Australia has similar provisions in its Commonwealth Crimes Act 1914 but never uses it. See *id.* The United States confines itself to "legislation that protects clearly identified national secrets such as the National Defense Act 1911, the Espionage Act 1917, and the Comint Act 1950." *Id.*

style of government.³³⁹ Concern as to whether the United States FOIA could be implemented in Australia, as a result of the countries' dissimilar constitutional and administrative frameworks, permeated the enactment of Australia's Freedom of Information (FOI) Act.³⁴⁰ Today, Australia's Act is lauded as playing an important role in Australia's democratic system and increasing the accountability of officials.³⁴¹ Yet, as in other countries, calls for change in agency cul-

339. See PATRICK WELLER, *Introduction* to MENZIES TO KEATING: THE DEVELOPMENT OF THE AUSTRALIAN PRIME MINISTERSHIP 1 (1993) ("The language of the Westminster system, however poorly that concept defines the workings of the political system, remains intact").

340. See generally ISSUES PAPER, *supra* note 7, at 4-7 (providing the background to the introduction of the FOI Act). In 1974, the first of two Interdepartmental Committees formed to examine freedom of information concluded that "should the Government decide to enact FOI legislation, it would be necessary to modify the United States legislation to take account of Australia's constitutional and administrative structure." *Id.* at 4. Specifically, the Committee recommended that certain exemptions be included and that conclusive certificates exist. See *id.*

Following this report, the Interdepartmental Committee Report of 1976 maintained that "a person should have a legally enforceable right of access to any document in the possession of a department" and that such a right is essential for and complimentary to Australia's democratic government. See *id.* at 5. The Committee stated as follows:

The basic premise from which consideration of the issue in Australia must begin is that in a parliamentary democracy the Executive Government is accountable to the Parliament and through the Parliament to the people. An informed electorate is able to exercise a more informed choice at the ballot box. But, more than that, openness of access to information, in the words of the Royal Commission on Australian Government Administration, 'promotes an aware and participatory democracy.'

Id.

341. See AUSTRALIAN LAW REFORM COMM'N, DISCUSSION PAPER 59, FREEDOM OF INFORMATION (1995) at 9 [hereinafter DISCUSSION PAPER] (stating that the Law Reform Commission considers that the "Act has had a marked impact on the way agencies make decisions and the way agencies . . . record information"). Furthermore, the Commission reported that:

[T]he FOI Act has focused decision-makers' minds on the need to base decisions on relevant factors. The knowledge that decisions and processes are subject to scrutiny . . . imposes a constant discipline on the bureaucracy. The openness guaranteed by the FOI Act has improved the accountability of government.

Id.

They also noted that public servants' accountability to Ministers is complemented by the fact that their decisions are open to public scrutiny. See *id.*; cf. Robert Richards, *The Freedom of Information Act*, AUSTRALIAN ACCT., May 1995, available in, LEXIS, News Library, ARCNWS File (advocating the use of the FOI Act for information from the Tax office, as a means of obtaining information). But see G. TERILL, SUBMISSION 17 ("In some ways the Act actually undermines efforts towards increased openness. The seriousness with which it is taken by government

ture are prevalent.³⁴² The Australian Law Reform Commission (ALRC)³⁴³ recommended that the Act be amended to contain a preamble, which would make clear that access to government information is a right, and, most importantly, that the Act has its origins in the present understanding of the Constitution and Australia's form of democracy.³⁴⁴

British MPs are correct that attitudes towards openness are difficult to legislate. Experiences in these countries, however, demonstrate that the statutes have played a crucial role in positively changing the mechanics of government.³⁴⁵ This section explores those experiences in detail, focusing on the issues raised in Britain's debates over freedom of information.

A. FORMS OF ACCESS

Unlike Britain, Australia, Canada, and the United States provide individuals with actual physical documents.³⁴⁶ Canadians have the broad legal right to information recorded in any form and controlled by most federal government institutions.³⁴⁷ Recent publications re-

. . . is often used to suggest that openness is a rule; this is not so. There are innumerable other ways to achieve openness.”)

342. See, e.g., DISCUSSION PAPER, *supra* note 341, at 11 (concluding upon a study of the FOI Act that “the culture of some agencies is not supportive of the philosophy of open government and FOI” and recommending that agencies change this culture through the use of training sessions inculcating the importance of the Act).

343. See ISSUES PAPER, *supra* note 7, at viii (providing a copy of the Acting Attorney General's Order to the Australian Law Reform Commission (ALRC) to conduct an inquiry and report under the Law Reform Commission Act 1973, Section 6 on whether the basic purposes and principles of the freedom of information legislation in Australia have been satisfied and whether they require modification). The ARLC was also instructed to conduct this inquiry with the Administrative Review Council (ARC). See *id.* at 1.

344. See DISCUSSION PAPER, *supra* note 341, at 13 (recommending that the FOI Act be amended to include a preamble and delineating what that preamble should include).

345. See *id.* at 9 (“[T]he review considers that the Act has had a marked impact on the way agencies make decisions and the way they record information.”).

346. See *supra* note 312 (explaining that the current Code of Practice on Access to Government Information does not require the release of actual documents).

347. See AIA, *supra* note 334, § 3 (defining record)

“Record” includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial, or graphic work, photograph, film, microform sound recording videotape, machine readable record, and any other documentary material, regardless of

leased by Canada's Information Commissioner, however, illustrate the need to reform the Act to reflect changes that have occurred in the infrastructure of information technology.³⁴⁸

In Australia, individuals have access to "documents."³⁴⁹ The concept of document is very broad, as in Canada, and "has served the Act well to date." A shift to the concept of information is being requested, however, in addition to provisions to bring the Act in line with new technology.³⁵⁰

physical form or characteristics, and any copy thereof.
Id.; see also ANNUAL REPORT 1995-96, *supra* note 333, at 1 (describing Canadian's rights under the AIA).

348. See INFO. COMM'R OF CAN., ANNUAL REPORT INFORMATION COMMISSIONER 1994-1995, (1995) at 3-5 [hereinafter ANNUAL REPORT 1994-95] (discussing the information superhighway, the Information Commissioner stated that "[p]raise it or doubt it, this tantalizing and powerful image cannot be ignored by gatherers and custodians of information or by those with legislative . . . or statutory . . . responsibility towards a law called the 'Access to Information Act'"); *Minister of Public Works and Government Services, Information Technology and Open Government* (visited July 23, 1997) <<http://infoweb.magi.com/~accessca/ogov-e.html>> (assessing the impact of new information technologies and new information management practices on open government and the principles and application of the Access to Information Act). This report was prepared for the Information Commissioner of Canada by Information Management & Economics, Inc. of Toronto. See *id.*; see also INFO. COMM'R OF CAN., ANNUAL REPORT INFORMATION COMMISSIONER 1993-1994, (1994) at 5-9 [hereinafter ANNUAL REPORT 1993-94] (making the case for reform by highlighting that "ten years ago government records were primarily paper records" and that this is rapidly changing and thus, the "access law has some catching up to do if our access rights are to remain vibrant into the next century"). See generally Tom Riley, *News From Canada and Abroad* 20 ACCESS REPORTS, Dec., 7, 1994 (describing the climate of change in Canada pertaining to their access to information act and information technology).

349. See Freedom of Information Act, 1982, ch. 3 § 4 (Cth) [hereinafter FOI] (defining document). "Document" includes:

- (a) any of, or any part of any of, the following things: (i) any paper or other material on which there is writing; (ii) a map, plan, drawing or photograph; (iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; (iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device; (v) any article on which information has been stored or recorded, either mechanically or electronically; (vi) any other record or information; or (b) any copy, reproduction or duplicate of such a thing; or (c) any part of such a copy, reproduction duplicate; but does not include: (d) library material maintained for reference purposes; or (e) Cabinet notebooks.

Id.

350. See DISCUSSION PAPER, *supra* note 341, at 31; ISSUES PAPER, *supra* note 7, at 29 (emphasizing that under the act, agencies are under no obligation to create a

The United States recently amended its FOIA to address the subject of electronic records, thus expanding the definition of agency "records" that must be made available to the public.³⁵¹ Such reforms were introduced in order to correct lengthy processing delays and fulfill FOIA's mandate of providing all "agency records."³⁵² The finding, releasing, and disseminating of records should now be much easier. Blair has already contemplated and addressed reforms of Britain's information technology in the Labour manifesto, linking such reforms to freedom of information legislation.³⁵³

B. FEES AND COSTS

Under all three statutes, access to information is subject to fees and charges. The costs have often been criticized as contrary to the

document from information in the possession of an agency in order to satisfy a request).

351. See FOIA UPDATE *supra* note 5, at 3-9 (providing the text of the Freedom of Information Act as amended, including the new definition of agency records). Section (a)(2)(D) "create[s] a new category of records that will be required to receive 'reading-room treatment'— a category consisting of any records processed and disclosed in response to a FOIA request that 'the agency determines have become or are likely to become the subject of subsequent requests.'" *Id.* at 1. In short, if an agency receives a number of requests for a certain type of information, under this provision, they will have to make it available via electronic reading rooms. *Cf. Is FOIA About Records or Information*, ACCESS REPORTS, Apr. 16, 1997, at 3 (grappling with the new EFOIA amendments and questioning whether the FOIA is concerned with records or information). Moreover, he states that twenty years ago the world of FOIA was "beginning to move from 'record' to 'information.' From a legal and policy standpoint, the words had begun to be used interchangeably with no particular awareness that the legal distinctions might become important at some time." *Id.*

352. See Michael Tankersly, *Opening Drawers: A Requestors Guide to the Electronic Freedom of Information Act Amendments*, LEGAL TIMES, May 19, 1997, at 29-30 (describing how agencies resisted the application of FOIA to electronic data and violated the FOIA's promise of a "prompt release of records"); Jamie A. Gordsky, *The Freedom of Information Act in the Electronic Age: The Statute is not User Friendly*, 31 JURIMETRICS J. 1 (1990) (exploring the conceptual and practical problems in applying the unamended Freedom of Information Act to computerized government information); Nancy Ferris, *Virtual Records*, GOV'T EXECUTIVE, Aug. 1997, at 43 ("EFOIA . . . will force agencies to use contemporary technology, while it prods them to cut their backlogs."). The EFOIA amendments extends the amount of days that an agency has to respond from 10 to 20. See *id.*

353. See New Labour, *supra* note 11, at *Information Superhighway*, <<http://www.labour.org.uk/views/info-highway/social.html>> (stating that "the information society can help make our society more open and accessible").

aims of the Acts.³⁵⁴ All three countries, however, realize the necessity of having requesters contribute financially in order to keep administrative costs to a minimum.³⁵⁵ Both the Information Commissioner for Canada and the ALRC have asserted that the number of requests per year is lower than initially predicted and that the law is not expensive.³⁵⁶ Experience in Australia highlights the fact that staff costs are the main expense; however, it attributes these costs to the absence of a sole independent monitor of the program.³⁵⁷ Recent proposals suggest an independent monitor to oversee the administration of the Act or a Parliamentary Committee.³⁵⁸

All three countries charge for search and retrieval, inspection and photocopying, and decision making, subject to fee waivers.³⁵⁹ In ad-

354. See DISCUSSION PAPER, *supra* note 341, at 82 (shaping the issues in regard to costs).

355. See *id.* (noting that requestors must be responsible financially); OFFICE OF THE INFO. COMM'R OF CAN., THE ACCESS TO INFORMATION ACT: A CRITICAL REVIEW 51 (1994) [hereinafter CRITICAL REVIEW] (stating that "anyone seeking information for the purpose of holding the government accountable or for their own personal interest should pay minimal fees for obtaining the information").

356. Compare ISSUES PAPER, *supra* note 7, at 9 (stating that "unlike the Australian FOI Act, the Act is used by a large number of professional brokers" in the United States), with NOTES, *supra* note 333 (scolding the Prime Minister Chretien for being misinformed and misstating that "every day hundreds and even thousands of information requests are made by journalists, academics and members of Parliament"). The Information Commissioner stated, "[T]he exaggeration here is so patent as to require no rebuttal." *Id.* In addition, he stated that in his view, "much of the complaining about the excessive cost of administering the access law is without foundation." *Id.*; see also ANNUAL REPORT 1995-96, *supra* note 333, at 5 (stating "[t]ake note ye skeptics who say the right to know is costing the taxpayer too much" and detailing examples of where money has been saved in Canada under the Act).

357. See ISSUES PAPER, *supra* note 7, § 9.7 (noting that non-staff costs, for such things as photocopying, printing, legal fees and computer time, represent less than ten percent of total costs).

358. See generally DISCUSSION PAPER, *supra* note 341, at 20-30 (recommending an independent person to oversee the administration of the FOI act and providing a number of options as to who should perform the role of independent monitor, including a parliamentary committee; quasi autonomous unit within the Attorney General's Department; Ombudsman; Australian Archives; AAT; Privacy Commissioner; and Chief Government Information Officer). The Commission believes, however, that given the nature of Parliamentary Committees, it is unlikely that a committee would be able to provide the constant review that is necessary and envisioned by the Review. See *id.*

359. See U.S. Dep't of Justice & U.S. General Services Administration, *Your Right To Federal Records: Questions and Answers on the Freedom of Information*

dition, both Canada³⁶⁰ and Australia³⁶¹ charge an additional application fee for requests. On top of these fees, Australia levies a charge for review of adverse decisions.³⁶² Current review of the fee system in Australia has resulted in a recommendation that the fees remain the same.³⁶³ In Canada, however, pressure continues to decrease costs, or at least prevent further increases, because of the deterrent effect of the fees.³⁶⁴ A report of the costs associated with the AIA recently suggested other opportunities to reduce the Act's administrative costs, including the reduction of exemptions available, improvement in records management, and the streamlining of internal review and approval procedures.³⁶⁵ All of these alternatives displace

Act, Dec. 1996, 3 [hereinafter *Federal Records*] (detailing the cost of obtaining information for United States citizens who are non-commercial requestors). In the United States, pursuant to the Freedom of Information Reform Act of 1986, Government agencies assess fees based upon the type of requestor. *See generally* FOIA GUIDE, *supra* note 5, at 391 (stating "[a]s amended by the Freedom of Information Reform Act of 1986, the FOIA provides for three levels of fees that may be assessed in response to FOIA requests according to categories of FOIA requestors"). The Freedom of Information Reform Act of 1986 also placed the Office of Management and Budget (OMB) in charge of establishing a uniform fee schedule and guidelines for individual government agencies as to the fees that requestors are required to pay. *See id.* at 390. Accordingly, individuals should consult the OMB Fee Guidelines, 52 Fed. Reg. 10,011 (1987). In general, in the United States, search fees usually range from ten to thirty dollars per hour. *See Federal Records, supra*, at 3. The charge for copying may be as low as ten cents per page, but could be higher depending on the agency. *See id.* The first 100 copies are free and two hours of search are free. *See id.*; 10 YEARS, *supra* note 336, at 21 (stating that in Canada, "Everyone pays a five dollar application fee which pays for hours of search time. Thereafter charges for searches, photocopies or computer time can be applied."); ISSUES PAPER, *supra* note 7, § 9.2 (charging Australians thirty dollars for an initial application fee and for photocopying and search time with rates varying by agency).

360. *See* NOTES, *supra* note 333, at 4 (noting that Canada imposes a five dollar fee per request).

361. *See* ISSUES PAPER, *supra* note 7, § 9.2 (noting that an initial request in Australia costs thirty dollars).

362. *See id.* (noting that Australia charges forty dollars for an internal review application).

363. *See generally*, DISCUSSION PAPER, *supra* note 341, at 90 (rejecting the need to change the fee system and rephrasing the issue in terms of the need to reduce the costs of providing information, offering improved technology as the means).

364. *See* NOTES, *supra* note 333, at 4 (arguing that no reform is better than any increase in rates).

365. *See* TREASURY BD. OF CAN., MANAGING BETTER: REVIEW OF THE COSTS ASSOCIATED WITH THE ADMINISTRATION OF THE ATIP LEGISLATION [hereinafter MANAGING BETTER] (advocating that agencies actively work to make information

the costs from requesters.³⁶⁶ Blair must decide who should bear the costs—the requester, the taxpayer, or the government.³⁶⁷

C. REVIEW MECHANISMS

If a United States government agency denies a request, an individual need only send a letter to that agency requesting a review.³⁶⁸ If the agency denies the appeal, the matter can be taken to a federal court for *de novo* review.³⁶⁹ United States courts have the power to review documents, compel agency disclosure, and/or affirm the agency's withholding of information.³⁷⁰

Unlike the United States, there is no internal departmental review in Canada.³⁷¹ Upon denial of a request the individual appeals to an independent Parliamentary Ombudsman called the Information Commissioner.³⁷² The Commissioner has the power to investigate

available to the public domain, introduce "integrity controls" to ensure that information is accurately reported, and change how exemptions are applied). Specifically, it is argued that agencies use an "injury test" to determine if exemptions apply, in order to provide for a more efficient and inherently less confrontational review process. *See id.* at 23.

366. *See id.* at 20 (noting that these reforms could reduce costs to the government without imposing higher fees on requestors).

367. *Compare* NOTES, *supra* note 333 (arguing that requestors should not be required to pay higher fees because costs to the government are not high, but in fact are exaggerated by opponents of open government) *with* MANAGING BETTER, *supra* note 365 (stating that both requestors and the government alike could benefit from reduced costs if government procedures were streamlined).

368. *See Federal Records*, *supra* note 359, at 5 (directing persons on how to appeal a FOIA decision).

369. *See id.* ("You can file a FOIA lawsuit in the U.S. District Court where you live, where you have your principal place of business, where the documents are kept, or in the District of Columbia.").

370. *See* 5 U.S.C. § 552 (a)(4)(B) (1994) ("The court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* . . .").

371. *See* ANNUAL REPORT 1995-96, *supra* note 333, at 1.

372. *See id.* (detailing the review process and defining the commissioner as an ombudsman who is "independent of the government"); INFO. COMM'R OF CAN., ANNUAL REPORT INFORMATION COMMISSIONER 1990-91, (1991) at 36 [hereinafter ANNUAL REPORT 1990-91] (detailing the two levels of independent review under the Access to Information Act).

The first level gives applicants the opportunity to ask the Information Commissioner to investigate their complaints that the government has not responded properly to their applications The second level provides the ground rules for asking the Federal Court to review two types of decisions: government proposals to disclose third-party information, and—once the Commissioner has completed his investigation—com-

complaints, including the power to compel the review of documents. He may not, however, order an agency to disclose documents.³⁷³ Thus, he must rely on persuasion to solve disputes.³⁷⁴ If the Commissioner believes that the government has wrongly denied access or the appeal involves disclosure of third party information, he may ask the Federal Court to review the denial.³⁷⁵ While the Canadian Ombudsman approach is criticized for its lack of power, the virtues of the approach are its informal, non-adversarial style, and expertise in freedom of information.³⁷⁶

Australia currently has all four approaches with some modifications. Initial review in Australia, like in the United States, is internally handled by the agency that denied the documents.³⁷⁷ Unlike the United States, however, the individual must pay forty dollars for the review.³⁷⁸ This form of review is considered the quickest and cheap-

plaints about improper denial of access.

Id.

373. See ANNUAL REPORT 1995-96, *supra* note 333, at 1 ("Since he is an ombudsman, the commissioner may not . . . order a complaint resolved in a particular way."); CRITICAL REVIEW, *supra* note 355, at 42 ("The federal commissioner has very strong investigative authority, but makes recommendations as to how to resolve differences over refusals of access."); 10 YEARS, *supra* note 336, at 11 (stating that the Commissioner's order powers "are not part of his repertoire . . . [w]hile he is able to compel public servants to hand over information for review, he can only make recommendations, not enforce decisions as to whether the information should be released").

374. See ANNUAL REPORT 1995-96, *supra* note 333, at 1.

375. See *id.* (noting that the Commissioner asks "for a federal court review only if he believes an individual has been improperly denied access"). Of the 1,530 complaints reported to the Information Commissioner for the FY 1995-96, 13 were filed in Federal Court. See *id.*

376. See generally 10 YEARS, *supra* note 336, at 10-12 (detailing the virtues and disadvantages of Canada's Information Commissioner). From time to time in the U.S., informal proposals have been made for an ombudsman based administrative structure, along with calls for an independent administrative tribunal model. See generally Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1, n.5 (1988) (noting that the "most detailed proposal was made by Robert L. Saloschin, former Director of the Office of Information Law and Policy, Dep't of Justice" and providing additional examples of the use of an information ombudsman).

377. See generally ISSUES PAPER, *supra* note 7, at 8.1 (detailing the existing review mechanisms in Australia).

378. Compare *id.*, § 8.3 (stating that Australia charges forty dollars), with Federal Records, *supra* note 359, at 5 (stating that a fee is not required for internal review).

est, and the ALRC has recommended it remain the same.³⁷⁹ If the individual is still dissatisfied, he can either opt for a free Ombudsman review or appeal to the Administrative Appeals Tribunal (AAT) at a cost of three hundred dollars.³⁸⁰ Australia's Ombudsman is similar to Canada's in that he can compel documents, but cannot overturn an agency decision. Unlike Canada's Ombudsman, however, he has discretion to investigate a matter and may refer the appeal directly to the AAT.³⁸¹ Many believe Australia's Ombudsman serves a valuable function in investigating government agencies; the ALRC recommends his role remain the same.³⁸² Any further powers, such as the ability to overturn agency decisions, may hinder the effectiveness of his investigatory powers.³⁸³ According to the ALRC, another effective review mechanism in Australia is the Administrative Appeals Tribunal (AAT).³⁸⁴ The AAT has jurisdiction for review under the FOI act and the Administrative Appeals Tribunal Act 1975.³⁸⁵ Thus, the AAT handles more than just FOI appeals and is considered a general tribunal.³⁸⁶ The AAT has the power to affirm, vary, or set aside an agency decision.³⁸⁷ Additionally, it can review all agency documents, but only at the tribunal hearing, not during the two preliminary conferences that are required by law.³⁸⁸ Many have criticized this aspect of the AAT, and the ALRC has recommended that

379. See DISCUSSION PAPER, *supra* note 341, at 98 (stating that a majority of submissions favor internal review as the first stage).

380. See *id.* at 98-101 (providing a thorough discussion of the review stages in Australia under the Freedom of Information Act).

381. See *id.* (describing the discretionary powers of the Ombudsman).

382. See *id.* at 101 (proposing that the Ombudsman's role remain unchanged).

383. See DISCUSSION PAPER, *supra* note 341, at 100 (stating that "[i]t is apparent from submissions that the Ombudsman is performing a valuable function in investigating agenc[ies] . . . and determinative review powers" may significantly affect the existing valuable role). The ALRC also bases its decision on the fact that the Ombudsman investigates a wide range of matters relating to an agency's handling of a FOI application, not just denied requests. See *id.*

384. See *id.* (reporting on the AAT).

385. See *id.*; see also Administrative Appeals Tribunal Amendment Act, 1993 [hereinafter AAT Amdnts] (amending the AAT 1975).

386. See ISSUES PAPER, *supra* note 7, at 101 (weighing the advantages of a general tribunal of diverse membership, flexibility to suit individual cases, and reduced costs versus the disadvantages of the lack of specialized FOI expertise and lack of consistency in decisions).

387. See *id.* (explaining that ATT must give reasons for its decisions as well).

388. See DISCUSSION PAPER, *supra* note 341, at 106 (detailing the power of the AAT to inspect documents).

the AAT be granted the power to review documents during all stages of appeal.³⁸⁹ Additionally, many have criticized the AAT's lack of power over conclusive certificates.³⁹⁰ Conclusive certificates are similar to Britain's "public interest certificates" because they provide blanket protection to certain categories of information deemed sensitive by ministers.³⁹¹ The AAT cannot review a decision to grant a conclusive certificate, but it can determine whether reasonable grounds existed for the issuance of such a certificate.³⁹² The ALRC considered whether certificates were legitimate and the role that the AAT should play in their review. The ALRC decided that the certificates are necessary and that the AAT may not revoke certificates, but it can continue to assess whether ministers had reasonable grounds for the certificate.³⁹³ Additionally, if the AAT believes that a certificate should be revoked and the minister disagrees, the minister must advise Parliament by tabling a notice and then reading it in his or her House.³⁹⁴ According to the ALRC, this "imposes a considerable and sufficient discipline on Ministers."³⁹⁵ Overall, the AAT is considered to be flexible, inexpensive, faster, and less formal than other approaches; yet, many say that the mechanism is too formal and adversarial.³⁹⁶ Australians may also appeal to the Federal Courts if their appeal is based on a "question of law."³⁹⁷ This type of review is rare, and falls under the Administrative Decisions (Judicial Review) Act 1977 rather than the FOI Act.³⁹⁸ Blair must decide which mecha-

389. *See id.* (requesting that section 64 of the Act be changed because "the Review agrees that the AAT should be able to inspect the documents in dispute at any stage"). This reform would allow the AAT to form its own view as to the substance of the claims for exemption at a very early point in the proceedings. *See id.*

390. *See ISSUES PAPER, supra* note 7, at 45 (asking "whether the provisions for conclusive certificates are necessary and whether the AAT should be given power to make determinative decisions?").

391. *See id.* (specifying that the Minister responsible for an agency has discretion to grant a conclusive certificate for certain documents).

392. *See id.* (indicating the current way the AAT handles certificates).

393. *See DISCUSSION PAPER, supra* note 341, at 55 (stating that there is a legitimate role for the certificates and noting that the expiration of the certificates after two years is sufficient).

394. *See id.* (recommending this procedure as an additional safeguard).

395. *Id.*

396. *See id.* at 101-05 (providing an analysis of AAT review).

397. *Id.* at 101.

398. *See ISSUES PAPER, supra* note 7, at 97-98 (listing it as one of four possible review mechanisms but not elaborating on it at length because it is not often used).

nisms will be accepted by UK's Parliament and which will provide the most access to government information.

D. EXEMPTIONS

As Canada's Information Commissioner stated in his 1993-1994 Annual Report: "Exemptions are difficult creatures to draft [and] [i]t is even more difficult to obtain a consensus on what they should be."³⁹⁹ The United States Congress agreed upon nine FOIA exemptions,⁴⁰⁰ while Canada's Parliament affirmed fourteen⁴⁰¹ and Australia's Parliament nineteen.⁴⁰² Of the three countries, Australia's exemptions have received the most general criticism for being too extensive and broad and containing complex statutory language.⁴⁰³

399. ANNUAL REPORT 1993-94, *supra* note 348, at 16.

400. See 5 U.S.C. § 552(b) (1994) (containing nine exemptions which protect classified national defense and foreign relations information, internal agency rules and practices, information prohibited from disclosure by another law, trade secrets and confidential business information, inter-agency or intra-agency communications protected by legal privileges, information covering personal privacy, information compiled for law enforcement purposes, information relating to the supervision of financial institutions and geological information).

401. See AIA, *supra* note 334, §§ 13-27 (providing 14 exemptions). These exemptions are:

(13) information obtained in confidence; (14) federal provincial affairs; (15) international affairs and defense; (16) law enforcement and investigations; (17) safety of individuals; (18) economic interests of Canada; (19) personal information; (20) third party information; (21) Advice; (22) testing, audits (23) solicitor-client privilege; (24) statutory prohibitions; (25) severability; (26) if information is to be published; (27) notice to third parties.

Id.

402. See FOI, *supra* note 349, §§ 33-47A (providing 19 exemptions). The exemptions are:

(33) national security, defence or international relations; (33A) relations with states; (34) cabinet documents; (36) internal working documents; (36A) periods for which certificates remain in force; (37) law enforcement and public safety; (38) secrecy provisions of enactment's apply; (39) documents affecting financial or property interests of the Commonwealth (40) certain operations of agencies; (41) personal privacy; (42) legal professional privilege; (43) documents relating to business affairs; (43A) documents relating to research; (44) national economy; (45) material obtained in confidence; (46) disclosure of which would be in contempt of court or Parliament; (47) documents arising out of companies and securities legislation; (47A) electoral rolls and decisions.

Id.

403. See ISSUES PAPER, *supra* note 7, at 34 (stating that the provisions "span sixteen pages of the Act" and are "worded in such a way that they are neither accessible nor intelligible to most people").

The ALRC has recommended that the Australian Parliament simplify the language so that requesters and officials can better understand and apply the statute.⁴⁰⁴

An area of exemption shared by all three countries and highlighted in Britain's debates is the protection of business information provided by third parties.⁴⁰⁵ Such an exemption is necessary in order to protect businesses from unfair business competition.⁴⁰⁶ Exemption four⁴⁰⁷ of the United States FOIA protects trade secrets and other confidential business information; however, in order to further protect business contractors, the United States Congress passed a new statute that contains provisions prohibiting agencies from releasing certain information.⁴⁰⁸ Thus, this information now falls under the protection of Exemption three of the FOIA as well as Exemption four.⁴⁰⁹

In Australia, section forty-three protects business affairs. It is comprised of two sections, one protecting trade secrets and the other protecting information with a potentially diminishing commercial value.⁴¹⁰ The ALRC has recently recommended that the two exemptions comprising section forty-three be repealed and combined.⁴¹¹

404. See DISCUSSION PAPER, *supra* note 341, at 11 (agreeing that the language and number of exemptions should be simplified).

405. See Fisher Arguments, *supra* note 1, at 585 (noting the importance of protecting commercial information).

406. See Ferris, *supra* note 352, at 44 (stating that "[t]he FOIA is not supposed to release commercial secrets to the world").

407. See 5 U.S.C. § 552(b)(4) (1994) (protecting "trade secrets and commercial or financial material obtained from a person and privileged or confidential").

408. See *New Statute Protects Contractor Proposals*, FOIA UPDATE (DOJ/Office of Information and Privacy, D.C.), Winter 1997, at 2 (explaining that new provisions contained in the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-210, 821, 110 Stat. 2422 provide even more protection for bid contractors under the FOIA).

409. See 5 U.S.C. § 552 (b) (3) (1994).

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters.

Id.

410. See FOI, *supra* note 349, § 43 (protecting trade secrets, information with a commercial value that could be destroyed or diminished, and certain information the disclosure of which would reasonably affect a person).

411. See DISCUSSION PAPER, *supra* note 341, at 75 (stating that "[i]n accordance with the desire to rationalise the exemption provisions, the Review proposes that

Use of the access statute to monitor competitors is more prevalent in Canada, even though the Act provides mandatory rather than discretionary exemptions for trade secrets and commercial, scientific, and technical information submitted in confidence to a government agency.⁴¹² According to Canada's Information Commissioner, many of the Act's delay problems concern requests for business information.⁴¹³ The Commissioner argues that the law should make details of government contracts public because that would "put more accountability in the government contracting process."⁴¹⁴

Britain is also debating the protection of Cabinet confidences, an area of information exempted from the Freedom of Information Acts in the United States, Canada, and Australia. In the United States, Exemption five⁴¹⁵ is used to "prevent injury to the quality of agency decisions" by providing a "discretionary deliberative process privilege."⁴¹⁶ Generally, the exemption is used to encourage open discussions on policy matters between high level and low level governmental officials, protect against the disclosure of pre-decisional policies, and protect against the disclosure of officials' reasons for policies that were not, in fact, the reasons upon which final decisions were made.⁴¹⁷ Accordingly, post-decisional documents do not fall within Exemption five protection. Unlike the United States, Australia adopted a mandatory, broader, class-based exemption that covers specific types of Cabinet documents.⁴¹⁸ "Once a document is deter-

§ 43(1)(a) and (b) be repealed").

412. See Tom Riley, *U.S. Canadian Information Acts Differ*, J. OF COM., Aug. 30, 1985 (discussing how Canada's Information Act provides mandatory exemptions for trade secrets, as well as commercial, scientific, and technical information submitted to the government). "Mandatory" means that if the information falls within the exemption, it cannot be released; whereas, if the exemption is "discretionary", it is up to the agency to decide if it can be released although it satisfies an exemption. See generally *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

413. See ANNUAL REPORT 1993-94, *supra* note 348, at 24 (attributing delays to business requests).

414. See *id.* As of October 5, 1997, the Commissioner's reforms had not been adopted. See *id.*

415. See 5 U.S.C. § 552(b)(5) (1994) (exempting "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency").

416. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

417. See FOIA GUIDE, *supra* note 5, at 180 (pointing to the "three policy purposes consistently . . . held to constitute the basis for this privilege").

418. See FOI, *supra* note 349, § 34; see also THE INFO. COMM'R OF CAN., THE

mined to be of the class described, it is exempt."⁴¹⁹ Much like under United States Exemption Five, material must be pre-decisional to qualify for exemption.⁴²⁰

Compared to the United States and Australia, Canada's approach to cabinet confidences is "very much behind the times."⁴²¹ As a result, the act continues to be viewed as a "secrecy law camouflaged in the language of openness."⁴²² Under the AIA, cabinet confidences that have been in existence for less than twenty years are excluded from coverage of the entire Act.⁴²³ A decade ago, the Standing Committee on Justice and Solicitor General agreed that it was time to replace the exclusion with an exemption bringing cabinet confidences within the purview of the AIA.⁴²⁴ Experiences at the provin-

ACCESS TO INFORMATION ACT AND CABINET CONFIDENCES: A DISCUSSION OF NEW APPROACHES 16 (1996) [hereinafter INFORMATION COMMISSIONER] (detailing Australia's Cabinet Confidence Exemption as a model for Canada). Specifically, the Report summarizes Australia's exemption 34:

The Australian Freedom of Information Act provides that each of the following documents is an exempt document: a document brought into existence for the purpose of submission to the Cabinet which has been, or is proposed by a minister to be submitted to Cabinet; an official record of Cabinet; a copy or an extract from a document covered above; and a document, the discussion of which would involve the disclosure of many deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially disclosed.

Id.

419. See INFORMATION COMMISSIONER, *supra* note 418, at 16.

420. See *id.*

421. See *id.* at 1.

422. *Id.* at 3.

423. See *id.* at 2 (detailing the information that is excluded under the Act). Subsection 69(1) of Canada's AIA provides that the Act does not apply to confidences of the Queen's Privy Council for Canada, including:

(a) memoranda the purpose of which is to present proposals or recommendation to Council; (b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions; (c) agenda of Council or records recording deliberations or decisions of Council; (d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; (e) records the purpose of which is to brief ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); (f) draft legislation; and (g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).

Id. at 1-2.

424. See INFORMATION COMMISSIONER, *supra* note 418, at 40 (referring to the

A. FORMS OF ACCESS

In the interest of simplicity and comprehensibility, Blair should employ the term "records" rather than "information." "Records" should be defined broadly, as in the United States, to include various types of media and up-to-date technology.⁴²⁹ By removing the term "information," it will be clear to British ministers that persons are entitled to actual physical documents rather than prepared summaries. Including a broad form of access will also prevent ministers from communicating in certain formats to avoid the law.⁴³⁰

B. FEES AND COSTS

In order to prevent the use of costs as a deterrent to access, as is currently the case under the Code, no fees should be charged for the request for information.⁴³¹ Although Canada and Australia believe that such fees are necessary,⁴³² the United States experience proves otherwise.⁴³³ Similar to all three countries, fees should be charged for search and retrieval, inspection and photocopying, and decision-making, subject to fee waivers. An independent administrative monitor should be created to ensure the most efficient handling of requests.⁴³⁴ The independent monitor should not be involved in the

429. See Cabinet Office (OPS) Press Office, *Clark Outlines Vision For Electronic Government*, June 18, 1997, (visited July 18, 1994) <<http://www.open.gov.uk/coi/cab/34/97.html>> (announcing the Government's commitment to "revitalise government by harnessing new technology to provide, simpler, efficient and responsive services"). David Clark, the Chancellor of the Duchy of Lancaster, announced that "clever use of Information Technology will reduce the traditional boundaries between government departments . . . Technology will provide a simple and efficient link to any Government Agency or function." *Id.* Thus, the implementation of a Freedom of Information Act along the lines of the U.S. seems perfectly reasonable.

430. See *supra* note 188 (explaining that MPs threaten to conduct all business over the telephone in order to avoid the reach of an access statute).

431. See *supra* note 311 (discussing the fact that high fees charged under the Code of Practice on Access to Government Office are a deterrent to the use of the Code).

432. See DISCUSSION PAPER, *supra* note 341, at 83-90; see also 10 YEARS, *supra* note 336, at 21.

433. See *supra* note 359 (explaining the United States' fee system which does not charge an initial application fee).

434. See *supra* note 358 (discussing the ALRC's recommendation that an independent person oversee the administration of its FOI Act).

cial level in Canada should support the calls for reform at the federal level, since mandatory exceptions for Cabinet confidences have been enacted provincially and have "not had any significant impact on the effectiveness of the collective decision-making of these Cabinets."⁴²⁵ Although the United States provisions provide the greatest degree of access, they may not be appropriate in Britain, given its style of government.

IV. RECOMMENDATIONS

In providing recommendations to Blair on a freedom of information statute, it is imperative to remember the pervasive governmental secrecy that exists in Britain and the particular constitutional framework within which Blair must work.⁴²⁶ Blair is fighting tradition by shifting access to information from the government to the people. As expressed throughout the Parliamentary debates, many are concerned that the tenets of Britain's Parliamentary democracy will be injured by an access statute.⁴²⁷ Experiences in Canada and Australia dispel such notions, but in view of these concerns it will be necessary for Blair to include a preamble similar to that recommended by the ALRC.⁴²⁸ This preamble will demonstrate to the government, Parliament, and the people that Britain is committed to providing its citizens with statutory rights of access to information while maintaining important British concepts like Ministerial Accountability, Crown Privilege, and Parliamentary Democracy. All provisions following this preamble should build upon this concept. A sample of the type of provisions that Blair's statute should contain are as follows.

Report entitled *Open and Shut: Enhancing the Right to Know and the Right to Privacy*).

425. *Id.* at 26.

426. *See supra* Part I.A (discussing Britain's unwritten constitution, Westminster style of government, and the Government's adherence to the doctrines of Ministerial Accountability and Crown Privilege).

427. *See supra* notes 33, 129, 282 (detailing Prime Minister Margaret Thatcher's and other MPs views that a freedom of information act would threaten Ministerial Accountability and Crown Privilege).

428. *See supra* note 344 and accompanying text (providing the ALRC's recommendation that Australia's FOI Act include a preamble).

appellate review process; rather, its role should be limited to ensuring that the proper technology is in place at all agencies so that information can be provided in its cheapest form. Additionally, this independent monitor should tour agencies and examine their administrative procedures and report to Parliament.⁴³⁵ Blair might consider forming a freedom of information Parliamentary committee to work with the independent monitor to ensure that records are not destroyed and that agencies are complying with the letter and spirit of the law.⁴³⁶ Moreover, this proposal would complement the principle of Ministerial Accountability, since ministers would be responsible to Parliament for their agencies' administrative procedures.

C. REVIEW MECHANISMS

As suggested by Fisher and employed in the United States, Australia, and the United Kingdom, internal review should be the first stage of review and a prerequisite to all other stages.⁴³⁷ Internal review is inexpensive and quick, and it allows the government to review its policies.⁴³⁸ The second stage should be an investigation by an independent Parliamentary Ombudsman. Unlike the Ombudsman used in Britain under the Code, and in Canada, this Ombudsman should have determinative powers and the power to compel disclosure of records. Experience at the local level shows that an Ombudsman with mere recommendatory powers will be ignored.⁴³⁹ The Ombudsman should not be the current Parliamentary Commissioner for Administration because he is in charge of too many measures. An official Information Commissioner should be created whose role is limited to freedom of information.⁴⁴⁰ Finally, and importantly, the

435. See *supra* note 358 (listing the creation of a Parliamentary Committee to supervise its FOI Act as one of the ALRC's proposals).

436. See *supra* note 250 and accompanying text (explaining that government officials regardless of their party will seek to withhold embarrassing information).

437. See *supra* notes 244, 368 (detailing the internal review mechanism proposed under Fisher's Right to Know Bill and the United States' initial internal departmental review procedure).

438. See ISSUES PAPER, *supra* note 7, at 69 (showing effectiveness of Australia's internal review mechanism).

439. See *supra* notes 213-14 and accompanying text (providing recent arguments that Parliament amend the Local Government (Access to Information) Act to include an appellate procedure).

440. See *supra* note 376. The proposed Information Commissioner's expertise should resemble the level maintained by the Canadian Information Commissioner

last stage of review should take place in the courts. Freedom of information case law will further control the government's proper disclosure of official information. As evidenced in the Ponting trial, the judicial system is willing and ready to take on the role and serve as a further check on the Executive.⁴⁴¹ Judicial intervention should not be considered incompatible with Ministerial Accountability because Ministers will have had the opportunity to plead their cases and respond to Parliament at the lower stages.

D. EXEMPTIONS

In order to avoid confusion, the statutory language of the exemptions should be clear.⁴⁴² The number of exemptions should be kept to a minimum in order to reinforce that this is an access law—not a secrecy law. In order to win support for his measure, Blair should not adopt the business recommendations proposed in Canada; rather, he should protect businesses and at the same time provide limited access to certain types of information as in the United States. With respect to cabinet documents, Blair should follow the lead of Australia and make the exemption mandatory. Such a provision will allow the candor of policy discussion to remain.

One final policy issue that must be addressed is whether the Official Secrets Act ought to be repealed.⁴⁴³ Such an action is necessary in order to demonstrate that the Government is committed to official openness rather than official secrecy. Because Canada has an Official Secrets Act in place along with its access statute, it can be argued that Britain could retain its statute as well.⁴⁴⁴ If that is the case, the Official Secrets Act would have to be amended allowing officials to disclose certain information.⁴⁴⁵ As a final recommendation, the name of the act should be as Fisher suggested, "The Right to Know." This

of Canada.

441. See Maurice Frankel, *Britain's Secret Society*, GUARDIAN, Jan. 26, 1993, at 18 (reiterating that "judges are becoming increasingly critical of official secrecy").

442. See *supra* notes 403-04 (explaining the criticism that Australia's FOI Act receives for its numerous exemptions and difficult language).

443. See *supra* note 22 (discussing the pivotal role of the Official Secrets Act in maintaining Britain's governmental secrecy).

444. See *supra* note 338 (noting Canada's Official Secrets Act).

445. See *id.* If Britain were to amend its Official Secrets Act it should use Canada's Official Secrets Act as a model, limiting it solely to espionage offense provisions. See *id.*

name helps inculcate the attitudes of openness that are so difficult to legislate.⁴⁴⁶

CONCLUSION

Governments have become the custodians of information which can profoundly affect the lives of individual citizens.⁴⁴⁷ That is why "access to government information is essential by right, not by the grace and favor of Government officials."⁴⁴⁸ History has shown in Britain that voluntary openness does not provide the necessary disclosure of information which often times leads to tragedies. A British "Right to Know Act" will provide greater access, make government more accountable, and enhance Britain's parliamentary democracy.

446. See *supra* notes 286-88 and accompanying text (providing MPs arguments that attitudes towards openness must occur naturally since mandating openness could lead to greater secrecy).

447. See Annual Report 1995-96, *supra* note 333, at 3 (justifying freedom of information and in particular statutory rights of access).

448. *Id.*