G4890

THE RIGHT TO FREEDOM OF INFORMATION IN INDIA

THESIS

SUBMITTED BY
M.C.PRAMODAN

FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
FACULTY OF LAW

COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY
COCHIN 682 022

JANUARY 1991

CERTIFICATE

This is to certify that this thesis entitled "The Right to Freedom of Information in Inida", submitted by Shri M.C.Pramodan, for the Degree of Doctor of Philosophy is the record of bona fide research carried out under my guidance and supervision from 27 November 1986 in the Department of Law, Cochin University of Science and Technology, Cochin-22. This thesis, or any part thereof, has not been submitted elsewhere for any other degree or diploma.

Cochin 682 022
24 January 1991

Dr.V.D.SEBASTIAN
(Supervising Guide)

DECLARATION

I do hereby declare that this thesis entitled "The Right to Freedom of Information in India", has been originally carried out by me under the guidance and supervision of Dr.V.D.SEBASTIAN, Director, School of Indian Legal Thought, Mahatma Gandhiji University, Kottayam. This work has not been submitted, either in part or in whole, for any degree or diploma at any university.

Cochin 682 022
24 January 1991

M.C.PRAMODAN

PREFACE

In a modern welfare democracy, there occured an enormous increase in the governmental activities. The presence of Government is felt in all walks of life. Along with the greater role of Government, there also arose the problem of accountability of the Government to the people. Openness in the governmental functioning is thus found to be a necessity. With this purpose in mind, nations like the United States, Australia, New Zealand etc., enacted statutes which provided for right of access to public records. In India a legislation with the above purpose is found to be lacking. In such a situation the democratic functioning of our Government itself is seriously affected. With these facts in mind, I undertook a study on freedom of information in India. Within the limited time and facilities, I have tried my level best in focussing the problems involved this area.

The guidance rendered by Dr.V.D.SEBASTIAN has been of great help to me. I am beholden to him for his superb guidance and encouragement.

I express my gratitude to the Cochin University of Science and Technology for awarding the Junior Research Fllowship for the past four years.

I also use this opportunity to thank Dr.P.Leelakrishnan, Head, Department of Law, Cochin University of Science and Technology, who has encouraged me a lot.

I also thank all other persons who had extended their helping hands in the course of the research programme. My thanks are also due to Mr.K.P.Sibiraj who neatly typed this thesis.

M.C.P.

CONTENTS

TABLE OF CONTENTS

Chapter

RIGHT TO KNOW IN A MODERN DEMOCRACY

Compared to the times when the laissez-faire idea of State was in operation, now, in a welfare State, there is an enormous increase in the governmental activities. Industrialisation, urbanisation and modern communication technology have placed on the democratic institutions a burden of management of large volumes of information. The processes of society and functions of the Government became more and more complex. New and new demands for services are sought for. The presence of Government has been increased to a large extent in the society. Along with the greater role of Government, there arose a problem of bringing the Government to account for the excesses and deficiencies. To clarify the doubts on many occasions, documents with the governmental agencies are required. A need for government-held information is thus felt in the modern democracies. However, the governments are not willing, for different reasons, to disclose the information required of them.

Reasons for Secrecy

In modern democracies, the governmental secrecy more often, a result of a deliberate act on the part of th

Government to keep the governed from knowing certain information at a given point of time.[1] It is quite natural that a ruling Government will be reluctant to open up its own deficiencies, failures and excesses. Again the Government will be reluctant to disclose information which affects the reputation of an official.

The attitude of the civil service is important in this respect. If the civil service is allowed to carry on their activities in unchecked secrecy, abuse of power is more likely to result. But to object, on that ground alone, may cause undesirable consequences. Such an accusation may invite an unco-operative or negative attitude from the officials.[2] Generally, civil servants have a feeling that to involve the public is to court trouble. They might have acquired experiences of usually sporadic, critical, negative and unfounded criticisms on their policies and methods. Involvement of more people with the decision-making process means, to them, a delay in the process. Such experiences incline them to adopt a policy of minimum disclosure.

The rule of anonimity also contributes much to the secrecy in Government. Unless a statute prescribes an offic

---

1. Itzhak Galnoor, Government Secrecy in Democracies, New Y University Press, New York (1977), p.276.
2. Norman S.Marsh, Public Access to Government-Held Infor Stevens, London (1987), p.3.

to execute a governmental function, it is difficult for an individual to know as to which official has taken the decisi It is also true that many of the decisions will be institut in nature where one official may not be accountable to the decision. The decisions, in fact, are taken collectively. The anonimity thus created also helps one official to evade his duties and to shift the blame on the head of someone else.

The hierarchy in the administration also contributes to secrecy. The lower officials will be usually obsessed by a general dogma against disclosure. Basically, they do not have the initiative or courage to propose in favour of disclosure using their discretion.[3] They prefer such matters to be decided by the higher officials. Fear of exposure before the bar of public opinion also forces them from taking a positive decision.

Apart from these reasons, there is a psychological reason. The administrators being the experienced hands, having the necessary expertise, have a conscious desire to be free from any outside control.[4] There is also a general feeling that secrecy contributes to efficiency.

---

3. See John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Boston (19[illegible]), Vol.8, p.793, as quoted in Francis E.Rourke, Secrecy and Publicity: Dilemmas of Democracy, John Hopkins Press, Baltimore (1961), p.22.
4. Francis E.Rourke, Secrecy and Publicity: Dilemmas of Democracy, John Hopkins Press, Baltimore (1961), p.22.

Apart from the nature peculiarities of civil service, there are other reasons which contribute to governmental secrecy. The information regarding defence affairs, diplomatic relations, investigatory records, privacy of individuals etc., is to be kept secret in public interest. A full-scale involvement of the nation in the world politics also contributes to secrecy. Thus different degrees of secrecy may be the rule in fields such as science, technology, international business etc.

In a modern welfare democracy, the Government acquires a large amount of information from different sources such as private business firms, informants etc. This information may relate to items as different as from health records to business secrets. Those who hand over this information to the Government expect that their identity will not be disclosed. Thus, apart from the Government, there is a section of the public who has a vested interest in the governmental secrecy.

Apart from the notion of governmental secrecy, situations may arise where the governmental agencies are forced to lie before the public. In times of war, critical domestic crisis, communal riots, terrorist activities or in dealing with affairs related to a hostile foreign nation, the government-lies are justified in the general public interest. However, these types of communications may take away the credibility of the Government.

Dangers of Secrecy

Any Government, whether democratic or not, it is feared, will abuse the power entrusted to it if it is allowed to work in secrecy. Bentham has thus rightly said that secrecy being an instrument of conspiracy ought never to be a system of regular Government.[5] Corruption necessarily thrives in secret places and avoids public places. Secrecy is an evil per se.

Governmental secrecy also contributes to inequality between the Government and private persons. The citizens sometimes may be forced to fight against the Government unsuccessfully due to lack of sufficient information. Thus access to government-held information is required to redress the disequilibrium between State and individuals.[6] Again a right of public access to public documents provides for an equality of access to all in a society thereby reducing the chances of one person, who is close to the governmental agencies, taking an advantage over one who does not have any such close ties with the agencies.

---

5. See "On Publicity", Works of Jeremy Bentham (W.Tait, Edinburgh 1843), Vol.2, pp.310-317, as quoted in Norman S. Marsh, Public Access to Government-Held Information, Stevens, London (1987), p.2.
6. Norman S. Marsh, Public Access to Government-Held Information, Stevens, London (1987), p.4.

Though certain information could justifiably be withheld in public interest, it is possible for a government authority to do so in other unjustifiable cases also under the same cover of public interest. Withholding of information undermines a public debate over the public issues. This may ultimately reach the electoral process also. Apart from the danger of omission of certain information, there is another danger that government-communications may be used to falsify the consent of the public by releasing selected information or twisted information.[7] Under the same method, the Government is also capable of shaping the choice and interests of the community in accordance with the preferences of the Government itself. Manipulation of the public opinion can also be achieved by the Government by imparting selected and wrong information. In this process the individuals unknowingly lose their own power of self-determination. The need then is to compel the Government to communicate true and full facts.

Information as Power

Information within the hands of the Government may sometimes confer power on the Government. Withholding as well as releasing information at opportune moments are powerful

---

7. Mark G. Yudof, When Government Speaks: Politics, Law and Government Expression in America, University of California Press, California (1983), p.15.

weapons in the hands of a Government. This is apart from the advantage the Government acquires over the political and other opponents. The continuity of the Government may, sometimes, depend on this power. Again, the very same power may be used to acquire more information.

Information acquired by the Government may be used to punish the individuals, when it chooses to do so.[8] Publicity as a punitive sanction has come to be recognized with the vast expansion in the regulatory activities of the Government. Inquiries and investigations conducted by the Government are instrumental in making the publicity as a weapon of the Government. A threat to publicise evidence of illegal activities, uncovered in the course of investigations and inquiries, is enough to shut the mouths of those involved.

Citizen's Participation in a Democracy

In a democracy the country is ruled by the elected representatives of people. They rule for the people on the trust and faith reposed in them. In a modern democracy, the activities of the Government have increased to such an extent that without the co-operation of the people, a Government cannot function successfully. Citizen's participation in the governmental activities has become inevitable.

---

8. Francis E.Rourke, Secrecy and Publicity: Dilemmas of Democracy, John Hopkins Press, Baltimore (1961), p.12.

Democracy is more than voting and demands participation and concern for common problems.[9] The people must be enlightened and well-informed for a meaningful successful participation. Otherwise it will lead to taking of wrong policies by the Government. In this context arises the right to know of the people for an effective participation. The participation may be positive, in the sense of supporting the Government, or negative, in the sense of protesting against or opposing the policies of the Government. Through participation it is also possible to correct the wrong policies of Government. When the Government does not inform the public, the participation may be lost. The Government, thus, may inform the public of the policies it has chosen, of the problems regarding which it requires co-operation from the public and of the crisis which it faces.

An ideal democracy, in which there is complete exchange of information between the ruler and the ruled, has its own flaws. Where the Government discloses everything the public, it cannot survive long either due to the external pressure or due to pressure from the antinational elements inside. If the Government declines to communicate, it will be difficult to maintain the confidence and thus the stability of the Government. It becomes an authoritarian form of

---

9. For more details on participation by the people in a Government, see Carole Pateman, Participation and Democratic Theory, University Press, Cambridge (1970).

Government. Again, where the feed-back from the people destroys the image of the Government, instead of correcting the policies, the process of communication exchange serves no purpose. Thus the ideal types of both authoritarian and democratic forms of Government are unstable.[10] What is the required is to limit the exchange of communication to a working level. Thus the preservation of democracy requires balance between communications from the Government and the people. One of the problems in the area of right to know i a democracy is how to find this balance between communicatio

People as Sovereign in a Democracy

In a theoretical way, in a democracy, the people are the sovereign and the Government its servant.[11] Viewed from this point of view, an individual's right to know in a democracy tends to become absolute and any demand for information has to be met with by the Government. This theory, however, causes much practical difficulties. In no period of democracy, people have sought the right to know from their servant-government as an inherent right. In a modern democracy, the Government handles a lot of things, many of them undigestible to an ordinary citizen. Again, release of information, relating to many fields, would be against the

---

10. See Mark G.Yudof, When Government Speaks: Politics, Law and Government Expression, University of California Press California (1983), pp.20-22.
11. See generally Alexander Meiklejohn, Political Freedom: The Constitutional Power of the People, Harper Brothers, New York (1960).

interest of the nation itself. Sovereignty of the people in a Democracy is thus limited, at least, regarding the right to know. This may be explained in terms of a 'consent theory' under which the people consent to decision of the Government in matters in which they are not experts or it would be injurious to their own common interests. Thus sovereignty of the people over their Government cannot be found to exist in the same effective measure, in all cases and at all times.[12]

Whenever the people become the sovereign over the Government in all respects, it would be difficult for a democratic system to save from a collapse. There may arise external pressures and internal pressures from anti-national elements. On the other hand, where the Government becomes the sovereign over the people in all respects, the meaning of democracy itself losses in that society. It becomes a totalitarian State. So regarding the right to know in a democracy, a compromise between these two extreme situations has to be kept.

An analysis of social contract theories may be helpful in this respect. In Hobbe's 'Leviathan' Government, the people surrender all their rights on a condition that they would be saved from physical attacks. There is no place for a compromise above stated because, the people

---

12. At the time of elections, it reaches its zenith.

~~surrendered their~~ ~~to know also to~~

In Locke's Government, the people surrender their rights with a condition that they may take back the rights surrendered to the sovereign. In this condition, the right to know can be validly enjoyed by the people and provides the optimum condition, where the above mentioned compromise is possible.

The Anglo-American tradition of liberal democracy based on Lockian theory of social contract grounds the legitimacy of the State in the consent of the governed. It also establishes significant limits on the authority of the Government. Individuals entering into a social contract consent to the Government's power to secure life, liberty and property. But they do not give consent to the State's authority to interfere in other domains. It may be debated as to what conditions exactly are required for a valid actual consent. Whatever be those conditions, the claim of actual consent would definitely be undermined, if information highly relevant to the evaluation of the Government is suppressed. It is unlikely that people would approve in advance a regime that would conceal such material information from the citizens. Thus, under the theory of social contract, there underlies a substantial argument against suppression of political ideas and facts.[13]

---

13. It is true even where a present majority approves the suppression. See Kent Greenawalt, "Free Speech Justifications", 89 Colum.L.Rev. 119 (1989) at pp.147-49.

The right to know in a democracy acquires [illegible] basis on the argument that people must know what their Government does in their name. It is thus that people's franchise becomes meaningless, if the Government's decisions are made without a check through the right to know facilities. In such a case, the right to know becomes diminished because one cannot seek any information unconnected with governance. The information sought must be of some public importance and the right to know becomes a political right without having much to provide an individual for his personal benefit or enjoyment.

With a large population in a State, it is impossible to have massive participation by the people. The complexities of the public issues and the busy life of individuals in a modern era make the participation more inconvenient. The people, thus, rely on leaders to participate on their behalf. The democracy, thus, becomes a selection of competing leaders.[14]

---

14. Disclosure of certain information may show the leader's affiliation to the political parties or groups. In the United States, the Federal Election Compaign Act, 1971 requires political committees to report to the Federal Election Commission the names of persons contributing more than ten dollars. This is subject to public inspection. The governmental interests sought to be vindicated by the pre-election disclosure requirements fall into three categories. First of all, the disclosure provides the electorate with information as to where the political compaign money comes from, and to help the voters to place the candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and compaign speeches. Secondly, the disclosure requirements deter actual

This system reduces the role of individuals and also the scope of their right to know. Since participation becomes primarily vested with the leaders, the people's right to kn may also go along with the leaders to a good extent. The people however finds that the leaders sometimes fail in their duties and demands the right to know why the failures have occurred, of course, forgetting the impracticabilities above given. This is the confused picture in a modern democracy regarding the right to know.

Conclusion

Thus in a modern welfare democracy, the place of right to know of the citizens is of high importance. The people have a right to know what their Government does on behalf of them. The people's participation in discussions on public issues contributes much to reach well-informed decisions at the governmental level. The self-governing powers of the people in a democracy attain meaning only when the people have a right to know from their Government.

(f.n.14 contd.)

corruption by exposing the contributions and expenditu to the light of publicity. Thirdly, the disclosure re ments helps to detect the violations of contribution limitations. See Buckley v. Valeo, 46 L.Ed. 2d. 659 (1976) at p.715.

Chapter 2

CONSTITUTIONAL BASIS OF THE RIGHT TO KNOW

The final end of State is to make men free to develop their faculties. To this, freedom to think as one may wish and freedom to speak as he thinks are necessary. These are means indispensable to the discovery and spread of political truth. Without this type speech and assembly, discussions on public issues would be futile.[1] The public discussion on public issues may be treated as duty of a responsible citizen. The right to know evidently is connected with the freedom of speech of a citizen for a fuller discussion on public issues.

We have seen that the right to know is necessary for the better working of a democratic order. In this chapter the constitutional foundation of it is analysed.

Regarding the right to know of an individual from the Government, it is necessary to seek the help of the courts by means of recognising the right to know as constitutional, embracing the right of the public to obtain information from the Government.[2] By conferring a constitutional status, as an element of freedom of speech, the right to know becomes a restriction on the governmental power. Without the judicial recognition the implementation of the right will also be seriously affect

---

1. Whitney v. California, 71 L.Ed. 1095 (1927) at p.1105 per Brandies, J.
2. Thomas I.Emerson, "Legal Foundations of the Right to Know" (1976) Wash. U.L.Q. 1 at p.14.

The theoretical basis is that the public as a sovereign must have all information available in order to instruct its servant the Government. By bringing an analogy of the right of the legislative and judicial branches of State to obtain information from the Government, and conceiving the citizenry as the fourth branch of Government, it can be seen that people would possess rights superior to those of the other branches of the Government.[3] On whether or not such a guarantee of the right to know is the sole purpose of the freedom of speech, it is argued that right to know is the main element of that right and should be recognized as such.[4]

In democracies, governments derive their just powers from the consent of the governed. If that consent is lacking, governments have no just powers.[5] This is because, in a democracy, the officials are agents of the electorate who needs information order to perform the governing function. Therefore, the principle of freedom of speech springs from the necessities of the programme of self-government.[6] It is a deduction from the basic agreement that public issues shall be decided by universal suffrage.[7] The word deduction could be interpreted to mean that, if people have a right to participate in deciding public issues, they ought to be able to exercise this right meaningfully.

---

3. Id. at p.15.
4. Id. at p.14.
5. Alexander Meiklejohn, Political Freedom: The Constitutional Power of the People, Harper Brothers, New York (1960), p.37.
6. Id. at p.27.
7. Ibid.

Such a meaningful exercise of the right requires additional rights, such as right to a good education, enough resources, and means to information.[8] The last mentioned right includes right of access to government-held information.

In the United States there are writers who have found in freedom of speech and expression, the constitutional basis for the right to know. Incorporating the right to know into the freedom of expression, Professor Emerson observed:[9]

> "It is clear at the outset that the right to know fits readily into the first amendment and the whole system of freedom of expression. Reduced to its simplest terms, the concept includes two closely related features: First, the right to read, to listen, to see, and to otherwise receive communications; and second, the right to obtain information as a basis for transmitting ideas or facts to others. Together these constitute the reverse side of the coin from the right to communicate. But the coin is one piece, namely the system of freedom of expression".

Professor Emerson thus maintains that, for the enjoyment of freedom of expression, right to know is essential. Situations may arise where lack of information results in the denial of the freedom of expression itself.[10]

---

8. See Edwin Baker, "Realizing Self-realization: Corporate Political Expenditures and Redish's The Value of Free Speech" 130 U.Pa.L.Rev. 646 (1982) at p.665.
9. Thomas I.Emerson, "Legal Foundations of the Right to Know", (1976) Wash.U.L.Q. 1 at p.2.
10. It is not Professor Emerson alone who has depended on the coin to explain the right to know. Justice Thurgood Marshall has once observed as follows:

While Professor Emerson did not give an absolute protection to right to know under the freedom of speech, Dr.Meiklejohn, another constitutional author, adopted the right to know as the principal basis for the constitutional protection afforded by the First Amendment. His theory may be summarised as follows:[11] In a democratic form of government, the people grant only some powers to the Government, reserving very significant powers of governance to themselves, because the people's basic decision is to govern themselves rather than being governed by others. There is distinction between the rulers and the ruled. There is only one group--the governing people.[12] The freedom of speech, accordingly is the repository of the self-governing powers. The reserved powers are concerned with a

---

f.n.10 contd...

> "... in a variety of contexts this court has held that the First Amendment protects the right to receive information and ideas, the freedom to speak. The reasons for this is that the First Amendment protects a process ... and the right to speak and hear--including the right to inform others and to be informed about the public issues--are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable: they are sides of the same coin. But the coin itself is the process of thought and discussion". (Kleindienst v. Mandel, 33 L.Ed. 2d. 683 (1972) at p.699, dissenting).

Thus according to Emerson and Marshall the freedom of speech is to be comprehended with the metaphor of a coin--a guarantee for the freedom from restraints on the dissemination of information on the one side and a guarantee for an affirmative right to receive or acquire access to information on the other side.

11. See Alexander Meiklejohn, Political Freedom: The Constitutional Power of the People, Harper Brothers, New York (1960). For more details see Meiklejohn, "The First Amendment is an Absolute", (1961) Sup.Ct.Rev. 245 and William J.Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", 79 Harv.L.Rev. 1 (1965).
12. Id. at p.12.

public power, a governmental responsibility and not a private right. Thus freedom of expression in areas of public affairs is regarded an absolute one. Thus the public as a sovereign must have all information available in order to instruct its servant, the Government. The most prominent criticism against such a line of thinking is that it is impossible to provide absolute constitutional protection to the right to know against the Government under all circumstances.[13]

A slightly different view has been expressed by Justice Holmes regarding freedom of speech resulting in free flow of information. He phrased his argument in the form of an analogy to the capitalistic market-place. According to him the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes can safely be carried out.[14] The underlying assumption is that there is a free market mechanism for ideas and that if the Government can be kept away, the self-operating and self-correcting force of full and free discussion will fence the people off from what is false.[15]

The marketplace-of-ideas concept, in its use as a defence of free speech, is also subjected to criticisms. Wher

---

13. Thomas I.Emerson, "Legal Foundations of the Right to Know", (1976) Wash.U.L.Q. 1 at p.4.
14. Abrams v. U.S., 63 L.Ed. 1173 (1919) at p.1180 per Holmes, J. (dissenting).
15. Justice Holmes observed:
    "Just as an unfettered competition among commodities guarantees that the good products sell while the bad gather dust, so in the intellectual marketplace the several competing ideas will be tested by the consumer public and the best of them will be purchased". Ibid.

the public are incapable of assessing the relative merit of information before them, the theory fails. The people may prefer the one which is already dominant, or which fits to their irrational needs, or the one which is comfortable to them. There arise also situations where the public rejects the correct information.[16]

There is a gross inequality among communicators as well as receivers in the marketplace of ideas. Also, there is an inclination among people to believe information that are already dominant socially or that serve unconscious irrational needs.[17] If the economic, social or other powers determine what the public hears, the Government may come out with regulation or rearrangements in the existing communication system. If there is an inequality among the receivers, whatever be the reason, again, the Government may rearrange the existing methods of its own communication system to help to improve equality of access to government-held information. Thus the basic condition is that people may be able to use their rational capacities to eliminate distortion caused by the form and frequency of the information,

---

16. An excellent example is that smokers reject the information that smoking is injurious to health though they do not doubt the correctness of the information.
In one sense, Holme's theory appears to suffer from an internal contradiction. The theory's goal is definitely the attainment of truth. It posits that we can never really know the truth and we must keep looking for it at points of time. This is because knowledge, in principle, is never complete and always fallible. There is no single universal visible truth. Thus, if one cannot ever attain truth, he may doubt the need to continue the fruitless search. Again, it is doubtful whether truth would always prevail over falsehood

Contd.....

and also to find the core of the information divulged by the Government as well as other private persons. Above all, in certain situations, the Government may not be willing to disclose certain information. Compulsion is impossible, unless a statute requires an agency to do so, because Government is like any other person in a free marketplace.

A broad protection for political communication and free speech interests of citizens over public issues are essential to their electoral powers and self-government. The people must be able to communicate with the officials. The questions of policy could be openly and freely debated. The protection may essentially be a functional one, assuring an opportunity for the citizens to influence those who govern them. However, there is no certainty whether the citizens will make use of the opportunity.

An absolute right to know of the governed from the governers is not beyond criticisms. It is doubtful whether the non-political forms of speech, such as art, literature, science and education, are protected under it. Again, in a monarchy or dictatorship, the people may not have any say in the political decision making process and consequently no right to such

---

f.n.16 contd...

in a free and open encounter because too many false ideas have captured the imagination of man. See Martin H.Redish, "The Value of Free Speech", 130 U.Pa.L.Rev. 591 (1982) at p.617 & Wellington, "On Freedom of Expression", 88 Yale L.J. 1105 (1979) at p.1130.

17. Kent Greenawalt, "Free Speech Justifications", 89 Colum. L.Rev. 119 (1989) at p.134.

information. However, the dictator allow the freedom of speech in the non-political areas, such art, literature and music.[18] Dr.Meiklejohn saw little connection between respect for the worth of the individual and the concept of self-government which depends on the nature of the individual. If men possessed no power of reason or judgement, there is no justification for encouraging them to participate in the nation's political decision-making process. Self-government, then, is premised on a belief in the integrity as well as the intellectual ability of the individuals.[19]

The public's right to know may also be considered in the light of the problem of government-falsification of the majorities. The information released by the Government, something is capable of presenting hazards to the ability of an autonomous citizen to come to an informed and intelligent policy judgement.[20] It is a fact that government-communications are capable of cultivating dependence and producing citizens who will merely follow the government policies and decisions.

The right to know is essential to the personal self-fulfilment as well as for collective decision-making in a democratic society. However, it is impossible to give absolute protection to the right to obtain information under all circ

---

18. See Martin H.Redish, "The Value of Free Speech", 130 U.Pa. L.Rev. 591 (1982) at p.602.
19. Martin H.Redish, "The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression", 39 Wash. L.Rev. 429 (1970-71) at p.438.
20. Mark G.Yudof, When Government Speaks: Law and Government Expression in America, University of California Press, California (1983), p.155.

stances.[21] However, the right to know gains a special import in three general areas: (a) where a right to know may be used as a defence against governmental interference with the system of freedom of expression,[22] (b) where the right to know doctrine may be used in formulating government-controls to regulate or expand the system of freedom of expression,[23] and, (c) where the doctrine may be used in obtaining information from governmental or private sources.[24]

The right to know is not without limitations. The right to privacy and the 'right not to know' are regarded as two limitations. In cases of any conflict between the right to know and right to privacy, the precedence goes to the latter.[25]

---

21. Thomas I.Emerson, "Legal Foundations of the Right to Know", (1976) Wash.U.L.Q. 1 at p.4.
22. One of these situations may arise where the Government attempts to control expression by applying a sanction directly against an individual. An individual, thus, may not be subjected to criminal penalties under an official secrets legislation upon the mere receipt of a classified information. Another situation occurs where the Government monopolises the means of communication, as seen in the field of education and broadcasting. Here, an individual is forced to know what the Government wishes. Id. at pp.5-8.
23. For example, two broadcasting stations cannot broadcast on the same wave-length. Similarly, two organisations cannot march on the same street at the same time. In such situations the Government's allocation of the facilities may have a bearing on the doctrine of right to know. Thus, law should provide for a greater degree of access to the available means of communication by compelling the owners and operators of broadcasting stations and printing press, to share their facilities with others who wish to communicate.
24. For details see Thomas I.Emerson, "Legal Foundations of Right to Know", (1976) Wash.U.L.Q. 1 at pp.5-20. See also Thomas I.Emerson, "Colonial Intentions and Current Realities of the First Amendment", 125 U.Pa.L.Rev. 737 (1976-77).
25. Id. at p.22.

The 'right not to know' protects the individual against communications forced upon him against his will.[26] A third major limitation on the right to know is the superior public interest which requires certain information, such as defence documents, diplomatic records, investigatory records etc., to be kept secret.

Now let us see how the courts in different countries have approached the question of foundation of the right to know. The courts in the United States, England and India find the basis in freedom of speech doctrine which is the backbone of self-government.

Position in the United States

Although the First Amendment traditionally comprehended only individuals freedom from restraints on his communications, certain constitutional scholars argue that affirmative rights to acquire information exist as a corollary of the First Amendment freedoms.[27] Response to such arguments from the Supreme Court may be analysed here briefly.

---

26. Ibid.
In Rowan v. Post Office Department, 397 U.S.728 (1970), as quoted in (1976) Wash.U.L.Q. 1 at p.23, the Supreme Court upheld a federal statute providing that any person who mailed material which the addressee believed to be "erotically arousing or sexually provocative" could be refrained by an order of the Postmaster General from further mailing of such materials to the objecting addressee.
See also Redrup v. State of New York, 18 L.Ed. 2d. 515 (1967) and Public Utilities Commission v. Pollak, 96 L.Ed. 1068 (1952).

27. See Thomas I.Emerson, "Legal Foundations of the Right to Know", (1976) Wash.U.L.Q. 1 and Meiklejohn, "The First Amendment is an Absolute", (1961) Sup.Ct.Rev. 245.

The Supreme Court, on a number of occasions, has recognized constitutional right to know. In Lamont v. Postmaster General[28], the Supreme Court invalidated a provision of statute conferring power on the Postmaster General to detain mailings printed or prepared in a foreign country and found by the Secretary of Treasury as communist political propaganda. Such mailings were delivered only after a request from the addressee. This limitation was held to be a restriction on the unfettered exercise of First Amendment rights.[29] Justice Brennan observed:[30]

> "It is true that the First Amendment contains no specific guarantee of access to publications. However the protection of the Bill of Rights goes beyond the specific guarantees to protect from Congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful..., I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren market-place of ideas that had only sellers and no buyers".

Later in 1969, in Stanley v. Georgia,[31] upholding the right of an individual to read pornography in the privacy of his home, the Supreme Court held that it was already established that the

---

28. 14 L.Ed. 2d. 398 (1965).
29. Id. at p.401 per Douglas, J., who delivered the opinion of the Court.
30. Id. at p.403 per Brennan, J., with whom Goldberg, J., joined in a separate but concurring opinion.
31. 22 L.Ed. 2d. 542 (1969).

Constitution protected the right to receive information and ideas.[32] The First Amendment was held to involve not only the right to speak and publish but also the right to hear, to learn and to know.[33] Thus freedom of speech necessarily protects the right to receive information.[34]

However, sometimes the Supreme Court had ignored the right to know of the citizens also. In Zemel v. Rusk,[35] the Department of State denied a citizen's request to have his passport validated for a travel to Cuba as a tourist and for the purpose of satisfying his curiosity to know the state of affairs there. The action of the Department of State was challenged inter alia, on the ground that it violated the citizen's First Amendment rights. The Court held that the right to speak and publish did not carry with it an unrestricted right to gather information.[36] However Goldberg,J., in his dissenting opinion, observed that freedom of speech and press included the right to travel for gathering information.[37]

Again, in Kleindienst v. Mandel[38], a Belgian journalist, a scholar in Marxian economic theory, was invited to speak at various American colleges. He applied for non-immigrant visa. But his advocacy of communist doctrine made him ineligible for

---

32. Id. at p.549.
33. Ibid.
34. Ibid.
35. 14 L.Ed. 2d.179 (1965),
36. Id. at p.190 per Warren,C.J., for the majority.
37. Id. at pp.196-204.
38. 33 L.Ed. 2d.683 (1972).

the visa. Though the Advocate General could have waived this ineligibility, he did not do it. This refusal to grant a waiver was challenged on the ground that it violated the First Amendment rights of American citizens to hear the alien's views. The majority found that the First Amendment guaranteed no such independent and enforceable right against the Government's bonafide exercise of discretion in the exclusion of aliens. Alternative methods of communication such as writings, recordings etc., weaken the argument for visa for the purposes of right to know. However, the dissenters, Douglas, Marshall & Brennan, JJ., observed that the First Amendment embodied affirmative constitutional rights. Justice Marshall thus observed:[39]

> "... in a variety of contexts, this Court has held that the First Amendment protects the right to receive information and ideas, the freedom to hear as well as the freedom to speak. The reason for this is that the First Amendment protects a process ..., and the right to speak and hear--including the right to inform others and to be informed about public issues--are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion".

The Kleindienst case and the Zemel case show that the the First Amendment does not give an affirmative right to receive which is capable of outweighing the governmental interests in imposing reasonable limits on the free flow of information.

---

39. Id. at p.699.

In all the cases referred to above, there is a common feature, that is, the Government's stand against the right to know of a citizen from a private source. The right was not asserted against the Government itself. Where the governmental officials exercised their discretion properly, the courts did not interfere. However, certain judges in the process have categorically established that people acquire an affirmative right under the First Amendment.

Now let us consider cases which are more direct on the topic of right to know from the Government itself. There are a series of cases,[40] Pell's case, Saxbe's case and Houchin's case, in which press demanded, under the First Amendment, personal interviews with the inmates of the prisons. In fact, by allowing access to government facilities (prisons), the right to know of the people--the press on behalf of the people in these cases--can be enjoyed. In Pell and Sexbe cases, Steward,J., for the majority, held that the First Amendment did not guarantee the press a constitutional right to special access to information not available to the public generally.[41] However, Douglas,J., along with Marshall and Brennan,JJ., in their dissent, in Pell case, argued that the First Amendment embodied an affirmative right to know

---

40. Pell v. Procunier, 41 L.Ed. 2d. 495 (1974); Saxbe v. The Washington Post, 41 L.Ed. 2d. 514 (1974); and Houchins v. K.Q.E.D., 57 L.Ed. 2d. 553 (1978).
41. Pell v. Procunier, 41 L.Ed. 2d. 495 (1974) at p.502; Saxbe v. Washington Post, 41 L.Ed. 2d. 514 (1974) at pp.519-20.

and the press, on behalf of the public, could vindicate informational interests in the operation of the Government.[42] The Pell and Saxbe cases demonstrate the appeal of the political ideal of an informed public. The cases also highlight the divisions within the Supreme Court over the issue.

Later, in Houchins v. K.Q.E.D.,[43] the division became more clear. In this case, a broadcasting station applied to the jail authorities for permitting access to a portion of the jail where a prisoner's suicide had occured. It was reportedly a result of the conditions of prison. On the rejection of the application, the broadcasting station challenged it as a denial of the First Amendment right. The Court found that press had no special privileges superior to that of the public generally.

In all the three cases, Pell, Saxbe and Houchins, the Supreme Court confronted with access claims of the journalists to the prison. Since the claims were from the press, the Court had no occasion to consider a generalised right of access applicable to all citizens. In Pell and Saxbe, the Court failed to define the content of the press's right to gather information. In both cases, equating the press right with that of the public, the Court denied that the Constitution of the United States

---

42. Pell v. Procunier, 41 L.Ed. 2d.495 (1974) at p.512. Justice Powell, dissenting, found that absolute prohibition on prisoner—press interviews would impair the right of the people to a free flow of information and ideas on this conduct of the government (at p.509).
43. 57 L.Ed. 2d.553 (1978).

imposed upon the Government any affirmative duty to make avail to journalists sources of information not available to members o the public generally.[44] In Houchin s case, Berger,C.J., flatly denied that public and media have a First Amendment right to government information regarding the conditions of jails and, presumably, all other public facilities, such as, hospital and mental institutions.[45] He found that such a right lacked a discernible basis in the Constitution and could not be translated into reasonably enforceable standards.[46] Steward,J., while rejecting the right to gather information 'when the Government has not opened its doors', suggested that the strict equality of press and public might be relaxed,[47] because the terms of access imposed on individuals would be unreasonable if applied to journalists.[48] In the dissenting opinion, Stevens,J., asserted a rationale for a constitutional right to gather information on the basis of self-governing rights of the people.[49] It was observed that the judiciary must weigh the governmental reason for denying access to the requested information against the public interest in receiving that information.[50]

---

44. Saxbe v. Washington Post, 41 L.Ed. 2d. 514 (1974) at p.520; Pell v. Procunier, 41 L.Ed. 2d. 495 (1974) at p.508.
45. Houchins v. K.Q.E.D., 57 L.Ed. 2d. 553 (1978) at p.564.
46. Ibid.
47. Id. at p.566.
48. Ibid.
49. Id. at p.575.
50. Id. at pp.577-81.
    On access to information regarding prison Stevens,J., observed as follows:
    "The reasons which militate in favour of providing special protection to the flow of information to the public about prisons relate to the unique function they perform in a democratic society. Not only are

(Contd....)

The most direct case on right to know from the Government seems to be Richardson's case.[51] In this case, Richardson, a taxpayer, sought to obtain from the Government information concerning detailed expenditures of the Central Intelligence Agency, the ground being based on Article 1, Section 9, Clause 9 of the Constitution.[52] The Supreme Court rejected the informational interests of Richardson on the ground of standing. He lacked standing since the challenge was not addressed to the taxing or spending power of Congress and he did not claim that appropriated funds were being spent in violation of any constitutional limitations. However, Brennan,J., in his dissenting judgement, observed that violation of the said Article caused an

---

f.n.50 contd...

> they public institutions, financed with public funds and administered by public servants, they are an integral component of the criminal justice systems permanently, deprived of their liberty as a result of a trial which must conform to the dictates of the Constitution. By express command of the Sixth Amendment, the proceeding must be a "public trial", It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding. That public interest survives the judgement of conviction and aopropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped for rehabilitation". (at p.578)

51. United States v. Richardson, 41 L.Ed. 2d. 678 (1974).
52. Article 1, Section 9, Clause 7 of the Constitution reads as follows:

> "No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time".

injury not only in respect of one's right as a citizen to know how Congress spends public money but also in respect of one's right as a voter to receive information to aid his decision how and for whom to vote.[53] Stewart,J., joined by Marshall,J., in his dissenting opinion, observed that Richardson as a taxpayer and citizen voter had a right to receive information as to Central Intelligence Agency expenditures and Government had a corresponding duty to supply the same.[54]

The Pell, Saxbe, Nouchins and Richardson cases were primarily decided on the locus standi problem. In the first three cases, the press was held not to have standing to seek information regarding prison details because it could not be given any privilege that is not available to the members of the public. These cases were decided on a basis that a common man is unconcerned with the facilities and other things in a prison existing in a country. It is the public money spent on a prison. Again the criminal after sentence has to come back to the society. Thus a citizen has definitely got a standing to know all those things, and so the press on behalf of such persons. Richardson's case also showed that he had no standing. It was also an instance where national security would have been another hurdle, had the standing issue not been brought in.

---

53. Schlesinger v. Reservists to Stop the War, 41 L.Ed. 2d. 706 (1974) at p.727. Justice Brennan delivered his opinion in Richardson's case along with his opinion in the Schlesinger's case.
54. United States v. Richardson, 41 L.Ed. 2d. 678 (1974) at p.70[illegible]

Thus these case do not ultimately decide that an individual, with proper standing has no right to know under the First Amendment. The trend in the United States is thus in favour of allowing an affirmative First Amendment right.

Position in England

In England, there are cases regarding the crown privilege bearing on the right to know of citizen against the governmental authorities. In certain cases, we can see that the judiciary, through the obiter dicta, approves openness in Government. The way the judiciary achieves it is by refusing the Government's claims of secrecy.

There are certain pieces of legislation which touch the area of openness in governmental functioning. The Public Records Act, 1958, provides that documents of thirty years old are open to the public.[55] The Local Government Act, 1939, provides for openness in the functioning of the local bodies.[56] Also the Public Bodies (Admission and Meetings) Act, 1960, entitles members of the public to attend the meetings of the local authorities.[57] In 1967, the creation of the Parliamentary Commissioner for Administration under a statute made things more open.[58] Under the Act, the records and files, which were

---

55. See section 2 of the Act.
56. Section 173 of the Act provides that the minutes of a local authority should be open to inspection to any local government elector.
57. See section 1 of the Act.
58. See Parliamentary Commissioner Act, 1967.

previously inaccessible, would be disclosed, provided a citizen established a *prima facie* grievance on grounds of maladministration. These Acts may be taken as forerunners of a freedom of information legislation in England. In 1962, by an administrative decision, the reports of the inquiry inspectors regarding planning permissions were made open to the public.[59] These reports have great influence on the responsible Minister's decision. Also till then, a loser did not know why he had lost. In 1968, the House of Lords in *Conway* v. *Rimmer*[60] established its jurisdiction to order the disclosure of any document and to hold a balance between conflicting interests of secrecy and publicity. These, three specific developments, arising respectively from an administrative decision, an Act and judicial decision, have enlarged public access to administrative information.[61] The Official Secrets Act, 1923 on the other hand, makes almost all kinds of documents secret and punishes anyone who leaks them out.[62] A consolation against this rigorous provision is section 10 of the Contempt of Court of Act, 1981.[63]

---

59. See Donald C.Rowat, *Administrative Secrecy in Developed Countries*, Macmillan, London (1979), pp.185-86.
60. 1968 A.C. 910.
61. See Donald C.Rowat, *supra* n.59 at p.186.
62. In 1968, the Fulton Committee Report on the Future of the Civil Service Report of the Committee on the Future of the Civil Service (Chairman, Lord Fulton), Cmnd.3638 of 1968, suggested that the administrative process was surrounded by too much secrecy, and that the public interest would be better served if there were a greater amount of openness. The Fulton Committee also proposed for a deep study on the Official Secrets Act. Thus Franks Committee - Departmental Committee on Section 2 of the Official Secrets Act, 1911 (Chairman Lord Franks), Cmnd.5104 of 1972 - was appointed to focus its inquiries on section 2 of the Official Secrets Act.

people's right to know under the ruling of Conway case gains only indirectly. Only where a party to the suit is deprived of the documents, which are withheld by the Government and at the same time which are not injurious to public interest on disclosure of them, the judiciary helps the party to the suit. In Spycatcher case,[64] the Government sought for a permanent injunction to refrain the Guardian Newspaper from publishing the memoirs of a former officer of British Security Service where the memoirs were alleged to contain information on disclosure

---

f.n.62 contd...

Keeping in view of the desirability of openness in governmental functioning, Frank's Committee recommended repeal of section 2 of the Act and its replacement by an Official Information Act. The proposals restricted criminal sanctions to defined categories of information: wrongful disclosures of (a) information relating to defence, internal security, foreign relations, and currency and reserves, (b) cabinet documents, and (c) information facilitating criminal activity or violating the confidentiality of information supplied to the Government by or about individuals, and the use of information for private gains. It was recommended that mere receipt of protected information would not be an offence under the Act. However communication by journalists and others would be an offence if the author or speaker had reasonable grounds for believing that it had been conveyed to him in breach of the Act. None of the proposals are implemented. In 1979, the Government came out with a Green Paper--'Open Government', Cmnd.7520, March 1979, which specified the need for a scheme of access to official information that should satisfy the public demand so far as is reasonable and practicable.

63. Section 10 of the Act reads:
"No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime".

64. Attorney General v. Guardian Newspapers, [1987] 1 W.L.R. 1248 (H.L).

would be against the public interest affecting badly the security service. Allowing the arguments of the Newspaper on the basis of free speech and free circulation of ideas, Lord Bridge of Harwich observed:[65]

> "Freedom of speech is always the first casuality under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road".

Section 10 of the Contempt of Court Act, 1981, provides the press and media with protection from disclosure of the sources of their information. The protection can only be desired by a judicial finding that their disclosure is necessary in the interest of any of the exceptional circumstances specified under the section.[66]

Section 10 reflects the importance which Parliament attaches to the free flow of information to the public.[67] It recognises the existence of a prima facie right of ordinary

---

65. Id. at p.1291.
66. Section 10 of the Act reads as follows:
"No court may require a person to disclose nor is any person guilty of contempt of court for refusing to disclose the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interest of justice or national security or for the prevention of disorder or crime".
67. Secretary of State v. Guardian Newspapers Ltd., [1984] 3 All E.R. 601 at p.615 per Lord Scarman.

members of the public to be informed of any matter that one thinks it appropriate to communicate to them.[68] Such a right encourages purveyors of information to the public. However, a member of the public as such has no right conferred on him by this section to compel purveyance to him of any information.[69] The choice lies with the publisher alone.

Prior to the enactment of the Act, such a protection was a matter for the judge's discretion.[70] The section substitutes for this judicial discretion subject only to specifically given exemptions. In the exercise of the common law discretion, the courts had never considered any general right of the public to be informed of the reprehensible conduct by persons in responsible positions or of future action intended to be taken by the Government or by other authorities.[71] But section 10 of the Act recognised a prima facie right to be informed, however, subject to the choice of the publisher and the specified exceptional cases.

Under the 'newspaper rule', an exception is allowed to the press, as defendants in actions of libel suits, from the general rule that discovery of documents and answers to interrogations must be made of all relevant matters.[72] The extension of

---

68. Id. at p.606 per Lord Diplock.
69. Ibid.
70. See Rogers v. Secretary of State for the Home Department, [1972] 2 All E.R. 1057; and D. v. N.S.P.C.C., [1977] 1 All E.R. 589.
71. Secretary of State v. Guardian Newspapers, [1984] 3 All E.R. 601 at p.605.
72. See Mc Guinness v. Attorney General for Victoria, 63 C.L.R.7

(Contd...)

such a protection to other areas other than libel, may provide a better mechanism for protecting the public's right to know. In British Steel Corporation v. Granada Television Ltd.,[73] Lord Denning emphasised the need for more protection for a responsible press. He observed that the courts were reaching toward the principle that public had a right to information of public importance.[74] The newspapers on behalf of the public may collect and divulge them to the public. Such a process to become more successful, the newspapers may not be compelled to disclose their sources. Otherwise the sources would dry up and wrongdoings would not be disclosed. Such a protection is granted and is available to the newspapers on condition that they would act with due sense of responsibility.[75]

Article 10 of the Convention for the Protection of Human and Fundamental Rights provides for freedom of speech and expression.[76] It also includes freedom to hold opinions and to

---

f.n.72 contd...

(1940) at p.104 per Dixon,J.
What is not clear is whether the rule applied to a freelance journalist or to a writer of pamphlet which imparts useful information to the public. See British Steel Corporation v. Granada Television, [1981] 1 All E.R. 417 (H.L) at p.478, per Lord Fraser of Tullybelton.

73. [1981] 1 All E.R. 417 (C.A.).
74. Id. at p.441.
75. Ibid.
76. Article 10 of Convention for the Protection of Human Rights and Fundamental Rights, 1953 reads as follows:
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it

(Contd...)

receive and impart information and ideas. United Kingdom is party to the Convention. Violations of any Article of the Convention could be successfully challenged before the European Court of Human Rights.[77] The Convention thus may be resorted to indirectly for the protection of freedom of information.

Position in India.

For the first time in India, the right to know of the citizens about the Government's activities was recognized by K.K.Mathew,J., in Raj Narain's case.[78] There were no controversies on finding a foundation for this new right. In this case, the defendant who challenged the validity of Mrs.Gandhi's election required disclosure of Blue Books which contained the tour programme and security measures taken for the Prime Minister.

---

f.n.76 contd...

duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

77. In Sunday Times v. United Kingdom,[1979] 2 E.C.H.R. 245, the European Court of Human Rights decided that there had been a violation of the Convention by reason of the judgement of the House of Lords in A.G. v. Times Newspaper Ltd., [1972] 3 All E.R. 1136. In this case, the House of Lords restrained "The Sunday Times" from publishing any article which prejudges the issues of negligence arising in any actions pending before the court.

78. State of U.P. v. Raj Narain, A.I.R. 1975 S.C. 865.

Though the disclosure sought was not allowed, Mathew, J., held the people of this country were entitled to know the particulars of every public transaction in all its bearing.[79] It was observed that the right to know derived from the concept of freedom of speech, though not absolute.[80]

It is true that Justice Mathew did not say how the right to know may be deduced from the freedom of speech. Later in Judges Transfer case,[81] where the communications between the Chief Justice of India and Chief Justice of the Delhi High Court were sought for disclosure, Bhagwati, J., also recognized the right to know under the freedom of speech. He observed that the concept of an open government was the direct emanation from the right to know which was implicit in the right of free speech and expression guaranteed under Article 19(i)(a).[82] Therefore disclosure of information regarding the functioning of Government must be the rule and secrecy is justified only where the strictest requirement of public interest demands.[83] It can be seen that Bhagwati, J., also had not given an account on how the right to know could be founded under the freedom of speech and expression. Both Mathew and Bhagwati, JJ., were silent also on the relationship between the restrictions which should be placed on the right to know and the restrictions existing under Article 19(i)(a) of the Constitution of India.

---

79. Id. at p.884.
80. Ibid.
81. S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149.
82. Id. at p.234.
83. Ibid.

In Sheela Barse v. Union of India,[84] the appellant highlighted the sad plight of the children detained in jails pending trials, and sought for a speedy trial. Finding her right person, she being a genuine social worker, the Supreme Court ordered for release of information to her regarding such undertrials kept in different parts of the country. Though the Court did not attract the right to freedom of speech and expression to confer the right to know, it can be seen that information were ordered to be released to her though she possessed no such right under any statute. Though the disclosure of information was limited to her and the Court, it would very well help a speedy trial of the under-trial children. Thus, once a need has been shown by a person having proper standing, he would be able to seek information from the Government. The courts do not object to such a process.

The principle enshrined by Mathew and Bhagwati, JJ., is now being followed. In a Rajasthan case,[85] the High Court allowed a public spirited citizen's request for information relating to the sanitation conditions of his home city under the principle of right to know based on freedom of speech and expression. Mr.Koolwal on behalf of the local inhabitants wanted to see whether the local authority performed its obligatory and primary duties faithfully in accordance with the law

---

84. A.I.R. 1986 S.C. 1773.
85. L.K.Koolwal v. State of Rajasthan, A.I.R. 1988 Raj. 2

of the land. The High Court, while accepting exceptions to right to know of citizen, held that the citizenery had a fullest right to know regarding sanitation and allied matters.[86] Thus, in India, the right to freedom of speech and expression may be taken as providing the constitutional basis for the right to know.

Justification of Right to Know under Freedom of Speech Doctrine

The constitutional basis for the right to know in modern democracy seems to be the freedom of speech and expression. This becomes evident from the very purposes of maintaining the freedom of speech in a community. Professor Emerson groups the values sought by the community in protecting this freedom into four categories, as assuring individual self-fulfilment; as a means of attaining the truth; as a method of securing participation by the members of the community in social and political decision-making; and, as maintaining the balance between stability and change in a community.[87]

Although Emerson sees these as distinct values, he believed that each is necessary, but not in itself sufficient, for the four of them are interdependant.[88] Professor Meiklejohn, on the other hand, was ready to accept that free speech was

---

86. Ibid.
87. Thomas I.Emerson, "Toward a General Theory of the First Amendment", 72 Yale L.J. 877 (1963) at pp.878-79.
88. Emerson, "First Amendment Doctrine and the Burger Court", (1977) Am.B.Found. Research J. 521, as quoted in 130 U. Pa.L.Rev. 591 (1982).

intended only to foster one aim--self-government. Although, not rejecting all other asserted values of free expression, Professor Blasi has urged recognition of the 'checking value' as the primary purpose of the freedom of speech.[89] Different from others, Justice Holmes posited that the primary function of free speech is as a catalyst to the discovery of truth under his 'marketplace-of-ideas' approach.[90] Recently, an author has found the true value served by free speech in individual self-realisation.[91]

Individual Self-fulfilment

Man, unlike the animals, has the capacity to think, to communicate and to build a culture. He has also the powers of imagination, insight and feeling. Development of these capacities and powers is necessary for the development of his personality. The right to freedom of speech can be justified as a right of an individual, in his capacity as an individual, because, the proper end of an individual is the realisation of his character and potentialities as a human being.[92] A second reason for the right to freedom of speech of an individual

---

89. See Blasi, "The Checking Value in First Amendment Theory", (1977) Am.B.Found. Research J. 521, as quoted in 130 U.Pa. L.Rev. 591 (1982).
90. Abrams v. United States, 63 L.Ed. 1173 (1919) at p.1180 per Holmes, J., (dissenting).
91. See Martin H.Redish, "The Value of Freedom Speech", 130 U.Pa.L.Rev.591 (1982).
92. See K.K.Mathew, Democracy, Equality and Freedom, Eastern Book Co., Lucknow (1978), p.96. See also Martin H.Redish, "The Value of Free Speech", 130 U.Pa.L.Rev.591 (1982). Redish maintains that the constitutional guarantee of free speech ultimately serves only one true value, that is, individual self-realization.

derives from the notions of the role of an individual in his capacity as a member of the community. He lives within the company of his fellow men and is subjected to the necessary controls of the society. A right to express one's opinions as a member of the community is necessary to promote the welfare of the individual as well as the community. Such a right to express one's opinions also provides an equal opportunity to share the common decisions which affect the individual as well as others. Thus arises the need for an individual in having access to knowledge. Such an access to knowledge is necessary to shape his own views to communicate his needs and to participate in formulating the aims and achievements of his community. In a democracy, the right to free expression is not only intended to define an individual right but also a right of the community to hear and being informed. Thus, right to know is necessary for the personal self-fulfilment of an individual whether in the capacity of an individual or as a member of the community. The right to know, however, may be either from the fellow-beings or from the Government.

In the laissez faire, the Government's interference in the citizen's life was minimal. The Government was concerned with the defence, law and order, external affairs etc. The need for the right to know from the Government in those periods, thus, evidently had less significance. But after the transition to the welfare era, the Government shouldered more responsibilities, duties, and powers. The people could feel the pulse of the

Government in every walks of life. The life of the people much depended on the decisions of the governmental authorities. The right to know of individual for his self-fulfilment thus required knowledge from the Government also apart from his fellow beings.

Along with the transition from one system to the other, there was also a change in the political process. People became more busy with their full-time engagement in daily work and found less time to think over public issues. Because of the increased literacy, education and influence of mass media, the public opinions became broader, more uniform and less independent. The political as well as other issues became more complex and people became more dependent on specific and true information which, however, were not available to the general public. Thus public opinion became more less informed, which ultimately led to manipulation of public opinion. This situation caused difficulties for individuals in taking decisions regarding their own affairs as well as public affairs. The urgent need for right to know became more clear in these circumstances for knowing the specific and true information. The Government, being the largest repository of information in a welfare State, thus, is bound to impart necessary information to an individual for the enjoyment the freedom of speech and expression in respect of his self-fulfilment and community interest.

By affording the people an opportunity to hear and digest competing ideas and to find necessary options, freedom of discussion promotes independent judgement and considerate decision. This provides for an autonomy of the individual. It is true that, even if freedom of discussion exists, people may reach irrational judgements. Thus, the supposition is not that freedom of speech will actually produce fully autonomous persons. The claim is only that the people will be more autonomous under a regime of free speech than under a regime of substantial suppression.[93] Those who decide for themselves and in a rational manner are acting in a more distinctly human way than those who passively submit themselves to authorities.

The Government may treat people as if they are rational and autonomous by maximising opportunities for making informed judgements. The difficulty in such a process is two-fold. Where the fellow citizens do not act in a rational way, it may result in harms on others, on disclosure of certain information. Again, certain citizens may cause harm to the community itself if certain information is disclosed to them. Thus, what is required is to accept a notion that people are autonomous and rational and at the same time keep the secrecy of the information which on disclosure could be used by one to cause harm to an individual or to the community.

---

93. Kent Greenawalt, "Free Speech Justifications", 89 Colum. L.Rev. 119 (1989) at p.144.

Discovery of Truth

One of the arguments for freedom of speech is that it promotes the discovery of truth. Found in Milton's Areopacitica[94] and in eloquent opinions of Holmes,[95] and Brandies,[96] the argument is the core of Mill's defence of freedom of speech in "On Liberty".[97] Mill says that if the Government suppresses communications from the public, it may suppress ideas that are true or partly true.[98] Even if an idea is wholly false, its challenge to received understanding promotes a re-examination that vitalises truth.[99]

A rational judgement can be arrived at after considering all the facts and arguments on an issue. Later, new propositions can be arrived at, after considering new and fresh knowledge. Knowledge is always subject to extension, refinement and modification. It is also subject to rejection. Suppression of information prevents one from reaching the most rational judgement, blocks the generation of new ideas, and tends to perpetuate error. This theory demands an open discussion which is necessary for arriving at the best judgement on individual as well as social problems. The right to know in this

---

94. J.Milton, Areopacitica, London (1819), as quoted in 89 Colum. L.Rev. 119 (1989) at p.130.
95. Abrams v. United States, 63 L.Ed. 1173 (1919) at pp.1178-80 per Holmes, J., (dissenting).
96. Whitney v. California, 71 L.Ed. 1095 (1927) at pp.1104-08.
97. J.S.Mill, "On Liberty", in M.Cowling (Ed.), Selected Writings of John Stuart Mill, (1968), as quoted in 89 Colum.L.Rev. 1 (1989) at p.130.
98. Ibid.
99. Ibid.

respect capable of helping best judgement on public issues be arrived at. Since many items of information regarding the public issues, and in certain cases private also, are with the Government in a welfare era, the right to know from the Government turns out to be a necessity. The theory of open market place of ideas propounded by Justice Holmes is also relevant to attaining truth.

The truth-discovery justification is not beyond challenges. First of all, certain truths are destructive to the social order itself. Secondly, it is not sure that people will grasp the truth whenever it appears. Thirdly, in certain cases, people are incapable of evaluating the truths. Fourthly, people may ignore certain truths even after a correct evaluation.[100] Finally, there is a criticism that objective truth does not exist.[101] Though the challenges cannot be written off, it may be noted that truth-discovery justification posits a contained optimism that people have some ability over time to sort out true ideas from false ones.[102]

Participation in Political Decision-making

The third purpose of a system of freedom of speech and expression in a modern democracy is to provide for participation in decision-making. It may be through a process of open

---

100. Every smoker agrees that smoking poses a serious risk to health and life. But the smokers neglect the truth disclosed to them on the packets and advertisements.
101. Kent Greenawalt, "Free Speech Justifications", 89 Colum. L.Rev. 119 (1989) at p.131.
102. Ibid.

discussion, which is available to all members of the community that information regarding political process may be known to every individual. It is mainly through the political process, the welfare and progress of a society are achieved. The greater the degree of political discussion allowed, the more responsive is the Government,[103] and for a greater degree of political discussion, more information held by the Government may be disclosed to the people.

Achievement of a Stable Community

Open discussion is also a method of achieving a stable community and useful maintaining a balance between healthy cleavage and necessary consensus.[104] Suppression of discussion makes a rational judgement impossible and at the same time promotes inflexibility and stultification, taking away the chances of a community from adjusting to changing circumstances or developing new ideas.[105] It also conceals the real problems and diverts public attention from the critical issues. Further, suppression drives opposition underground leaving the suppressed desparate.[106] These people may resort to force and may weaken the majority. It may make the community unstable.

Thus, it is wrong to believe that freedom of speech protects only self-expression. In addition, it protects the stability of the nation and prepares citizens to exercise their

---

103. Thomas I.Emerson, "Toward a General Theory of the First Amendment", 72 Yale L.J. 877 (1963) at p.883.
104. Id. at p.884.
105. Ibid.
106. Ibid.

right of self-government. It also helps the pursuit of intellectual development. The freedom of speech thus plays a structural role in our constitutional and political system.

Checking Function

Apart from the four functions spelt out by Emerson, there is another function-the checking function for the free speech in a society.[107] Free speech acts as a check on abuse of authority, especially governmental authority. If those in power are subject to public exposure, corrective measures can be taken. Again, if the public officials know that they are subject to such a scrutiny, the officials are less likely to yield to corrupt and arbitrary ways. Thus, the checking function aims at exposure and prevention of abuse of power and corrective measures for them.

Exposure of abuses contributes to healthy government. It is not limited to liberal democracies alone. Even in authoritarian regimes, where the citizens have little say in the governing process, threat of exposure can restrain officials from personal abuses of office. The value behind the checking function is a democratic one that individuals should have a say in the policies of the Government because the Government in a democracy is acting on their behalf. The checking function thus shows the finite elements of self-government.

---

107. For more on the topic, see Blasi, "The Checking Value in First Amendment Theory", (1977) Am.B.Found.Research J.521, as quoted in 130 U.Pa.L.Rev. 591 (1982).

Right to Know as a Pre-condition for Self-government

Persons who see themselves as autonomous see themselves as having a right to make up their own minds.[108] The freedom of speech and expression necessarily provides an individual to become autonomous in this thinking process. A right of that kind may better support a healthy doctrine of free speech.[109] Such a freedom may not be checked except in cases of strong counterveiling public interests. A control on the sources of information may restrict the man from being autonomous.

The basis of self-government is that each individual in the community has a right to determine how he is collectively or individually governed.[110] Implicit in this is the right of access to information on how decisions are made affecting him directly or indirectly. Thus, the notion of a people's right to self-government, evidently implies right to gather information from their Government even when the Government resists disclosure. Though such a right is not absolute, it is a fundamental presumption of self-government.[111]

The fundamental postulate of self-government is that the citizens are capable of governing themselves.[112] Implicit

---

108. T.Scanlon, "A Theory of Freedom of Expression", in R.M. Dworkin (Ed.), The Phylosophy of Law, Oxford University Press, London (1977), p.168.
109. Ibid.
110. See Peter Bayne, "Freedom of Information, Democracy and the Protection of the Processes and Decisions of Government," 62 A.L.J. 538 (1988).
111. Note, "The First Amendment Right to Gather State-held Information", 89 Yale L.J. 823 (1980) at p.928.
112. Ibid.

in such a postulate are two bases for the right to know from the Government. Firstly, the citizens have a right to necessary information to participate in the decision-making process for the purposes of governing themselves, and secondly, the citizens are the right persons to determine the limits of their search for information.[113]

The right to information derives from the postulate of individual political competence.[114] The decisions of Government in a democracy reflect the choice preferred by the greatest number. The Government thus may have a system to ascertain the citizen's views. Such a system finally ends in voting. Only where an individual possesses a meaningful opportunity to form this opinion, the system becomes a success. In order to express one's preferences, one has to be able to acquire the required information relevant to the issue. When the Government is the sole possessor of such information, the right to know against the Government may rightly be conferred upon the citizens.

A self-governing citizen in a community may decide not to decide on certain public issues before him. The choice to elect, on which issue he may think over and decide, is left to the individual. Such a freedom of an individual leads to the conclusion that only an individual himself could properly determine which information he requires from the Government.[115]

---

113. Id. at p.929.
114. Ibid.
115. Id. at p.930.

The right of the individual to participate in public debates and the right to select the information form the pre-condition of a successful self-government system.

The requirement of the right of the citizen to information and the correlative duty of the Government to disclose may seem to be perfect in theory. In practice every democratic society requires some level of secrecy to conduct its affairs in certain quarters, such as, foreign affairs, defence, investigation of crime etc. It is also a truth that people in fact consents to such secrecy. Otherwise, openness to an absolute level may definitely destroy the very system of government.

Conclusion

It can be seen that in a modern welfare democracy all the purposes of the freedom of speech require the right to know for a proper and fuller enjoyment of the freedom. As a constitutional theory for the communication of information, laissez faire has become outmoded. As time changes, law changes. Or new interpretations, improved and improvised, may be given to the existing laws making them suitable to the modern conditions. And that was what the American dissenting judges were doing--to provide right to know a constitutional basis under the freedom of speech.

The freedom of speech having constitutional protection has two dimensions. Being a restriction on the governmental power, it protects the freedom of the people by non-interference by the authorities. The Government rather keeps away from the public. Thus, Government may not restrict the free flow of information from a voluntary source unless strong public interest demands it. In this dimension comes the freedom of speech of an individual regarding the non-political areas such as art, literature, music and education. The second dimension is the most important part of the freedom of speech. The Constitution being a political document must also consider the political functions of an individual. In a democracy, free speech provides for a full and free discussion of political issues of the nation. For a fuller enjoyment of the free speech right conferred by the Constitution to the people, it becomes the duty of the Government to divulge necessary information held by it. It is high time to recognize this positive content of the freedom of speech through a separate legislation detailing exceptions to the right to know, the procedure for obtaining required information, and remedies in cases of violation of the right.

Chapter 3

OPENNESS IN LEGISLATURE, JUDICIARY AND LOCAL BODIES

In the preceding chapters, we have seen the importance of the right to know from the Government in a modern democracy and its constitutional basis on the right to freedom of speech. In this chapter, the right to know from the Legislature, the Judiciary, and the Local Authorities of the State will be discussed briefly. It may be noted that the proceedings in both the legislature and the judiciary are traditionally open. Considering the current importance of the local authorities, the right to know from the local authorities is also dealt with in this chapter.

A. Openness in Legislature

In a democracy, the legislature expresses the aspirations of the community. The people elect their representatives on the basis of a trust that the representatives will adequately represent the community's interests. The openness in the legislature helps the people to watch the way their representatives in fact function in the legislature. The discussions openly made in the legislature and also before the public only add to the democratic nature of the legislature. Again, the discussions alleviates the doubts and confusions in the minds of the people regarding various issues. It clears the public mind and also shapes the demands of the public opinion.

Apart from the legislative function, legislature has another function—'the informing function'.[1] It is a duty of a legislature to look deligently into the affairs of Government. The legislature may see that the will of the people projected through it is respected by the Government. For this purpose, the legislature may acquaint itself with acts of the Government and through the legislature, the people may know how the country is being served.[2] The information thus available to the public helps them to discuss the public issues. It, in fact, helps them also to become self-governing.

The communication between the legislature and the people exposes the working of the political system, the policies underlying the new laws and the role of executive in the administration. The informing function is necessary to foster the public faith in the responsiveness of the Government. It is not only an ordinary task of the legislator, but one that is essential to the continued vitality of the democratic institution.[3]

Previously, the legislative meetings were not so open as we see now. At one time, no one except the members were allowed to enter the hall. For a brief history on how the legislatures became open, it is necessary to go through the position in England.

---

1. Woodrow Wilson, Congressional Government, (1885), pp.303-04, as quoted in Mike Gravel v. United States, 33 L.Ed. 2 d. 583 (1972) at pp.610-11.
2. Ibid.
3. Mike Gravel v. United States, 33 L.Ed. 2d. 583 (1972) per Brennen, J., (dissenting) at p.618.

Position in England

In England, the legislature had always claimed and enjoyed the right to exclude strangers and to discuss within closed doors. According to an ancient custom of Parliament, by orders of both Houses, strangers were not admitted while the Houseswere sitting.[4] The first reason for avoiding the strangers was the inconvenience caused by the strangers pressing into the body of the House.[5] There was also inconvenience when the strangers from the galleries tried to influence the debate.[6] Another reason was the fear of an action from the Crown if reports were made of the speeches and actions of the members.[7] It may be noted that in earlier periods, the freedom of debate did not, in practice, afford to complete protection. Later, in the eighteenth century, the reason for avoiding strangers seems to be reluctance to be held accountable to public opinion.[8] Until 1845, the Commons,

---

4. Erskine May, Parliamentary Practice, Butterworths, London (19th ed., 1976), p.221.
5. Id. at p.79
6. Ibid.
   The public had no common law right to attend meetings of legislature. In seventeenth and eighteenth centuries, publication of Parliamentary proceedings was frequently met with harsh punishment in England. The motive for secrecy originally lay in protection from Crown. But later it was thought useful to conceal the debates from the electorate also. See Note, "Open Meeting Statutes: The Press Fights for the Right to Know", 75 Harv. L.Rev. 1199 (1962) at p.1203.
7. Ibid.
8. Id. at p.79

by a sessional order, maintained the exclusion of strangers from the House.[9] But since that time, the presence of strangers has been recognized in those parts of the House not appropriated to the members.[10]

Where a member takes notice of the strangers, the Speaker was obliged to order the strangers to withdraw even without putting a question.[11] Prompted by the inconvenience of this rule, the House agreed in 1875, under a resolution, that where notice was taken that strangers were present, the Speaker should forthwith put the question that strangers be ordered to withdraw.[12] However, a power was reserved to the Speaker to order the withdrawl of strangers, whenever he thought fit.[13]

Position in the United States

In the United States, from the inception itself, the House of Representatives met in public and the Senate from 1794.[14] Most of the congressional work is now done in Committees which are generally open.[15] Most of the States have constitutional requirements that the legislatures meet in public.[16] In other States, legislative sessions are open

9. Id. at p.221.
10. Ibid.
11. Id. at p.222.
12. Ibid.
13. Ibid.
14. Note, "Open Meeting Statutes: The Press Fights for the Right to Know", 75 Harv. L.Rev. 1199 (1962) at p.1203.
15. Ibid.
16. Ibid.

as a matter of custom.[17]

Position in India

In India each House of Parliament has the right to exclude strangers under Article 105(1) of the Constitution.[18] The right to exclude strangers flows from a necessary corollary to the privilege of freedom of speech as it enables the House to obtain such privacy as may secure the freedom of debate.[19] In Searchlight case[20], the Supreme Court observed that the freedom of speech claimed by the House ensured secrecy of the debate.[21] It was also observed that the object of excluding strangers is to prevent the publication of debates and proceedings in the House.[22] In Lok Sabha, the Speaker has the power to order withdrawal of strangers from the House whenever he thinks fit.[23]

---

17. Ibid.
18. Article 105(1) of the Constitution of India reads: "Subject to the provisions of this Constitution and the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament".
    The right to exclude strangers is regarded as a corollary to the freedom of speech. See M.P.Singh, V.N.Shukla's Constitution of India, Eastern Book Co., Lucknow (8th ed., 1990),p.307.
    Article 105(3) also provides necessary authority to the Houses. It reads: "In other respects, the powers, privileges and immunities of each House of Parliament, and the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act 1978.
19. Kaul M.N. and Shakdher S.L., Practice and Procedure of Parliament, Metropolitan Book Co., Delhi (2nd ed., 1972), p.199.
20. M.S.M.Sharma v. Sri Krishna Sinha, A.I.R. 1959 S.C. 395.
21. Id. at p.404 per S.R.Das, C.J.
22. Ibid.
23. See Rule 387 of the Rules of Procedure and Conduct of Business in Lok Sabha (5th edition) as quoted in Kaul M.N. and Shakdher, S.L., supra n.19 at p.806.

In England as well as in India, the sessions of Parliament are conducted openly. Only in exceptional circumstances, sessions are conducted secretly. During the World Wars, it had been the practice, in England and in India, to hold secret sessions. It was considered that members should be taken into full confidence with regard to the prosecution of war.[24] The information, which may be given to the debate, shall not reach the enemy. The Indian legislature rules provide for the holding of a secret session.[25]

---

24. See, Erskine May, supra.n.4 at p.223.
25. The rules are as follows:
    (i) On a request made by the leader of the House, the Speaker shall fix a day or part thereof from sitting of the House in secret,
    (ii) When the House sits in secret, no stranger shall be permitted in the Chamber, Lobby or Galleries: Provided that the Members of the Council may be present in their Gallery provided further that persons authorised by Speaker may be present in the Chamber, Lobby or Galleries.
    (iii) The Speaker may cause a report of the proceedings of a secret sitting to be issued in such manner as he thinks fit, but no other person present shall keep a note or record of any proceedings or decisions of a secret sitting, whether in part or full, or issue any report of, or purport to describe such proceedings.
    (iv) The procedure in all other prespects in connection with a secret meeting shall be in accordance with such directions as the Speaker may give.
    (v) When it is considered that the necessity for maintaining secrecy in regard to the proceedings of a secret sitting has ceased to exist, and subject to the consent of the Speaker, a motion may be moved by the Leader of the House, or by any member authorised by him, that the proceedings in the House during a secret sitting be no longer treated as secret.
    (vi) On adoption by the House of the motion under sub-rule (v), the secretary shall cause to be prepared a report of the proceedings of the secret sitting, as soon as practicable publish it in such form and manner as the Speaker may direct.

Questions for Information

Apart from the sessions of the legislature being open to the citizens, the members of the legislature have a right of putting questions to Ministers for the purpose of eliciting information regarding matters under administrative control and of public importance. This is one of the later developments in the parliamentary practice. In India, the development of question procedure in Parliament is associated with the constitutional changes that have taken place from time to time. The first Legislative Council set up under the Charter Act, 1853, though primarily meant for making laws, showed some degree of independence by asking questions as to and discussing the propriety of the measures of the Executive Government.[26] The Indian Councils Act, 1861, was a retrograde step in this respect and thus demanded reforms so as to allow the members of the Legislative Council to elicit information by asking questions.[27] This was later conceded under the Indian Councils Act, 1892.

---

f.n.25 contd...

(vii) Subject to the provisions of these rules, disclosure of proceedings or decisions of a secret sitting by any person in any manner shall be treated as a gross breach of privilege of the House.

See, A.R.Mukherjea, Parliamentary Procedure in India, Oxford University Press, Calcutta (2nd ed., 1967), p.194.

26. Kaul M.N. and Shakdher S.L., supra n.19 at p.370.
27. Ibid.

Though the members of Parliament have a right to ask questions, the procedure has certain limitations. There are restrictions regarding the time, nature, and contents of the questions.[28] The time allotted for asking questions and answering them is limited. The members cannot ask any number of questions. Again the Ministers are not bound to answer all questions.[29] Though the question procedure helps the public regarding their right to know, due to the limitations mentioned above, it does not seem effective. Thus, the right to know of the public through their representatives to the legislature is limited.

Publication of the Proceedings in the Legislature

Though the proceedings of the legislature is generally conducted openly, the general public may not be able to enjoy the freedom to watch the proceedings. Only few people can find time and space for the purpose. Thus, if the proceedings are really intended to be reached to the people, it is necessary to depend press and such other media. The publication of the proceedings, as we see now, is of later origin only.

---

28. Regarding the rules of form and contents of questions in England, see ErskineMay, supra n.4 at pp.327-34. Regarding the question hour, period of notice and restrictions on contents of the questions in India, see Kaul M.N. and Shakdher S.L., supra n.19 at pp.371-400. For the position in India, see also A.R.Mukherjea, infra n.29 at pp.78-98.
29. A.R.Mukherjea, Parliamentary Procedure in India, Oxford University Press, Calcutta (2nd ed., 1967), pp.78-98.

Position in England

Closely connected with the power to exclude strangers is the right of the House to prohibit publication of debates or proceedings. The publication of the proceedings has been declared to be a breach of privilege, especially, the false and perverted ones.[30] In early times, in England, all proceedings of the legislature were supposed to be secret except the promulgation of the Acts of Parliament.[31] Everyone present in Parliament was to keep secret the things done and spoken in Parliament. However, from 1641 onwards, the House of Commons showed a desire that public should be made aware of the proceedings but only through its own actions and through official channels.[32] Thus, in 1680, the supervision of printing of the votes was confided to the Speaker.[33] Votes later became voluminous, for it had to cover all the proceedings. Thus, in 1817, the select committee recommended that they should be converted into concise record available on the following morning.[34]

Though every person in Parliament were to keep the proceedings inside secret, it was common, at all periods, that private diaries and notes kept by Members and others leaked

---

30. Erskine May, supra n.4 at p.79.
31. Strathearn Gordon, Our Parliament, Cassell & Co., London (6th ed., 1964), p.129.
32. Id. at p.130.
33. Ibid.
34. Ibid.

out to a greater or lesser extent. These notes however found their way to the coffee houses and news-letters of the day. The news-letters which were distributed in manuscripts were both the precursors of modern newspapers and pioneers of parliamentary reports. Later news-letters gave place to printed magazines and newspapers. While printing was introduced, the Houses feared more about the possibilities of misrepresentation. In 1738, the House of Commons declared the publication as high indignity and notorious breach of privilege.[35] In 1762, under a resolution, the House threatened to proceed with utmost severity against the offenders.[36] In the later tussle, the publishers, supported by the public and Corporation of the City of London, overpowered the House.[37] Later, in 1834, a separate reporter's gallery was provided in the House which was later labelled as 'the Fourth Estate'. Recently, in 1971, the House of Commons resolved that notwithstanding the earlier resolutions, it would not entertain any complaint of contempt of the House or breach of privilege in respect of publication of debates or proceedings of the House or its committees except when it is expressly prohibited by the House.[38]

---

35. Id. at p.132.
36. Id. at p.131.
37. Id. at p.132.
38. Erskine May, supra n.4 at p.79.

Position in India

In India each House has the right to prohibit the publication of its proceedings. The Supreme Court once observed that the powers, privileges and immunities conferred on the House under Articles 194(3) and 105(3) of the Constitution[39] provide for the control of publication of the proceedings.[40] The underlying object of the power is to protect the freedom of speech by ensuring privacy of debate whenever found necessary. It prevails over the general right of an individual's freedom of speech and expression guaranteed by the Constitution.[41]

In Lok Sabha, the Secretary General is authorised to prepare and to publish the report of the proceedings of the House under the directions of the Speaker.[42] The Speaker may also authorise printing, publishing and sale of documents and reports in connection with the business of the House or any paper laid on the table or presented to the House of a Committee.

---

39. For Article 105(3) of the Constitution, see supra n.18. Article 194(3) is similar to Article 105(3) conferring the privileges and immunities to legislatures of States.
Also, Article 105(2) of the Constitution provides that no person shall be liable for reporting, in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings. Article 194(2) confers a similar protection in respect of State legislatures.
40. M.S.M.Sharma v. Sri Krishna Sinha, A.I.R. 1959, S.C. 395 at p.407.
41. Ibid.
42. See Rule 379 of the Rules of Procedure and Conduct of Business in Lok Sabha, (5th edition) as quoted in Kaul M.N and Shakdher S.L., supra n.19 at p.201.

The constitutional immunity relating to the publication of the proceedings does not extend to the publication of reports of parliamentary proceedings in the newspapers by individual persons.[43] Now Article 361-A inserted by the Fortyfourth Amendment, provides that no person shall be liable to any proceedings, civil or criminal, for reporting the proceedings of either House of Parliament or a State legislature unless the reporting is proved to have been made with malice.[44]

Position in the United States

In the United States, the Constitution provides for publishing the proceedings of the Houses in a journal excepting such parts which in the legislature's opinion require secrecy.[45]

---

43. See Kaul M.N and Shakdher S.L., supra n.19 at p.201.
44. Again the Parliamentary Proceedings (Protection of Publication) Act, 1956 provides for necessary protection. Section 3 of the Act reads:
    Publication of reports of Parliamentary Proceedings privileged (1) Save as otherwise provided in sub-section (2), no person shall be liable to any proceedings, civil or criminal, in any court in respect of the publication in a newspaper if a substantially true report of any proceedings or either House of Parliament unless the publication is proved to have been made with malice.
    (2) Nothing in sub-section (1) shall be construed as protecting the publication of any matter, the publication of which is not for the public good.
    Under section 4, the Act also applied to Parliamentary Proceedings broadcast by wireless telegraphy.
45. Article I section 5 clause 3 of the U.S.Constitution reads as follows:
    "Each house shall keep a Journal of its proceedings, from time to time publish the same, excepting such Parts as may in their Judgement require secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of the one fifth of those Present, be entered on the Journal.

Thus a general requirement of full disclosure is necessitated under the Constitution. Again the Constitution requires the President to provide information to the Congress from time to time.[46] Thus, there is a positive duty on the part of the President to inform Congress. In the ordinary executive power of the President, this may be true. But, in the executive powers of the President as Commander-in-Chief of Armed Forces and in the diplomatic relations, secrecy may be necessary because of the very nature of these two functions.

Conclusion

The existing openness in the legislature is not sufficient. Two suggestions are made in this respect. The questions put by the members of the legislature may be answered promptly either in the House itself or through a separate communication. If any information could not be disclosed, the reasons may be adduced. Secondly, it is suggested that the proceedings of the legislature may be covered by the television network. This enables the public, who are not in a position to attend the meeting by reasons of distance, money or time, to watch how their representatives function in the House. The knowledge that people watch the proceedings will also make the members more responsible in their duties.

---

46. Article II, Section 3 of the U.S.Constitution reads as follows:
"He shall from time to time give the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extra-ordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors or other public Ministers; he shall take Care that the Laws be faithfully executed and shall Commission all the Officers of the United States."

B. Openness in the Judiciary

The functioning of the other branch of State, the judiciary, is also more or less open. People can watch the proceedings in a court. The decisions are pronounced in the open court. If the proceedings are conducted in a secret chamber, the people may lose faith in the judiciary. The confidence in the system may also be lost.

The principle is widely regarded today as fundamental. The institutional status which it enjoys today, however, was accorded to it only in recent times.[47] It is through the writings rather than judicial pronouncements, we started to hear about the principle of openness in judicial proceedings. Jeremy Bentham, said that only through publicity, justice became the mother of security.[48] Without publicity all other checks are fruitless. The English system of procedure owes much to the principle of publicity from becoming a worst system.[49] On the relation between justice and publicity, Bentham observed:[50]

> "Publicity is the very soul of justice. It is the keenest slur to exertion and surest of all guards against improbity. It keeps the judge himself while trying under trial. Under the auspices of publicity, the cause in the court of law and appeal to the court of public opinion are going on at the same time".

---

47. Garth Nettheim, "The Principle of Open Justice", 8 U.Tasmania L.Rev. 25 (1984).
48. Works of Jeremy Bentham, Vol.4, (Bowring, Ed., 1843), pp.316-17, as quoted in Garth Nettheim, supra n.47 at p.28.
49. Ibid.
50. Ibid.

Apart from stressing the principle of openness in the judicial proceedings, Bentham also opined that the reports of the judicial proceedings should be freely published. Bentham was also conscious about the exceptions to the general doctrine of openness in the judicial proceedings. Altogether he developed eight grounds for the exception.[51]

The glorious tradition of the English legal system is that of openness in the judicial proceedings.[52] Openness is the general rule and only in exceptional cases, such as,

---

51. The exceptions are the following ones:
    (a) To preserve the peace and good order of the proceedings to protect the judge, the parties, and all other persons present, against annoyance;
    (b) To prevent the receipt of mendacity-serving information;
    (c) To prevent the receipt of information subservient to the evasion of justiciability in respect of person or property;
    (d) To preserve the tranquility and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour, or liable to be productive of uneasiness or disagreement among themselves;
    (e) To preserve individuals and families from unnecessary vexation, produceable by the unnecessary disclosure of their pecuniary circumstances;
    (f) To preserve the public decency from violation;
    (g) To preserve the secrets of State from disclosure; and,
    (h) So far as concerns the taking of active measures for publication —the avoidance of the expense necessary to the purchase of that security, where the inconvenience of the expense is preponderant over the advantage referable to the direct ends of justice.
    See Jeremy Bentham, Rationale of Judicial Evidence, Vol.I, Ch.X (1827), (Garland Facsimile Ed., 1978), pp.541-42, as quoted in Garth Nettheim, supra n.47 at pp.29-30.
52. See Kurt H.Nadelmann, "The Judicial Dissent: Publication v. Secrecy", 8 Am.J. Comp.L. 415 (1959) at pp.417-18.

lunatics, wards, and trade secrets, the proceedings are conducted in private. However, a court possesses an inherent jurisdiction to hear the cases in private where the administration of justice requires a closed proceeding. This power may be exercised only on well recognised principles. In India, we follow the English system. It may be noted that the principle of openness in judicial proceedings has achieved international recognition also.[53]

---

53. Article 6(1) of the European Convention on Human Rights, 1950, reads as follows:

"In the determination his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society where the interests of juveniles or the protection of the private life of the parties so required, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice."

Article 14 of the International Covenant on Civil and Political Rights, 1960, also provides for access to court proceedings except in certain situations. Article 14 reads as follows:

"The Press and public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The Article clearly says that it is the court itself to decide questions of exclusion of the public. See, J.G.Starke, "Current Topics: The Right of Freedom of Public Access to Court Proceedings", 63 A.L.J.155 (1989).

For a better understanding of the topic, it will be fruitful to have a brief account on the position of law in England, before we take up the Indian position.

Position in England

The origins of the practice of judicial openness are obscure. One modern writer says that it is a traditional feature of England trials.[54] Nothing has been said about openness in any major English constitutional documents, such as, Magna Carta, Petition of Rights of 1621 and the Bill of Rights. However, Sir Edward Coke, in the 17th century, had found out the principle of openness in the statute of Malborough of 1267 which provided that all causes ought to be heared, ordered and determined before the judges openly in the courts where all persons may resort, and not in chambers or private places.[55] The decision in this case may be treated as an interpretation of a provision in a statute.

Judicial exposition of openness in judicial proceedings began to appear as early in 19th century. In Daubney v. Cooper[56], the question was whether the openness principle was applicable to summery criminal trials. It was observed

---

54. N.A.Radin, "The Right to a Public Trial", (1932) Temple L.Q.381 at pp.388-89, as quoted in Garth Nettheim, supra n.47 at p.26.
55. E.Coke, 2, Institutes of the Laws of England, (1642) at pp.103-104, as quoted in Garth Nettheim, supra n.47 at pp.26-27.
56. 109 E.R. 438 (1829).

that openness was one of the essential qualities of a court of justice and all parties, who were desirous of hearing what was going on inside the court, had a right to be present there.[57] The reasons for supporting the principle of openness in the case was that the person present must be able to observe the testimony of witnesses.

In 1913 came the most important case in this area, Scott v. Scott.[58] In this case, a woman successfully petitioned for a decree of nullity on grounds of her husband's impotence. The case was heared in camera. The wife later sent copies of the transcript of the decision to certain persons in order to vindicate her reputation. On a motion by the husband, the wife and solicitor were held to be guilty contempt of court. They appealed to the Court of Appeal from where the case came before the House of Lords.

The House of Lords took the view that the order that the hearings be held in camera did not prevent subsequent publication of the proceedings. Viscount Haldane, L.C., held that the power of an ordinary court of justice to hear in private could not rest merely on the discretion of the judge or on his individual view that it was desirable for the sake of decency or morality that the hearing should take place in private.[59] An exception to the general rule of

---

57. Id. at p.440.
58. [1913] A.C. 417.
59. Id. at p.435.

openness may be based on the application of some other and overriding principle which defines the field of exception.[60] It may not be left to the individual discretion of the judge. Viscount Haldane,L.C., also discussed whether the consent of the parties was enough to make the proceedings closed. Where the individual rights of the parties are at stake, the parties are free to waive and a judge thus may exclude the public if he demits his capacity as a judge and sits as an arbitrator.[61] In proceedings, however, where the public has a general interest, the parties cannot exclude the public.[62] The consent of the parties in such cases cannot make it an exceptional case to the general rule of openness.

On exceptions, apart from the parental jurisdiction of the court regarding lunatics or wards of court, Lord Loreburn cited two more exceptions--where the subject matter of the action would be destroyed by a hearing in open court (as in the case of some secret manufacture) and where a precaution is necessary for the administration of justice.[63]

The hearing of a case in public may be,and often is, no doubt,painful, humiliating or deterrent both to the parties and witnesses, especially in criminal cases. The details may be so indecent as to tend to injure public morals.

---

60. Ibid.
61. Id. at p.436.
62. Ibid.
63. Id. at p.445.

But all this is tolerated and endured because it is felt that public trial is found to be the best security for the pure impartial and efficient administration of justice.[64] The best means for winning public confidence and respect is to conduct the trial in public.[65] Thus, only when it is proved to be necessary for the attainment of justice, a court may conduct the proceedings in camera.

The principle enunciated in Scott's case was readily accepted and followed by the English as well as other Commonwealth courts. The High Court of Australia followed Scott's case in Dickason's case[66] in 1913. The privy Council accepted the principle in Mc Pherson's case[67] in 1936. The Canadian courts also followed the principle of openness.[68]

An important decision pronounced after Scott's case is the Leveller Magazine's case.[69] In this case, the Magazine published the name of a witness which the court had previously ruled that it was only to be disclosed to the court and the defence counsel. Rejecting a contempt action, the House of Lords held that it was not contempt to publish what could be deduced from evidence given in open court, which was freely reported, and since the identity of the witness would be

---

64. Id. at p.463 per Lord Atkinson.
65. Ibid.
66. Dickason v. Dickason, 17 C.L.R. 50 (1913).
67. Mc Pherson v. Mc Pherson, [1936] A.C. 177 (P.C.).
68. Snell v. Haywood (No.2), 88 C.C.C. 213 (1947), as quoted in Garth Nettheim, supra n.47 at p.37.
69. Attorney General v. Leveller Magazine Ltd. and Others, [1979] 1 All E.R. 745 (H.L.).

discovered from such evidence. Referring to Scott's case, Lord Diplock observed that the application of the principle of open justice had two aspects.[70] Firstly, it requires that the proceedings in the court should be held in open court to which the press and public are admitted, and secondly, in criminal cases, at any rate, all evidence communicated to the court must be done publicly.[71] However, it may become necessary to depart from the general rule of open justice where the application of the general rule in the entirety would frustrate or render the administration of justice impracticable or would damage some other public interests which are protected by statutes.[72] Any such departation may be made only when the court reasonably believes that it is necessary to serve the ends of justice. In such exceptional cases, it is desirable for a court to explain the reasons and special circumstances which lead it to arrive at the decision.

After Leveller Magazine's case, a slight derogation of the principle has been made by the House of Lords in Harman's case.[73] In this case, certain documents in the course of discovery regarding a prisoner who was represented by one Mrs.Harman, were obtained from the Home Office under an express undertaking that they would not be used for any other purpose .

---

70. Id. at p.750.
71. Ibid.
72. Ibid.
73. Home Office v. Harman, [1982] 1 All E.R. 532 (H.L.).

But before the judgement was delivered, Mrs.Harman allowed a journalist to extract copies from them, who later wrote an article criticising the prison system. The Home Office then applied for an order that appellent was in contempt of court. It was argued for Mrs.Harman that she was released from the undertaking since the documents were read in the open court. Also the journalist would have obtained access to them if he had attended the court. Rejecting these arguments, the House of Lords held that the documents were used for a collateral or ulterior purpose unconnected with the case. However, Lord Scarman in his dissenting judgement, observed that the documents which were read out in the open court, had become public property and public knowledge thereby releasing Mrs.Harman from the undertaking.[74] Recognizing the right to freedom of communication, Lord Scarman found that there must be correlation between the right to impart information and the right to receive information.[75] When the documents became public property and public knowledge, a journalist thus has the right to receive information about them.[76]

Position in the United States

While in England the tradition of common law provided openness in judicial proceedings, in the United States,

---

74. Id. at p.542.
75. Id. at p.543.
76. Ibid.

the openness is brought into practice by wider interpretation of the constitutional law. The Sixth Amendment to the Constitution provides for a speedy and public trial.[77]

The first major decision in this area is Gannette Co. v. De Pasquale[78]. In this case, the counsel for the accused person requested that the press and the public be excluded from the hearing at the pretrial stage because the adverse publicity had jeopardised their ability to receive a fair trial. The request was granted. There was also no opposition to it even by the reporter of the Gannette newspaper. However, the next day reporter's request for the transcript of the proceedings was rejected. The ruling was that the interest of the press and public was outweighed by the defendant's right to a fair trial. The reporter's challenge before the Supreme Court also ended in vain by 5 to 4 majority. The Supreme Court held that the Constitution did not give the petitioner any affirmative right of access to the pre-trial proceedings.[79] It was also held that the Sixth Amendment's

---

77. The Sixth Amendment reads as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence."
78. 61 L.Ed. 2d. 608 (1979).
79. Id. at p.629 per Stewart, J.

guarantee of a public trial was for the benefit of the defendant alone and did not confer any rights of access on the public.[80]

The Gannette decision left the public interest in open trials at the non-constitutional level of common law tradition which could be infringed with the consent of the accused and prosecutor.[81] A change in the law came after the decision in Richmond Newspaper's case.[82] In this case, the Virginia Supreme Court barred two reporters from a murder trial at the motion of the defence counsel, unopposed by the prosecutor, on the basis of a statute which conferred on the Court a discretion to exclude any person whose presence would impair the conduct of a fair trial. Distinguishing Gannette as confined only to pretrial proceedings, the Supreme Court held that there was a presumption of openness in the very nature of the criminal trial.[83] In an open trial, the Court found a theraputic value of providing an outlet for community concern, hostility and emotion engendered by a shocking crime.[84] Public access was also found to provide a form of community legal education.[85] The Supreme Court thus accorded

---

80. Ibid.
81. Garth Nettheim, "The Principle of Open Justice", 8 U.Tasmania L.Rev. 25 (1984) at p.42.
82. Richmond Newspapers Inc. v. Commonwealth of Virginia, 65 L.Ed. 2d. 973 (1980).
83. Id. at p.987.
84. Id. at pp.985-86.
85. Id. at p.987.

protection against exclusion of the public from the trials. Such a protection was found to exist not in the Sixth Amendment but in the First Amendment which in conjunction with Fourteenth Amendment prohibited Government from abridging the freedom of speech, or of the press, or the right of the people peacefully to assemble.[86] It was also observed that the First Amendment had a structural role to play in securing and fostering the republican system of self-government, and thus, it extended to ensuring access to information.[87]

The effect of Richmond Newspapers is that the right of the public and press access to trials achieved a constitutional status through the circuitous route of the First Amendment.[88] The logic of Richmond rule may also extend to pretrial proceedings.[89] Since openness in judiciary is based on the First Amendment, any statutory provision taking the access away absolutely could be successfully challenged. Thus in Globe Newspaper's case,[90] the Supreme Court struck down a statute which required mandatory exclusion of press

---

86. Id. at p.988.
87. Id. at pp.989-90.
88. Garth Nettheim, "The Principle of Open Justice", U.Tasmania L.Rev. 25 (1984) at p.44.
89. See United States v. Edwards, 66 L.Ed. 2d. 92 (1981).
90. Globe Newspaper Co. v. Superior Court for the County of Norfolk, 66 L.Ed. 2d. 124 (1982).

and public during the testimony of minor victims of sex crimes. It was opined that the trial judge should decide on a case-by-case basis whether closure is necessary to protect the interest of a minor victim.

The restrictions placed on the freedom to publish judicial proceedings and related records through a legislation may not always hold good. In Cox Broadcasting Corporation v. Martin Cohn[91], the identity of a deceased rape victim was obtained by a newsman from the court records open to the public. In response to the television newscasts, where the victim was identified by name, the father of the deceased brought an action against the newsman for invasion of privacy on basis of a Georgian law where it would be a misdemeanour to publish or broadcast the identity of a rape victim. The Supreme Court held that since the records are open to the public, the press could not be sanctioned for publishing the same.

The decision does not seem proper. The Georgian legislature in fact wanted to hold a compromise between the privacy interests of a rape victim and the openness interest in the judicial proceedings. The legislature wanted to

---

91. 43 L.Ed. 2d. 328 (1975).

protect the victims from a wide publicity to the unfortunate past. The distinction between the openness in judiciail proceedings and publication of the same is meaningful in certain situations.

The requirement of a public trial confers no special right to the press. Under the Sixth Amendment, the requirement of a public trial is satisfied by the opportunity of members of the public and press to attend the trial and report what they observe.[92] The right to inspect and copy the documents is not absolute. That is upto the supervisory powers of the court. It is in this area the Georgian legislature brought a restriction which ought to have been respected by the Supreme Court.

Position in India

In India, we follow the principle enunciated in Scott's case.[93] In Naresh's case[94], one of the witnesses

92. Richard Nixon v. Warner Communications, 55 L.Ed.2d. 570 (1978).
93. Scott v. Scott [1913] A.C. 417.
94. Naresh Shridhar Mirajkar v. State of Maharashtra, (1966) 3 S.C.R. 744.
In this libel suit between K.M.D.Thakersey and R.K.Karanjia, one Bhaichand Goda was cited as a witness. In a different proceeding Goda had earlier an affidavit of facts which were relevant to the libel suit. Karanjia was allowed to cross-examine Goda with reference to the earlier statements. The whole proceedings were covered by the press and were regularly published. The witness prayed for an order from the court to the effect that his evidence may not be published by the press, the ground being the loss of business to him due to the press coverage. An oral order was made by the court giving effect to the prayer of the witness. The reporters challenged it as a violation of their right to freedom of speech and expression.

in a suit for defamation prayed before the High Court for an order that publicity may not be given to his evidence in the press as his business would be affected. The High Court's decision allowing the prayer was challenged by the plaintiff reporter before the Supreme Court. The Supreme Court found that the order was passed to help the administration of justice for the purpose of obtaining true evidence and the order was within the inherent jurisdiction of the High Court.[95]

Though openness is the rule, there may arise situations where it would be against the public interest or it would be causing miscarriage of justice. In India, the legislature itself has found out certain such situations and enacted expressly providing for trials 'in camera'.[96] The notion regarding judicial openness is that unless it is statutorily exempted, openness is the rule. The inherent powers of a court to conduct proceedings in camera

---

95. Id. at p.759 per Gajendragadkar, C.J. However, Justice Hidayathullah, dissenting, opined that loss of business was not a good ground (at p.789). Learned author H.M.Seervai maintains the view that the dissenting opinion delivered by Hidayathullah, J., is correct. See H.M.Seervai, Constitutional Law of India, Tripathi, Bombay (2nd ed., 1976), pp.1002-1011.

96. See section 53 of the Act IV of 1869 dealing with matrimonial causes; section 22 of the Hindu Marriage Act, 1955; section 352 of the Code of Criminal Procedure, 1898; and, section 14 of the Indian Official Secrets Act, 1923.

arises only to cover the cases of unforeseen factual situations.

Publication of dissenting opinions

Publication of a judgement is necessary for the public to know the law of the country. There arises no question of keeping secrecy of the judgements. The dissenting opinions in a case may also thus be published. But the deliberations and results of voting are kept secret in certain countries.[97]

There are certain arguments against the publishing of the dissenting judgements. An open system may promote external interference with the exercise of judicial functions. A powerful dissent is also capable of rallying a public opinion. The authority of a decision may be weakened if it is known that it has been disapproved by some members of the same court. But it may be noted that certainty in law is reached through successive testing and approximations for which dissenting notes are useful. Again, the disclosure of dissenting views is particularly important where law is

---

97. In Italy and West Germany, the deliberations and voting in a constitutional case are kept secret. See Kurt H. Nadelmann, "The Judicial Dissent: Publication v. Secrecy", 8 Am.J.Comp.L. 415 (1959).

not codified or crystallised. Since the dissenting opinions come along with the majority, the people get both sides at the same time for their own evaluation and this is the way in which democracy is expected to work.[98]

It is through publicity alone that justice becomes the mother of security.[99] Disclosure of the votes forces the judges to take responsibility and to justify their positions before his colleagues, parties and public in general. The right to dissent and the publication will thus only add to the better functioning of the system as well as the quality of the judgement. Again, when a judge's right to dissent is affected by non-publication, it invariably lessens the personality of a free judge.[100]

Openness in judicial proceedings means also the publication of or the right to know the names of the judges who decided a case. It cannot be kept secret under the inherent power of a court to control its proceedings.[101] Defences based on privacy or collective responsibility are no good reasons.

---

98. Id. at p.430.
99. Bentham, 'Draught for the Organisation of Judicial Establishment', in, 4 Bentham Works 305, 307 (Bowring Ed., 1843), as quoted in Kurt H.Nadelmann, "The Judicial Dissent: Publication v. Secrecy", 8 Am.J.Comp. L.415 (1959) at p.430.
100. See Kurt H.Nadelmann, "The Judicial Dissent: Publication v. Secrecy", 8 Am.J.Comp.L.415 (1959) at p.430.
101. R. v. Felixstowe Justices; Ex parte Leigh, [1987] 1 Q.B.582.

Reporting of decisions

What takes place in a court is public. The publication of the proceedings may be treated as an enlargement of the area of the court. Where the public is excluded from the court, the right to publication of the proceedings also goes away for the simple reason that the publication will bring in the harm which is intended to be avoided by closure. The publication of the open proceedings cannot be prevented provided the report is a verbatim or fair comment.[102]

Public interest is served by placing the decisions and proceedings before the public who has a right to access to the court. In this respect comes the freedom of the press to publish such information. It may be noted that all the public cannot go to the court and watch the proceedings. The press on behalf of them has a standing to do it. Once the information is disclosed in an open court, the press may not be sanctioned for publishing it. In certain cases, the public and the press may be excluded for the furtherance of a fair trial. Where the right to access to judicial proceedings is balanced against the right to fair trial, it is submitted that the latter may prevail over the former because the very purpose of openness in judicial proceedings is itself to achieve fairness in judicial proceedigns.

---

102. See Naresh v. State of Maharashtra, (1966) 3 S.C.R. 744.

Inquiry into the allegations against a judge

An area where confidentiality may be required is where an allegation against a judge is inquired into. There are certain advantages in keeping confidentiality in such cases. It protects the reputation of the judge from the adverse publicity which might flow from frivalous complaints. It also maintains the confidence of the people in the judicial system by preventing the premature disclosure of the allegation before the inquiry commission determines that the charge is well founded.[103] Confidentiality may also become necessary to protect the complainants and witnesses from possible recrimination by prohibiting disclosure until the validity of complaint had been ascertained.[104]

The judges are more likely to resign or retire if charges are justified. But, if charges are made public at an early stage, the judges may wait till the final decision. Certain judges may prefer to resign once an allegation has been made against him, however unfounded it may be. If the allegations are not serious enough to remove a judge, the confidentiality of the proceedings will help the judges to be more cautious of such minor allegations.[105]

---

103. Landmark Communications v. Commonwealth of Virginia, 56 L.Ed. 2d.1 (1978) at p.7.
104. Ibid.
105. Id. at p.8.

C. Openness in the Local Authorities

Functions of local bodies in a country is an important part of the sum total of the State activities. Local bodies have to function within the legal and financial frame work of the State. The local bodies again gain importance because of its natural familiarity with the requisite details of the situation. Thus, many of the functions of the State can be done effectively through the local authorities. Again, there are lot of problems which are of local importance only. Such matters may better be dealt with by the local authorities, instead by a distant State Government. Further, local authorities can function as units of self-government.[106] In this part, we will discuss on openness in the functioning of the local authorities.

Now we will see the advantages of open meetings, the position in this regard under the common law of England, the United States and India.

The advantages of open meeting statutes

The basic argument for open meetings is that public knowledge of what is going on is essential to the democratic process. The public may be able to "go beyond and behind"

---

106. Article 40 of the Constitution of India deals with the organisation of village panchayats. It reads as follows: "The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government".

the decision.[107] They can also make sound judgements and solutions after appraising the "pros and cons" involved. A direct knowledge may be preferred to the reported information. The persons who attend may pass on the information to others also. The publicity of expenditure will definitely deter misappropriation.[108] Openness will promote the responsiveness of the authorities. Individual citizens will be able to correct factual misconceptions. In a local government, it may be noted that public has a greater and accurate knowledge of the issues involved. The people may better understand the demands and problems of the authority and the significance of the issues so that they may be ready to accept a compromise in the interest of the public good. Where the meetings are made open, it will foster more accurate reporting which is beneficial to those who do not attend.[109]

There are also certain disadvantages in making the meetings of local authorities open to all. It is possible to have information which one would be reluctant to disclose before the public.[110] The members of the body may waste time by making speeches for the audience. Again, an open meeting requirement will tend to disadvantage members by publicising their disagreement with the policies that they themselves

---

107. Note, "Open Meeting Statutes: The Press Fights for the Right to Know", 75 Harv. L.Rev. 1199 (1962) at p.1200.
108. Id. at p.1201.
109. Ibid.
110. Id. at p.1202.

have to administer. The publicity of proposels made in the preliminary discussions may frustrate the final agreement because a member may hesitate to abandon the view that he has publicly advocated.[111]

Although these arguments cannot be neglected, the need for open meetings cannot be ruled out. It is also possible to nullify the disadvantages through different methods.

Position in common law

In common law, everyone having an interest in the documents of the local government may inspect them.[112] If anyone of the King's subjects is able to prove himself to be interested, the court may order a mandamus to enforce the production of the documents.[113] In a local authority, every officer who keeps the records ought to deem himself for that purpose a trustee.[114] The common law was much in favour of access to information for the ratepayers of the local government. The only criterion before the courts was whether there existed a need for the documents or whether the requester had a purpose in mind to make use of the documents sought for inspection.

---

111. Ibid.
112. The King v. The Justices of Staffordshire, 112 E.R. 33 (1837) at p.38.
113. Ibid.
114. Ibid.

Most of the earlier cases were related to the rates and accounts of the local authority. In King v. Justices of Leicester,[115] two inhabitants of the parish, upon an affidavit, stated that the rates in their borough had become burdensome to the inhabitants. It was also alleged that greater sums were raised than was necessary and warranted by law. Though certain documents were published in the newspapers, the applicants sought for more information. The affidavit did not show any specific grievance or allegation of misapplication of funds but only doubted it. The argument that the inhabitants had a right to inspect and to take copies of documents was allowed by the Court. The need for the document was to check whether there was overrating or misapplication of funds. In another case,[116] the Court did not allow an inhabitant to inspect the accounts of a church warden because he had not stated any grounds upon which he desired to inspect them. The only purpose was to give the party an opportunity of appealing where the time for the same had elapsed. Still the Court opined that, had the party pointed out some public ground, it would have ordered in favour of an inspection.[117] Thus, it can be seen that the need criterion was not so stringent. But if the interest of the applicant is nothing more than a general curiosity, the courts may not allow inspection.[118]

115. 107 E.R. 1290 (1825).
116. King v. Clear, 107 E.R. 1293 (1825).
117. Ibid.
118. See King v. The Justices of Staffordshire, 112 E.R. 33 (1837). In this case, the King's Bench did not allow an inspection sought by the ratepayers because the applicants were not able to do anything by knowing the documents. Even if the money was paid mistakenly, it could not have been recovered under the law.

The purpose of seeking inspection of documents must be genuine. If there are any ulterior motives, the right of the inhabitant may be lost. In King v. Godstone Rural District Council,[119] the applicant had a dispute with the Council regarding the repair of a road. The Council maintained the view that it had no liability to repair it. On the application of an elector to inspect the related documents, the Court found that the applicant did not desire to inspect documents as a ratepayer but as a litigant with a view of obtaining evidence in support of his claim that the Council had a duty to repair the road. It may be noted that the decision was made irrespective of the Local Government Act, 1894, which provided that every parochial elector of a parish, in a Rural District Council, may, at all reasonable times, without any payment, inspect and take copies of, and extracts from all books, accounts, and documents belonging to or under the control of the Council.

Statutory right to inspect and take copies of documents

Under the Local Government Act, 1939, section 173 provides that the minutes of a local authority should be open to inspection to any local government elector. The minutes of the Council and those of a committee of a Council are

---

119. [1911] 2 K.B. 465.

treated differently by the courts.[120] It does not seem proper. The acts and decisions of a committee is generally treated as one of the Council itself. Formation of committees is for the efficient functioning of the Council. Moreover, the public accountability rests on the Council and not on any of the committees. Confidentiality may be allowed to documents of the committees only when the nature of the document necessarily requires it in instances, such as, privacy, juvenile records etc.

Councillor's right to documents from the local authority

A councillor has a right to inspect all documents in the possession of the Council. This common law right of a councillor arises from his duty under common law to keep himself informed of all matters necessary to enable him to discharge his duties as a councillor properly.[121] However, a councillor does not possess a right, as a roving commission, to examine each and every document of an authority. Mere curiosity or desire to see and inspect documents is not sufficient.[122] Where a councillor is not acting bonafide,

---

120. See Wilson v. Evans, [1962] 2 Q.B. 383. In this case, the defendant sought inspection of minutes of the town planning committee which was acting under the power delegated by the Council. The committee, there, was able to take decisions and act without reporting to the Council. The rights under section 173 of the Act of 1939 was held to be not available to the councillor defendant.

121. See R v. Barne's Borough Council; Ex parte Conlan, [1938] 3 All E.R. 226 at p.230 (K.B.D).

122. R v. Southworld Corporation; Ex parte Wrightson, (1907) 97 L.T. 431, as quoted in R v. Barnes Borough Council; Ex parte Conlan, [1938] 3 All E.R. 226 at p.230.

or is acting with some indirect motive or purpose, he loses his access rights.[123] Again, in certain cases, disclosure of the documents may not be proper because such documents are traditionally protected under common law. The juvenile records are not disclosed to each and every councillor.[124] The public interest here in maintaining the confidence of an infant outweighs the councillor's access rights. Again, secrecy is required where the disclosure of the documents to a councillor is likely to result in assisting a party to a suit in which the local authority is on the other side.[125] If the documents on disclosure would likely to invite action for damages against defamation, they need not be disclosed.[126] Thus, a Council on the advice of a solicitor may keep the documents secret.[127] Where the documents are still required by a committee to further its statutory functions, the documents need not be disclosed.[128] Again, where the documents are capable of spreading rumours, gossips or defamation, which would seriously affect the public service of the local authority, such documents may be protected.[129]

---

123. R v. Hampstead Borough Council; Ex parte Woodward, (1917), 116 L.T. 213, as quoted in R v. Lancashire County Council; Ex parte Hook, [1980] 3 W.L.R. 70 at pp.78-79 (C.A).
124. R v. City of Birmingham District Council; Ex parte O, [1982] 2 All E.R. 356.
125. See R v. Barnes Borough Council; Ex parte Conlan, [1938] 3 All E.R. 226.
126. R v. Lancashire County Council Police Authority; Ex parte Hook, [1980] 3 W.L.R. 70 (C.A).
127. Ibid.
128. Ibid.
129. Ibid.

A councillor's right of access to documents has different aspects. He can take up a citizens complaint and can assist him in finding the required information. Also, the new roles of a local authority, in a welfare era, as provider, adjudicator, administrator and entrepreneur, in the fields of housing, planning, education etc., require knowledge of a lot of information for a councillor's service.

A councillor's right of access to documents clearly depends on whether such documents are necessary to carry out the functions and duties of a councillor. Where the documents are more sensitive, such as, personal or financial information, juvenile records, the 'need criterion' is to be applied. In ordinary cases, the criterion may depend on the possible harm to the public interest on disclosure. Finally, it may be noted that it is the Council which is responsible for its decisions and not the committees which actually decide, and a member of a Council, though not one of the committee, may be given access to the documents of the committee in ordinary situations.

Sunshine laws

In England, the Public Bodies (Admission and Meetings) Act, 1960, entitles the members of the public to attend the meetings of the local authority except when the body decides on a confidential matter or when there is a need for advice

or recommendations from sources other than the members of the body.[130] The statute was enacted with the purpose of making the decision-making process open to the whole society. However, if the public disrupts the meeting by an unruly behaviour, the Council may then conduct the proceedings without making it open to the public.[131] In such situations, the duty of the body to carry out its statutory functions and duties overrides the duty under the Act to keep the meetings open. There exists such an inherent power to exclude the public where it is the only practical way of carrying out the business of the authority.

In the United States, the Government in the Sunshine Act, 1976, requires the federal agencies to hold their meeting in public.[132] However, the agencies may conduct a closed session under any one of the ten exemptions given under the Act.[133] These exemptions are more or less similar to those of the Freedom of Information Act. What is required is to get a majority of the votes of the members of the body concurring that one of the exemptions justifies secrecy to that particular meeting.

---

130. See section 1 of the Act.
131. R v. Brent Health Authority; Ex parte Francis, [1985] 1 All E.R. 74 (Q.B.D).
132. See section 2 of the Act.
133. Under section 3 of the Act, the exemption areas include, trade secrets, foreign policy, internal personal rules and practices of an agency, trade secrets, confidential or privileged commercial or financial information obtained from a person, privacy, investigatory records etc.

Even if a meeting is conducted in a closed hall, the Act requires for the keeping of the records of the meeting.[134] Such records are records under the Freedom of Information Act and thus are available to the public.

Whether it is a Federal or State agency or a local authority, openness in the proceedings is required, especially where the nature of the proceedings is legislative or quasi-judicial. However, where such bodies take policy decisions, in exceptional cases, after giving the reasons, a closed meeting may be allowed.

Position in India

In India, the subject 'local authorities' comes under the State list of Schedule VII.[135] Two relevant Kerala Statutes—the Kerala Municipal Corporations Act, 1961 and the Kerala Panchayats Act, 1960—are considered here to examine the question of openness in the functioning of the local authorities.

---

134. Ibid.
135. Item number five of the State List in the Seventh Schedule of the Constitution of India reads as follows:
5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

All meetings of the Panchayat and the Municipal Council are open to the public.[136] However, the President of the Panchayat or the Mayor of the Council in any particular case, may direct that the public generally or any particular person or persons shall withdraw from the hall.[137] In both cases, the Rules do not specify the grounds under which the public may be excluded. It is left to the Chairman of the body.[138] Under the Panchayats Rules, the fact that public has been excluded by the President shall be recorded in the minutes of the proceedings of the meeting along with a brief statement of the reasons for the exclusion.[139] The minutes of the proceedings of the meeting of a Panchayat[140] and Council[141] are open to the members of the respective bodies at all reasonable times without payment of any charge. In the case of Panchayat such facilities are also available to any person.[142] But at the same time, in the case of Corporations, an elector may be allowed to inspect only on payment of a fee.[143]

---

136. See Rule 7 of the Kerala Panchayats (Proceedings of Panchayat Meetings and Committees) Rules, 1962, and Rule 7 of the Rules Regarding Proceedings of the Council and Committees given under Schedule I of the Kerala Municipal Corporations Act, 1961.
137. Ibid.
138. Ibid.
139. See Rule 7 of the Kerala Panchayats (Proceedings of Panchayat Meetings and Committees) Rules, 1962.
140. Id., Rule 12.
141. See Rule 11(2) of the Rules Regarding Proceedings of the Council and Committees given under Schedule I of the Kerala Municipal Corporations Act, 1961.
142. See supra n.140.
143. See supra n.141.

Under the Panchayats Rules the minutes of the proceedings of a committee, though the proceedings are not open to the public, is available as in the case of the minutes of the proceedings of the Panchayat.[144]

Under the Municipal Corporations Act, the Commissioner shall be responsible for the custody of all the records of the Corporation including all papers and documents connected with the proceedings of the Council, the standing committees and other committees.[145] Under the Panchayats Rules it is the Executive Authority who is in charge of such records.[146] Any person requiring copies of records of a Panchayat shall submit an application to the Executive Authority of the Panchayat.[147] If the records are more than one year old, search fee shall be remitted.[148] If the record is not found, the applicant shall be furnished with a certificate stating that the documents applied for cannot be found out.[149] If the documents are classified as confidential by the competant authority, no copies will be granted.[150] However, if the document is not classified as confidential but the Executive Authority considers it to be confidential in nature, the Executive Authority shall refer the matter,

---

144. See Rule 15 of the Kerala Panchayats (Proceedings of Panchayat Meetings and Committees) Rules, 1962.
145. See section 10 of the Kerala Municipal Corporations Act, 1961.
146. See Rule 3 of the Kerala Panchayats (Custody of Records and Grant of Copies of Proceedings or Records) Rules, 1962.
147. Id., Rule 4.
148. Ibid.
149. Id., Rule 5.
150. Id., Rule 9.

along with reasons for treating the documents confidential, to the competent authority for its orders.[151] Copies may be granted according to the decision of the competent authority.[152]

The members of the Panchayat as well as the Corporation have a right to know. Under the Panchayats Act, a member shall have access to the records of the Panchayat during office hours after giving notice to the Executive Authority.[153] However, the Executive Authority may refuse access after giving reasons in writing which are approved by the President of the Panchayat.[154] The position of a councillor of a Corporation is exactly similar to that of a member of Panchayat in respect of the right to demand documents and refusal by the Commissioner.[155] Apart from these rights, a member of the Panchayat[156] and the councillor of a Corporation[157] may interpellate the President and Mayor respectively, for further information and explanation. Again, the Panchayat itself can require the Executive Authority to produce any document before it.[158] The Executive

---

151. Ibid.
152. Ibid.
153. See section 31(3) of the Kerala Panchayats Act, 1960.
154. Ibid.
155. See section 24(3) of the Kerala Municipal Corporations Act, 1961.
156. See section 31(2) of the Kerala Panchayats Act, 1960 and the Kerala Panchayats (Interpellation of President by Members) Rules, 1962.
157. See section 24(2) of the Kerala Municipal Corporations Act, 1961.
158. See section 42 of the Kerala Panchayats Act, 1960. See also the Kerala Panchayats (Requisition of Documents) Rules, 1963.

Authority has to comply with such requests.[159] Similarly under Corporations Act, the Council or a standing committee may at any time require the Commissioner to produce necessary documents.[160] Again, the taxation and finance standing committee shall have access to the accounts of the Corporation and may require the Commissioner to furnish any classification.[161] Apart from the power to require disclosure of documents from the Commissioner, the Corporation Council has also the power to requisition records from the standing committees or other committees.[162] It may be noted that no specific grounds are mentioned either under the Panchayats Act regarding the member's or Panchayat's power to requisition the documents from the Executive Authority or under the Corporations Act regarding the Councillor's, Council's or Committee's power to require documents from the Commissioner or Committees as the case may be.

Confidentiality is also sought to be kept regarding certain kinds of documents. Under the PanchayatsRules, all kinds of documents relating to the profession tax of an

---

159. Ibid.
160. See section 26 of the Kerala Municipal Corporations Act, 1961.
161. Id., section 26.
162. Id., section 19(2)(b).

individual or a company are required to be kept confidential and copies of them shall not be granted to the public.[163] The Corporations Act also provides for the same protection.[164] Again, under the Panchayats Rules, confidentiality of the employees of the Panchayat, in respect of educational and public health records has to be maintained.[165]

Apart from the members of the body and public, the employees of a Panchayat are provided with right to access to documents in certain situations. An employee shall be allowed to peruse any of the records pertaining to the disciplinary case against him in the presence of the inquiry officer for the purposes of preparing his written statement.[166] He may take extracts of such documents also.[167] However, if such records cannot be furnished or disclosed to him in public interest or for any substantial reason, the employee shall be informed of the refusal together with the reasons in writing.[168]

There are also certain provisions making publication of certain information mandatory. The electroal rolls shall be published under the Panchayats Act[169] as well as the

---

163. See Rule 12 of the Kerala Panchayats (Profession Tax) Rules, 1963.
164. See section 116 of the Kerala Municipal Corporations Act, 1961.
165. See Rule 19 of the Kerala Panchayats (Establishment) Rules, 1967.
166. Id., Rule 25.
167. Ibid.
168. Ibid.
169. See section 15 of the Kerala Panchayats Act, 1960. See also Kerala Panchayats (Preparation and Revision of Electoral Rolls and Publication of Lists of Polling Stations) Rules, 1978.

Corporations Act.[170] In both cases, the bye-laws and the cancellation or alteration of them are to be published mandatorily.[171] The copies of them shall be available to any person on payment of a fixed price.[172] Under the Panchayats Rules, the Executive Authority shall prepare and keep assessment books showing the persons and property liable to taxation.[173] It shall be open at all reasonable times, and without charge, to inspection by any persons who pay any tax to the Panchayat.[174] He shall also be entitled to take extracts from such books and accounts.[175] When the assessment books have been prepared for the first time and whenever general revision of such books has been completed, the Executive Authority shall give public notice stating that a revision petition will be considered within a period of thirty days.[176] The decision in respect of the revision application shall be communicated to the applicant.[177] The Executive Authority is also bound to give a public notice specifying the last date for payment of the tax.[178]

---

170. See section 48 of the Kerala Municipal Corporations Act, 1961. See also the Kerala Municipal Corporations (Election of Councillors) Rules, 1963.
Section 63 of the Kerala Municipal Corporations Act, 1961, further provides for penal sanctions against any kind of infringement of secrecy of elections.
171. See Rule 3 of the Kerala Panchayats (Framing of Bye-laws) Rules, 1963, and sections 375 and 377 of the Kerala Municipal Corporations Act, 1961.
172. Ibid.
173. See Rule 5 of the Kerala Panchayats (Taxation and Appeal) Rules, 1963.
174. Ibid.
175. Ibid.
176. See Rule 7 of the Kerala Panchayats (Building Tax) Rules, 1963.
177. Id., Rule 10.
178. Id., Rule 12.

There are certain restrictions on the employees of the Panchayat. No employee, except when he is generally or specially empowered, shall communicate any information which has come into his possession in the course of his official duties, whether from official sources or otherwise, to any other employee of the Panchayat or servant of the Government or a non-official person or press.[179] No employee shall make any statement to the press under his name which is capable of embarassing the relations between the Panchayat and the Government or the relations between the Central Government or any State Government and the people of India or any section thereof.[180] An employee who intends to publish any document or communication under his name may take a prior sanction from the Director.[181] Such a restriction also applies when an employee intends to participate in a radio broadcast.[182] However, such a restriction does not apply in cases of purely literary, artistic or scientific nature.[183] Again, no employee shall approach any member of the legislature with a view to having any grievance made the subject-matter of interpellations or discussions in the legislature.[184] Any such disclosure will be treated as an unauthorised one.[185]

---

179. See Rule 29 of the Kerala Panchayats (Employees Conduct) Rules, 1968.
180. Id., Rule 32(1).
181. Id., Rule 32(2).
182. Id., Rule 40.
183. Ibid.
184. Id., Rule 33.
185. Ibid.

Conclusion

Though there are provisions in our local authorities statutes and the Rules made under them favouring citizen's right to know, it does not seem to be adequate. What is required is a full fledged right to know with only exceptions where they are necessary in the public interest. It may be noted that defence, foreign affairs and such exceptions will not generally arise in the case of local authorities. The exception will generally be related to the better functioning of the local authority and privacy interest of the individuals

An open meeting statute will be of no use unless there is a provision requiring the authority of the time and place of the meeting. At least one week's notice seems to be proper. However, in emergency sessions, the period may be a shorter one.

Where an authority discusses a matter which has a bearing on the reputation or other interest of an individual, such a meeting may be conducted in a closed hall. Similarly, issues regarding the promotion, demotion, dissmissal and suspension of an employee may also be conducted in private. In these cases also, the reputation of a person may be affected.

In the executive sessions, sometimes premature disclosure may turn out to be detrimental to the public interest. It happens when a local authority intends to purchase a land,[186] or when it decides to enter into a contract with an individual. Although such a provision may help the officials who are members of the local authority to make personal profits, such a danger can be minimised by disclosure of all data after the transaction is completed.[187]

It is better to have the preliminary sessions be closed. It will leave the members with a broad discretion when their deliberations shall be secret. Also, where the authority seeks the help of an outside expert, it will be better to have a closed session. However, after preliminary sessions, other sessions must be open. It helps a thorough discussion and protects the free exchange of ideas.

Enforcement of the open meeting statutes is another issue. It is better not to meet the violators with criminal penalties. A fine may be appropriate in cases of wilfull violations. Invalidation of a meeting violating the openness law is also not suggested. If any one is affected by a decision taken in a closed session which ought to have been conducted in public, may be given a hearing regarding his grievances. Injunctions and writs of mandamas to enforce the provisions of the open meeting statute seem to be useful in preventing a violation of the statute.

---

186. Note, "Open Meeting Statutes: The Press Fights for the Right to Know", 75 Harv.L.Rev. 1199 (1962) at p.1209.
187. Ibid.

We have seen that proceedings in legislature and judiciary are more or less open. The functioning of local bodies is also open to a certain extent. However, in the other part of the State, ie., executive, the functioning is generally secret. There is no need for such a secret culture. Though the executive handles several sensitive matters, there is nothing wrong in making the functioning generally open.

Chapter 4

EXECUTIVE PRIVILEGE

The culture in the executive is that of secrecy. Apart from it, there are three other reasons which contribute to secrecy in executive functioning: the executive privilege to withhold documents, the criminal sanctions imposed under the Official Secrets Act, and the classification of documents by the executive itself. In this chapter, the "executive privilege " is being dealt with.

The law of evidence considers the rules of privilege or testimonial exclusion under four categories: political, judicial, professional and social. The first species of privilege is political, relating to the secrets of State, such as, State papers, communications between Government and the officers, and other matters of public policy.[1] Such evidence is rejected on the ground that from its reception some collateral evil would ensue to society. A non-disclosure of matters involving secrets of State in military or international affairs is a well recognised and genuine ground for claiming testimonial exemption. Secrecy may be legitimately invoked for documents of pending international negotiations or military directions against enemies.

---

1. The privilege of jurymen, legal advisers and spouses are examples of the latter three categories. See Niranjan Dass v. State, A.I.R. 1968 P.& H. 255 at p.259.

The general principle on the production of documents is that if a person is involved in a litigation, the court can order him to produce all the documents he has which are related to the issues of the case. Even if they are confidential, the court can direct them to be produced when the party in possession does not produce them for the other side to see them. When the court directs the production of documents, there is an implied understanding that the documents thus produced may not be used for any other purpose.

Executive privilege is the privilege asserted by the executive to withhold documents from disclosure because, in the opinion of the executive, the disclosure of them is injurious to the public interest. According to Wigmore, there are four conditions to be satisfied for the establishment of a privilege.[2]

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

---

2. Wigmore On Evidence, Vol.VIII (Mc Naughton Rev., 1961) 2285, as quoted in 54 Can.Bar Rev. 422 (1976) at p.426.

It was Wigmore's view that if the protection, which necessarily frustrates the ability of a court to have before it all possible relevant information, is to be extended to communications within other relationships, the four conditions had to be present. Wigmore's "privileged communications" test was aimed at protecting the individual who spoke in confidence in a particular relationship. It seems, that the fourth condition is more important when privilege is claimed by the Government against a person.

In this chapter, the law of executive privilege in the United States, England and India is explained.

A. Position in the United States

In the United States, the Housekeeping statute enacted by Congress in 1789, authorised the head of the department to prescribe regulations for the 'custody', 'use' and 'preservation' of official documents.[3] Although Congress did not intend this to be a secrecy statute, the result was the opposite. A vast majority of rules were promulgated

---

3. Rev.Stat. 161 (1875): "The Head of each department is authorised to prescribe regulations, not inconsistent with the law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it". This section was later coded as 5 U.S.C. 22 (1952). This section was later amended in 1958 by adding the following sentence. "This section does not authorize withholding information from the public or limiting the availability of records to the public", 5 U.S.C. 22 (1958). Now 5 U.S.C. 301 (1970).

under the section conferring secrecy status to a lot of documents.[4] The courts also cited the section as the principal authority for withholding documents.

The key words of the section are 'custody', 'use' and 'preservation'. The definitions of these words are the same today as they were in 1789. 'Custody' denotes guarding or safe keeping; 'use' involves application or employment; and 'preservation' implies protection from injury or destruction.[5] Thus, it is ample clear that the section never intended to withhold or limit information. But these terms were misinterpreted resulting in secrecy and claims of privilege.

In Boske v. Comingore[6], the Kentucky Court required certain documents relating to tax returns from the Collector of Internal Revenue for deciding a case before it. The Collector denied the documents on the basis of a regulation made under section 22 which prohibited him from giving out tax returns to an outsider including a court. He was adjudged as having committed contempt of court and the matter hence came before Supreme Court, the main question being the validity of the regulations. The Court found the necessity of not allowing access to such records for reasons of public policy in the interest of Government as well as private business.

---

4. John J.Mitchell, "Government Secrecy in Theory and Practice: Rules and Regulations as an Autonomous Screen", 58 Colum. L.Rev. 199 (1958) at p.200.
5. Ibid.
6. 44 L.Ed. 846 (1900).

The Court also said that the Secretary had deemed the regulations in question a wise and proper one and was not beyond the authority conferred upon him by Congress. The regulations were held to be valid because they were made pursuant to a statute.

This case has been cited frequently as an authority for regulations against disclosure. But it may be noted that the decision was limited to the particular situation. It is hard to see how the decision in any way sets up a positive and ultimate right to withhold information. The decision can only be considered as a narrow one holding the Secretary of Treasury had the right to protect a particular kind of document from disclosure without his permission. Though the case does not propose that a department head can ignore the order of a court to produce documents, the Government was quick enough to assert an absolute immunity to department heads on the basis of this decision.[7]

Another important case decided on section 22 is Touhy's case.[8] Here the court required certain F.B.I. records for the purposes of deciding a habeas corpus petition. This was denied on the basis of the Attorney General's order, made under section 22, that he must not produce them before the

---

7. United States of America v. Patricia J.Reynolds, 97 L.Ed. 727 (1953).
8. United States of America;Ex.Rel.Roger Touhy v. Joseph E. Ragen, 95 L.Ed. 417 (1951).

Court. The official was adjudged guilty of contempt of court. In the appeal, the question before the Supreme Court was whether it was permissible for the Attorney General to make a conclusive determination not to produce documents. The Court found that it was appropriate for him, pursuant to the authority given by section 22, to make such an order because it was necessary to centralize in him the power as to disclosure, considering the variety of information contained in the government files and possibilities of harm from unrestricted disclosure.[9] Though the Court upheld the validity of the order, it did not say that the Attorny General was not within its reach in a legal process. Commenting on the Boske decision, the Court said that there was not any hint in that case that the Government could reject an appropriate judicial demand for official documents.[10]

The above decisions sanctioned the use of the house keeping statute to centralized authority over disposition of department records indicating that the privilege of the department might be absolute. The attitude of the Court was that the head of the department was the better judge in determining the pros and cons of disclosure. This discretionary power of the head of the department was held not to be reviewed. In fact, the courts were surrendering their authority before the head of the department rather than requiring them to justify their claims leading to the privilege.

---

9. Id. at p.422.
10. Id. at p.424.

In 1953 came another important decision regarding executive privilege, the Reynold's case.[11] An aircraft with four civilians aboard as observers was flown for the purpose of testing certain secret electronic equipment. While aloft, fire broke out and the aircraft crashed. The widows of the three civilians who were killed, brought a suit against the United States under the Federal Tort Claims Act under which the United States shall be liable, subject to certain exceptions, for torts committed by its servants. Under Rule 34 of the Federal Rules of Civil Procedure, it provides for production of documents unless privileged. The plaintiffs sought production of the official accident report and certain other documents relating to official investigation into the accident. The Secretary filed a claim of privilege. It may be noted that under the Air Force Regulations formed under section 22, the head of the department was authorised for the use, custody and preservation of documents.

The Supreme Court held that the head of the department must assert a formal claim of privilege after actual personal consideration and it was for the court to determine whether the circumstances were appropriate for the claim of privilege without forcing a disclosure.[12] The Court also emphasized that judicial control over the evidence in the case could not be abdicated to the caprice of the executive officers.[13]

---

11. United States of America v. Patricia J.Reynolds, 97 L.Ed. 727 (1953).
12. Id. at p.733.
13. Ibid.

If the circumstances of a case show a reasonable danger that compulsion of evidence will expose military matters, then the court in the interest of national security, will not allow the documents to be divulged.[14] The Court found that military secrets were at stake.

The Court's ingenious compromise, that is taking judicial control over the evidence from the executive, on the one hand, and not requiring a complete disclosure to the judge on the other, has certain conceptual weaknesses. In the first place, the trial judge cannot accurately evaluate the litigant's showing of necessity without knowing something of the content

---

14. Id. at p.734.
The Court also compared the executive privilege with the privilege against self-incrimination. It said.
"Privilege against self-incrimination presented the Court with a similar sort of problem. Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while complete abandonment of judicial control would lead to intolerable abuses. Indeed in the earlier stages of judicial experience with the problem, both the extremes were advocated, some saying that the bare assertion by the witness must be taken as conclusive, and others saying that the witness should be required to reveal the matter behind his claim of privilege to the judge for verification. Neither extreme prevailed and a sound formulae of compromise was developed" (at p.733).
Thus the Court simply referring to the difficulties found in an analogous privilege, did not solve the problem of how the judge is to make determination of circumstances appropriate for the claim of privilege, without having a disclosure to him. See Bishop, "The Executive's Right of Privacy: An Unresolved Constitutional Question", 66 Yale L.J. 477 (1957) at p.481.

of the information sought. In the second place, the trial judge cannot find that national security might be endangered by disclosure of something when the Court has no idea on what the something is. Finally, if the court does not examine the documents to weigh the need for disclosure against the public interest in secrecy, the executive, and definitely not the court, determines the questions of privilege finally.[15]

Analysing the case from the point of section 22, it has an interesting aspect. For the first time, the head of the department was directly involved rather than a subordinate. Though privilege was claimed under the Regulations made under section 22, the Court did not give any weight to such an argument. Rather, the Court based its decision on the need to protect national security, thus reducing the weight of earlier cases decided on section 22.

Later, Congress felt that section 22 was being miscited as statutory authority for non-disclosure and that head of the department should be forced to rely specifically on privilege. Thus, Congress enacted the amendment in 1957 simply as an assurance against the misuse of the section. The amendment added one sentence to the section: 'This section does not authorise withholding information from the public or

---

15. See Paul Hardin, "Executive Privilege in the Federal Courts", 71 Yale L.J. 879 (1962) at pp.893-95.

limiting the availability of records to the public".[16] Thus, the rigour which the section had attained through wrong interpretations was lost, leaving the executive to enjoy only those privileges allowed by the courts.

In United States v. Nixon[17], the District Court indicted certain persons charging them conspiracy to defraud the United States and to obstruct justice. A third party subpoena duces tecum was issued directing the President to produce certain taperecordings and other documents for the use at the pending trial. President claimed privilege against disclosure of such confidential communications. It was argued that there was a need for protection of communications between high officials. Secondly, it was argued that under the doctrine of separation of powers, the President could make claim for absolute privilege. Rejecting the arguments, the Supreme Court held that it would be difficult to accept the privilege except in cases to protect military, diplomatic or sensitive national security secrets.[18] It was observed that fair administration of justice carried more weight

---

16. Almost all departments except the Department of Interior objected to the amendment. See John J.Mitchell, "Government Secrecy in Theory and Practice: Rules and Regulations as an Autonomous Screen", 58 Colum.L.Rev. 199 (1958) at p.209.
17. 41 L.Ed. 2d. 1039 (1974).
18. Id. at p. 1063.

compared to the need for confidentiality.[19] The allowance of privilege would also cut deeply into the guarantee of due process of law.

Unlike earlier cases, in this case, the privilege was claimed on the basis of Article II of the Constitution which provided for the separation of powers. The Supreme Court did not allow the privilege on that basis. It considered, on the other hand, the need for documents in an impending criminal trial. However, it was ordered for an in-camera inspection of the documents.

After introduction of the Freedom of Information Act, the privilege claims became restricted. Where a document is freely available to a citizen under the statute, the Government would not raise a plea of privilege for the same document. However, regarding the documents coming under the enumerated exemptions under the statute, the Government could make out a legitimate claim of privilege. But the need for secrecy would be decided by the courts in the light of the decisions in Reynolds case and Nixons case. Whether a document comes under a specified category would be a matter for the judicial decision.

---

19. Id. at p.1066.

B. Position in England

The source of the privilege in relation to production of documents in a suit can be traced to the prerogative right to prevent the disclosure of State secrets or to prevent the escape of inconvenient intelligence.[20] The King had power to shield those who do unlawful acts in his name and could have withdrawn cases from the ordinary course of justice in which he had any concern.[21] In the Layer's case,[22] the Attorney General claimed that minutes of the Lords of the Council should not be produced; and Sir John Pratt,L.C.J., supported the claim, adding that it would be a disservice to the King to have these things disclosed. Thus,in the early periods,it was the King's wish that was important.

With the growth of democratic government, the interest of the Crown in these matters developed into and became identified with the interest of the public.[23] In England, in 1794 itself,it was accepted in R. v. Hardy[24] that, in State trials, the names of informers should not be disclosed upon the general principle of the convenience of public justice. It was soon realized that executive action should only be

---

20. C.S.Emdon, "Documents Privileged in Public Interest", 39 L.Q.R. 476 (1923).
21. Pollock & Maitland, History of English Law, Cambridge University Press, Cambridge, Vol.I (2nd ed., 1968), 517.
22. (1722) 16 How.St.Tr. 224,as quoted in C.S.Emdon, supra n.20 at p.477.
23. C.S.Emdon, supra n.20 at p.477.
24. (1794), 24 How.St.Tr. 816,as quoted in C.S.Emdon,supra n.20 at p.477.

screened in the interest of the public at large.[25] In the early part of the nineteenth century, when principles of public policy received broad and generous interpretation, the privilege was found to be recognized on the public interest.[26] By this time, the courts began to test the claims of authorities with public interest.

In Anderson v. Hamilton,[27] the Court had decided that communications in official correspondence relating to matters of State were not to be produced on the ground, apart from confidentiality, that disclosure might betray secrets of State policy where it would be injurious to the interests of the country. Later, the position became more clear after the decision in Home v. Bentinck.[28] Bearing in mind the informer privilege, the Court said that the production of the minutes of a Court of Inquiry relating to a military officer's conduct could not be disclosed on a broad rule of public policy and convenience. Later cases also proved the importance of public interest. In Smith v. East India Co.,[29] certain documents regarding commercial transactions were held to be privileged merely because the Court found that in all affairs of the

---

25. But see Wyatt v. Gore, 171 E.R. 250 (1816). In this case, the Court allowed privilege solely on the basis of confidentiality.
26. C.S.Emdon, supra n.20 at p.477.
27. 129 E.R. 917 (1816).
28. 129 E.R. 907 (1820).
29. 41 E.R. 550 (1841).

East India Co. supervision, direction and control were made by Commissioner for Affairs of India and such supervision, control and direction were to be exercised effectively and for the benefit of the public. In Wadeer v. East India Co.,[30] the dispute was regarding disclosure of certain documents in respect of promisory notes signed by the Governor General of India. The Court found the documents privileged considering the danger to the public interest which might result from the production of them. After these cases came Beatson v. Skene[31] which made the position more clear. In this case, the Court expressly considered the question whether a ministerial objection to production of documents was conclusive or not.[32] The Court was not even ready to decide whether the documents were injurious to public interest in disclosure. The whole duty was transferred to the executive whose opinion was held to be final. Pollock C.B. said:[33]

> "...if the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of Justice ..."

---

30. 44 E.R. 360 (1856).
31. 157 E.R. 1415 (1860).
32. Even before the Beatson's case, on one occasion, in Heslop v. Bank of England, (1833) 6 Sim.192, the objection taken by the Attorney General had been disallowed. But the objection although in essence was taken with regard to public interest, it was not so expressly taken. See D.H. Clark "Administrative Control of Judicial Action: The Authority of Duncan v. Cammell Laird", 30 M.L.R. 489 (1967) at p.494.
33. 157 E.R. 1415 (1860) at p.1421.

But after this express opinion, in 1877, in, Kain v. Farrer,[34] Justice Grove had referred to the judge's discretion to accept or reject a ministerial objection. Later in Hennessy v. Wright,[35] Field,J., expressly asserted his right to examine privately the document.[36] However, in that case, it was sufficiently clear that the documents in question were privileged from discovery, for the disclosure seemed to be injurious to public interest. After this progressive opinion by Field,J., came In Re Joseph Hargreaves Ltd.[37] In this case, Vaughan Williams, L.J., referred to the judge's discretion to accept or reject ministerial objection. But his brother judges did not express any clear opinion and were not with him. Thus, it can be seen that opinions not in favour of the stand of Pollock,C.B., were coming. It was thought that time was ripe for a change in the position.

---

34. 37 L.T. 469 (1877), as quoted in D.H.Clark, "Administrative Control of Judicial Action: The Authority of Duncan v. Cammell Laird", 30 M.L.R. 489 (1967) at p.495.
35. (1888) 21 Q.B.D. 509.
36. Id. at p.515.
    Field,J., observed: "... I desire to say, while disclaiming all intentions of dictating to the judges who may try this case, that I do not feel the difficulty which appears to have weighed with the majority of the Court and that, should the head of a department take such an objection before me at nisi prius, I should consider myself entitled to examine privately the documents to the production of which he objected, and to endeavour, by this means and that of questions addressed to him, to ascertain whether the fear of injury to the public service was his real motive in objecting." Ibid .
37. [1900] 1 Ch. 347.

At this time came Robinson's case[38] before the Privy Council. In this case, the plaintiff alleged negligence against Government of South Australia for the loss caused to him under the Wheat Marketing Scheme. In the process, he sought production of documents regarding the Scheme, to which privilege was claimed by the Government. Taking into account of the increasing extension of State activities into the sphere of trade, business and commerce, Lord Blanesburgh opined that the scope of the executive privilege could not be extended to such a litigation.[39] The fact that production of documents would prejudice the Government's case was not found to be a ground for withholding.[40] It was observed that only gravest considerations of State policy could become a compelling reason for withholding.[41] Thus, Robinson's case paved the way for a change in the position. But the courts in England doubted the authority of the Privy Council's opinion. At the same time the Australian courts were free to follow Robinson's case, for the Privy Council was their ultimate authority on questions of law.[42]

Later came one of the most important cases in this area. In Duncan's case,[43] a submarine sank during trials, killing

---

38. Robinson v. State of South Australia (No.2), [1931] A.C. 704 (P.C).
39. Id. at p.715.
40. Ibid.
41. Id. at p.716.
42. D.H.Clark, "Administrative Control of Judicial Action: The Authority of Duncan v. Cammell Laird", 30 M.L.R. 489 (1967) at p.511.
43. Duncan v. Cammell Laird & Co., [1942] A.C. 624.

certain persons. The dependants of the killed brought an action against the builders of the vessel on the ground of negligence in manufacture. In order to prove the negligence, the blueprints of the design of the vessel was required to which privilege was claimed on the ground that the disclosure would jeopardise public interest for it was a military secret. Allowing the claim of privilege, the House of Lords propounded a broad rule, allowing the Crown to withhold documents of two types—documents where the disclosure of the contents of them would be injurious to the public interest, and the document where it was one of a class of documents which must be withheld in order to ensure the proper functioning of the public service.[44] More importantly, a statement by a Minister, in the proper form, that a document fell into one of these two categories, was held to be final and could not be reviewed by the courts.[45]

The principal danger of the Duncan doctrine was that it enabled the Government to claim privilege merely on the ground that documents belonged to a class which the public interest required to be withheld from production and not because the particular documents were themselves secret but merely because it was thought that all documents of that kind should be secret. Free rein was given to a tendency to claim

---

44. Id. at p.636.
45. Id. at pp.637-38.

secrecy. Such a blank cheque provided the Crown to overdraw.[46] Later, Government itself came forward to rectify the position. Thus in 1956, Viscount Kilmuir, L.C., announced that privilege would no longer be claimed for reports of witnesses, accidents on the road, or on government premises or involving government employees, for ordering medical reports on the health of civilian employees; for medical reports (including those of prison doctors) where the Crown or the doctor was sued for negligence; for papers needed for defence against a criminal charge; for witnesses' ordinary statements to the police, and, for reports on matters of fact (as distinct from comment or advice) relating to liability in contract. Supplementary announcements were also made in 1962 and 1964 regarding proceedings against police and statements made to police and claims based on national security.[47]

The potential breadth of the class doctrine propounded in Duncan's case enabled the Government to protect the documents of a type which may not have required any

---

46. See Ellis v. Home Office, [1953] 2 All E.R. 149 (C.A). In this case, the plaintiff, an undertrial, who was admitted in the hospital wing of the prison, was violently hit with an iron implement by a convicted prisoner who was thought to be mentally defective. In order to prove the alleged negligence, the plaintiff sought production of medical reports on the prisoner and certain other reports on the incident, to which privilege was claimed. The Court held that the opinion of the responsible Minister should be final.
47. See 197 H.L.Deb. Col.741 (6 June 1956); 237 H.L.Deb. 1197 (8 March 1962); and 261 H.L.Deb. 423 (12 November 1964), as quoted in H.W.R.Wade, Administrative law, Clarendon Press, Oxford (5th ed., 1984), p.724. See also Ingress Bell, "Crown Privilege", [1957] P.L. 28 at p.36.

protection at all. Thus came pressure for a judicial reconsideration of the position.[48] Thus in Conway v. Rimmer,[49] the position was reconsidered by the House of Lords. In this case, a police constable was prosecuted for theft of an electric torch. He was later acquitted of this charge. The constable then sued the Superintendent of Police for damages for malicious prosecution and applied for discovery of certain reports about him which were in the police records. The reports included reports made by the Superintendent about the constable while he was on probation and another report by him to the Chief Constable for the transmission to the Director of Public Prosecutions regarding the prosecution of the plaintiff on the theft charge. Both parties wished this evidence to be produced but the Home Secretary interposed with claim of privilege on the ground that each report fell within a class of documents, the production of which would be injurious to public interest. The House of Lords disallowed the claim and, after an inspection of them, ordered for disclosure.

The House of Lords expressly asserted the power of the courts to hold a balance between the public interest as expressed by the Minister and the public interest in ensuring the proper administration of justice. If the court was in doubt as to the outcome of this balancing, it could inspect

---

48. See In Re Grosvenor Hotel, London (No.2), [1965] 1 Ch.1210; Merricks v. Nott-Bower, [1964] 1 All E.R. 717 (C.A.); and, Wednesbury Corporation v. Ministry of Housing and Local Government, [1965] 1 All E.R. 188 (C.A.).
49. [1968] A.C. 910.

the documents before ordering the production. Thus, the superiority of the executive in withholding the documents was taken away. In such a situation, the term 'Crown privilege' also became obviously inappropriate. Thus, Lord Reid in a case,[50] observed that there was no question of any privilege in the ordinary sense of the word.[51] The real question is whether the public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court all relevant evidence.[52] Thus, it is public interest privilege rather than Crown privilege.

In England, now, section 28 of the Crown Proceedings Act, 1947 specifically recognises the right of the Crown to withhold documents if it would be injurious to the public interest in the opinion of the concerned Minister. However, the claim of privilege is to be decided by the judiciary and not by the executive. For this purpose, the courts may inspect the documents also. Thus, the control over the privilege is now in the safe custody of the judiciary.

C. Position in India

In India, the law regarding executive privilege is dealt with in sections 123 and 162 of the Evidence Act. It will be helpful to know the position of law in England at the

---

50. R. v. Lewes Justices, Ex parte Home Secretary, [1972] 2 All E.R. 1057.
51. Ibid.
52. Ibid.

time of the enactment of the Evidence Act. The leading cases at that time were Home v. Bentinck,[53] Smith v. East India Co.,[54] and Beatson v. Skene.[55] In all these cases, the courts were emphatic in affirming the strong position of the executive in the matter of disclosure of documents. The question as to whether any injury to public interest would be caused by the production of a document, could not be determined by the court because such an enquiry was considered to be capable of defeating the very purpose for which privilege is claimed. To answer the question whether the Evidence Act incorporated the position of law in England, it is necessary to examine section 123 of the Act. Section 123 of the Evidence Act reads as follows:

> "Evidence as to affairs of State - No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit".

The term "affairs of State" is not defined under the Act. It is possible to have wider as well as narrow constructions to the term. According to Seervai, it is synonymous with public business and section 123 provides for a general prohibition against production of any document

---

53. 129 E.R. 907 (1820).
54. 41 E.R. 550 (1841).
55. 157 E.R. 1415 (1860).

relating to public business unless permission for its production be given by the head of the department.[56] He argued that the documents relating to affairs of State constituted a genus under which there are two species of documents—the documents whose disclosure would cause no injury to the public business, the innocuous documents, and the other, noxious documents, the disclosure of which would cause injury to the public business.[57] Under the narrow construction of the term, the documents relating the affairs of State should be confined only to the class of noxious documents[58] and it is the judiciary which has to decide the character of the document.

Regarding the role of the court, it is possible to have three views.[59] The first view is that it is the head of the department, who decides to which class the document belongs. If he comes to the conclusion that, as the document is innocuous, he will give permission to its production and, if he comes to the conclusion that the document is noxious, he will withhold the production. In any case, the court does not come into picture. The second view is that it is for the court to determine the character of the document and, if necessary, enquire into the possible consequences of the

---

56. State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493 at p.502.
Seervai argued as Advocate General for the State of Maharashtra.
57. Ibid.
58. Ibid.
59. Id. at p.503.

disclosure. In the third view, the court may determine the character of the document and, if it comes to the conclusion that the document belongs to the noxious class, it may leave it to the head of the department to decide whether the production of the document should be permitted or not. This is because it is not the policy of section 123 that, in the case of any noxious document, the head of the department must always withhold production.[60] In choosing the right alternative out of the three, it is necessary to examine section 162 of the Evidence Act. Section 162 reads as follows:

> "Production of documents: A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or its admissibility. The validity of any such objection shall be decided on by the Court. The Court, if it sees fit, may inspect the document, unless it refers to matters of State or take other evidence to enable it to determine on its admissibility".

The first clause of the section requires that a witness must bring the document to the court and then raise the objections against either to its production or admissibility. It also authorises the court to decide on the validity of the objections. However, the second clause of the section restricts the power of the court to inspect the documents while dealing with the objection. The power cannot

---

60. The Sukhdev Singh Court opted the third view.

be exercised where the objection relates to a document relating to matters of State. It may be noted that matters of State is identical to "affairs of State".[61] In such a case, the court may take other evidence to enable it to determine the validity of the objections. Thus, in holding an enquiry into the validity of the objection under section 123, the court cannot permit any evidence about the contents of the document. If the document cannot be inspected, its contents cannot indirectly be proved.[62] However, other collateral evidence could be produced which may assist the court in determining the validity of the objections.[63] This was the Supreme Court's view expressed in the very first case came before it, that is, Sukhdev Singh's case. The decisions of various High Courts before 1961 also convey the same views regarding the court's role.[64]

---

61. State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493 at p.503.
62. Id. at p.504.
63. Id. at pp.504-05.
64. The decisions of various High Courts regarding the privilege claim under section 123 and inspection under section 162 show that the statute brought a departure from the position of law prevailing in England. Though the courts cannot hold an enquiry into the injury to the public interest on disclosure of a document, the courts are competent to hold a preliminary enquiry into the question as to whether the evidence relates to affairs of State. In this enquiry, the Courts have to decide the character of the document. If it is found to relate to affairs of State, the courts have no further role in deciding the injury to public interest. Otherwise the courts may order the production of the documents. See Nagaraja Pillai v. Secretary of State, A.I.R. 1915 Mad. 1113; Collector of Janpur v. Jamna Prasad, A.I.R. 1922 All. 37; Srila Sri Vythilinga Pandara Sannidhi v. Secretary of State, A.I.R. 1935 Mad. 342; Kaliappa Udayan v. Emperor, A.I.R. 1937 Mad. 492; In Re Mantubhai Mehta, A.I.R. 1945 Bom. 122; R.M.D.Chamarbachwala v. Y.R.Parpia, A.I.R. 1950 Bom. 230;

(Contd...)

Sukhdev Singh's case

In this case,[65] the Supreme Court elaborately discussed the position of law regarding executive privilege. The Court spelt out its decision in the following words:[66]

"... our conclusion is that reading Secs.123 and 162 together the Court cannot hold an enquiry into

---

f.n.64 contd...

Lady Dinbaishaw Petit v. Dominion of India, A.I.R. 1951 Bom. 72; Public Prosecutor v. Damera Venkata Narasayya, A.I.R. 1957 A.P. 486; Tilka v. State, A.I.R. 1959 All. 543, and, S.B.Choudhury v. I.P.Changkakati A.I.R. 1960 Ass. 210.

However two High Courts had opined against the general opinion formed and followed by various High Courts. The two High Courts—Calcutta High Court and Lahore High Court were against providing a power to have even a preliminary enquiry into the objections. In, Irwin v. Reid, A.I.R. 1921 Cal. 282, it was observed that the Court could not discuss the nature of the document. But later in Ijjat Ali Talukdar v. Emperor, A.I.R. 1943 Cal. 539, the High Court of Calcutta followed the commonly accepted view. In, Nazir Ahmed v. Emperor, A.I.R. 1944 Lah. 434, the High Court observed that the courts must stay its hands as soon as a claim was made that the document referred to matters of State. Later, in, Governor General in Council v. H. Peer Mohammed, A.I.R. 1950 E.P. 228, the High Court returned to the commonly accepted view.

65. State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C.493. The facts of the case may be stated briefly as follows:
The respondent, a former District and Sessions Judge, who was removed from service, made a representation to the Council of Ministers. Council of Ministers, after considering the advice of the Public Service Commission, ordered that he may be employed on some suitable post. However, the respondant filed suit seeking a declaration that the removal from service was illegal, void and inoperative. The trial court in the course of proceedings ordered for production of certain documents, including Cabinet decision regarding the representation made by the respondant and the report by the Public Service Commission. The State claimed privilege for these documents by filing an affidavit. While the trial court upheld the claim of privilege the High Court quashed it. Hence came the suit before the Supreme Court.

66. Id. at p.505.

> the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the Court is competant, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under Sec.123 or not".

Under this enquiry, while determining the character of the document, if the court finds that the document does not relate to affairs of State, it shall reject the claim of privilege.[67] If the document is found to be related to affairs of State, it may be left to the head of the department to decide whether he should permit its production or not.[68] Such a discretion was held to be necessary because the head of the department may take a view that disclosure would not cause injury to the public interest even in respect of a document falling within the class of documents relating to affairs of State.[69] It is also possible that the head of the department may find the injury to the public interest on disclosure of the document is minor or insignificant, indirect or remote.[70]

Thus, the law in 1872, where the complete say was in the heads of the executive, was not incorporated into the Evidence Act. The Supreme Court observed:[71]

---

67. Ibid.
68. Ibid.
69. Ibid.
70. Ibid.
71. Id. at p.506.

> "It may be true to say that in prohibiting the inspection of documents relating to matters of State, the second clause of Sec.162 is intended to repel the minority view of Baron Martin in the case of Beatson,... Nevertheless, the effect of the first clause of Sec.162 clearly brings out the departure made by the Indian law in one material particular, and that is the authority given to the Court to hold a preliminary enquiry into the character of the document".

The role of the court remains substantially the same whether a wider or narrower interpretation is given to the term 'affairs of State'.[72] In the former case, the court will decide whether the document falls into the class of innocuous or noxious documents. If it finds that a document belongs to the innocuous class, it will direct its production. On the other case, it will leave it to the discretion of the head of the department. In the case of a narrower interpretation of the term 'affairs of the State', the court will determine the character of the document in the first instance itself. If it finds that it does not fall within the noxious class, which alone is included in the term 'affairs of State', an order for production will be made. If it belongs to the noxious class, the matter will be left to the head of the department.[73]

The Supreme Court did not attempt to define the term 'affairs of State'. The question as to whether a particular document or a class of documents answers the description of the

---

72. Id. at p.505.
73. Id. at pp.505-06.

term must be determined in each case, taking into account of the facts and circumstances of the case.[74] However, the Court observed that the State in pursuit of welfare activities, undertakes to an increasing extent, activities which were formerly treated as purely commercial, and that such documents could also be allowed to take the claim of privilege.[75]

The Supreme Court in the process introduced the class doctrine in India. Protection was thus given to documents which fell in a class of documents which on ground of public interest must as a class be withheld from production.[76] The report of the Public Service Commission was thus found to be one of such class because it carried on its face the character of a document, the disclosure of which would lead to injury to the public interest.[77] No other specific reason was asserted by the Court. It may be noted that there was no way other than adopting the class doctrine before the Court. This is because the Court had already found, from reading sections 123 and 162 together, that it could not inspect the document to know whether the contents of the documents were capable of producing injury to the public interests on disclosure. Thus, before the court, the preliminary way of classifying the disputed documents into noxious or innocuous, was to identify the general nature of them and allow protection to all such documents.

---

74. Id. at p.502.
75. Ibid.
76. Id. at p.512.
77. Ibid.

Since it is not unlikely that extraneous and collateral purposes may operate in the minds of the officers, the Supreme Court framed certain rules to be respected while making a claim of privilege.[78] The Minister or the Secretary may make a claim of privilege in the form of an affidavit. Where it is made by the Secretary, the Court may, in proper cases, require an affidavit from the Minister himself. The affidavit should show that each document has been carefully read and considered and is satisfied that its disclosure would lead to public injury. The affidavit may also briefly indicate the reasons for the apprehension of injury to public interest.

Amarchand Butail's case

The Supreme Court in Sukhdev Singh's case limited the role of the court to make only a preliminary enquiry as to objections to produce documents. Later, in, Amarchand Butail's case,[79] the Supreme Court recognized the court's power of inspection of the documents in finding out whether the document is noxious or not and also whether it should be excluded from production on the ground that it relates to affairs of State. This is because it may be difficult for the court, in certain cases, to determine the character of document without seeing it. In this case, the document signed by the Minister could not be treated as a proper affidavit because the requirements which

78. Id. at p.504.
79. Amarchand Butail v. Union of India, A.I.R. 1964 S.C. 1658. The judgement was headed by Gajendragadkar, C.J. It may be noted that the Sukhdev Singh decision was also headed by him.

had to be satisfied in making an affidavit were not satisfied.[80] Apart from this ground, it was found that the Minister had not applied his mind seriously into the contents of the document and had not examined the question as to whether the disclosure would injure the public interest.[81] The Court also found from one of the documents produced before it that the sole reason for claiming privilege was the fear that the disclosure of the document would defeat the defence made by the Government.[82] Then, the Court found it necessary to consider whether the claim of privilege had been rightly upheld by the courts below, and ordered production of documents for inspection.[83] After inspecting them, it was found that the claim was not justified.

It can be seen that there were options before the Court after finding the procedural or technical irregularities. It could have asked the head of the department to make a proper affidavit or the claim of privilege could have been rejected on account of the affidavit being made not bonafide. The Court, however, took a safe path by ordering the production of documents for its inspection. It was only found that the claim was not properly made and not that there would occur no injury to public interest on disclosure. Indirectly, the Court intended to balance the public interests involved. If the Court had

---

80. A.I.R. 1964 S.C. 1658 at p.1661. It may be noted that Additional Solicitor General had admitted this fact (at p.1662).
81. Ibid.
82. Ibid.
83. Ibid.

found that documents were fatal to the public interest, it would not have admitted those documents even if the affidavits were made defectively or the disclosure of them was capable of defeating the defence of the State. It may be noted that the Court did not say that it deviated from the Sukhdev Singh's rule. Under the guise of preliminary enquiry, the Court in fact stepped into the shoes of the head of the department.

The ruling in Amarchand Butail's case helped the High Courts in extending their power of inspection of documents to which privilege has been claimed. In Kotah Match Factory v. State of Rajasthan,[84] the Court inspected the documents regarding negotiations made between a Minister and a government contractor, and the legal advice tendered to the Minister. After having seen them, the Court was satisfied that privilege was rightly claimed. In Lalli's case,[85] the party produced a plain copy of the original document before the Court. The State was in a position where it cannot produce the original and show the copy produced by the respondent was not the true one. On the other hand, if the copy produced is correct, the production will make the claim nugatory because State would not even make out a right claim. Thus, the Court held that the presiding officer may examine the original document for himself and decide whether the claim of privilege was rightly made.

---

84. A.I.R. 1970 Raj.118.
85. Union of India v. Lalli, A.I.R. 1971 Pat.264.

In State v. Midland Rubber Co.,[86] the contractor applied for reimbursement of the loss caused to him due to the non-cooperation of certain authorities. In order to prove the claim, the company sought production of the estimate report and recommendations of the Chief Engineer to the Government based on the report. Rejecting the claim of privilege the Government made to these documents, the High Court held that no public interest would be suffered on disclosure of these documents. The Court reserved to itself the right to inspect the document before allowing the claim of privilege.[87]

Raj Narain's case

Though the power of the court to inspect the documents was not fully explained in the earlier Supreme Court case, it was later established in Raj Narain's case.[88] In this case, the documents for which the privilege was claimed were the Blue Book and other similar documents which contained information regarding the security arrangements made for the Prime Minister Mrs.Gandhi on her election campaign. The privilege claim made for these documents was rejected on the ground that the head of the department did not make an affidavit in the first instance. It was argued that the Blue Book was

---

86. A.I.R. 1971 Ker.228.
87. The High Court referred to Conway v. Rimmer, [1968] A.C. 910, with approval. The Court also referred to Tirath Ram's case, A.I.R. 1954 J.& K. 11, in which the Court held that where the State had entered into a commercial transaction with a subject, the State had to be presumed to have given up, to a very large extent, its privileged position.
88. State of U.P. v. Raj Narain, A.I.R. 1975 S.C. 865.

an 'unpublished official record' within meaning of section 123, although certain parts of it were already published. Again no reasons were adduced for the injury to the public interest on disclosure of the document. The Supreme Court found that, merely because certain parts of the Blue Book were made public, it would not render the whole book a published one.[89] Secondly, it was held that the executive privilege could not be waived by the authorities because the protection was given to the public interest. Thus, even if an affidavit is not filed by the head of the department or the affidavit filed is a defective one, the Court may require a fresh affidavit to be filed before it.[90] Finally, it is of utmost importance that the Supreme Court established the court's power to inspect the document if it is not satisfied with the affidavit.[91]

The Supreme Court found that it was difficult for the court to find the effect of disclosure upon public interest without seeing the document though there are certain classes of documents which are per se noxious.[92] It is possible to have documents which do not belong to noxious class and yet their disclosure would be injurious to public interest.[93] Under section 162, the enquiry to be conducted by the court is into the validity of the objections that the document is unpublished

---

89. Id. at p.876.
90. Ibid.
91. Ibid.
92. Id. at p.882. For the Court, the document was relating to affairs of State if it would injure the public interest on disclosure.
93. Ibid.

official record in relation to affairs of State so that permission to give evidence is declined. In such a case, the question is that why should the officer be given a discretion. If it relates to affairs of State, he would not give permission. Otherwise, he would not object. Thus, an officer cannot be expected to object first, and then give permission to the disclosure. Section 162 was held to have visualised an enquiry into the objection and empowered the court to take evidence for deciding whether the objection is valid. Therefore the court has to consider two things—whether the document relates to secret affairs of State and whether the refusal to permit evidence was in the public interest.[94] The term "as he thinks fit" under section 123 was held to confer absolute discretion to the head of the department.[95] However, where an objection arises, section 162 would govern the situation.[96] An over-riding power was held to be given to the court under section 162, to decide finally on the validity of the objection.[97] The Court will disallow the objection if it comes to the conclusion that the document does not relate to 'affairs of State', or that the public interest does not compel its non-disclosure, or that the public interest served by the administration of justice in a particular case overrides all other aspects of public interest.[98] This conclusion is derived from the fact

---

94. Ibid.
95. Ibid.
96. Ibid.
97. Ibid.
98. Ibid.

that in the first part of the section 162, there is no limitation on the scope of the court's discretion unlike in the second part. Therefore, it is open to the court to go into the question, after examining the document, and find out whether disclosure would be injurious to public interest even if the head of the department refuses his permission.[99] The expression "as he thinks fit" need not deter the court from deciding the question afresh because section 162 authorises the court to determine the validity of the objections finally.[100]

The Supreme Court had also found it difficult to understand what purpose would be served by reserving to the head of the department, the power to permit disclosure after a court had enquired into the objection and found the disclosure injurious to public interest.[101] This is because the question to be decided by the head of the department would be more or less the same question, that is, whether the disclosure of the document would be injurious to public interest, a question which has already been decided by the court. If injury to the public interest is the foundation of the privilege, it will be a futile exercise for the head of the department to enquire into the question which has already been decided by the court.[102] The Supreme Court found it difficult to imagine that a head of the department would take the responsibility to

---

99. Id. at p.883.
100. Ibid.
101. Ibid.
102. Ibid.

come to a conclusion different from that arrived by the court regarding the effect of disclosure on public interest unless he has a different concept of public interest.[103] The Supreme Court however agreed that there could be areas such as defence and diplomatic affairs in which the executive would be better authorities.[104]

In Raj Narain's case, Supreme Court did not reject the class doctrine though it established its power of inspection. Under an inspection, it is quite easy for a court to decide whether a particular document is capable of injuring the public interest. Though the Court accepted that it was the contents which conferred privilege to a document,[105] it was also opined that cabinet documents, foreign office despatches and high level inter-departmental minutes as a class should be protected.[106] Thus, the Court intended to restrict the documents which could be given protection under the class doctrine.

It may be noted that Sukhdev Singh Court had rejected the arguments for introducing the English law into the Indian law. But, in Raj Narain's case, the Supreme Court referred to Conway v. Rimmer[107] as well as Robinson's case[108] with approval. It is interesting to note that in Amarchand

---

103. Ibid.
104. Ibid.
105. Id. at p.875.
106. Id. at p.876.
107. [1968] 1 All E.R. 874.
108. [1931] A.C. 704.

Butail's case, the Court had accepted the residual power of inspection as was done in England in Conway v. Rimmer.[109]

Another important aspect of Raj Narain's case was the observations of Justice Mathew regarding people's right to know against their Government.[110]

Though the trend was to restrict the Government's interest to withhold documents from disclosure, in A.D.M. Jabalpur v. Shivakant Shukla,[111] the Supreme Court took one step back from its position. Section 16 A(9) of the Maintenance of Internal Security Act, 1971, provided that the grounds of detention may be treated as confidential and referred to matters of State and to be against public interest to disclose them. The section is in the nature of sections 123 and 162 of the Evidence Act. Since there could be no disclosure, no inference could be made against the detaining authority. Also, the detenu cannot challenge the detention. The Supreme Court held that the section was valid. However, after the emergency period, the Supreme Court maintained its pre-emergency tenor of judicial articulation.[112]

---

109. [1968] 1 All E.R. 874.
110. State of U.P. v. Raj Narain, A.I.R. 1975 S.C. 865 at p.884.
111. A.I.R. 1976 S.C. 1207.
112. In State of Orissa v. Jagannath Jena, A.I.R. 1977 S.C. 2201, the plaintiff wanted to see endorsement on a file by the Deputy Chief Minister and the Inspector General of Police. The Supreme Court disallowed the claim of privilege on the ground that the public interest aspect had not been clearly brought out in the affidavit. However, the judgement showed that, in proper cases, it would intervene.

Judge's Transfer case

Though Sukhdev Singh principle was discarded by the Supreme Court itself, it was only in Judge's Transfer case,[113] it was specifically overruled. In this case, under a circular issued by the Law Minister, the transfer of the Chief Justice of Patna High Court and non-extension of S.N.Kumar, the Additional Judge, Delhi High Court were effected. This was alleged to be an encroachment on the independence of judiciary. In the appointment of an Additional Judge and, in the continuance after the initial period of two years, the Chief Justice of respective High Court and the Chief Justice of Supreme Court have to be consulted by the Law Minister under Articles 124 and 217 of the Constitution of India. One of the question in the case was whether the correspondence between the Law Minister and the two Chief Justices ought to be produced before the court so as to enable it to decide the validity of the non-extension of the Additional Judge. The Government opposed to the production of these documents claiming privilege for them on the basis of class doctrine. The Supreme Court establishing the power of inspection held that the documents did not belong to a class of documents which should be protected on that basis.

The Supreme Court also established the open government principle and explained the constitutional basis of the peoples right to know in a democracy. Reiterating the reasons

---

113. S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149.

given in Raj Narain's case, the Supreme Court rejected the Sukhdev Singh's rule. It was held that final decision in respect of the validity of an objection against disclosure under section 123 would always be with the court by reason of section 162.[114]

The Supreme Court added a new rider to executive privilege in the form of open government. It was held to be elementary that citizens ought to know what their Government is doing.[115] The Court urged for a greater openness in the Government. It was observed that the concept of open government was the direct emanation from the right to know which derived from the right of free speech and expression under Art. 19(1)(a) of the Constitution.[116] Impliedly, the Court was intending to add a new criterion bearing on public interest itself, that is, public's right to know from the Government, apart from the public interest in the fair administration of justice and the public interest in governmental secrecy.

The scope of the class doctrine was further narrowed by the Supreme Court. It was held that there would be a heavy burden of proof in order to win a claim of privilege on the basis of class and the courts would be slow in upholding such broad claims.[117] Though it was agreed that the classes of

---

114. Id. at p.237.
115. Id. at p.232.
116. Id. at p.234 per Bhagwati,J. See also Raj Narain's case, A.I.R. 1975 S.C. 865 at p.884 per K.K.Mathew,J.
117. Id. at p.247.

documents to which immunity may be afforded are not closed, it was held that privilege on the class basis would be allowed only in exceptional cases.[118] It was observed that in a fast changing society, rapidly growing and developing under the impact of vast scientific and technological advances, new class or classes of documents may come into existence to which immunity may have to be granted in public interest.[119]

Doubts were raised against the extent of openness brought in by the ruling in Judges Transfer case. In State of Bihar v. Kripalu Shanker,[120] a Division Bench of the Supreme Court remarked that the legal milestone in the Judge's Transfer case needed a retreat to a certain extent. It was held that the government files are privileged documents and no contempt proceedings, civil or criminal, could be initiated on the basis of the notings on files where privilege was necessary in order to maintain the independent functioning of Civil Service , and fearless expression of views.[121] Later, in Doypack Systems' case,[122] it was held that it was the duty of the court to prevent disclosure of documents where Article 74(2) of the Constitution is applicable. Protection on the basis of 'class' was also upheld by the Court in this case.[123]

---

118. Ibid.
119. Ibid.
120. A.I.R. 1987 S.C. 1554.
121. Id. at p.1559.
122. Doypack Systems v. Union of India, A.I.R. 1988 S.C. 782.
123. Id. at p.799. The class of documents was held to include cabinet minutes, minutes of discussions between heads of departments, high level inter-department communications, despatches from the ambassadors, papers brought into existence for the purpose of preparing a submission to

Thus it can be seen that in India, the judiciary controls the question of privilege to withhold documents. It exercises it's discretion judicially after a careful perus of the documents.

Judge's Transfer case: A critique

Immunity from production of documents may arise because of the sensitivity of the contents of the particular document or because of the nature of the document that it belonged to a class of documents which ought not to be disclosed whatever be their contents. In Sukhdev Singh's case, the Supreme Court accepted the claims of privilege based on the 'class' doctrine. Later, in State of U.P. v. Raj Narain also, the Supreme Court followed the class doctrine. In S.P.Gupta v. Union of India, the Supreme Court rejected a claim of class immunity for the correspondence between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India in regard to the non-appointment of a High Court Judge. The Government's argument was that such documents belonged to a class which were immune from the disclosure irrespective of their contents because in the national interest and in the interest of maintaining the dignity of judiciary and preserving the confidence of the people in the judicial process, it was necessary that documents of that class should be withheld from disclosure.

---

f.n.123 contd...

cabinet, notings of the officials leading to the cabinet decision, and documents which relate to the framing of government policy at the high level.

It is submitted that appointment of a High Court Judge is an extremely important matter and the constitutional functionaries concerned with these matters should be able to express their views freely and frankly. It is necessary to have some trust or faith in authorities such as Chief Justice of India and Chief Justices of High Courts. The Solicitor General had rightly argued the reasons for non-disclosure of the disputed documents. If the above said constitutional functionaries differ in their views in regard to the suitability of an additional judge for further appointment, the disclosure of their views would cause considerable embarrasment because the rival views might be publicly debated. There might be captions and uninformed criticisms which have the effect of undermining the prestige and dignity of one or other of the Chief Justices. It may also shake the confidence of the people in the administration of justice. If despite the opinion of the Chief Justice of the High Court, the Additional Judge knows the views of the Chief Justice about him, it might lead to a certain amount of friction which would be detrimental to the proper functioning of the High Court. It may also create a piquant situation because the disclosure would affect the image of the Chief Justice of the High Court in the public eye. Such a situation arises again with regard to the Chief Justice of India where his views are rejected and the views of Chief Justice of High Court are accepted. Finally, it was argued that a feeling might be created in the minds of the

public that a person, who was regarded as unsuitable for judicial appointment by one or the other of the two Chief Justices, has been appointed as a judge and the litigants would be likely to have reservations about the system. The confidance of the people in the administration of justice would also be affected. Moreover, the judge whose suitability was being considered may feel embarrassed when he knows that one of the Chief Justices had found him unsuitable. Rejecting these arguments, the Supreme Court found that the public interest in the disclosure of the correspondance between the Law Minister, the Chief Justice of the High Court and the Chief Justice of India, and the relevant notings made by them outweighed the injury which would cause by the non-disclosure of the documents.

However, when such constitutional functionaries give consent to the disclosure, disclosure may be permitted. And such disclosures may be made before the appointment is made and not after the judge has taken the charge. It is good if such functionaries come out to express their views boldly or fearlessly in public. But such boldness or fearlessness should not be imposed by taking away the privilege regarding such documents. In such cases, the ultimate result would be reporting of insincere views while performing their constitutional duties.

Justice Fazal Ali, dissenting, said that our democracy was only three decade old while those of the United States,

Australia and the United Kingdom are of centuries old.[124] Before adopting the liberal trends on disclosure issues, much thought has to be made into the possible difficulties. Any revolutionary decision so as to expose highly confidential matters to public gaze by following of a policy of liberal disclosure of documents by ignoring the Indian situations would not only be detrimental to our progress but may also cause serious obstruction in the practical running of day to day affairs of the Government or for that matter the governance of the country itself.

If the correspondence between these constitutional functionaries are disclosed, the result will be widespread criticism by the people without understanding the niceties of law. Also, in the past, such documents were treated as secret, confidential and privileged. No disclosure of such documents had been ordered by any court except by the Supreme Court in the Judge's Transfer case.

The disclosure of the correspondence showed that there were serious differences between the constitutional functionaries. A good section of people might believe that the integrity of the Judge was not beyond doubt. This will create much difficulties in the functioning of a judge.

The judiciary commands confidence in it and inspires faith in the minds of people in its capacity to do evenhanded

---

124. S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149 at p.362.

justice. For a continued confidence and faith, the moral authority of the court shall be maintained. For that, the judges at the higher level may create an image of being attached to higher values of life. Once the people come to know that those occupying the seats of justice at the higher level are mere men with human failings and weaknesses of character, the rebuilding of the image would become difficult. The disclosure in this case had caused the same damage to institution of the judiciary and its image. In fact, the decision is a 'self-inflicted injury because it brought into open the inner wranglings in the house of judiciary and made people revise their opinion about those in higher echelons of that important wing of the State'.[125]

Now the important terms coming under the concerned sections of the Evidence Act may be explained. After that section 124 of the Act will be briefly dealt with.

Unpublished official records

In order to claim a privilege for non-disclosure, the document must be an'unpublished official record'. Once it is found that the document is already published or disclosed by the concerned authority, it is not possible to claim a privilege for the same document again. However, a publication or disclosure of a document under an illegal method, may not take away the privilege on that ground.

---

125. H.R.Khanna, Judiciary in India and Judicial Process, S.C. Sarkar & Sons, Calcutta (1985), p.47.

The word 'unpublished' relates to the person against whom privilege is claimed. If he has been permitted to see those papers and also to take copies of them, it will be futile for the authorities to claim privilege for the same documents.[126] The "unpublished official records" may include, documents that passed between the State and the subjects, documents between different State officials and documents that passed between heads of departments or between the Ministers of a State etc.[127]

Where a part of a document has already been published, it does not mean the document as a whole is published. Thus, in State of U.P. v. Raj Naraín,[128] where certain parts of the Blue Book were disclosed in the legislature, it was held that the unpublished parts of the Blue Book would be considered as unpublished official records under section 123. Partial publication does not constitute a waiver on the part of the Government also.

Once the Government decides to disclose official records and had taken active steps toward it, it is better to consider those documents as published official records even if the records were not received by the individuals. In Mehtab Singh's case,[129] claim of privilege was made by the Government for certain letters written by the head of the

---

126. Union of India v. Sudhir Kumar Roy, A.I.R. 1963 Ori.111.
127. Iqbal Ahmed v. State of Bhopal, A.I.R. 1954 Bhopal 9 at p.11.
128. A.I.R. 1975 S.C. 865.
129. Mehtab Singh v. Secretary of State for India, A.I.R. 1933 Lah.157.

department to the petitioner. It was not clear whether the letter had reached the plaintiff or not. The Court held that if those letters had reached the plaintiff, they would not become 'unpublished official records' within the meaning of the section 123 of the Evidence Act.[130] It is better to take the criterion in these situations as follows: whether the authorities had sent the letters or not. Reaching or not reaching of the letter definitely was not the criterion before the authorities in deciding to send the letters or disclose the concerned material.

Head of the department

From the section it is clear that the head of the department is charged with the duty of protecting documents from disclosure as he thinks fit. Any lower officer may not be able to do it, for only a head is responsible for what is going on in this department. Moreover, where the head of the department is charged with claiming privilege, it is expected that the head of the department, who is more experienced, will claim privilege only in proper cases, after considering different aspects of the issue.

Only the concerned Minister, or the Secretary of the department may be considered as head of the department under section 123 of the Evidence Act.[131] So some officer's name as head of the department under certain Rules, such as, Railway

---

130. Ibid.
131. State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493.

Supplementary Rules, may not be considered for the purposes of section 123.[132] There are reasons for limiting the expression 'head of the department' to the highest officials of the State. The expression head of the department has two distinct meanings--heads of various departments of the Secretariate, namely, the Secretaries of the departments, and heads of departments of attached offices either under the Union Government or under the State Government.[133] It is ordinarily expected that neither the Minister nor the Secretary will lightly make a claim of privilege, whereas heads of departments of subordinate offices may not be fully aware of their responsibility in the matters.[134] Also, interests other than the public interest may be brought in and undue advantage of the provisions of section 123 may be taken.

Affidavit by the head of the department

Section 123 confers wide powers on the head of the department to claim privilege on the ground that disclosure may cause injury to the public interest. Apprehension of public criticism on the department, officials, Government or Minister has no relevance. The sole test which should determine the decision of the head of the department is the injury to the public interest and nothing else. The affidavit made by the Minister or the Secretary of the department may show

---

132. See Union of India v. Indra Deo Kumar, A.I.R. 1964 Pat. 1118.
133. Union of India v. Sudhir Kumar Roy, A.I.R. 1963 Ori.111.
134. Id. at p.114.

that each document in question has been carefully read and considered and is satisfied that the disclosure would lead to public injury. The affidavit may also indicate briefly the reason why it is apprehended that disclosure would lead to injury to public interest. This requirement assumes importance in marginal cases where the documents do not prima facie show the need for protection.

If the court is not satisfied with the affidavit, it can summon the Minister or the Secretary to appear as a witness to enable the court to come to a better decision. This procedure, to an appreciable extent, may act as a guarantee against unjust objections that may otherwise be raised by the Government.[135]

Section 123 requires that the claim may be made by the head of the department. But it does not expressly say that the affidavit must be made by him. However, in view of the Sukhdev Singh's case, the affidavit is to be sworn in by the Minister in charge or by the Secretary concerned.[136] Later cases also approved the same view.[137]

As he thinks fit

From section 123 of the Evidence Act, it appears that even if a document forms part of an 'unpublished official record' and relates to any affairs of State, the document may

---

135. State of Punjab v. Sodhi Sukhdev Singh, A.I.R.1961 S.C.493
136. Union of India v. Sudhir Kumar Roy, A.I.R. 1963 Ori.111.
137. See Raj Narain's case, A.I.R.1975 S.C.865; and, Judge's Transfer case, A.I.R.1982 S.C.149.

be given in evidence if the head of the department grants permission for the purpose.[138] If the court is not satisfied with the affidavit claiming protection for the document from disclosure, it may go through the document and decide the issue.[139] In State of U.P. v. Raj Narain, it was held that the words "as he thinks fit" conferred an absolute discretion on the head of the department to give or withhold the document.[140] The overriding power over the opinion of the head of the department was held to be found in the courts under section 162 of the Evidence Act.[141] It is difficult to concede an absolute discretion on the authority. The term "as he thinks fit" may be interpreted as 'as he reasonably thinks fit', allowing the judicial review over the decision of the head of the department regarding reasonableness. Thus, court may examine the different factors which led the head of the department to arrive at his decision whether to disclose or not to disclose.

Affairs of State

The terms 'affairs of State' is not defined in the Act. Affairs of State means matters of public nature in which the State is concerned or the disclosure of which would be

---

138. Pulin Behari Biswas v. The State, A.I.R. 1965 Tri.33.
139. State of U.P. v. Raj Narain, A.I.R. 1975 S.C. 865 at p.876.
140. Ibid.
141. Id. at p.882.

prejudicial to the public service where the State is a party to the litigation.[142] It will cover every business activity of the State so as to include the routine administration and highly confidential matters pertaining to defence, foreign affairs and cabinet documents. But in respect of section 123 of the Evidence Act, all such matters need not be included under the term because it will shut out the possibilities in getting the documents disclosed. Thus, Punjab High Court has defined it as "matters of public nature in which the State is concerned and the disclosure of which will be prejudicial to the public interest or injurious to national defence or detrimental to good diplomatic relations.[143]

At the time when the Evidence Act was passed, the concept of welfare state had not evolved in India. These words 'affairs of State' thus could not have been, at that time, intended to cover the commercial or the welfare activities of the State. But, where the words are elastic, they could be construed so as to include such activities also, provided the condition of injury to public interest is also satisfied. The Sukhdev Singh court opined that the words 'affairs of State' thus acquired a secondary meaning, namely those matters of State whose disclosure would cause injury to the public interest.[144]

---

142. State of Bihar v. Kasturbhai Lalbhai, A.I.R. 1978 Pat.76.
143. Governor General in Council v. H.Peer Mohammed, A.I.R. 1950 E.P. 228 at p.233.
144. State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493 at p.527.

The term 'affairs of State' is a general one but it cannot include all which are contained in a record. Thus, where an open enquiry is made, statements recorded during the enquiry cannot be deemed to be relating to affairs of State.[145] A complaint made by a person to the authorities,[146] statements made by an accused to a forest officer in the course of investigation,[147] and records relating to the illegal activities of the Government [148] are also not records relating to affairs of State.

In S.P.Gupta v. Union of India,[149] Justice Venkataramiah opined that the expression 'affairs of State' should receive a very narrow meaning.[150] The reason is that ours is an open society which has a Government of people which has to run according to the Constitution and the laws.[151] Any claim for interpreting the term 'affairs of State' widely may expose section 123 to be challenged as being violate of Article 21 of the Constitution.[152]

The term 'affairs of State' is not defined in the Act. In State of Punjab v. Sodhi Sukhdev Singh,[153] Mr.Seervai argued for the State that the words 'affairs of State' are

---

145. Mahabirji Birajman Mandir v. Prem Narayan Shukla, A.I.R. 1965 All. 494.
146. Id. at p.496.
147. Kaliappa Udayan v. Emperor, A.I.R. 1937 Mad.492.
148. Emperor v. Rais Rasulbakhsh, A.I.R. 1944 Sind 145 at p.159.
149. A.I.R. 1982 S.C. 149.
150. Id. at p.642.
151. Ibid.
152. Ibid.
153. A.I.R. 1961 S.C. 493.

synonymous with public business.[154] Mr.Seervai argued that documents relating to affairs of State constituted a genus under which there are two species of documents: one, the disclosure of which will cause no injury to the public interest, and the other, the disclosure of which may cause injury to the public interest.[155] These documents were respectively called innocuous and noxious documents. Accordingly, the effect of section 123 was that there was a general prohibition against the production of all documents relating to public business subject to the exception that the head of the department would give permission for the production of documents that are innocuous.[156] Rejecting the classification put forward by Mr.Seervai, the Supreme Court held that it was quite conceivable that even in regard to a document falling within the class of documents relating to the affairs of State, the head of the department might legitimately take the view that the disclosure would not cause injury to the public interest.[157] It is also possible that the head of the department may feel that injury to public interest on disclosure is minor, or insignificant, indirect or remote.

The meaning given to the expression affairs of State used in section 123 may be confined to that section. It cannot be made use of while interpreting constitutional provisions.[158]

---

154. Id. at p.502.
155. Ibid.
156. Ibid.
157. Id. at p.505.
158. Chini Mazdoor Sangh v. State of Bihar, A.I.R. 1971 Pat. 273 at p.276.

The term 'affairs of State' may not be confined only to matters which will be prejudicial to the public interest or injurious to national defence or detrimental to good diplomatic relations. It may also cover the case of documents in respect of which the practice of keeping them secret is necessary for the proper functioning of the public service.[159]

It is for the court to decide whether the document relates to the affairs of State or not, where the decision of the head of the department that a particular document related to the affairs of State, is challenged. The court may go through the records if found necessary.

Section 124, Evidence Act

Section 124 deals with disclosure of official communications. It reads as follows:

> "No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure".

Section 124 is designed to prevent the knowledge of official paper, ie., the paper in official custody from going beyond an official circle that receives the knowledge in confidence, whether the confidence is express or implied. The requirements of section 124 are that the communication must have been made

---

159. S.B.Chowdhary v. I.P.Changkakati, A.I.R. 1960 Ass.210 at p.216.

to a public officer in official confidence and the officer must consider that public interest would suffer by the disclosure of the communication in question.

Public officer

The term 'public officer' in section 124 may not be given the same meaning as that is given in section 2(17) of Civil Procedure Code.[160] In the absence of a definition in the General Clauses Act, the term may be given its ordinary meaning. Normally, it may include all officers including clerks of superior officers and non-officials to whom such papers are disclosed on an understanding, whether express or implied, that the knowledge shall go no further.[161] The term 'public officer' may be construed to be an officer with public, as opposed to private, duties, who receives communications made to him in official confidence of such a nature that disclosure in certain cases would injure public interest.[162] University[163] and Court of Wards [164] are public officers under section 124.

Procedure under section 124

Before claiming protection under section 124, the public officer may come to a positive conclusion that, by the

160. University of Punjab v. Jaswanti Rai, A.I.R. 1946 Lah.220. Under section 2(17) of the Civil Procedure Code, a public officer include every judge, every member of the All India Service, every commissioned or gazetted officer in the military services and certain other kinds of officers.
161. Chandra Dhar Tewari v. Deputy Commissioner, A.I.R. 1939 Oudh 65.
162. University of Punjab v. Jaswanti Rai, A.I.R. 1946 Lah.220 at p.222.
163. Ibid.
164. Chandra Dhar Tiwari v. Deputy Commissioner, A.I.R. 1939 Oudh 65.

disclosure of the communication, the public interests would suffer.[165] A claim cannot be made on any other ground. Also, it is necessary that privilege may be claimed by the public officer concerned.[166] The public officer seems to be the sole judge to decide the nature of injury to the public interest. His decision may not be arbitrary or capricious. Also, section 124 may not be used as a cloak to shield the truth from the court. In case of doubt, the court may inspect the document to determine the claim of privilege.[167]

Formerly, the courts adopted a view that the courts cannot question the decision of the public officer that the disclosure of the document would be detrimental to the public interest and the court's power was restricted to consider whether the section would be applied to the case before it or not.[168] And the court's inspection was limited to the purpose of finding whether the communication was in official confidence or not. If not, the court could reject the claim of privilege. But if it is found that the communication was in official confidence, the public officer's opinion that it should not be disclosed on the ground of public interest, will be the supererogatory opinion, because the public officer is the sole judge on the point of harm to the public interest. But this does not seem proper. The decision of the public officer

---

165. Excelsior Film Exchange v. Union of India, A.I.R. 1968 Bom. 322.
166. B.R.Sreenivasan v. Bramhatantra Parakalaswamy Mutt, A.I.R. 1960 Mys. 186.
167. Ganga Ram v. Union of India, A.I.R. 1964 Pat. 444.
168. See, In Re Makky Moithu and Others, A.I.R. 1943 Mad. 278.

is a judicial one because it is capable of producing civil consequences to the individual. The discretion of the public officer who takes into different aspects of the communication before deciding the issue, is thus subjected to the judicial review. Also no authority can have an absolute discretion unquestionable in a court of law.

Communications in official confidence

The words 'communications in official confidence' used in Section 124, Evidence Act, import no special degree of secrecy and no pledge or direction for its maintenance. It includes generally all matters—communication by one officer to another in the performance of duties. These words have the same meaning as 'professional confidence' used in section 126 of the Evidence Act.[169] The documents produced and statements made by an income tax assessee could not be treated as being made in official confidence within the meaning of section 124.[170]

Whether the communication is made in official confidence or not is a question of fact.[171] It is for the court to decide it and, in order to determine that fact, the courts may take into consideration all details regarding the communication and, if found necessary, may call for inspection of the same.

---

169. Nagaraja Pillai v. Secretary of State, A.I.R. 1915 Mad. 1113 at p.1117.
170. Venkatachella Chettiar v. Sampathu Chettiar, 32 I.L.R. Mad. 62 (1909) at p.67.
171. B.R.Sreenivasan v. Bramhatantra Parakalaswamy Mutt, A.I.R. 1960 Mys. 186.

The court may adopt any procedure that it considers suitable in the circumstances to satisfy itself to find out whether the document for which privilege is sought is a communication made in official confidence or not. The court may also decide the injury on disclosure after hearing the views of public officer.

Conclusion

It can be seen that in all the three countries, the executive does not enjoy much control over the privilege claim to withhold documents as it previously enjoyed. The function is now being done by the judiciary. While in the United States, the importance of the judicial discretion has been substantially come down with the implementation of the Freedom of Information Act, in other two countries, the judiciary still holds the sway.

Chapter 5

OFFICIAL SECRETS LEGISLATION

Leaks of official information of all kinds have been causing problems to all governments for years. Exhortations, threats, disciplinary proceedings are proved to be inadequate to stop such leakages.[1] A statute providing for penal sanctions was thus found to be necessary to cope with leakages especially taking place in foreign offices and defence departments.[2]

Early period

In England, the first statute prohibiting disclosure by the civil servants was passed in 1889 after finding that there was no effective law to punish one for such activities. The incident behind it was the leakage of the Anglo-Russian Treaty.[3] The Act of 1889 was also applicable to India because it was applicable to any part of Her Majesty's dominions. However, it was re-enacted in India by the Imperial Legislative Assembly in 1889.[4]

---

1. See Report of the Departmental Committee on Section 2 of the Official Secrets Act, 1911, Cmnd.5104, H.M.S.O. (1972), p.120. Hereinafter referred as Frank's Committee Report.
2. In England, the Official Secrets Act, 1889, was the result of the concern about the unauthorised disclosures by the civil servants. The 1889 Act was further strengthened in 1911 and later in 1920. For a history on the English position, see Appendix III of Frank's Committee Report.
3. A temperory clerk in the Foreign Office disclosed the details of the Treaty to "The Globe" which published it much in advance of the presentation of it to Parliament. The proceedings against the clerk for theft could not stand before the argument that the clerk had not stolen them but only reproduced it from memory. See S.R.Maheshwari, Open Government in India, Macmillan, New Delhi (1981), p.14.
4. See S.R.Maheshwari, Open Government in India, Macmillan, New Delhi (1981), p.15.

Even before the Act of 1889, there were restrictions on the disclosure of official information by the Indian civil servants. A notification issued by the Central Government in 1843 required the civil servants not to communicate information to the press.[5] But the notification was found to be ineffective. Notifications came one after another improving the former ones in the years 1875, 1878, 1884 and 1885. One of the reasons for the failure of the restrictions was the strengthening of the independence movement.[6] While promoting secrecy, the Government was also aware of the responsibility in respect of flow of legitimate information to the press. Thus, the Government appointed the first Press Commissioner in 1877 to laise with the press and through him official information were given. Later, in 1889, the first statute on official secrets was passed.

The Indian Official Secrets Act, 1889 covered a wider area than the earlier notifications. It was directed against any person to whom official information ought not, in the interest of the State, to be communicated. The overriding objective of the Act was to prevent disclosure of official documents. The British Act, on the other hand, was intended to prevent the disclosure of naval and military secrets.

---

5. For the text of notification, see S.R.Maheswari, supra n.4, p.9.
6. For more details and texts of the notifications, see S.R. Maheshwari, supra n.4, pp.9-13. See also Shriram Maheshwari, "Secrecy in Government in India", in T.N.Chaturvedi (Ed.), Secrecy in Government, Indian Institute of Public Administration, New Delhi (1980), pp.115-120.

By the turn of the century, our national movement was gaining fresh ground. The Act of 1889 was proved to be inadequate in preventing leakage of government held information. With more stringent measures, it was replaced in 1904, despite the objections raised by Gopal Krishna Gokhale, Asutosh Mukharjee and such other personalities.[7]

In England, the Act of 1889 was replaced by the Act of 1911. It was passed against the background of fears of German espionage.[8] In India, the laws applicable at that time were the Act of 1889, the Act of 1904 and British Act of 1911. Like the Act of 1889, the Act of 1911 was automatically applicable to India unless India enacted a similar legislation for herself.[9] Finding the inconvenience of the law being scattered, the Indian Official Secrets Act, 1923 was enacted.

---

7. The Act of 1904 introduced three distinct modifications in the Act of 1889. It placed civil matters on par with naval and military matters. In place of the original provision that a person who enters an office for the purpose of wrongfully obtaining information is liable to be punished, the Act of 1904 provided that whoever without legal authority or permission goes to a government office commits an offence under the Act. Finally, all offences were made cognizable and non-bailable. See S.R.Maheshwari, supra n.4, pp.24-25.
8. M Chalapathi Rao, "Official Secrets and Freedom of Information in India", in T.N.Chaturvedi (Ed.), Secrecy in Government, Indian Institute of Public Administration, New Delhi (1980), p.110.
9. Shriram Maheshwari, "Secrecy in Government in India", in T.N.Chaturvedi (Ed.), Secrecy in Government, Indian Institute of Public Administration, New Delhi (1980), p.121.

After the independance, the Press Laws Inquiry Committee discussed the matter. The Committee agreed with the theory of the State's unquestionable right over official information.[10] The Act of 1923 was amended a few times since 1947. The object was to make certain terminological changes to bring it in accord with the terminology of the Constitution of India. A basic change however was brought in 1967.

The armed conflict between India and China took place in 1962. Later it was discovered, though not publicly admitted by the Government, that China had prior knowledge of many of India's military secrets.[11] Later, after the war against Pakistan in 1965, it was again found that management of military secrets was week and Pakistan had acquired knowledge of movements of Indian troops through an espionage network. In order to plug those leakages, the Act was amended in 1967.[12] The amendment in 1967 was also intended to make most of the offences punishable with greater sentences of imprisonment and to make most of the offences cognizable offences.[13]

---

10. See S.R.Maheshwari, supra n.4, p.62.
11. Id. at p.63.
12. The Amendment Bill was introduced in the Rajya Sabha on 23,June,1967 and was passed on 7 August 1967. The Lok Sabha discussed it on 12 August 1967 and passed on the same day. The Bill was not referred to any Select Committee and was not given much publicity.
13. In the case of Amir Hussain, a Pakistan citizen who was prosecuted under the Act for passing on secret information to Pakistan, jumped the bail and crossed over to Pakistan because under the provisions of the Act it was bailable. The Government thus lost the case completely. See Shriram Maheshwari, supra n.9, p.125.

The Indian Act

The Official Secrets Act, 1923 deals with two aspects—espionage and disclosure of other secret information. The former is dealt with by section 3.[14] Section 5 deals with the latter.[15]

14. Section 3 of the Act reads as follows:

3. Penalties for spying. (1) If any person for any purpose prejudicial to the safety or interests of the State--

(a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or

(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly, useful to an enemy; or

(c) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty, and integrity of India, the security of the State or friendly relations with foreign States,

he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dock-yard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, to fourteen years and in other cases to three years.

(2) On a prosecution for an offence punishable under the section it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or pass-word is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, and from the circumstances of the case or his conduct or his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of the State, such sketch, plan model, article, note, document, information, code or pass-word shall be

(Contd....)

The word 'secret' qualifies only 'official code or pass-word' and nothing else. This is clear from the comma and the word 'or' which comes after the word pass-word.

---

f.n.14 contd..

presumed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State.

15. Section 5 of the Act reads as follows:

5. Wrongful Communication, etc., of Information. (1) If any person having in his possession or control any secret official code or pass-word or any sketch, plan, model, article note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, or which is likely to assist, directly, or indirectly, an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States or which has been made or obtained in contravention of the Act or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government, or as a person who holds or has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office on contract--

(a) wilfully communicates the code or pass-word, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or

(b) uses the information in the possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or

(c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(d) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code or pass-word or information;

he shall be guilty of an offence under this section.

(2) If any person voluntarily receives any secret official code or pass-word or any sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe, at the time when he receives it, that the code, pass-word, sketch, plan, model, article, note, document or

(Contd...)

Therefore in order to make a person liable under section 3 for obtaining and communicating a plan it is not necessary that it is a secret plan. It is only necessary that the plan was useful to an enemy directly or indirectly. The words 'obtains, collects, records or publishes or communicates' would cover the case of any past activity of an accused. These words may not include the prospective acts of such person.

The provisions covering espionage are made extremely favourable to the State. It is provided that it would not be necessary to prove that the accused has committed an act which was prejudicial to the safety or interest of the State, if from the circumstances of the case or conduct of the accused it appeared that his purpose was prejudicial to the safety of or interests of the State. The word 'spying' has not been defined in the Act. But section 3 provides for the penalties which can be inflicted to a person who is found guilty of spying. Though the section specified the instances which constitute the offence of spying, it does not give a comprehensive list of such instances.

---

f.n.15 contd...

information is communicated in contravention to this Act, he shall be guilty of an offence under this section.

(3) If any person having in his possession or control any sketch, plan, model, article, note, document or information, which relates to munitions of war, communicates it, directly or indirectly, to any foreign power or in any other manner prejudicial to the safety or interests of the State, he shall be guilty of an offence under this section.

(4) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

The judiciary has explained who is an 'enemy'. In Kutbuddin v. State of Rajasthan,[16] an argument was made before the Court to the effect that Pakistan was not an 'enemy' of India at the material point of time when the secret information was formed. Rejecting the argument, the High Court held that the active spies may collect information before the actual hostilities.[17] The term 'enemy' was held to include any unfriendly State.[18] It was also held that even a potential enemy, with whom one country might some day be at war, would be an 'enemy' under the Act.[19]

Section 5 of the Indian Official Secrets Act, 1923, like section 2 of the British Act of 1911, is a catch-all provision. More than two thousand differently worded charges can be framed under it.[20] The section covers all that happens within the Government. All kinds of information which an official happens to go through in the course of his duty is official and is thus covered under it. This includes any official code, pass-word, sketch, plan, model, article, note, document or information.

It may be noted that the word 'secret' is not defined in the Act. Thus, the Government becomes the final authority in deciding whether a particular document may be marked 'secret' or not.

---

16. A.I.R. 1967 Raj.257.
17. Id. at p.258.
18. Ibid.
19. Ibid.
20. See Franks Committee Report, p.14.

Section 5 applies not only to a civil servant but also to other persons. It classifies persons into four classes. They are:

(a) the government contractors and their employees;

(b) any person to whom official information is entrusted in confidence by a civil servant;

(c) any person in possession of official information which has been made or obtained in contravention of the Official Secrets Act; and

(d) any person coming into possession, by whatever means, of a secret official code or pass-word or of information about a defence establishment or other prohibited place. .

In Britain only the Attorney General is empowered to initiate a prosecution for violation of the Act. In a small nation it may be feasible. In India that power is vested with the executive. Being a large nation, the power is rightly conferred on the executive, a big machinery, for the better implementation of the Act.

Apart from the persons communicating the secret information, the persons receiving it are also guilty of the offence under section 5 of the Act. The section applies not only to the government servants but also to all persons who

have obtained the secret information in contravention of the Act, ie., a person commits an offence by the receipt of the information alone unless he is lawfully authorised to receive it. Again, an offence is committed when a person, after receiving the secret information from a public officer, further communicates it to another.

Section 5 of the Act is very comprehensive in its nature. An invitation by the news magazine 'Blitz' to the public to send official secrets for which a lavish payment was promised thus would fall under the section.[21] It was really an invitation encouraging or inciting any person to commit an offence. The Court in such an instance was not concerned with the intention or the motive underlying the article in question but with the direct or indirect tendency of the words used in the article to encourage or incite one to commit an offence.[22]

Budget documents are secret documents till the presentation of the budget before the legislature. The reception and publication of such documents would fall under section 5 of the Act.[23]

Unlike section 2 of the British Official Secrets Act, 1911, which is the counterpart of section 5 of the Indian Official Secrets Act, 1923, the Indian Act punishes

---

21. R.K.Karanjia v. Emperor, A.I.R. 1946 Bom. 322.
22. Id. at p.324.
23. State of Kerala v. K.Balakrishnan, A.I.R. 1961 Ker. 25; Nandlal More v. State, (1965) Cri. L.J.392.

one for an offence under section 5 only if mens rea is proved. The words such as 'wilfully', 'voluntarily', 'knowing', 'reasonable ground to believe' show that the mental element is a necessary ingredient of the offence under section 5 of the Act. Thus a mere 'leak' may not be covered by the Act. The burden of proof is naturally high on the Government compared to the position in England.

A literal reading of section 5 may reveal that the fact that information might have been communicated contrary to his desire is irrelevant and does not immunise him.[24] But it does not seem correct. The general spirit of the section is to punish one who has a guilty mind. A mere receipt of an official secret may be punished unless he informs the proper authority about the fact rather than keeping it with him and taking the risk in keeping it secret. Here the pre-condition is that the person knows that the document is a secret one. If mere receipt is not made an offence it will be difficult to take action against those who make use of the information for personal benefits.

Section 5 provides that a person guilty of an offence under it shall be punishable with imprisonment which may extend to three years or with fine or both. Such a blanket provision gives much discretion to the judiciary to fix the punishment in an individual case. This does not seem

---

24. Shriram Maheshwari, supra n.9, p.122.

proper. Within the section itself, classification of offences respecting gravity of the leakage may be made. The punishments for each types of leakages may also be separately given.

According to section 5 it is the disclosure which is punishable and not the purpose of disclosure or prejudicial effect on certain interest deserving protection in the national interest.[25] Such a position is desirable also. Because, as far as an official is concerned, his duty is to keep the secret government information secret. He is not to judge the public interest in disclosure. There are officials authorised for that purpose. Apart from the person communicating the secret information, the person receiving it is also guilty of an offence under the Act.

If literally read and applied strictly, there will be innumerable prosecutions of the press, completely hampering its work.[26] However, the Government uses the Act only sparingly.

From section 5 it is clear that punishment for the unauthorised disclosures is the same, subject to the discretion left to the court. No respect is paid by the section to the difference in consequences on disclosure of different types of documents, some capable of causing serious injury and

---

25. M.P.Jain & S.N.Jain, Principles of Administrative Law, Tripathi, Bombay (4th ed., 1986), p.897.
26. Ibid.

certain others less serious injury. Franks Committee highlighted the need for a two part definition in such cases.[27] The first part discribesthe categories of official information, the unauthorised disclosure of which would cause serious injury to the security of the nation or the safety of the people.[28] The second includes other unauthorised disclosures of which would cause less injury to the nation. For the former, criminal law was recommended to be applied while for the second, it was not recommended.[29] It does not seem proper. Criminal law shall be applied to all kinds of unauthorised disclosures. What is required is the classification as given above and at the same time providing higher punishments against offences, coming under the first part and lower punishments against offences coming under the second part. The classification is useful to the officials who handle such information, for they can know where they stand in relation to the law, and the risks and consequences more clearly.

In order to make it more safe, the court under section 14 of the Act, may conduct the proceedings in camera. However, the court is not bound to conduct it in camera.[30]

There is an argument that section 5 is neither fair nor purposeful, the reason being that in a democracy some

---

27. Frank's Committee Report, pp.46-47.
28. The Frank's Committee suggested defence and internal security, foreign relations and currency and reserves may be included in the first part. Id. at pp.40-52.
29. Id. at pp.46-47.
30. See Superintendent and Remembrancer of Legal Affairs, W.B. v. Satyen Bhowmick, A.I.R. 1981 S.C. 917.

information must be revealed to the public to ensure good and proper government. It makes a criminal offence of all unauthorised disclosure of information from official sources regardless of the consideration whether the public interest really demands secrecy.[31] But it is not fair to allow officials, who are not authorised to release information, to do it. Once the Government has found the information to be made secret, it should have done it after considering the public interest behind it. It is also in the public interest to keep such secret information undisclosed. An ordinary official cannot judge the consequences of disclosure. Also, from official to official, the meaning of public interest may vary. The solution does not lie in allowing the secret information being divulged according to the judgement of an official. Rather it lies where the classification is made.

One of the criticisms formed against section 5 of the Indian Act and section 2 of the English Act is that these catch-all provisions restrict the free flow of information from the Government to the public. Thus, amendment to it is also suggested. But public's right to information from the Government may not be introduced at the cost of official secrets. Both are necessary in our country. Even if section 5 is amended, it is impossible to assume that officials will help the free flow of information from the Government.

---

31. M.P.Jain & S.N.Jain, Principles of Administrative Law, Tripathi, Bombay (4th ed., 1986), p.897.

The information which the public as well as press require will be usually those making the executive unpopular. The officials however may not be happy in divulging such information. Again, removing the stringent parts of the section may not provide the public any right to information. It will then be left with the discretion of the concerned officials whether to disclose or not. Ultimately, the result will be that the flow of information from the Government will be available to those who are in good relations with the officials. The equality in getting information from the Government may not be present in such a system. What is then required is not the amendment of the section 5 but a new legislation which provides for the right to freedom of information from the Government. Along with it the classification system may also be improved.

Conclusion

The Official Secrets Act was quite necessary for the colonial Government in order to survive because the nationalist movement was striking deeper roots in the country. The colonial administration thus installed a sprawling network of checks within the administrative system also. The present political conditions in India also are not much different from the colonial periods. The terrorist activities, communal riots, linguistic problems, etc., are strong enough to disturb the integrity and security of the nation. Any change in

removing the stringent measures provided under section 5 of the Act will not be timely. As far as public's right to know is concerned, it is better to have a separate information legislation instead of amending the Official Secrets Act.

Chapter 6

CLASSIFICATION OF DOCUMENTS

Today in the modern welfare era, a lot of documents are generated in the departments and other agencies. Many of them have to be kept secret from the common people for the proper functioning of the department and in the best interest of the nation. The core processes of Government require to be protected against undue and unnecessary public exposure. The maintenance of law and order in the domestic as well as international realms, may also require secrecy. The proper conduct of international affairs is an essential part of maintaining our external defence and security. Apart from these, there are information regarding private citizens with the Government. Protection of private interests, in certain cases also requires secrecy. It is impracticable also for a Government to function keeping all the information open.

Though secrecy is maintained in the departments, the degree of secrecy required in case of particular documents varies in relation to the relative importance attached to those information. For example, the degree of secrecy attached to an information relating to military operations cannot be given to an information relating the character report made by a superior on a subordinate official. Similarly information regarding diplomatic relations and information regarding a

private person's business stand on different tiers. Thus, different degrees of secrecy may be attached to each of such documents. Because the degree of secrecy required varies with document to document, the protection required for them also varies. For this purpose, the Government itself classifies the documents into different levels, in order to identify the importance and the protection required to keep them secret. The classification is thus necessary for the convenience and protection. A system of classification may also be designed to ensure the proper physical security of the documents.[1]

Position in England

The Statement on the Recommendations of the Security Commission[2] presented to Parliament by the British Prime Minister in 1982, sets out the definitions of the four-fold classification in use in the United Kingdom, as follows:[3]

> "TOP SECRET: Information and material, the unauthorised disclosure of which would cause exceptionally grave damage to the nation. SECRET: Information and material, the unauthorised disclosure of which would cause serious injury to the interests of the nation. CONFIDENTIAL: Information and material, the unauthorised disclosure of which would be prejudicial to the interests of the nation. RESTRICTED: Information and material, the unauthorised disclosure of which would be undesirable in the interests of the nation".

---

1. Joseph Jacob, "Some Reflections on Government Secrecy", [1974] P.L. 25.
2. Cmnd. 8540 (1982), as quoted in Secretary of State v. Guardian Newspapers, [1984] 3 All E.R. 601 (H.L) at p.610.
3. Ibid.

Apart from classifying documents into different classes, there is another method--"D-Notices System", to keep low level defence information undisclosed. Here, the Defence, Press and Broadcasting Committee, which is composed of officials from departments concerned with defence and national security and representatives of the press and broadcasting organisations, issues "Defence Notices" to the editors that the Government regards certain categories of information as being secret for reasons of national security and asks the editors to refrain from publishing such information.[4]

The classified information may not be divulged to persons other than officials who are authorised to receive or inspect or see them. According to the relative importance of the information, the divulging may only be made to highly ranked official. Sometimes government agencies may even refuse to admit the existence of a document on the ground that information about the existence of the document is itself a classified information.[5]

The Frank's Committee on section 2 of Official Secrets Act recommended that the administrative system of

---

4. See Joseph Jacob, "Some Reflections on Governmental Secrecy", [1974] P.L. 25 at pp.30-31, n.23.
5. Phillipi v. C.I.A., 546 F. 2d. 1009 (D.C.Cir.), as quoted in Lindsay J.Curtis, "Freedom of Information: The Australian Approach" 54 A.L.J. 525 (1980) at p.534.

the classification may be maintained and those classifications which invite criminal sanctions may also be specified.[6]

Position in the United States

In the United States, Executive Order 12065 (1978) provides for the basis for classifying information. There are three classes: Top Secret, Secret and Confidential. The authority for classification of information as top secret may be exercised only by the President or by such officials he may designate by publication in the Federal Register, by the agency heads listed in the order and by officials to whom such authority is delegated under the Order. In the case of 'secret' and 'confidential' classification, the President does not come in. But the other three authorities classify the documents. The Order provides for this classification requirements as well as a procedure for declassification and down-grading. Under the new Executive Order 12356 (1982) information shall be classified as long as required by national security consideration and authorised officials may declassify or down-grade documents as soon as national security considerations permit.

---

6. Report of the Departmental Committee on Section 2 of the Official Secrets Act, 1911, Cmnd. 5104, H.M.S.O. (1972), p.47. For a model classification system, See William Birtle, "Big Brother Knows Best: The Frank's Report on Section Two of the Official Secrets Act", [1973] P.L. 100 at pp.111-14.

Position in India

The normal rule in the Government of India is secrecy and openness is an exception.[7] Government papers and documents are classified into two categories--"non-classified" and "classified".[8] In the case of the latter category, greater secrecy is observed.

The classified documents are divided into four categories, namely, 'Top secret', 'Secret', 'Confidential', and 'Personal--not for publication'.[9] The 'Top secret' grading is given to information of a vital nature affecting national security such as military secrets, matters of high international policy, intelligence reports etc. The 'Secret' status is given to documents containing information, which on disclosure is likely to endanger national security or cause injury to the interests or prestige of the nation or would cause serious embarrassment to the Government either within the country or in its relations with foreign nations. The 'Confidential' marking is given to information, whose disclosure would be prejudicial to the interests of the nation or gives advantage to a foreign nation or even causes administrative embarrassment. 'Personal--not for publication' is marked in cases where the information is fit for communication to the individual members of the public, but it is desired that the information given to him is not meant for publication.

---

7. M.P.Jain & S.N.Jain, Principles of Administrative Law, N.M.Tripathi, Bombay (4th ed., 1986), p.898.
8. Ibid.
9. Ibid.

The classification into the four categories of 'classified' documents, does not have any legal sanction.[10] It is a matter within the prerogative of the Government.[11] It is also doubtful whether there is any system of declassification.

Regarding the 'non-classified' documents also, secrecy is maintained. The rule is that no official may communicate any information to anyone which has come into his possession in the course of his official duties, unless so authorised by a general or special order. Also the note portions of a file are to be treated as confidential.[12]

A government servant is under an obligation not to disclose anyone including a fellow servant any information acquired by him during the course of his official duties.[13]

---

10. Ibid.
11. Ibid.
12. Ibid.
13. Rule 8 of the All India Services (Conduct) Rules, 1968, reads as follows:

    "Unauthorised Communication of Information- No member of the Service shall, except in accordance with any general or special order of the Government or in the performance in good faith of the duties assigned to him, communicate directly or indirectly, any official document or information to any government servant or any other person to whom he is not authorised to communicate such document or information.

    Explanation: Quotation by a member of the Service (in his representation to the Head of Office, Head of Department or President) of or from any letter, circular or office memorandum or from the notes or any file to which he is not authorised to have access or which is not authorised to keep in his personal custody or for personal purposes, shall amount to unauthorised communication of information within the meaning of the rule". The Rule is quoted from I.S. Mathur, A.S.Misra's Official Companion in Administration and Law, Eastern Book Co., Lucknow (2nd ed., 1979), p.241.

A violation of this rule will lead to disciplinary action. He is also subjected to other laws such as, the Official Secrets Act, 1923.

Conclusion

The secrecy required for a document depends upon the time and circumstances. Usually, after a certain period of time, the secrecy in many classified documents may be lost. Thus requires a system of declassification where the classified documents are again tested with the requirement of secrecy at that time. Sometimes, the document may still be in need of protection and sometimes not. In certain cases, 'top secret' may be replaced by 'secret' and 'secret' by 'confidential' and so on. A full-fledged system of declassification requires great efforts and expenses.

Classification may be made by experienced and highly ranked officials. Classifying a document means non-disclosure to the public and so a great impediment before one's right to information. The most negative aspect of classification is the overclassification. The officials may take a safe path in all cases of slightest doubts by classifying such documents preventing public access to them.

Since secrecy is inevitable in governmental functioning, classification also becomes inevitable. But openness in governmental functioning seems to be strong public interest countering the secrecy interests. To safeguard openness, classification however cannot be made openly. What is required then is to evolve the policies and criteria of classification by the executive itself and to publish them. The executive then may be required to stick to its own rules. A quasi-judicial body within the executive may hear complaints against classification. The judicial intervention may however be resorted to only later.

Chapter 7

JUDICIAL REVIEW

Where an authority rejects a request for a certain document, the remedy available before a litigant is either to make an appeal before the higher administrative authority and, on a further refusal, to seek the help of the judiciary for a review of the administrative refusal. In such cases, the reviewing court has to decide on various issues such as, balancing of conflicting interests, the final authority on disclosure issues, in-camera inspection, the onus in asserting the privilege, locus standi to assert the privilege, and loss of privilege. In this chapter, all these areas are separately dealt with.

A. Balancing of Conflicting Interests

In a case, it is possible to have different public interests, often conflicting ones. Where the case is related to the area of the right to freedom of information, these conflicting interests will boil down to two: the necessity of secrecy in a department for efficient functioning, and the other, the interest that justice to an individual be administered to the maximum extent possible. The extent of interest in non-disclosure varies from case to case.

Balancing of conflicting interests is not an easy process. There are areas such as national security, defence affairs, diplomatic relations etc., in which the courts are not in a position to ascertain the relative public interests, due to the lack of experience and expertise in those fields. In such cases, naturally, the courts may depend on the views of the authorities. However, in other cases, it may be possible for a court to analyse the documents and the different public interests involved. The courts may thus weigh the interests and balance the competing interests to arrive at a decision on the disclosure issue, of course, paying respect to the particular fact-situations of the case.

However, where there is a statute which provides for the disclosure of documents, the role of the court changes in respect of the balancing process.

Statutes and Balancing Process

There are a lot of statutes which restrict the flow of information or which keep certain information secret.[1] Such a statute is a potential barrier to the use of the information in the court room. Much of the statutorily protected information was also formerly protected under the Crown privilege. Thus arises the question of how the two

---

1. See section 18 of the Atomic Energy Act, 1962; section 15 of the Census Act, 1948; section 5 of the Official Secrets Act, 1923, etc.

sources of protection interact. Ian Eagles provides for three possible approaches to the question.[2] Under the first approach, once a statute is enacted, the common law vacates the field and thus protection may be found in the statute alone and not anywhere else. Under the second one, the statute and public policy are contained in mutually exclusive compartments. The only point of contact between them is that they relate to the same item of evidence. Under the third approach, there is a symbiosis between statute and common law. There the statute constitutes a new head of public policy and common law attributes are absorbed into the statutory privileges. Finally, Eagles comes to the view that it is impossible to trim or tame a statutory privilege by reference to the public interest.[3] That is, once a privilege has been created under a statute, the common law can only contain or extend, but cannot contract that privilege.[4]

In fact, every secrecy statute is enacted by the legislature after weighing the competing public interests, and finding in favour of non-disclosure. Since the right to information is a basic need, to proceed upon any right, it is not wise to allow such wide powers to the legislature enabling it to shut out any kind of information. Paying respect to the

---

2. Ian Eagles, "Public Interest Immunity and Statutory Privilege", [1983] C.L.J. 118 at p.140.
3. Ibid.
4. Ibid.

balancing process at least where a person requires a document to establish one of his rights or to defend himself. It may be noted that the balancing by the courts is quite different from that of the legislature. While a legislature may decide solely on the basis of the Government's policies, the courts may decide only on the basis of legally acceptable justifications. The cabinet, the highest tier of the executive is from the legislature and evidences bias of the executive in a statute passed by the legislature.

The position of law in the United States, England and India may now be considered briefly.

Position in the United States

The Supreme Court in Reynold's case[5] opined that the court could decide the question as to the dangerous character of the document after considering the views expressed by the agency. Only where the court is satisfied, the privilege will be allowed.[6] The role of the judiciary, however, changed considerably after the introduction of the information statute.

By way of enacting the Freedom of Information Act with specific exemptions, the legislature in fact balanced the competing interests. The duty then left to the courts is to interpret the provisions of the Act. However, a

---

5. 97 L.Ed. 727 (1953).
6. Id. at p.734.

question may arise whether the courts may exercise their discretion to permit withholding of documents even though no provision of the Act expressly provides for such withholding. Ordinarily courts have powers of equitable jurisdiction, for they are traditionally envisioned as a part of Congress in clarifying the meaning and application of broad principles in specific factual contexts. The Freedom of Information Act contains language pointing to restrictive judicial role in interpreting the scope of exemptions.[7] If equitable discretion is allowed the courts will be able to bring in new exemptions. This may upset the legislative resolution of conflicting interests. Problems arise only when the judiciary faces a new situation which is not foreseen by the Congress but which requires an adoption of non-disclosure policy in the public interest.

Position in England

In England, formerly the attitude of the court was to accept the affidavit submitted by the Minister or Head of the Department regarding the question of disclosure of the contested document.[8] Thus, the balancing process was left to the executive. However, later in Conway v. Rimmer[9], the

---

7. Sub-section (c) of the Freedom of Information Act reads as follows: "This section does not authorise withholding of information or limit the availability of records to the public except as specifically stated in this section. This section is not authority to withhold information from Congress."
8. See Duncan v. Cammell Laird & Co., [1942] A.C. 624.
9. [1968] 1 All E.R. 874 (H.L.).

position was changed. The House of Lords, rejecting the principle of Duncan, ordered for the production of documents in order to see whether there would be any harm to the public interest on their disclosure. It does not mean that a court would reject a Minister's views. Due weight will be given to them. If the Minister's reasons are relevant and are of a character which judicial experience is incompetent to weigh against the individual's need for the documents, naturally the Minister's view may be allowed to prevail.[10] However, whether the court is competent or not to weigh the different interests, will be decided by the court itself.

Position in India

In India, section 123 of the Evidence Act deals with the balancing of the competing public interests. Earlier the courts held the view that under section 123, the court had no other way but to accept the views of the Minister.[11] However, this was changed after the Judge's Transfer case.[12] Where an objection is raised under section 123, the court has to determine two questions. Firstly, it is whether the document relates to the affairs of State and, secondly, it is whether the disclosure of that particular document would be injurious to the public interest. In reaching its decision, the court has to balance the two competing aspects of public

---

10. Id. at p.888.
11. See State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493.
12. S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149.

interest, namely, injury to the interests of public service and injury to the fair administration of justice. This balancing between the two competing interests has to be performed by the court even when an objection is made on the ground that the document belongs to a class of documents irrespective of the contents. The reason is that there is no absolute immunity for documents belonging to such class.[13]

Section 123 does not expressly refer to injury to the public interest. In Sukhdev Singh case,[14] it was observed that the principle implicit in section 123 is that a document shall not be allowed to be produced in court if the production would cause injury to the public interest and, where a conflict arises, the public interests in non-disclosure shall prevail.[15] This formulation of the principle was later rebutted by Bhagwati, J., in the Judge's Transfer case.[16] It was observed that, in cases of two competing public interests, it was the court to find a balance between them in order to decide which dominates over the other.

The inconsistency of the view taken by the Sukhdev Singh Court was later explained by Bhagwati, J.[17] According to the Sukhdev Singh court, it was for the court to determine

---

13. Id. at p.240.
14. State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C.493
15. Id. at p.501.
16. S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149 at p.235.
17. Id. at p.236.

whether the disputed document was a document relating to the 'affairs of State'. At the same time, for this purpose, the court could not inspect the document or hold an enquiry into the possible injury to the public interest on disclosure of the document.[18] According to the Sukhdev Singh decision, the court would have to reach the conclusion that the disclosure of the document would be injurious to the public interest before it could find that the document related to affairs of State. Then, it becomes doubtful as to what purpose would be served by reserving to the head of the department the power to decide the question of disclosure, where the same question has been practically answered by the court. If injury to the public interest is the foundation of the immunity from disclosure, when the court has once inquired into the question and found the disclosure injurious to the public interest and therefore it is a document relating to the 'affairs of State', it would be a futile exercise for the head of the department to decide once again the question of disclosure and injury to the public interest.[19] Also, it is doubtful for the head of the department to permit the disclosure where the document is related to affairs of State and injurious to public interest. Finding it unable to accept Sukhdev Singh decision, the Supreme Court held that it would allow objection if it was found that the document related to the affairs of State and its disclosure would be

---

18. Ibid.
19. Id. at pp.236-37.

injurious to the public interest.[20] On the other hand, if the court finds that the documents are not related to the affairs of State or that the public interest in the administration of justice overrides all other aspects of public interest, the court will overrule the objection and order disclosure of the document.[21] Thus, the final decision on balancing of competing interests is to be made by the court and not by the administrative authorities.

Where a court is not well informed, the balancing process becomes a peripheral one and such a process is not advisable for deciding upon the rights of individuals. The only thing which is required may be the establishment of the relevance of the documents to the case. Only when this relevance is rebutted strongly by the administration beyond any doubt, the court may decide not to examine the documents.

After the examination comes the balancing stage. At this stage, it is the duty of the court to weigh the competing interests for concealment and disclosure. If the court finds that no harm will be caused to the public interest, it may order for production. Apart from the relevance of the document, the court may consider whether the production of document and inclusion of it among the evidence arecapable of tilting the case to the applicant. If so, the court may

---

20. Ibid.
21. Ibid.

then consider the harm which may possibly be caused by disclosure. The court may decide then which interest would overhelm the other. So, unlike at the inspection stage, at the production stage, two more criteria come in—the chances of tilting the case in favour of the applicant and, the harm which may result on disclosure. It is the second criterion which is more important.

Conclusion

Balancing of the competing interests is not an easy process. Sometimes courts will have to accept the views of the experienced executive. In all other cases, however, the court is the better forum compared to the Minister. The Minister will be more concerned with the assertion of injury to the public interest on disclosure. Though a Minister is also a representative directly elected by the people, he need not have more concern with the public interest in the fair administration of justice. In reality, he is not in a position to appreciate and assess the relative importance of the two kinds of interests. On the other hand, the court is in a position of greater independence. The role of State as a guardian of public interest is also undoubted. In proper time, the court may, where it finds any doubt, raise this question of public interest involved so that the Government could make objection in time thereby not allowing to injure the public interest. The court may thus keep its position of independence also.

In cases of conflicts of interests before a court, they had to be balanced before coming to the final decision. The judiciary being an impartial and disinterested forum, it is the right body to weigh the public interests. On the other hand, if it is done by the executive—one of the parties to the suit—it will be against the second principle of natural justice. It will also cast doubts in the minds of the litigant as well as the public.

For a balancing process to be successful, co-operation and understanding between judiciary and executive is necessary. The executive may raise objections only after a careful perusal of the documents by senior officials. From the court's part, it may order production only where it is necessary to proceed the case and the public interest in the administration of justice outweighs the other interests. The orders by the court to produce documents may also show the reasons or necessity for the production in the open court or in the chamber.

B. Final Authority on Disclosure Issues

There has always been a conflict between the executive and judiciary, as to, who is the final authority to determine the disclosure issues. The arguments in favour of the executive are based on its experience and expertise. For

the judiciary, the arguments are based on the independent position of the courts[22] and the fact that balancing of interests is a judicial function, for it affects the rights of the individuals.

Where a request for information reaches a head of the department, he may well be advised to refuse it. He will not have enough time to make a thorough personal study of the request. Also, he knows that his decision normally will not be reviewed. The administrative inconvenience plays a greater role in withholding of necessary information. To withhold information, where the public interest ranges from "non-existent" to "not very compelling", is a serious default in the citizenship responsibilities of the officers of administration.[23]

Now, it will be fruitful to have a brief discussion on the position of law in England on the issue of final authority. The position in India and the United States is also considered thereafter.

Position in England

It was not until 1860, the question as to the final authority on disclosure issues was expressly considered.

---

22. See Note, "Discovery from the United States in Suits between Private Litigants: The 1958 Amendment of the Federal House-keeping Statute", 69 Yale L.J. 452 (1960) at p.458.
23. Paul Hardin, "Executive Privilege in the Federal Courts", 71 Yale L.J. 879 (1962) at p.887.

In Beatson v. Skene,[24] for the Court of Exchequer, on a motion for a new trial of an action for slander, Pollock, C.B., answered the question in the following words:[25]

> "It appears ...that the question ...must be determined not by the judge but by the head of the department having the custody of the paper; and if, he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any state or nation, and we think is (with respect to the production or non-production of a state paper in a court of justice) subordinate to the general welfare of the community".

Thus, the Court had full faith in the balancing made by the executive. The Court had never thought of a private examination of the document. However, one of the judges did not entirely agree with the majority expressed by Pollock, C.B. Justice Martin was of the opinion that a judge shall compel the production of a document, notwithstanding the reluctance or objection of the head of the department, whenever he is

---

24. 157 E.R. 1415 (1860).
On one occasion before Beatson v. Skene, the Attorney General had made an objection to the production of certain books by the Bank of England in Heslop v. Bank of England, (1833) 6 Sim. 192. In this case, the objection was not expressly so taken although in essence taken with regard to public interest, was disallowed. See D.H.Clark, "Administrative Control of Judicial Action: The Authority of Duncan v. Cammell Laird", 30 M.L.R. 489 (1967) at p.494.
25. Id. at pp.1421-22.

satisfied that document would not prejudice the public service on disclosure.[26] Justice Martin found such instances only in extreme cases.[27]

The difference of opinion, seen in the Beatson's case,[28] seems to have been the first signal for the transfer of power from the executive to the judiciary. Later, in Hennessy's case,[29] Field, J., observed that he was entitled to examine the documents privately in order to ascertain the injury to the public service.[30] However, the Court did not examine the documents because it sufficiently appeared that the documents were privileged from discovery.[31] In 1900, In Re Joseph Hargreaves Ltd.,[32] Williams, L.J., observed that

---

26. Ibid.
27. Ibid.
28. Ibid.
29. Hennessy v. Wright, 21 Q.B.D. 509 (1888).
30. Id. at p.515.
Referring Beatson v. Skene, Field, J., said:
"I do not feel the difficulty which appears to have weighed with the majority of the Court and that should the head of a department take such an objection before me at nisi prius I should consider myself entitled to examine privately the documents to the production of which he objected, and to endeavour, by this means and that of question addressed to him to ascertain whether the fear of injury to the public service was his real motive in objecting". (Ibid.)
31. Though Field, J., expressly asserted the power of the Court, his brother judge, Wills, J., was not in favour of him in giving a residual power to object to the production of documents. Wills, J., said:
"The question whether or not in the public interest, production of the document should not be allowed is so far a matter of State rather than of legal decision, but it is within the undoubted competence of the responsible Minister of the Crown by taking the proper steps to interfere and raise an objection to which every tribunal would be certain, to say the least to pay respectful attention".
Id. at p.522 .
32. [1900] 1 Ch. 347 (C.A).

the judges had a discretion to accept or reject a ministerial objection to produce documents.[33] However, the Court of Appeal was not altogether with him.[34]

The development from the dissenting voice of Justice Martin to Justice Williams has been somewhat steady. A good background was made for the later courts to take a firm decision on the issue. By this time came Nottingham Corporation's case,[35] in which an injunction was sought against the local authority to restrain one from using a building as a small-pox hospital. The medical inspector of the Local Government Board declined to produce a report on the hospital which he had made to the Board. It was held that the Court would not overrule the President of the Local Government Board who had instructed the doctor not to produce the report.[36] Thus, a halt was put to the enthusiasm shown by the former judges. Later, in Ankin's case,[37] the Court of Appeal held that the position in England was to accept the opinion of the Minister. However, the Court agreed that the position in Scotland was different where the court could examine the documents and also that there was no harm in such a procedure.[38]

---

33. Id. at p.352.
34. Ibid.
    Lindley, M.R., without establishing any power, said in an unclearly form, as follows:
    "I do not intend to say what is the limit of the power of the court (if there is a limit) to order the production of such document as there." (Ibid.)
35. A.G. v. Corporation of Nottingham, [1904] 1 Ch. 673.
36. A surprising feature of the case is regarding the way in which the objection was conveyed to the court. The doctor simply stated from the witness box that his superiors had instructed him not to reveal the contents of the report.
37. Ankin v. London and North-Eastern Railway Co., [1930] 1 K.B. 527.
38. Id. at p.533.

An year later, one of the celebrated decisions in this area was decided. In Robinson's case,[39] the Judicial Committee of the Privy Council recommended that it was proper for the exercise of the Court's power to inspect the documents in order to determine whether the facts discoverable by the production would be prejudicial to the public welfare though privilege was claimed for the same documents. However, this case could not make any effect on the English law because the Privy Council's opinions were not binding on English courts. In 1942 came another important decision

---

39. Robinson v. State of South Australia, [1931] A.C. 704.
The position in Australia before Robinson may be given here briefly for a better understanding. In 1905, in Commonwealth v. Baume, 2 C.L.R. 405, the High Court of Australia held that it would not require the production of documents which, in the opinion of the Minister, would be detrimental to the public interest (at pp.416-17). Later, in a tort case, Commonwealth v. Miller, 10 C.L.R. 742 (1910), the High Court allowed the right of an individual for discovery against Commonwealth as in a suit between subject and subject. In Marconi's Wireless Telegraph Co. v. The Commonwealth, 16 C.L.R. 178 (1913), the High Court found that the Court could not abdicate its duty and refuse to examine the documents. Thus the Court could inquire into the facts so as to ascertain the nature of the State secret. Thus, the control of the executive on the disclosure issues was lessened. However, later in Griffin v. South Australia, 36 C.L.R. 378 (1925), the High Court followed Beatson v. Skene, 157 E.R. 1415. In the dissenting voice, Starke, J., opined that the court should use its power to inspect the documents privately (at p.402). Starke, J., observed as follows:
"No one has suggested that the interests of the public are such that a judge ought not to see the documents; and if such an allegation be ever made, the court would, without doubt fully protect the public interests and do nothing to imperil them" (at p.402).
Later, Robinson's case, the facts of which were quite similar to Griffin's case, disapproved the latter case.

Duncan's case.[40] The House of Lords expressly held that a subject had no right to discovery against the Crown.[41] Viscount Simon observed that judges did not know the conditions under which the production of document would not be injurious to the public service, and at the same, that the departments knew the public exigencies better than the courts.[42] Thus, Duncan's case completed the process of submitting the power to balance the competing interests to the executive, leaving the judiciary as a mere by-stander.

Duncan's case ruled the field till the decision of Conway v. Rimmer.[43] A lot of cases were decided following Duncan.[44] While most of them blindly followed Duncan rule, in certain cases, certain judges showed their unhappiness toward the Duncan's rule. A less submissive attitude was first manifested by Cross, J., in In Re Grossvenor Hotel London Ltd. (No.2).[45] It was pointed out that Duncan's rule had established that only a 'validly taken' objection was final, leaving the question of requisite procedural

---

40. Duncan v. Cammell Laird & Co., [1942] A.C. 624 (H.L.).
41. Id. at pp.632-33.
42. Id. at p.640.
43. [1968] A.C. 910 (H.L.).
44. See Ellis v. Home Office, [1953] 2 All E.R. 149 (C.A.); Broome v. Broome, [1955] 1 All E.R. 201 (Ch.D.); Auten v. Rayner, [1958] 3 All E.R. 566 (C.A.); Gain v. Gain [1962] 1 All E.R. 63 (C.A.) etc.
45. [1965] 1 Ch. 1210.

formalities open.[46] Lord Salmon in another case,[47] questioning the precedential value of Duncan's rule, observed that Lord Simon's opinion was only an obiter and also that it was time to reconsider it.[48]

The departments under the strength of Duncan's rule started to adopt a usual pattern of certificate requesting that a particular document belongs to a class of documents which it is necessary in the public interest, for the proper functioning of the public service, to withhold from production.[49] Criticising such patterns of certificates, Lord Denning observed that such a procedure made all the documents taboo.[50] In such a procedure, the court is forever

---

46. Id. at p.1244 per Lord Denning. Lord Denning also observed:
"There always has been, and is now in Scotland, an inherent power of the court to override the Crown's objection,... in my judgement, the law of England should be brought into line with that of Scotland in this matter, and with the rest of the Commonwealth. The objection of a Minister eventhough taken in proper form should not be conclusive. If the Court should be of the opinion that the objection is not taken in good faith, or that there are no reasonable grounds for thinking that the production of the documents could be injurious to the public interest, the court can override that objection and order production. It can, if it thinks fit, call for the documents and inspect them itself so as to see whether there are reasonable grounds for withholding them ..." (at p.1245).
47. Merricks v. Nott-Bower, [1964] 1 All E.R. 717 (C.A.).
48. Id. at p.726.
49. Id. at p.722.
50. Ibid.

blindfold.[51] On another occasion,[52] Lord Denning opined that the words "the proper functioning of the service" was not enough to allow privilege.[53] It is in this background Conway v. Rimmer was decided.

In Conway v. Rimmer,[54] the certificate produced by the Home Secretary merely said that the production of documents of the class to which referred, would be injurious to the public interest. It did not say about the degree of injury apprehended. The House of Lords held that there was no constitutional impropriety in enabling the court to overrule a Minister's objection.[55] The court was held to be entitled to exercise a power and duty to hold a balance between the two public interests.[56] The inherent power of the court was held to include a power to ask for a clarification or amplification of an objection or a power to examine the documents privately.[57] Thus, Duncan's case was overruled and the power of the court to reject a Minister's objection and to examine the documents was established. And this continues to be the law in England.

---

51. Ibid.
52. Wednesbury Corporation v. Ministry of Housing and Local Government, [1965] 1 All E.R. 188 (C.A).
53. Id. at p.190.
    In this case, Lord Denning declared that the affidavit submitted in the common form was insufficient in itself for allowing the privilege. However, the issue did not become hot because the documents were not at all necessary for the disposal of the case.
54. [1968] A.C. 910 (H.L).
55. Id. at p.951 per Lord Reid.
56. Id. at p.952 per Lord Reid.
57. Id. at p.971 per Lord Morris of Borth-y-Gest.

Position in India

The question as to who is the final authority on disclosure issues has also come up before the courts in India. In Sukhdev Singh's case,[58] it was held that under the privilege conferred on the executive by way of section 123, Evidence Act, a document need not be produced in the court, if in the opinion of the Minister, the production would cause injury to the public interest. However, later in Judges Transfer case,[59] rejecting the Sukhdev Singh opinion, it was held that the question of injury to the public interest would be decided by the court.

Position in the United States

In the United States, section 22 of the House-keeping statute[60] had a substantial role in providing the executive much discretion in disclosure matters. It was the judiciary itself which interpreted the section wrongly to the advantage

---

58. A.I.R. 1961 S.C. 493.
59. A.I.R. 1982 S.C. 149.
60. Rev. Stat. § 161 (1875). It reads as follows:
"The head of each department is authorised to prescribe regulations, not inconsistent with the law for the government of his department, the conduct of his officers and clerks, the distribution and performance of its business and the custody, use and preservation of records, papers and property appertaining to it". Later in 1958 the section was amended by adding one sentence. "This section does not authorise withholding information from the public or limiting the availability of records to the public". See 5 U.S.C. 22 (1958). Now 5 U.S.C. 301 (1970).

of the executive.[61] However, in Reynold's case,[62] the Supreme Court, correcting the mistake, declared that it was judiciary to decide whether a document is privileged or not, and for that purpose an in-camera inspection could also be made.

After the introduction of Freedom of Information Act, the position is more or less clear. The Act provides for a de novo review of a refusal of an application for disclosure of a document.[63] De novo review implies the power of the court to take relevant evidence and to exercise independent judgement as to whether a particular document is exempted under the exemption provisions of the Act. In fact, by

---

61. See, Boske v. Comingore, 44 L.Ed. 846 (1900); and United States of America; Ex.Rel.Roger Touhy v. Joseph E.Ragen, 95 L.Ed. 417 (1951).
62. United States of America v. Patricia J.Reynolds, 97 L.Ed. 727 (1953). See also United States v. Nixon, 41 L.Ed. 2d. 1039 (1974). In the later case, the Supreme Court did not allow the confidentiality interest argued by the President to be over and above the interest to do justice in a criminal case. Normally President would seem to be better equipped than the courts to balance the interests in prosecuting criminals. First of all, protection of public interest in prosecuting criminals is generally viewed as the responsibility of the executive. Also, executive will be more sensitive to the effect of disclosure which effects the ability to elicit candid advice. Thus, arguably President has a greater expertise in determining the manner in which criminal prosecutions should be made. But the unique facts of the case proved that judiciary was better qualified to weigh the interests. Many of the accused were close associates of the President. Natural emotions of gratitude and loyalty could possibly undermine the President's ability to reach a right evaluation. See Note "The Supreme Court 1973 Term", 88 Harv.L.Rev. 41 (1974) at p.59.
63. 5 U. S. C. 552(a)(4)(B).

specifically providing the exemptions in the Act, the legislature had done a good job to avoid conflicts between judiciary and executive. Now, conflicts may arise only as to whether a document is exempted under the Act to which de novo review confers full power to the courts.

Under the Act, the courts are the final arbiters. Their posture is one of disinterest, ensuring a more balanced appraisal of the merits of the claim. An objection in this regard is the utilisation of the equity power by the courts, because a 'not-so-proper' exercise of discretion may subvert the effective thrust of the Act.[64] But, it may be noted that discretion could only be exercised having in mind that the very purpose of the Act is itself maximum disclosure to the public.

Conclusion

From the experience and expertise, the executive argues that it is a more suitable body to judge whether disclosure of a document is detrimental to the public interest or not. But it may be noted that courts reasonably do a good job in the patent cases where determination of technical issues involve.[65] More serious than the complexity is the chance that national security or defence may be threatened on disclosure. Here reflects the executive's view that protection

---

64. See Note, "Freedom of Information Act: A Seven Year Assessment", 74 Colum.L.Rev. 895 (1974) at pp.918-19.
65. Berger & Krash, 'Government Immunity from Discovery' 59 Yale L.J. 1451 (1950) at p.1463.

of government secrets cannot safely be handed over to the courts. But it is a mistaken belief.[66] In fact, judiciary enjoys more respect than the executive. Moreover, to insist that relevant documents must be disclosed to the court is not to disparage the administrative expertise and experience. Finally, when executive decides the issue of disclosure, there is a violation of the second principle of natural justice. It will definitely cast doubts in the minds of litigants and the public. The judiciary, being impartial and disinterested, is the right body to decide such cases of conflict finally.

C. In Camera Inspection

When the court itself is in doubt about the harm which may be caused to the public interest on disclosure of the document, in camera inspection arises. To avoid injury to the public interest, the courts adopt the measure of in-camera inspection where the requester may not be shown the documents. In fact, a decision affecting an individual litigant is being made without allowing the litigant any access to the document.

A court has two separate jurisdictions which enable it to inspect the documents to which privilege is claimed. It may inspect any document in order to see whether the documents match the claims made for them. If the claim is formally

---

66. See Note, "Executive Immunity from Judicial Power to Compel Documentary Disclosure", 51 Colum.L.Rev. 881 (1951) at p.888

correct and sufficiently identified, the court may accept the claim without going further and inspecting the documents.[67] A second basis for the inspection is the balancing test which follows from the assumption of jurisdiction that a court may have to make a value judgement by way of balancing the competing public interests.[68]

There are two grounds upon which a court may inspect the documents on which privilege has been claimed.[69] Where the Minister's certificate and affidavit do not adequately detail the nature and status of the documents, the court may inspect them. Also, where the certificates are not determinative of the balance between the competing public interests, inspection may be made.

The inherent powers of a court may include a power to ask for a clarification of an objection to the production of documents. Such a power includes a power to examine the documents privately also. But it may be exercised sparingly and operated as a safeguard against the executive's abuse of discretion.

The power to inspect documents may be exercised by the court carefully. Although the court has such a power the question whether to exercise it may be treated as one for

---

67. This was done in Duncan's case, [1942] A.C. 624 (H.L).
68. See Robinson v. State of South Australia, [1931] A.C. 704 at p.725 (P.C); and, Conway v. Rimmer, [1968] A.C. 910 (H.L)
69. See J.Stephen Kos, "Crown Privilege:Recent Developments in New Zealand", 10 V.U.W.L.R. 115 (1979-80) at p.119.

the discretion of the judge. The power may be exercised if there are reasons to doubt the accuracy of the certificate or the cogency of the reason given by the Minister or where a strong positive case is made out by the litigant. The documents may be inspected, if found necessary, to form the opinion as to the public interest involved.[70] Inspection may not be made unless the court is persuaded that it is likely to satisfy the court that it ought to take the further steps of ordering production of documents.[71] An individual litigant may be required to convince the court that the documents to which privilege is claimed is likely to help the court in deciding the issue in his favour. If convinced, the court may make an order to produce documents, fully or partially, and inspect them before disclosing them to others.

The question then arises is the degree of burden of proof required from the applicant. According to Lord Wilberforce the applicant has to make out a strong positive case.[72] It may not inspect on a fishing or speculative request. Lord Fraser on the other hand introduced a likelihood test, where the applicant must show that the document was likely to help his own case.[73] There must be a reasonable probability that

---

70. In Re Grosvenor Hotels Ltd., [1965] 1 Ch.1210.
71. Air Canada v. Secretary of State for Trade (No.2), [1983] 1 All E.R. 910 at p.916 per Lord Fraser.
72. See Burmah Oil Co. v. Bank of England, [1980] A.C. 1090 at p.1117.
73. Air Canada v. Secretary of State for Trade, [1983] 1 All E.R. 910 at p.916.

it is beyond speculation and fishing. In a different way Lord Scarman supported the likelihood test. He was of the opinion that he would not inspect the documents unless there was a likelihood that documents would be necessary for disposing fairly of the case or saving costs.[74] Whether the stricter test by Lord Wilberforce or the liberal one by Lord Fraser— there is a preliminary onus on the applicant.

A Canadian case may be referred to here regarding the burden of proof.[75] In it, the appellant contended that once the relevance of the documents has been demonstrated to the satisfaction of the court, the presumption should be in favour of production, with the onus then on the executive to provide a sufficient reason why the documents should not be disclosed. Rejecting this contention, the Court of Appeal framed an elaborate and demanding onus requirement. At the inspection stage, the applicant may persuade the court that the documents are likely to provide evidence and will substantially assist the applicant. The issue to which documents are relevant may be one of real substance in the litigation. Again, without production of the documents, there may be reason to believe that the existance of the facts to be established is unlikely to be capable of being proved by

---

74. Id. at p.924.
75. In Re Carey and the Queen, (1983) 1 D.L.R. (4th) 498 (Ont. C.A), as quoted in D.C.Hodgson, "Recent Developments in the Law of Public Interest Immunity: Cabinet Papers", 17 V.U.W.L.R. 153 (1987) at p.167.

other means. However, these formulations were rejected by the Supreme Court where it preferred an approach that merely required the applicant to establish the relevance of the document. The reason was that the applicants who will not have seen the documents, cannot be expected to know the nature and content of the documents precisely. The Supreme Court's view seems to be reasonable for it is unfair to require an applicant to make a comprehensive case for the production.

Now we may refer to the position of law in this regard in the United States, England and India.

Position in the United States

In the United States, under the Freedom of Information Act, on a complaint that information is improperly withheld by an agency, the district court examines the records in-camera in order to determine whether such records shall be withheld under the specified exemptions given under the Freedom of Information Act.

Position in England

Earlier, the practice was to accept the affidavit submitted by the Minister totally.[76] Later, in Conway v. Rimmer,[77] the House of Lords, rejecting the Duncan rule, held

---

76. See Duncan v. Cammell Laird Co.Ltd., [1942] A.C. 624 (H.L)
77. [1968] A.C. 910.

that for the purpose of balancing the competing public interests, the courts could generally have a right to inspect the documents without showing them to the parties.[78]

Position in India

Regarding inspection of documents by the court, in Sukhdev Singh's case,[79] it was held that where an objection had been raised against the disclosure of a document under section 123 of the Evidence Act, the court had no power to inspect the document under section 162 of the Evidence Act, for the purposes of deciding the objection. However, later decisions detracted from the Sukhdev Singh rule. In Amarchand Butail's case,[80] the Court did inspect the documents regarding certain contracts in order to see whether they were related to affairs of State. Later, in Raj Narain's case,[81] when an objection was made under section 123 against disclosure of the Blue Book, it was held that the court could inspect the documents if it was not satisfied with the affidavit submitted by the Minister. Finally, in Judges Transfer case,[82] the Supreme Court emphatically established the power of the court to inspect documents. The Supreme Court observed:[83]

---

78. The House of Lords thus accepted the dictum of Martin, B., in Beatson v. Skene, 157 E.R. 1415 (1860), p.1422; and, Field, J., in Hennessy v. Wright, 21 Q.B.D. 509 (1888) at p.515.
79. State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493. The Court followed the Duncan's case.
80. Amarchand Butail v. Union of India, A.I.R. 1964 S.C. 1658.
81. State of U.P. v. Raj Narain, A.I.R. 1975 S.C. 865.
82. S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149.
83. Id. at p.244.

"It is true that under S.162, the Court cannot inspect the documents if it relates to affairs of State, but this bar comes into operation only if the document is established to be one relating to affairs of State. If however there is any doubt whether the document does not relate to affairs of State, the residual power which vests in the Court to inspect the document for the purpose of determining whether the disclosure of the document would be injurious to public interest and the document is therefore one relating to affairs of State is not excluded by S.162. Thus if there is any doubt regarding the injury to public interest the court can inspect the document under its residual power."

Under section 123, the officer has the discretion to give or withhold the documents "as he thinks fit". In the present era the term "as he thinks fit" means as he reasonably thinks fit. The reasonableness of the decision taken by the officer can be examined by the court under the powers of judicial review. In a review, the court may inspect the documents in camera where it is found necessary. Otherwise the review becomes a farce.

Under section 124, the court may look into whether the communications are actually made in official confidence. An executive decision that disclosure of a document injures public interest can be reviewed by the court. If found necessary, an inspection may also be made.

Under section 162, if the document refers to matters of State, the court may decide the issue without inspecting the documents. However, it may take into account other evidences available in order to decide the privilege claim. First of all, it is nowhere stated in the section or elsewhere in the Act that the Government's assertion that a document refers to matters of State is conclusive or final or could not be challenged. If any doubt arises in this regard, the court may first determine whether the Government has made a legitimate claim, ie., the document is really referred to matters of State. If the document does not refer to matters of State, the claim for privilege may be rejected. Secondly, the very purpose of allowing protection to the document is to avoid any detrimental effect to the public interest on disclosure of them. The documents relating to matters of State get that status only when they are capable of injuring the public interest on disclosure. An inspection may be made only on the satisfaction of such a primary condition. It is unfair to think that disclosure to the court alone would cause detriment to the public interest. Thus, where a court finds that no public interest will be injured on disclosure after a careful examination in camera, the document may lose its status as 'matters of State' and thus the claim of privilege also.

Conclusion

Since openness is the fundamental rule in the judicial proceedings, in earlier periods, courts might have thought what is disclosed to the court shall also be disclosed to the parties. Inspection by the court alone might have been thought to be inappropriate. But now, inspection by the court is accepted as a solution for the necessity to keep certain information secret and the need for the administration of justice. Even if the court decides in favour of non-disclosure after an in camera inspection, it provides for a satisfaction to the parties because such a decision is taken by an impartial and independent body. In camera inspection also shows the acceptance of the concept that justice must not only be done but also seen to be done.

Regarding the power of the court to inspect documents in camera, it is always better not to limit this discretionary power. Such a power arises from the court's duty to render justice. Thus, even self-restraint on the part of the court is not desirable, for it always will be at the cost of justice. Moreover, through the inspection, a balancing of conflicting interest is made. It is said that the court is not deciding any lis between the parties by way of deciding for or against an in camera inspection.[84] But it may not be

---

84. Conway v. Rimmer, [1968] A.C. 910 at p.996 per Lord Upjohn

true in all respects. Certain documents may be crucial for a person to assert his right or to defend himself. A negative answer from the court, in effect takes away his rights or makes him liable. So the decision of the court regarding inspection is a judicial one. Again, where a suit is for the disclosure of a document, no doubt the lis is regarding the disclosure itself.

D. Standing to Assert the Public Interest Privilege

Ordinarily, a question of public interest privilege arises when the Government objects to the production of certain document sought for disclosure by the individual parties to the suit. The Government, as a custodian of the public interest, definitely is the right person to object to the disclosure of the documents. The standing of the Government in this regard is undoubtedly accepted. However, apart from the Government, there may arise situations in which certain other persons may be given standing to do the same, especially where the disclosure is harmful to them or where the Government improperly waives the privilege. It will be fruitful to discuss the position of law on the topic in England, the United States and finally, India, before we arrive at a conclusion.

Position in England

After the change in the name of the privilege—from Crown privilege to public interest immunity or public interest

privilege[85] - there arose a problem as to who may assert the privilege. There is no doubt that the executive is a suitable and desirable body to assert the privilege. Where a responsible Minister states that disclosure of a document may jeopardise public safety, it is inconceivable to any court to make an order of production without having second thoughts over the issue. The experience and expertise of the executive enables it to predict the harmful consequences of disclosure more than anybody.

The role of a judge is also important in this regard. The court may be allowed to raise questions of public interest so that the Government may make a formal objection. Such a procedure may be helpful where the Government fails to object the production in time. Again, in a suit between the private parties, the executive may miss the chance to object the production of a document or it may be late in doing so. In such situations, the court may bring the matter to the notice of the Government to make a formal objection.[86]

Local authorities,[87] and other government controlled bodies[88] may also successfully claim privilege. Such bodies

---

85. See Rogers v. Home Secretary, [1972] 2 All E.R. 1057 (H.L).
86. Judiciary's role may be limited to this extent. Otherwise the judiciary becomes an interested party in the issue and loses it independance and impartiality.
87. In Re D(Infants), [1970] 1 All E.R. 1088(C.A).
88. Rogers v. Home Secretary, [1972] 2 All E.R. 1057 (H.L). In this case, the gaming board was allowed to claim privilege.

either function on the basis of a statute or under the government departments. There is necessary control over them from the Government.

There may arise situations where privilege may be allowed even to bodies which are neither statutory nor an agency of central or local authorities. In N.S.P.C.C. case,[89] the Society which was neither statutory nor an agency of Government succeeded in claiming public interest privilege because the Society exercised powers conferred by a statute in respect of gathering information, and also because, the public interest asserted by the Society was identical to that of the police. The effect of the decision is that standing has been liberalised to assert the privilege.

The N.S.P.C.C. decision does not establish that a claimant need have no status at all in order to claim the privilege. The Society made a 'broad' as well as 'narrow' submission on this point. In the broad submission, it was argued that a party may assert any public interest in non-disclosure and it must be balanced with the corresponding public interest in the due administration of justice. The narrow submission was that there was an existing and established head of public policy, namely the protection of informers to the police, which by analogy may be applied to the Society also.

---

89. D. v. National Society for the Prevention of Cruelty to Children, [1977] 1 All E.R. 589 (H.L).

The House of Lords accepted the narrow submission. Thus, provided a claimant can establish that he exercises some power or duty in relation to the creation or management of the document and that some existing head of public policy demands withholding of such kinds of documents, then the privilege may be allowed.[90]

Position in the United States

The Supreme Court in Reynold's case,[91] observed that the privilege belonged to the Government and must be asserted by it.[92] The privilege could neither be, thus, claimed nor be named by a private person. However, the position becomes changed after the introduction of the information legislation. The Freedom of Information Act provides for relief against improper withholding. Then, the agency naturally acquires standing to object to the disclosure of documents arguing that the document comes under one of the specified exemptions of the Act.

Situations may arise where persons other than the agencies are also interested in disclosure as well as non-disclosure of agency records. Under Exemption Four of the Act, the confidential trade and business information are protected

---

90. See Stephen Kos, "Crown Privilege: Recent Developments in New Zealand", 10 V.U.W.L.R. 115 (1979-80) at p.138.
91. 97 L.Ed. 727 (1953).
92. Id. at p.733 per Vincon,J.

from disclosure.[93] In most cases, the agencies have nothing to lose practically. Rather it is the private business firms who are affected by an improper disclosure. Unlike in other information suits, the suits in these instances are for reliefs against disclosure. In these 'reverse F.O.I.A.' suits, the plaintiff is one who is likely to be injured by the disclosure while in other cases a plaintiff is benefited by the disclosure.

A plaintiff in a reverse F.O.I.A. suit advances several arguments. First, the Exemption Four is argued to be a mandatory non-disclosure provision barring an agency from releasing confidential business information. But the Act merely says that the statute does not apply to matters that fall within the exemptions. Second, the release of such information will invite violations of some other statutes, such as, Trade Secrets Act etc. Third, irreparable harm will result to a submitter in case of disclosure. Finally, the release of information may constitute an abuse of agency discretion.[94] All these arguments were considered by the Supreme Court in Chrysler Corporations' case.[95] In this case, the Corporation,

---

93. Section 552(b)(4) reads as follows:
This section does not apply to matters that are -
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

94. See Note, "A Proceedural Framework for the Disclosure of Business Records under the Freedom of Information Act", 90 Yale L.J. 400 (1980-81) at pp.404-05. See also Comment, 'The Consumer Product Safety Act as a Freedom of Information Withholding Statute', 128 U.Pa.L.Rev. 116 (1979-80).

95. Chrysler Corporation v. Brown, 60 L.Ed. 2d. 208 (1979).

a government contractor, submitted certain written affirmative action programs and annual employer information reports, which were required under an Executive Order, to the concerned agency. Later, these records were requested under the Freedom of Information Act to which the Corporation objected. The Court held that the congressional concern was with the agency's need or preference for confidentiality. However, the Court found that review of agency's decision to disclose was available under the Administrative Procedure Act. Thus, there is no implied right of action under Freedom of Information Act for the submitters of information. The remedy is found to be in Administrative Procedure Act that the disclosure was not in accordance with law. Such a showing would be made if there existed a statute which prohibited disclosure of the type of information.

A submitter is more aware of the harm resulting from disclosure. At the same time, the agency official may not be aware of the harmful consequences of disclosure. The officials are mere 'clerks' and not experts in the field. Thus the submitter is the most appropriate person to defend the confidentiality of the submitted information. It is also a check on the agency's arbitrary disclosure.[96]

---

96. See Comment, "Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection", 70 Nw. U.L. Rev. 955 (1975-76) at p.999.

Thus, it can be seen that, in the United States, certain category of persons have standing to object to the disclosur of documents apart from the agencies.

The nature of the Exemption Six of the Freedom of Information Act is also similar to Exemption Four.[97] Under it, information relating to personal, medical and similar information are exempted. In these cases also, the disclosure may turn out to be harmful to the individuals. The protection given to the submitters of business information, the right to have a judicial review of the decision of the agency to disclose the submitted information under Administrative Procedure Act may also be allowed in the case of Exemption Six plaintiffs.

Position in India

In India, the cases show that only the Government has come forward objecting disclosure of documents. Regarding standing, the position in India has developed to a good extent, after the celebrated decisions in Asiad case[98] and Judge's Transfer case.[99] The public interest litigations provide for

---

97. Section 552(b)(6) reads as follows:
This section does not apply to matters that are -
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
98. People's Union for Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1473.
99. S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149.

a wider standing. Any person on behalf of the poor and needy may be allowed standing to represent them. These developments may possibly influence the courts in widening the standing of an individual to object to the disclosure of a document on the ground of public interest.

Conclusion

Any public spirited individual may be allowed to draw the attention of the court to the public interest involved and may be allowed to seek non-disclosure of the document. Since the privilege is based on the public interest, the court may intervene if it appears that public interest requires the document to be protected from disclosure.[100] However, it may be limited to the extent of raising the question of public interest. Thus, the category of persons who may be allowed to raise the question of harm to the public interest includes the Government, voluntary organisations directly connected with the information and under a duty similar to that of public authorities, and any public spirited citizen. No need to say, the parties and witnesses have standing to object to the production of a document.

---

100. Id. at p.243.

E. The Onus in Asserting the Privilege

The adversary system requires a full disclosure of facts to ascertain the truth. Thus, any document which is related to the issue may be called for. Then the first question is regarding the 'relatedness' of the document. This naturally has to be established by the person who seeks disclosure. In a suit between the citizen and State, the State has two options either to object on the relatedness itself or agreeing that the document is related but and at the same time to claim public interest privilege. Thus, the duty to establish that the documents deserve protection on the ground of privilege is on the Government. It has a duty to establish the 'need', or 'reason' or 'necessity' for withholding the documents.

Now we will see the position in the United States, England and India.

Position in the United States

In the United States, the Freedom of Information Act shows a maximum policy of disclosure. All kinds of records are to be disclosed on request unless exempted specifically under the Act. Thus, the onus in asserting an exemption is on the agencies.

The agencies may keep documents of the private nature or business information apart from that of the agencies.

The individuals or the business firms may be allowed standing to object to the disclosure of such documents. Thus, the onus in asserting an exemption in such situations may be transferred to the private individuals or business firms or the onus may be shared between agencies, individuals and business firms.

Position in England

In early periods, the executive had no difficulty in establishing the privilege. A certificate from the Minister that after a perusal he had found that the disclosure of the documents would be injurious to the public interest, was only required.[101] It was only necessary to show that the particular document fell within a class of documents the production of which would be injurious to the public interest. Later, in Conway v. Rimmer,[102] the House of Lords held that such a certificate was not final to establish that the disclosure would injure the public interest. The court would examine the document in order to balance the competing public interest.

In a case where the considerations for and against disclosure appear to be fairly balanced, Lord Cross opined that the courts should uphold a claim to privilege on the ground of public interest.[103] In one case,[104] Lord Reid held

101. Duncan v. Cammell Laird & Co., [1942] A.C. 624.
102. [1968] A.C. 910.
103. Alfred Crompton Amusement Mechines Ltd. v. Commissioners of Customs and Excise, [1973] 2 All E.R. 1169.
104. Norwich Pharmacal Co. v. Customs and Excise Commissioner, [1974] A.C. 133 (H.L).

that the courts should order discovery only if satisfied that there was substantial chance of injustice being done. A change in the judicial attitude was seen in Crossman Diaries case[105] where the issue was relating to the secrecy of cabinet documents. Lord Widgery suggested that the Government must show that the public interest required the publication of diaries to be restrained. It was also required to show that there was no other facts of public interest contradictory to, and more compelling than, that relied by the Government. Later, in N.S.P.C.C case,[106] Lord Edmund Davis opined that disclosure should be ordered if on balance the matter was left in doubt. Thus, the position in England is more in favour of the individuals.

Position in India

In India also, the Minister's certificate to the effect that disclosure of the document would be injurious to public interest, was enough to allow the privilege.[107] However, later in Raj Narain's case,[108] the position was changed. The class doctrine was diluted. In the Judge's Transfer case,[109] finally it was declared that disclosure of information regarding the functioning of the Government must be the rule and secrecy an exception. Thus a heavy burden is there on the executive which makes a claim for privilege.

---

105. A.G. v. Jonathan Cape Co., [1975] 3 All E.R. 484 (Q.B.D.).
106. D. v. N.S.P.C.C., [1977] 1 All E.R. 589 (H.L.).
107. State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493.
108. State of U.P. v. Raj Narain, A.I.R. 1975 S.C. 865.
109. S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149.

Conclusion

The onus to assert the privilege definitely lies on the executive. However, the degree of onus may be liberally taken in the case of documents relating to defence, diplomatic affairs and investigatory records. In other cases, the degree of proof may be fixed at a higher level.

Documents may be of different kinds. Certain documents may be protecting the interests of the Governments only. Certain others may be protecting the interests of the Government as well as the private individuals. Yet certain others may may be protecting the interests of the individuals only. In the first category, once the individual applicant establishes, prima facie, the need for disclosure, the Government may rebut it. Thus the onus is on the Government to win the claim of privilege. In the second category, once the party shows the prima facie need for disclosure, the onus is then shifted to the Government as well as to the private individual whose interests are also protected by non-disclosure. Even if one party faulters in his attempt to establish the privilege, it is enough the other claimant establishes the need for non-disclosure. Thus a waiver by one of them does not affect the claim of the other. In the case of the third category, the claimants are the Government acting for the private person and the private persons. Here the waiver by the Government may not be allowed. However, on a waiver by the private persons, there is no need to pay much respect to Government's claim for protection.

F. Loss of Privilege

Privilege may be lost when it is waived or where new circumstances arise taking away the element of harm to the public interest. Passage of time may also take away the relevance of a continued privilege. Prior disclosure will also definitely take away the cause for the privilege.

Waiver

Normally the privilege belongs to the parties. Since an individual is the best judge to decide his own interests, he is able to waive a privilege also. But where the privilege is based on considerations of public interest, there can be no power of waiver on the parties though they are the 'owners' of the communication. In the case of public interest privilege also, the same situation arises. Since the privilege is conferred not on the basis of the 'ownership' but on the harm to the public interest, privilege cannot be waived.[110] Apart from the Government, there may be certain other persons who are interested in the issue. Thus, power of waiver cannot be entrusted to the Government alone.

Considering the working realities, it seems that waiver may not at all be allowed in certain kinds of infor-

---

110. In the case of executive privilege, the Government represents the public interest. Being an owner of the communication who always wants them to be secret, it is not possible to think that the Government would properly fare in its second role as the guardian of that public interest. Usually it is found that the balance tilts in favour of withholding. Thus, the final say may not be conferred on the executive.

mation such as defence, diplomatic affairs and national security. The court may allow a claim only after a careful perusal and after getting sufficient explanation to its doubts. However, in the case of other documents, privilege may be allowed to be waived. Thus, where the documents are kept confidential in order that the officials would be frank and cordial in expressing their opinions, the Government may be allowed to waive the privilege provided the officials consent to the disclosure.[111] Also where the disclosure does not affect any other person, the Government may be allowed to waive the privilege. However, where there is a specific provider or maker of a document and a receipient of it, the discretion to waive the privilege may be exercised, after consulting the maker of the document. The receipient may not be allowed to waive because it is only the maker who knows better the consequences of disclosures than anyone.

There may arise situations, where the Government is statutorily empowered to collect information. At the same time it may be impossible or rather difficult to gather required information. The Government may make promises to keep such information confidential. In such cases, the Government may be treated as a guardian or custodian of other's secret and not

---

111. Lord Denning was of the opinion that the maker of such documents may be allowed to waive the privilege. See Campbell v. Tameside Metropolitan Borough Council, [1982] 2 All E.R. 791 (C.A.) at p.795. See also Hehir v. Commissioner or Police of the Metropolis, [1982] 2 All E.R. 335.

of its own. Waiver may not be allowed in these cases without giving a proper hearing to the suppliers of information. There is joint interest in the information and waiver may not be made unilaterally.

In India, under section 123 of the Evidence Act, the immunity claimed is not a privilege which can be waived. It is granted to protect the public interest. Thus, even if the Government has not filed an affidavit or the affidavit filed is not satisfactory or proper, the court may allow another opportunity to file a fresh affidavit.[112]

It is difficult to see how Government could decide against the public interest. Presently the element of public interest involved in a privilege dispute may ultimately be decided by the court. Even if it is considered that the Government is the final authority on the question of public interest privilege, it cannot waive the privilege because the decision of the Government to do so would be improper and unreasonable which is not allowed under Article 14 of the Constitution of India.

Prior disclosure

Privilege to withhold documents is claimed against documents which are confidential and which have not come to

---

112. See S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149 at p.243.

the public knowledge. Courts have expressed their view that once a government document has been published, its disclosure in judicial proceedings cannot be resisted.[113] The public interest in non-disclosure will be reduced if the document has already been published. Thus, in Sankey v. Whitlam,[114] the High Court of Australia ordered production of documents which had become public knowledge before.

Two difficulties arise when a court emphatically rejects claims of privilege for documents which are already published. The first problem is regarding identification. The court may see that the document for which the privilege is claimed is the same document which has been already published. The court may compare the document if any doubt arises in this respect. The other problem arises where the prior disclosure was wrongfully or unlawfully made. If the the court rejects a claim of privilege on the ground of prior disclosure, it is equivalent to legalising the unlawful or wrongful disclosure.

The extent of disclosure is important for deciding a privilege claim. Where the disclosure is within the Government, though an extensive one, privilege may be allowed. A disclosure to a judicial hearing which was closed to the public may not take away the privilege. Problems arise where the

---

113. See Sankey v. Whitlam, 142 C.L.R. 1 (1978). See also Marconi's Wireless Telegraph Co. v. Commonwealth, 16 C.L.R 178 (1913).
114. Ibid.

information is released to particular persons outside the Government with express restrictions on the further dissemination. Where such persons disclose information against the restrictions, such disclosure may not be taken into account for the purposes of deciding a privilege claim.

Disclosure of documents in Parliament may not take away the claim of privilege when Parliament was conducted in a closed session or when documents were supplied to a member restricting a further dissemination. But, in ordinary circumstances, laying a document before Parliament makes the documents available to parliamentary and press reporting. It is also not wise to allow discretion to a Minister to make a document public for parliamentary or other purposes and then claim that it is not in the public interest for the document to be produced for the purposes of judicial proceedings.[115]

Sometimes Government may disclose information regarding inner workings of Government or other subjects selectively. Such a selective disclosure may not take away the claim of privilege to the documents which are unpublished. Prior disclosure of a document may not provide for the disclosure of other closely related documents or other documents in the series. Thus, in Raj Narain's case,[116] the

---

115. Dennis Pearce, "Of Ministers, Referees and Informers: Evidence Inadmissible in the Public Interest", 54 A.L.J. 127 (1980) at p.133.
116. State of U.P. v. Raj Narain, A.I.R. 1975 S.C. 865.

Supreme Court held that the publication of certain parts of the Blue Book which formed the innocuous parts of the document would not render the entire document a published one.[117] Disclosure of unpublished parts of a document may always depend on the harm to the public interest and not on the fact that some related part has been published.

A single file may contain documents for which privilege can be claimed and for which privilege cannot be claimed. In such situation, it is better to separate the documents and allow privilege only to those for which privilege can be claimed. Thus, in Mohmmed Youseff's case,[118] where the file contained communication made between high level officers of various departments of different States as well as correspondence made between lower level officers of the State, privilege was allowed only to the former category. In another case,[119] it was opined that though a case diary of a police man was generally privileged as such, it was not necessary that every entry in it must be conferred privilege. Again, in the case of privilege for cabinet documents conferred under Article 163 of the Constitution,[120] a file containing the

---

117. Id. at p.876.
118. Mohammed Youseff v. State of Madras, A.I.R. 1971 Mad. 468.
119. Bhaiya Saheb Dajibabhan Kumbi v. Pandit Ramnath Rampratap, A.I.R. 1938 Nag. 358.
120. Article 163(3) reads as follows:
"The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court".
Article 74(3) also provides for a similar protection. It reads as follows:
"The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court".

advice by the Ministers to the Governor is not entirely privileged. Only those portions which indicate the advice tendered by the Ministers may be considered for a claim of privilege. The test in these cases may be that any part of the document which is detrimental to the public interest on disclosure may not be disclosed and to the other parts of the document privilege may not be allowed. Again, simply because a document belonged to a class of documents, the document may not be protected on the basis of the class. The criterion may be founded upon the relation between the content of the document and the harm to the public interest.

The fact that a document has already been disclosed may not always be a sufficient reason to claim disclosure of the contested document. Where the disclosure of that document is made under a genuine mistake that may be condoned by the court, the document may not be treated as evidence.[121] Where a document is published by a government official not authorised to do it or where the publication of the document is an offence under a statute or where the document has come to the public knowledge through any unauthorised means, there is no need to weaken the privilege on account of prior disclosure. In John Fairfax case,[122] the High Court of Australia granted an injunction sought by the Commonwealth against publication of a

---

121. Guinness Peat Properties Ltd. v. Fitzroy Robinson Partnership, [1987] 2 All E.R. 716 (C.A.).
122. Commonwealth of Australia v. John Fairfax & Sons, 147 C.L.R. 39 (1980).

book entitled 'Documents on Australian Defence and Foreign Policy 1968-1975'. The book contained several unpublished documents regarding relationship of Australia with foreign nations, such as, New Zealand, Indonesia, the United States, Iran etc. The decision was based on the fundamental principle of equity that courts will restrain publication of confidential information properly or surreptitiously obtained or information imparted in confidence which ought not to be divulged. In Roger's case,[123] the Court did not consider the argument by the appellant that a copy of the contested report had reached him and was no more a secret. However, where a document has already been produced before a lower court, no privilege could be sought for it later before the appellate court.[124] The test in the above circumstances may be whether the document could have been disclosed in the public interest and not the fact that the document is already public. Otherwise there may arise a tendancy to see that the required document be made public through any means including unlawful ones.

Passage of time

Passage of time and change of circumstances may be other grounds by which privilege can be taken away. By these factors, sometimes the need for secrecy itself may have lost.

---

123. Rogers v. Secretary of State for Home Department, [1972] 2 All E.R. 1057 (H.L).
124. Rathanamasari v. Secretary of State, A.I.R. 1923 Mad. 332.

For example, the secrecy in the details of a contract may be lost when it is already performed. The need for secrecy varies with the contents of the documents. The questions regarding the period and the circumstances may better be left to the discretion of the court.

G. Nature of the Document

Generally it was accepted in earlier years that an official document was not privileged as such. It was generally apprehended that the privilege did not extend to documents which could not be described as 'public', 'official' or 'State' documents.[125] In Blake v. Pilfold,[126] when privilege was claimed in respect of a letter addressed by a private individual to a public officer relating to public affairs, but under no public duty, the claim was rejected. It was not on the ground that public interest would not be prejudiced, but because the case did not come within the precedents, which were all cases of communications made by and between Ministers and Officers of the Government and in the course of the discharge of a public duty by the person making the communication. However, the decision in Asiatic Petrolium Co.Ltd. v. Anglo-Persian Oil Ltd.[127] changed this position to some extent.

---

125. C.S.Emdon, "Documents Privileged in Public Interest", 39 L.Q.R. 476 (1923) at p.478.
126. (1832) 1 Moody & Rob. 198 as quoted in C.S. Emdon, supra n.125 at p.478.
127. [1916] 1 K.B. 822 (C.A).

In this case, privilege was sought in respect of a letter written by the defendants to their agents in Persia which contained certain confidential information from the Board of Admiralty, with whom the defendant company had contracts for supply of oil for His Majesty's ships.

It was urged by the plaintiffs that the rule protecting documents from discovery, on the ground that disclosure would be injurious to the public interests, was limited to State papers, reports, minutes and other official documents or correspondence, and could not be held to extend to a letter from the defendants to thier agents in Persia, and to cablegrams from the agents to the defendant company. The instances in which documents have been held to be protected from discovery on the broad principles of State policy and public convenience, have usually have been cases of official documents of political or administrative character.[128] The Court of Appeal however observed that the rule was not limited to these documents.[129] The foundation of the rule is that the information cannot be disclosed without injury to the public interest , and not that the documents are confidential or official, which alone is no reason for their non-production.[130] As a result of this decision, the executive was able

---

128. See Smith v. East India Co., 41 E.R. 550 (1841); and Hennessy v. Wright, 21 Q.B.D. 509 (1888).
129. Asiatic Petroleum Co. v. Anglo-Persian Oil Co., [1916] 1 K.B. 822 at p.829.
130. Id. at pp.829-30.

to claim privilege not merely of a limited class of documents but of any document the disclosure of which would cause an injury to the public interest.

When carefully analysed, it can be seen that in Asiatic Petrolieum case, even though the court allowed the claim of privilege to the correspondence between the defendant company and their agents, the real purpose of the court was to protect the 'content' of the official documents, which were received by the defendant company from Board of Admiralty, narrated or expressed in the correspondance, or to protect the particular copy of such official documents attached in the correspondance. Thus, even though technically it could be said that the documents other than official documents were also subjected to the Crown privilege, the purpose of the court did not seem likewise. But, such a situation arose in Broome v. Broome,[131] a divorce case between a military sergeant and his wife. The Chancery Court allowed a claim of Crown privilege asserted by the Secretary of State for letters and such other documents made by the Solidier's, Sailor's and Airmen's Family Association, a welfare association which was independant and formed under a Charter, to the Secretary of State. It can be seen that the documents were not official or State documents. Nor the Association was bound to send letters to the Secretary under any law. The reason for seeking exclusion of the document was stated to be the desire

---

131. [1955] 1 All E.R. 201 (Ch.D).

of the Crown to ensure that those works of the Association concerned with maintaining good relations between a serving husband and wife, and in particular, its attempts at reconciliation should be given the same sort of protection from disclosure in court as the efforts of probation officers and others specifically concerned with matrimonial reconciliation. The Court said that crown privilege could be claimed for any document in the possession of the Crown irrespective of where the document originated or in whose custody it reposed.[132] Thus, crown privilege could be attached, it was clearly decided, to a document which is not official or State or public.

After the adoption of public interest privilege in place of crown privilege, the position became quite clear. In D. v. N.S.P.C.C.,[133] the privilege was allowed to an independent society which was doing a social welfare function. The document, it may be noted, was not at all official or State or public. In Buckley v. Law Society,[134] the public interest immunity was also allowed to certain documents, which were not official or public or State, to the independant Society.

In the United States, the Freedom of Information Act specifically defines the class of documents which would

---

132. Id. at p.204.
133. [1977] 1 All E.R. 589 (H.L).
134. [1984] 3 All E.R. 313 (Ch.D).

be protected.[135] The statute specifically provides for the classes of documents which should be published in the Federal Register and be made available to the public.[136] These documents may generally be called as public records.

In India, under section 123 of the Evidence Act, only unpublished official records relating to affairs of State may be conferred the privilege. So the records must be official records. However, under section 124 of the Act, any communication made to a public officer in official confidence may be protected provided such communications on disclosure would injure the public interest. In this case, the documents need not be official in status.

Generally, only official documents may be given the privilege. However, situations may arise where non-official documents reaching an official may also be conferred the privilege on account of the possible harm to the public interest on disclosure of such documents.

H. Judicial Review: An Evaluation

It can be seen that in all the three countries, the United States, England and India, the attitudes of the courts were similar. In the United States and India, the judiciary

---

135. The exemption provisions of the Act provides for the protection.
136. See sections (a)(1) and (a)(2) of the Freedom of Information Act.

showed a noninterference policy interpreting the concerned sections of the statutes. While in England, the executive was given the final say regarding the privilege. However, later the judiciary took control over the matter, first in the United States[137], later in England[138] and finally in India.[139]

After the takeover, the judiciary became sole authority to balance the conflicting interests. A citizen's need was pitted against the desired secrecy for the proper functioning of the public service. Though it is difficult to weigh these two interests, for these two interests fall on different planes and fixing the priority of one over the other may be inappropriate in certain cases, courts somehow managed to decide the cases in a comfortable way. The in-camera inspection revealed the possible dangers hidden in the document on a disclosure.

Apart from getting the first hand knowledge regarding the dangers on disclosure, the courts were to go more into the merits of the case. Formerly decisions were made keeping the vital documents unseen by the courts as well as the party. The disclosure to the court through an

---

137. See Reynold's case, 97 L.Ed. 727 (1953).
138. See Conway v. Rimmer, [1968] A.C. 910.
139. See Judge's Transfer case, A.I.R. 1982 S.C. 149.

in-camera inspection followed by the balancing of competing interests, in fact put a break to the executive's tendency to claim privilege even for unjustifiable cases also.

In the United States, Congress in 1966 came forward to enact the Freedom of Information Act. By specifying the exemption areas, the judiciary's role was also cut to that extent. In England and India, the courts still rule the situation. The legislature is yet to come in the way by bringing an information legislation.

An individual's request for information may be rejected by the executive as well as by the judiciary, in a suit followed. The reasons in such cases may be that, the document does not relate to the fact in issue or that it would not help in deciding the case or that a dominant public interest prevails over the individual's interest. The loss caused to the individual in the third situation is not by his fault. He suffers for the public interest, that is, for the whole society. There seems no need for an individual alone to suffer a loss for a society. It is more appropriate for the society to compensate the loss suffered by one of its members. The judiciary in all the three countries have not gone into the above mentioned problem.

In all the three countries, in earlier times, the judiciary was reluctant to intervene in privilege issues. Such a problem was also not brought before them.

The judiciary in fact had the confidence in the executive. However, the judiciary later found that claims of privilege were also made in cases where public interest did not demand secrecy. In certain cases the executive claimed privilege merely for winning cases. The loss of confidence in the executive thus paved the way for the loss of executive's authority over privilege claims. The judiciary found no other way but to inspect the documents and then decide the claims.

Chapter 8

EXEMPTIONS TO THE RIGHT TO KNOW

We have seen that right to know from the Government has the foundation in the right to freedom of speech and expression. Apart from the general culture of secrecy prevailing in the executive, the executive privilege, the official secrets legislation to a certain extent, and the classification of documents, as explained in the preceding chapters, are the main challenges before an open Government. The right to know assumes a higher place in a modern democracy like India. However, as any other right, the right to know also cannot be absolute. In the general public interest, certain kinds of information may be exempted from the general right to know of a citizen. Information relating to defence, foreign affairs, investigation, privacy of individuals are only some of them. In this chapter, such exemption areas are separately dealt with.

A. DOCUMENTS RELATING TO DEFENCE MATTERS

Defence matters are of a class which is very sensitive. The secrecy in that area is accepted by all. The leaks of such information cause big hue and cry in the international circle. Strained relations between two countries, no doubt, may invite military actions. It may also affect the bilateral relations in the field of trade, commerce, culture etc. Now, we will see the position of law regarding the secrecy attached to these kinds of information in the United States, England and India.

Position in the United States

In the United States, the Freedom of Information Act exempts information regarding defence matters from disclosure. Even before the enactment of the statute, the courts had provided an absolute privilege to information regarding military affairs. In Totten v. United States[1], an action was brought to recover compensation for services alleged to have been rendered under a contract with President Lincoln by the claimant's intestate. Under the contract, he was to ascertain the number of troops stationed in the

---

1. 23 L.Ed. 605 (1876).

insurrectionary States and such other information and to report to the President. On the disclosure of the contractual documents, the Supreme Court expressed its view in the following words:[2]

> "Our objection is not to the contract but to the action upon it in the Court of Claims. The service stipulated by the contract was a secret service; the information sought to be contained clandestinely and was to be communicated privately; the employment and service were to be equally concealed... This condition of the engagement was implied from the nature of the employment and is implied in all secret employments of the Government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our Government in its public duties or endanger the person or injure the character of the agent."

The Court also pointed out that the existence of such a contract was itself a fact not to be disclosed.[3]

Thus, the Court in Totten's case took an extreme attitude that even the very existence of the matter should not be disclosed. In Reynold's case,[4] however, the Court

---

2. Ibid.
3. Ibid.
4. 97 L.Ed. 727 (1953).

did not adopt such an attitude, but the opinion of the Secretary for non-disclosure of records for national security reasons, was accepted because the Court had also found that such a need was prevalent at that time.

In the United States, Exemption One of the Freedom of Information Act,[5] as originally stood, authorised withholding of records specifically required by Executive Order to be kept secret in the interest of the national defence or foreign policy. This exemption went much further than the constitutional doctrine of executive privilege. Any matter that was properly classified pursuant to the relevant Executive Order fell within this exemption. But in 1974, the Congress amended the sub-section substantially. The present sub-section authorizes withholding of records which are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy and are in fact properly classified pursuant to such Executive Order.[6] The new sub-section requires courts for the first time to determine the

---

5. Exemption One of the F.O.I.A. before the 1974 amendment read in the following words: 552(b). This section does not apply to matters that are-
   (1) specifically required by Executive Order to be kept secret in the interest of the national defence or foreign policy;
6. Exemption One of the F.O.I.A. now reads as follows:"552(b) This section does not apply to matters that are-
   (1)(A) specifically authorised under criteria established by an Executive Order to be kept secret in the interest of national defence or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

substantive adequacy of executive classification systematically. Exemption One is drafted to limit the areas in which information could be withheld and to force the executive to be more specific in its reasons for withholding information. The amendment in 1974 provided the courts with discretion to examine documents in camera for de novo determination of their classification and placed the burden of proof on the executive to sustain the classification. Courts are now able to exercise an effective judicial review of classification decisions and are able to rectify over-classification abuses.

The courts are expected to review both procedural and substantive adequacy of executive classifications. But the language of the sub-section does not make clear the extent to which the phrase "in the interest of national defence or foreign policy" is applied to the classification standards. Two interpretations could be given to the phrase.[7] It can be read to apply to the 'Executive Order' authorizing classification proceedings in which it would define the scope of an Executive Order which could be used as a defence of actions for disclosure. Thus, the phrase may prevent the executive from developing classification criteria for information clearly outside the area of national defence

---

7. See Note, "National Security and the Amended Freedom of Information Act", 85 Yale L.J. 401 (1975-76) at pp.403-04.

or foreign policy. The phrase may also be read to supply directly to particular information, the executive desires to be withheld. Thus, the courts may be required to examine the information withheld to determine whether it was both in the interest of national defence or foreign policy, and in fact properly classified pursuant to the criteria of an appropriate Executive Order. An alternative is to provide the court with much flexibility in reviewing executive classification decisions. Thus, the courts need not decide the validity of Executive Order entirely, but only need apply a standard which would operate independently of executive classification criteria.

The amended sub-section is not free from defects. The draftsmanship of it is inadequate. It contains no requirement that the criteria of the Executive Order be in fact in the interest of national defence or foreign policy. This permits the executive to classify whatever information it wishes so long as a proper authorization is issued. Although Congress intended to concede the executive the power to frame classification criteria within the general area of national defence and foreign policy, the language of the sub-section also concedes to the executive the authority to decide when its criteria fall within this area.[8] Even in the presence of a statute requiring

---

8. Id. at p.407.

disclosure of documents, Exemption One prevails over the statute. Thus, in Weinberger v. Catholic Action of Hawaii,[9] the Supreme Court held that Exemption One was applicable to the publication requirement of Environmental Policy Statement under the National Environmental Policy Act, 1969.

In Environmental Protection Agency v. Mink[10], the respondent, a Congresswoman, sought a copy of the recommendation received by the President on the availability of an underground nuclear test. The Government argued that certain documents were classified as Top Secret and certain others as Secret pursuant to an Executive Order. The District Court held that non-secret portions must be disclosed if separable. Reversing the District Court decision, the Supreme Court observed that Exemption One did not permit a compelled disclosure of documents.[11] The test was whether the President had determined by Executive Order that particular documents

---

9. 70 L.Ed. 2d. 298 (1981). In this case, the Navy decided to construct several weapon storage structures capable of storing nuclear weapons. The Navy prepared an Environmental Impact Assessment and found that the new storage facilities would not make any environmental impacts. No Environmental Impact Statement was prepared and published because the information was classified for national security reasons. The Navy's regulations forbade them either to admit or to deny the facts. The Catholic Union thus sought the preparation of the Statement and disclosure of the same. This was rejected by the Navy and hence the case.
10. 35 L.Ed. 2d. 119 (1973).
11. Id. at p.129.

were to be kept secret.[12] Congress was held to be well aware of the Executive Order and obviously accepted determination pursuant to that Order as qualifying for exempt status under Exemption One.[13] The Court also held that an in-camera inspection of documents was not necessary if the agency could demonstrate by circumstances or by representative documents, that the documents contained no separable factual information.[14]

The Supreme Court interpreted Exemption One to mean that if documents had in fact been classified by an agency in a procedurally appropriate manner, the substantive adequacy of the classification would not be subject to judicial review. In a way, the Court in the Mink's case tied the holding of Reynold's case into the Exemption One and reinforced the principle that military secrets are protected from judicial scrutiny once the court is convinced of their presence in the contested material.[15]

---

12. Ibid.
13. Id. at p.130.
14. Id. at p.135. Brennan, J., (dissenting) feared an indiscriminate classification by the executive. He said: "... the Executive Order simply delegates the right to classify to agency heads who are empowered to classify information as Confidential, Secret or Top Secret. Thus, the classification decision is left to the sole discretion of these agency heads. Moreover in exercising this discretion, agency heads are not required to examine each document separately to determine the need for secrecy, but, instead, may adopt blanket classifications, without regard to the content of any particular document" (at pp.137-38).
15. See Comment, "United States v. Nixon and the Freedom of Information Act: New Impetus for Agency Disclosure", 24 Emory L.J. 405 (1975) at p.413.

The Mink's Court opined that exclusive control over the large and amorphous area of material coming under Exemption One was with the executive. The amendment introduced in 1974 was intended specifically to overrule the Mink's ruling. The amendment does not remove or even limit the traditional protection for State secrets. Rather, it is to require the executive to comply with its own rules as set out by the Executive Order and to give the court the authority to decide whether there has been such compliance.[16]

The inadequacies of the amended Exemption One call into question the basic policy of the Freedom of Information Act of using judicial review as a means to correct widespread classification abuses. The classification abuses can roughly be divided into three categories.[17] The first consists of those classifications which are in one form or another, clearly or mainfestly erroneous.[18] This category of classification can be effectively remedied by the amended Freedom of Information Act. A second category of classification abuses includes the

---

16. The Reynold's case had approved a similar procedure. See Elias Clark, "Holding Government Accountable: The Amended Freedom of Information Act", 84 Yale L.J. 741 (1974-75) at p.754.
17. Id. at pp.419-20.
18. For Example, classification of non-sensitive information in properly classified documents, or classification of information which are not at all related to national defence or foreign policy.

classifications which are intended to conceal mistakes, embarrassments or wrongdoings, the disclosure of which would clearly damage the national security. Classification abuse contained in this category would continue under the present law, since such classifications may meet the standards of Executive Order. As a third category, there is a large residual category of abuse consisting of classifications which are questionable whether a disclosure would pose a threat to national security or not. In this type of classifications, there is a possibility of exaggerating the justifiable scope of possible damage to national security. It may also be noted that such damage may occur due to the attempts to hide mistakes, which if disclosed, would have uncertain effects on national security. Under the present law, the courts are not able to detect and disclose such information classified by the executive. Thus, there is always a limit in checking or controlling the executive by the disclosure provision. This is due to the inherent nature of the functions of executive as well as the limited ability of the courts to go into all types of fact-situations.[19]

---

19. The capacity of the courts in this respect has been questioned due to various reasons. It is impracticable for a court to have a real examination of all facts. Moreover, the court would never have the overall picture within which classification decisions may be made. A top official in the executive branch sees the classification against the global background of which only he is fully aware, where a judge is only an amateur passing judgements on professional. He faces an infinite variety of unknowns which he can only understand if he leaves the bench and joins the department. See Elias Clark, 'Holding Government Accountable: The Amended Freedom of Information Act', 84 Yale L.J. 741 (1974-75) at p.756.

National Security

National security is one of the key words to be understood in the context of privilege of defence documents. On the term 'national security' the Executive Order No.11652 says:

> "National Security is a generic concept of broad connotations referring to the Military establishment and the related activities of national preparedness including those diplomatic and international, political activities which are related to the discussion, avoidance or peaceful resolution which could otherwise generate a military threat to the United States or its mutual security arrangements."

The concept of national security also depends on the calculation of future contingencies and foreign affairs.[20] It is a prophylactic concept concerned with potential danger with uncertainties and probabilities rather than with concrete threats readily foreseeable and easily grasped.[21]

---

20. In certain cases, the term may be used in a limited sense relating to activities which are directly concerned with the nation's safety as distinguished from the general welfare. See Cole v. Yong, 100 L.Ed. 1396 (1956).
In this case, a government employee was dismissed by the head of the department under the powers conferred on him by an Act which authorised to dismiss employees when necessary in the interest of the national security. When challenged, it was held that the term 'national security' under the Act had reference only to those activities directly concerned with the nation's safety as distinguished from the general welfare. (at pp.1402-06 per Harlan,J.)
21. See Note, "National Security and the Amended Freedom of Information Act", 85 Yale L.J. 401 (1975-76) at p.411.

The term seems to be quite vague in the modern era making a court in a confused position in applying it to classification decisions.[22]

National security is highly connected with foreign policy and the link with the military power alone is not enough to provide national security. This is because a nation's security may be connected with the foreign relations and policies relating to it. Also national security can be achieved by other than purely military means. For example, Switzerland seeks security through the policy of neutrality and certain other countries seek it through alliances, armaments and non-alignment. In all these cases, the important factor is the policy determinations. The courts may find it difficult to review such determinations and classifications relating to them.

If courts are not capable of judging such policy determinations, it will be difficult to review the classifications made by the executive. Where courts review them and replace with their own decisions, no doubt, the courts place themselves in the position of policy makers. In any

---

22. The courts do not possess the technical expertise to assimilate the information regarding national security as well as a specific standard to permit the use of such information even if this expertise is available to the courts.

respect, this is not acceptable. Thus, there is a heavy presumption in favour of executive definitions of national security interests although the amended Freedom of Information Act requires the executive to prove its classifications justified.

Position in England

From an early period, the documents relating to defence were protected from production in the courts in England. Apart from the core documents relating to defence, other subordinate matters were also kept secret. In Home v. Bentinck,[23] the Commander-in-Chief of the army directed the defendant officer to conduct an enquiry into the conduct of the plaintiff and report to him. The plaintiff alleged that the report thus made contained libellous statements about him. A discovery sought for the report was successfully resisted on the ground of privilege of confidentiality. In Beatson v. Skene,[24] the Court said, in similar circumstances, that the production of a State paper would be injurious to the public service. The general public interest must be considered paramount to the individual interest of a suitor in a court of justice. Similarly, communications made by a commanding officer of a regiment to his immediate superior, containing

---

23. 129 E.R. 907 (1820).

24. 157 E.R. 1415 (1860) at p.1421.

charges against a colonel were held to be privileged.[25] In another case,[26] the communications made by a Family Welfare Association formed in the military service, which was mainly concerned with maintaining good relations between a serving husband and wife were held to be privileged. Thus, even documents relating to matrimonial reconciliation may come under protection under the banner of defence.

In Asiatic Petroleum Co. v. Anglo-Persian Oil Co.,[27] privilege was sought for a letter written by the defendant Company to their agents in Persia which contained certain confidential information passed by the Board of Admiralty to the defendant Company who had contracts for the supply of oil to His Majesty's ships which were engaged in war. The Court considering the harm to the public interest allowed privilege to the documents.

In Duncan's case,[28] the records sought for disclosure were the design and plan of a submarine and the official reports on the accident. At the time of the second world war, the Court without any hesitation rejected the claim

---

25. Dickson v. The Earl of Wilton, 175 E.R. 790 (1859). See also Chatterton v. Secretary of State for India in Council, [1895] 2 Q.B. 189 (C.A).
26. Broome v. Broome, [1955] 1 All E.R. 201 (Ch.D.).
27. [1916] 1 K.B. 822.
28. [1942] A.C. 624.

for disclosure. The House of Lords also accorded a class status to such documents where a document belonging a class need not be disclosed whether a single document individually was harmful to the public interest or not.

Wherever the matter is related to defence, the courts usually do not ask them to be produced. Though not given a privilege in the name of national defence specifically, such matters are given privilege in the public interest with utmost respect.

Position in India

In India there does not seem to be a direct decision on this point. However, in various cases, the courts have already accepted the status of documents relating to defence matters as being privileged.[29] The term affairs of State under section 123 of the Evidence Act has been held to include matters relating to defence affairs also.[30]

---

29. State of U.P v. Raj Narain, A.I.R. 1979 S.C. 865 at p.876; S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149 at p.628.
30. Ibid.

Conclusion

Unlike other cases for disclosure, the courts cannot take much risk in privilege sought for defence matters because of the irreparable harm arising on an undesirable disclosure. Invariably, the courts seek the views of administration.

The State secrets privilege is involved only when military or diplomatic secrets are in issue. The privilege against production of this information is an unusual one because the court is handicapped due to reasons of inexperience and inexpertise to review the Government's assertion of the privilege. Rather the courts may accept the executive's opinion that the documents sought contain a State secret,[31] after an in-camera inspection.

Unlike other governmental privileges, the privilege based on defence record seems to be absolute to a certain extent. Generally the courts will not balance the interests in disclosure against the interests in secrecy. The standard for favouring this privilege will remain unchanged in all situations and sometimes, even the most compelling

31. See Mark S.Wallace, "Discovery of Government Documents and the Official Information Privilege", 76 Colum. L.Rev.142 (1976).

necessity cannot dominate this privilege.[32] In the process, the most important question before the court relates to the criteria to be followed in arriving at a conclusion. The courts may consider the prejudicial impact results from the disclosure, that is, whether there is a reasonable danger prejudicial to national security.[33]

The prejudicial impact test provides a very flexible and broad protection for security interests. It does not evaluate the sensitivity of particular materials, that is, the danger reasonably likely to attend on disclosure. Yet another criticism is that the courts have not required the executive to assert its security interests consistantly or evenhandedly.[34] The courts ignore factors like, the

---

32. In the United States, the State secrets privilege has emerged as a significant impediment to discovery. There are two reasons for this growth. First is the expansion of the factors considered relevant to national security. Apart from the conventional trade, manufacturing techniques, details regarding meteorological condition etc., have gained recognition as reasons for State secrets privilege. The other factor is the increased use of civil litigation to protect individual rights from intentional abuses of executive power. See Note, "The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive", 91 Yale L.J. 570 (1981-82) at p.576.
33. See Note, "The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive", 91 Yale L.J. 570 (1981-82).
34. The executive has been permitted to withhold information from litigants in one suit while making similar information available elsewhere. Also the Government is not stopped from concluding in one case that disclosure is permissible while in another case, it is not. See Note, 91 Yale L.J 570 (1980-82) at p.574.

extent of probable harm to national security, the litigant's need for documents or the disclosure practices followed by the executive. The courts rely primarily on the executive's say on the need for secrecy and are reluctant to decide otherwise. This is because of two reasons—the courts lack effective standards and feel that executive has the required experience and expertise in the concerned field enabling it to formulate a better opinion. Thus, even though the courts claim that they take independent decisions and executive caprice and self-interest will not be allowed, in fact they depend on the executive opinion. Hence the need arises for a better method for deciding State secret claims.[35]

An alternative to the 'prejudicial impact test' . seems to be a 'comparative standard' which considers the sensitivity of the information sought, the litigant's need for information and the executive's treatment of such information in the past.[36] Under this standard, the judiciary may ensure that the executive invokes its security interest reasonably and fairly. The courts may not consider information to be privileged solely because of its potential prejudicial impact.

---

35. The whole problem before the court is that they are unable to differentiate bonafide claims from those intended to promote other executive interests.
36. See Note, "The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive", 91 Yale L.J. 570 (1981-82) at p.584.

Rather the courts may see that the harm from disclosure under the conditions imposed by the court outweigh the disclosure value. Instead of a fixed standard for measuring the prejudicial impact, a variable standard may be brought in by the courts to adjust with different and varying situations. The courts may attempt to make the information available in a restricted form that will satisfy the security requirements. The courts may also attempt to develop a system to provide a stipulation of facts, or a set of representative findings or a summary of documents deleting identifying and harmful materials, to litigants. As a last resort, courts may construe facts in favour of litigants or may shift burden against the Government.

It is true that judiciary may find it difficult to understand and assess the consequences of disclosure of defence or diplomatic records. Non-interference by the judiciary may then invite abuse of power by the concerned authorities. What is then required is the provision for certain built-in-standards to be made, as well as to be followed, by the authorities as done under the Freedom of Information Act. A judicial review on whether the authority has complied with their own restrictions is suggested. In the sensitive area of defence, review beyond this may invite risks.

B. DOCUMENTS RELATING TO DIPLOMATIC AFFAIRS

Information relating to diplomatic relations and foreign affairs deserve a high degree of protection. Leaks of such documents cause much sensation though the particular information is not capable of damaging relationship with any nation. A disclosure sometimes may cause much injury to the relationship between two nations. Confidentiality to a high degree may be attached to these documents. Any unauthorised disclosure whether the document is capable of injuring the public interest or not, may be taken seriously.

Though the judiciary had given utmost secrecy to such documents, the recent attitude toward it seems to be diluted. In John Fairfax case,[1] an employee using his access to secret documents of State, wrote a book containing such secrets. An injunction restraining the publication of the book was sought by the Government though certain copies were already sold out. It may be noted that the documents included cables passed between Australia and Indonesia, agreements regarding American military bases in Australia, information regarding presence of Soviet Navy in Indian

---

1. The Commonwealth of Australia v. John Fairfax Ltd., 147 C.L.R. 39 (1980).

Ocean, Australia's support for the State of Iran and A.N.Z.U.S. Treaty. It was argued that there was a threatened or actual breach of section 79 of the Crimes Act 1914 - the official secrets provision-and also that disclosure would be inimical to the public interest because national security, relations with foreign nations and ordinary business of the Government would be prejudiced. It was also argued that there was a violation of copyright by the publishers.

The High Court held that the threat to official secrets provision would not justify granting of an injunction because the use of injunctions to restrain breaches of criminal law are exceptional.[2] The Court found that certain parts of the book were capable of embarrassing Australia's relations with other countries. It was held that an injunction on that ground would not be granted because copies of the book had already been sold out.[3] However, the Court found that injunctions would be granted on the basis of the infringement of the copyright on a usual undertaking as to damages.[4]

The Commonwealth argued also on the basis of the fundamental principles of equity[5] that the court will

---

2. Id. at p.50.
3. Id. at pp.50-54.
4. Id. at p.59.
5. Id. at p.50.

restrain the publication of confidential information improperly or surreptitiously obtained or information imparted in confidence which ought not to be divulged.[6] The Court though found the principle applicable to private persons, was not ready to apply it in the case of Government because the equitable principle had been fashioned to protect personal, private and proprietary interests of the citizen.[7] And the interests of the Government in this case was quite different from those of a private person. The Court will determine by reference to public interest. Unless disclosure is likely to injure public interest, it will not be protected.[8]

The decision does not seem proper. The Court took the diplomatic records as any other records which are capable of injuring the public interest. But it may be noted that the degree of protection required for the diplomatic affairs is so high compared to other areas. The degree of consequences also varies between disclosure of information regarding diplomatic affairs and other information. The Court may not have been taken the matter so lightly.

---

6. Lord Ashburton v. Pape, [1913] 2 Ch. 469 at p.475 per Swinfen Bady,L.J. See also Lamb v. Evans, [1893] 1 Ch. 218 at p.235;and Tipping v. Clarke, 67 E.R. 157 (1843).
7. Commonwealth of Australia v. John Fairfax Ltd., 147 C.L.R. 39 at p.51.
8. Id. at p.52.

In India there does not appear to be a direct decision on this point. The courts in India have repeatedly accepted matters relating to diplomatic affairs as privileged documents.[9] The term "affairs of State" has been held to include diplomatic communications.[10]

In the United States also, there seems to be no direct decision on this point. The Freedom of Information Act under Exemption One provides for the protection of documents relating to foreign policy.

Conclusion

Similar to the kind of protection required for the records relating to defence affairs, documents relating to diplomatic affairs also require more or less an absolute protection. The judiciary does not seem to be an apt body to review on disclosure of records relating to foreign affairs.

---

9. State of U.P. v. Raj Narain, A.I.R. 1975 S.C. 865 at p.876; S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149 at p.628.
10. State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493 at p.529.

C. CABINET DOCUMENTS

Cabinet decisions form the highest level executive decisions in a country. Any leakage of them may affect the entire nation because many of the decisions may be intended to be carried out in future, some relating to internal affairs, some relating to external affairs and yet some other relating to defence matters. There is nothing unique about the way in which the cabinet takes its decision compared to the body at the equivalent level of local government, except the high level importance earlier said.[1] Comparing local government and cabinet, it seems dangerous[2] because of the lone reason—its high importance and after-effects on a premature disclosure.

In this chapter, the nature of cabinet secrecy, what constitutes cabinet documents, and the required period for secrecy are being dealt with. The position of law in Commonwealth countries such as England, Australia, New Zealand and Canada are also then explained briefly. After that the position of law in India is examined. This is followed by the conclusions.

---

1. In England, local government is now more open than it was. See Public Bodies (Admission to Meetings) Act, 1960; and section 100, Local Government Act, 1972.
2. See Ian Eagles, "Cabinet Secrets as Evidence", [1980] P.L. 263 at p.264.

The Rationale of Cabinet Secrecy

By convention, a member of the cabinet takes an oath that he will keep secret all matters revealed unto him. But an oath of secrecy cannot be a satisfactory or reasonable justification for cabinet secrecy because oaths taken by private persons or rules of secrecy imposed by professional associations do not create any kind of privilege for them.[3] Also, oaths and declarations of secrecy taken by other public officials do not give rise to any kind of privilege, even when such practices are prescribed by statutes.[4] The oath of secrecy appears to be founded upon morals or conscience rather than on law.[5] Thus, it is necessary to show that whatever obligation of secrecy or discretion attaches to a cabinet minister, that obligation is binding in law.

Cabinet papers are not protected from disclosure because they are confidential in nature. The question is whether the disclosure of the cabinet documents would be contrary to the public interest. Confidentiality has been already held not to be a separate head of privilege but only a material consideration to bear in mind when privilege is claimed on the ground of public interest.[6]

---

3. Id. at p.266.
4. Ibid.
5. A.G. v. Jonathan Cape Ltd., [1975] 3 All E.R. 484 (Q.B.D).
6. Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No.2), [1973] 2 All E.R. 1169 (H.L) at p.1184 per Lord Cross.

Another rationale attributed to the secrecy of cabinet documents is related to the constitutional fiction that the cabinet exists solely to formulate advice for the sovereign in whose name all executive decisions are taken and that the advices to the Crown are secret.[7] This fiction had its meaning in earlier days. But in the present democratic governmental set up, it is cabinet the real rulers and the 'Crown' is only a by-stander.

Protection of cabinet papers has sometimes been sought on the basis of the convention of collective responsibility for the cabinet decisions whether the Ministers concur to them or not. Also, all Ministers are expected to support publicly cabinet decisions regardless of their own personal view. The disclosure of cabinet documents indicating the particular views of individual Ministers, will tend to undermine this convention.[8] The Ministers, it is feared, may not feel free to surrender their political personal and departmental preferences to the achievement of a common view

---

7. I.G.Eagles, 'Cabinet Secrets as Evidence', [1980] P.L. 263 at p.266.
8. Even cabinet minutes seldom record dissenting voices. A Minister who wants his dissent recorded must ask for it to be done. This is clearly regarded as exceptional and undesirable procedure. See Mackintosh, The British Cabinet (3rd ed., 1977), p.534, as quoted in I.G. Eagles, "Cabinet Secrets as Evidence", [1980] P.L. 263 at p.267.

if they know that their stand or compromise would become public knowledge. Based on this ground, the convention cannot be made compelling at least for two reasons. Firstly, the convention seems to be unravelling.[9] Secondly, cabinet minutes seldom now include contributions by individual Ministers as Cabinet Government moves increasingly towards consensus.[10] Moreover, maintaining collective responsibility merely requires that members of the cabinet may tell the same story before the public.[11] If there is no disagreement in fact, the disclosure of cabinet documents will cause no harm to the convention. Also, the convention may not be breached by disclosure of the agenda or the ultimate decision of the cabinet.

Cabinet minutes and notes do not constitute a complete record of the discussion at the cabinet meetings and fail to indicate the basis upon which the cabinet reached its decision. This situation, it is argued, creates ill-informed criticism against the Government. Thus, Lord Reid thought that the business of the Government would be difficult and no Government could contemplate with equanimity, the inner workings of the government machinery being exposed to

---

9. D.C.Hodgson, "Recent Developments in the Law of Public Interest Immunity: Cabinet Papers", 17 V.U.W.L.R. 153 (1987) at p.169.
10. Ibid.
11. Ibid.

the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind.[12] There are really two strands to Lord Reid's thinking. First is that the Ministers may go back from taking hard decisions if they are made known to the political opponents. But this seems unlikely because secrecy merely postpones the inevitable unpopularity.[13] The second is that the pressure groups will seek to intervene directly in the decision whenever they find that their interests are at stake. But it is a truth that in the actual operation of a Government, few Ministers can avoid the importuning of lobbyists. Many departmental submissions to the cabinet are disguised briefs for various outside organizations.[14] Thus, all that secrecy may achieve is that only favoured groups will have the opportunity to acquire timely information.[15]

An argument frequently relied on by the courts for cabinet secrecy is based on candour in cabinet discussions, that is, Ministers must be free to express alternatives in the policy formulation and decision making process in a private atmosphere in which candid and even blunt assessments

---

12. Conway v. Rimmer, [1968] A.C. 910 at p.952.
13. I.G.Eagles, "Cabinet Secrets as Evidence", [1980] P.L. 263 at p.269.
14. Ibid.
15. From the Burmah Oil Co. case, [1980] A.C. 1090, it is clear that Governments do seek advice from outside financial and industrial circles. It is more in accord with the realities of modern government.

may be made. Secrecy is thus said to be required for a full, free and open discussion in the cabinet meeting. If the cabinet discussions were made public, discussion may be made with an eye to the record and not to the problem in hand, detracting from the efficient running of a department. An author says that the candour argument operates no more forcefully at cabinet level than in the lower reaches of the administration.[16] This opinion seems to be doubtful. It seems that secrecy has a merit in this regard so that Ministers may be able to take bold decisions neglecting the lobbyists and partymen. However, this 'candour argument' cannot be a justification for non-disclosure of the final decisions taken by the cabinet.[17]

---

16. I.G.Eagles, "Cabinet Secrets as Evidence", [1980] P.L. 263 at p.268.
17. The Government had exploited the blank cheque based on this 'candour argument' allowed by the courts in earlier cases at the expense of justice in individual cases. But later, the English courts corrected themselves. See Conway v. Rimmer, [1968] A.C. 910. The Australian High Court also expressed its dissatisfaction with the candour argument. See Sankey v. Whitlam, 142 C.L.R. 1 (1978). In a recent New Zealand case, Brightwell v. Accident Compensation Corporation, [1985] 1 N.Z.L.R. 132, Mc Mullin J., asserted that public confidence in the administration of government was likely to be increased by the realization that advice was given with knowledge of the risk of subsequent examination in the courts. See D.C.Hodgson, "Recent Developments in the Law of Public Interest Immunity: Cabinet Papers", 17 V.U.W.L.R. 153 (1987) at p.171.

The cabinet papers are generally treated as a class. The cabinet is the very centre of national affairs and at all times possesses information which are or must be kept secret. But it would not be appropriate to entitle the same degree of protection to all documents falling with the class of cabinet papers, because the extent of protection required depends on the particular subject matter or policy contained in each document. As a general rule, the greater the sensitivity and importance of the information sought, the higher the documents on the policy formulation scale, and the wider the context, the more reluctant should a court be to order production over the objections of the executive.[18]

The Period of Secrecy

Passage of time is an important criterion in deciding the secrecy of cabinet papers. Lord Reid in Conway v. Rimmer[19] said that cabinet papers could be ordered to be disclosed when they become documents of 'historical interest' only. A slightly different view was taken in A.G. v. Jonathan Cape Ltd.[20] The Court said that there must

---

18. D.C.Hodgson, "Recent Developments in the Law of Public Interest Immunity: Cabinet Papers", 17 V.U.W.L.R 153 (1987) at p.172.
19. [1968] A.C. 910 at p.952.
20. [1975] 3 All E.R. 484.

be a limit in time after which the confidential character of the information would lapse and the time limit would depend on the particular case.[21] It seems that this view is more appropriate.[22]

The point in time at which a litigant seeks disclosure of cabinet documents may constitute a balancing factor to be weighed by the courts.[23] The possible prejudice to the implementation of the policies underlying the cabinet papers due to the premature disclosure is important in the balancing process. Disclosure of cabinet discussions at the developmental stage, when there is keen public interest in the subject-matter, could seriously impair the proper functioning of the executive. On the other hand, the risk of damage to the public interest is comparatively less when it is no longer of continuing policy significance.

---

21. Id. at p.495.
22. The Jonathan Court had also given the circumstances in which a court should restrain the publication of cabinet papers. It was said that a court would restrain publication when it could be shown that (a) such publication would be a breach of confidence, (b) that publication would be against the public interest in that it would prejudice the maintenance of the doctrine of collective cabinet responsibility, and (c) that there was no other facet of the public interest in conflict with a more compelling than that relied on. See A.G. v. Johathan Cape Ltd., [1975] 3 All E.R. 484 at p.495.
23. D.C.Hodgson, "Recent Developments in the Law of Public Interest Immunity:Cabinet Papers", 17 V.U.W.L.R. 153 (1987) at p.175.

In Sankey v. Whitlam,[24] the High Court was unable to specify the time at which the need for secrecy lapsed. In Conway v. Rimmer,[25] Lord Reid opined that it lasted until it became historical interest only.[26] In A.G. v. Jonathan Cape Ltd.,[27] Lord Widgery observed that the disclosure of cabinet documents must wait until they have passed into history.[28] However in the Jonathan case, disclosure was held to be harmless after ten years. In Sankey v. Whitlam[29], the documents ordered to be disclosed were only between three and half to five years old. Thus, the life of cabinet secrecy appears to be getting shorter even though it may be impossible to lay down a concrete rule for determining when secrecy would lapse. What is more important is the consequences on disclosure.

Prior Disclosure

The public interest in the maintenance of cabinet secrecy will be very much reduced in weight if the documents have already been published.[30] The necessity for secrecy then no longer operates.[31] Once the papers become public,

---

24. 142 C.L.R. 1 (1978).
25. [1968] A.C. 910.
26. Id. at p.952.
27. [1975] 3 All E.R. 484.
28. Id. at p.490.
29. 142 C.L.R. 1 (1978).
30. Sankey v. Whitlam, 142 C.L.R. 1 at p.66.
31. The Privy Council in Robinson's case had also formed a similar view. See Robinson v. State of South Australia, [1931] A.C. 704 (P.C.) at p.718.

and subject to public speculation and discussion, it is not easy to identify the particular quality of public interest which is said to reside in the non-production of such documents.[32] Still, one question arises whether the documents, which are improperly or illegally published, should be taken in evidence or whether the Government should be asked to produce such documents as evidence. It may not be the impropriety or illegality in the method in which the cabinet documents become open that matters, but the attitude of the court to such documents, that is, whether the court would have ordered disclosure of the documents after the balancing of the competing interests.

The court may inspect the original document before ordering disclosure to satisfy itself that what had been published was in fact the true copy. Where the prior disclosure has been limited to selective portions, it does not take away the privilege.

What Constitutes Cabinet Documents

Courts always prefer to allow secrecy for the cabinet documents unless it is controverted beyond doubt. Thus, it is necessary to know what documents may be called as cabinet documents having the privilege.

---

32. Sankey v. Whitlam, 142 C.L.R. 1 at p.66.

Courts may not confer privilege to a file merely due to the presence of a particular document. A cabinet document does not give advantage of privilege to the whole file in which it is contained. Also, a document is not privileged because there is a chance that it will come before the cabinet. Submissions by individual Ministers to the cabinet, discussion papers circulated among the members of the cabinet and briefs prepared by departments for Ministers to use in cabinet or cabinet committees may be treated as cabinet documents to be protected from disclosure. In Lanyon Property Ltd. v. The Commonwealth,[33] disclosure of minutes of the cabinet and its committees were sought by the plaintiff in order to prove the claims of compensation for the land acquisitioned by the Government. Allowing the claim of privilege, Menzies, J., observed:[34]

> "... the governmental process directed to obtaining a cabinet decision upon a matter of policy and cabinet's decision upon that matter should not, in the public interest, be disclosed by the production of cabinet papers including what I would describe as papers which have been brought into existence within the governmental organization for the purpose of preparing a submission to cabinet. Such papers belong to a class of documents,

---

33. 129 C.L.R. 650 (1974).
34. Id. at p.653 (Emphasis by the Research Fellow).

> that in my opinion, are of a nature that ought not to be examined by the Court, except, it may be, in very special circumstances."

This opinion provides ample freedom for the executive where all sorts of documents could be concealed by simply including them in cabinet submissions. Though the Court insisted that the documents must be created with the cabinet in mind, possibility of abuse is more. A similar approach was also taken in Conway v. Rimmer[35] in which the Court was prepared to extend the privilege to all high level documents concerning policy making.[36] This approach is also not appropriate. The mere fact that cabinet looks at a document cannot be a sufficient criterion to confer cabinet status leading to privilege.

Generally, the detailed work leading to cabinet decisions will be mostly done by the cabinet committees. In the committees, takes place the real debate. The matters decided in the cabinet committees are not usually reopened in the cabinet. Thus, there is nothing wrong in conferring the status of cabinet papers to those of the cabinet committees for the purpose of conferring the privilege, though the cabinet committees include members other than Ministers.

---

35. [1968] A.C. 910.
36. Id. at p.952 per Lord Reid.

The cabinet is the centre where the most important executive decisions in a nation are taken. The privilege for cabinet papers may be allowed for such decisions taken in the cabinet. In Conway v. Rimmer, both Lord Pearce[37] and Lord Upjohn[38] were ready to bestow the same immunity to other high level documents also. Lord Reid extended the immunity even further to documents which were concerned with policy making even when prepared by quite junior officials.[39]

Many important decisions do not reach the cabinet at all but are taken by individual Ministers without reference to their colleagues and in certain cases, the Ministers may delegate the authority to the permanent head of the department.[40] The importance of these decisions is never below that of the cabinet decision. Documents referring to the views of the Minister or the permanent head may be protected whether the cabinet is made aware of those views or not.[41] The explanation for bringing such documents within the ambit of immunity is that it is necessary to prop up the convention of individual ministerial responsibility and also that the convention whereby civil servants remain anonymous and have

---

37. Id. at p.987.
38. Id. at p.993.
39. Id. at p.952.
40. I.G.Eagles, "Cabinet Secrets as Evidence", [1980] P.L. 263 at p.272.
41. Id. at p.273.

their failures and successes attributed to the Ministers. The anonymity is seen as a quid pro quo for the disinterested apolitical advice.[42] But, if it is possible to disclose the document or its contents without giving the identity of the official, it may be done.

Access to Documents of Previous Cabinet

Another issue is regarding the right of a present Government to a waive privilege relating to cabinet papers of a previous Government by releasing them in a court or to a litigant. Another question is: could a defeated ministry disclose what went on in cabinet to defend their own record in office whether as defendant or mere witness? In these situations, apart from giving a hearing to the ex-Ministers, it is better the court intervene at an early stage itself. In England, there is a practice in which the Government of the day does not disclose to an outside body, the papers of a previous Government without the consent of the former Prime Minister. Also, there is a practice that the Government of the day does not itself have access to the papers of the previous Government of a different political party, although this practice has been questioned. The ground is that how can new Ministers be expected to start without full knowledge of what had happened earlier.[43]

---

42. Ibid.
43. Hunt of Tanworth, "Analysis - Access to A Previous Government's Papers", [1982] P.L. 514.

The need for the above said convention becomes justifiable when it is realized that they reconcile two otherwise potentially conflicting requirements.[44] The first is that the papers of a previous Government should be preserved to allow continuity of administration, research into the past and eventual release to the Public Record Office, that is, to ensure that outgoing Ministers do not destroy or remove any papers that might embarrass them. The second is the need to avoid new Ministers using such papers to make unfair political capital at the expense of their predecessors.[45]

A classification of the former Ministers into two, viz., those from the same political party and those from different party does not seem proper. What is required is that the personal views of the former Ministers may not be disclosed to the current Ministers. Secondly, the current Ministers may not ask for previous Government's records unless there is a need for them. When access to the previous

---

44. Ibid.
45. However, there are three categories of papers which are generally regarded as exempt from the convention. They are, (1) papers which even if not publicly available can be deemed to be in the public domain, eg., letters sent by former Ministers to trade associations, unions, or to Members of Parliament or to members of the public etc., (2) papers other than genuinely personal messages dealing with matters which are known to foreign governments, eg., messages about inter-governmental negotiations, and (3) written opinions of law officers which are essentially legal rather than political documents. See Hunt of Tanworth, "Analysis - Access to A Previous Government's Papers", [1982] P.L. 514 at p.516.

Government records are afforded to anyone outside the present cabinet, the current Prime Minister may seek the agreement of the former Prime Minister or the concerned Minister or, if they are not available, the Leader of their party. Lastly, it is submitted that the previous Ministers may have access to any document they dealt with when in office. At the same time, the records may not be published by them or disclosed to any other person.

The Position in England

It has generally been assumed that important State documents relating to high level policy decisions, especially cabinet papers, are immune from production. The Duncan's case[46] established that documents could well remain secret unless the Government allowed disclosure. In Re Grosvenor Hotel Ltd. (No.2),[47] which had shown reluctance or unhappiness with Duncan's rule, however, decided that a court should never order production of cabinet papers because executive was considered to be a judge as to whether such papers should be disclosed. In Conway v. Rimmer[48], though the Court was in favour of taking away the executive's discretion, it was reluctant to apply the same principle in the case of cabinet papers. A ministerial claim to non-disclosure of cabinet

46. [1942] A.C. 624.
47. [1965] 1 Ch. 210.
48. [1968] A.C. 910.

papers was held to remain judicially unreviewable despite the contents of the documents sought and their importance to the party seeking production. Accordingly, Lord Reid said:[49]

> "I do not doubt that there are classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that cabinet minutes and the like ought to be disclosed until such time as they are only of historical interest".

Lord Hodson thought that cabinet documents as a class required absolute protection from disclosure from their very character.[50] Lord Pearce who extended the privilege further said that production would never be ordered of fairly wide classes of documents at a high level, such as, cabinet correspondences.[51] The varying opinions in Conway v. Rimmer were finally crystallised in Rogers v. Secretary of State for Home Department[52] in which Lord Salmon cited cabinet minutes falling within classes of documents which for years have been recognized by law as entitled in the public interest to be immune from disclosure and even a certificate from a Minister

---

49. Id. at p.952.
50. Id. at p. 973.
51. Id. at p. 987.
52. [1972] 2 All E.R. 1057.

to that effect was not at all necessary. Later, in Attorney General v. Jonathan Cape Ltd.,[53] the Court held that the cabinet proceedings and papers were secret and could not be publicly disclosed until they had passed into history.

In England, in 1979, came another important decision regarding the cabinet secrecy. In Burmah Oil Co.Ltd. v. Bank of England[54], the House of Lords applied the balancing principles laid down in Conway's case to high level governmental policy formulation. In this case, production of communications between Ministers and minutes and briefs for Ministers and memoranda of meetings attended by Ministers etc., were sought. It was resisted on the ground that such documents formed a class of documents relating to the formulation of high level governmental policy and that their non-disclosure was necessary for the proper functioning of the public service. This was rejected by the House of Lords. Although none of the documents were 'cabinet papers', the decision contained a lot of dicta concerning cabinet secrecy. The majority of Law Lords accepted with varying degrees of enthusiasm that no classes of documents, not even cabinet papers are excluded entirely from the balancing exercise. Later, in Air Canada v. Secretary of State for Trade[55], the

---

53. [1975] 3 All E.R. 484.
54. [1980] A.C. 1090.
55. [1983] 1 All E.R. 910.

House of Lords held that communications between, to and from Ministers, minutes and briefs for Ministers, memoranda of meetings attended by Ministers etc., did not enjoy the status of cabinet minutes. It was asserted that cabinet documents did not have complete immunity but were entitled to a high degree of protection against disclosure. One of the instances where the immunity loses is when a serious misconduct is alleged against a Minister.[56]

Position in Australia

The position in Australia was also similar. Although in the Marconi's case[57] it was held that the courts had power to examine documents to determine whether an executive claim to immunity was justified, the courts in Australia were unable to shrug off the effects of Duncan's decision. Thus, cabinet papers as a class continued to be exempt from production. In 1974, a slightly different opinion was expressed by Menzies, J., in Lanyon Property Ltd. v. The Commonwealth.[58] Upholding a claim for immunity for cabinet documents, he said that, in special circumstances, the cabinet documents may be ordered for production.[59]

---

56. Id. at p.915 per Lord Fraser.
57. Marconi's Wireless Telegraph Company Ltd. v. The Commonwealth (No.2), 16 C.L.R. 178 (1913).
58. 129 C.L.R. 650 (1974).
59. Id. at p.652.

Later, in 1975, Australian National Airlines Commission v. The Commonwealth[60], the High Court treated cabinet papers as a class which should be kept secret in the public interest. However, in 1978, in Sankey v. Whitlam[61], four out of the five judges[62] held that cabinet papers were not entitled to absolute protection and that court had power to inspect such documents with a view of balancing the competing interests.[63]

Position in New Zealand

In New Zealand, the courts were much influenced by the dicta of Duncan's case and cabinet documents were protected as a class.[64] However, in 1981, in Environmental Defence Society Inc. v. South Pacific Aluminium Ltd.(No.2)[65], the Court after considering Sankey's case and Burmah Oil case

---

60. 132 C.L.R. 582 (1975) at p.591.
61. 142 C.L.R. 1 (1978).
62. Gibbs, A.C.J., Stephen, Mason and Aickin, JJ., held the same view. Jacobs, J., did not express any opinion on the issue.
63. In this case, Gibbs, J., said: "The fundamental principle is that documents may be withheld from disclosure only if, and to the extent that the public interest renders it necessary. The principle in my opinion must also apply to State papers. It is impossible to accept that the public interest requires that all State papers should be kept secret for ever, or until they are only of historical significance". 142 C.L.R. 1 (1978) at pp.41-42
64. See Elston v. State Services Commission, [1979] 1 N.Z.L.R. 193 (Sup. Ct.); and Tipene v. Apperely, [1978] 1 N.Z.L.R. 761, both as quoted in D.C. Hodgson, "Recent Developments in the Law of Public Interest Immunity: Cabinet Papers", 17 V.U.W.L.R. 153 (1987) at p.160.
65. [1981] 1 N.Z.L.R. 153, as quoted in D.C. Hodgson, "Recent Developments in the Law of Public Interest Immunity: Cabinet Papers", 17 V.U.W.L.R. 153 (1987) at p.160.

decided that the cabinet papers and the like should not be entitled to absolute protection from production. Following the Environmental Defence Society's case, in 1984, in Fletcher Timber Ltd. v. Attorney General[66], it was ordered for production of communications between Ministers and Prime Minister and memoranda of Cabinet Committees. The Court rejected immunity claimed on the basis of class. A Minister's certificate was held not to become the substitute for informed judicial decision.

Position in Canada

In Canada, the recent authority in this area is Re Carey and the Queen.[67] In this case, the Supreme Court held that although the Canadian provincial common law did not confer an absolute immunity upon cabinet papers, courts must nevertheless proceed with caution in having them produced. The Court was thus careful enough to note the high importance of the cabinet documents and only in strong cases of public interest, they may be ordered to be produced.

---

66. [1984] 1 N.Z.L.R. 290, as quoted in D.C. Hodgson, "Recent Developments in the Law of Public Interest Immunity: Cabinet Papers", 17 V.U.W.L.R. 153 (1987) at p.161.
67. Unreported, but quoted in D.C. Hodgson, "Recent Developments in the Law of Public Interest Immunity: Cabinet Papers", 17 V.U.W.L.R. 153 (1987) at p.163.

Position in India

Unlike in the United Kingdom, in India, the Constitution provides for the protection of cabinet documents from disclosure. Articles 74 and 163 of the Constitution provide for the protection in the cases of Central cabinet and State cabinet documents respectively, by prohibiting inquiries into the advice tendered by the cabinet.[68] Further, Article 361 of the Constitution indirectly protects the cabinet documents by saying that the President or the Governor shall not be answerable to any court for the exercise or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.

Notwithstanding the protection provided under the constitutional scheme, the courts have protected the cabinet documents treating them as "affairs of State" under section 123 of the Evidence Act. In Sukhdev Singh's case[69], cabinet documents relating to removal of the respondent and the reappointment in a different post, were protected from disclosure by treating the documents as those relating to

---

68. Article 74(2) of the Constitution reads as follows: "The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court". Article 163(3) reads: "The question whether any and, if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court".
69. State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493.

the "affairs of State". The Court held that documents which embodied the minutes of the meetings of the cabinet and documents which indicated the advice that is given by the cabinet to the Governor were protected under section 123 of the Evidence Act. The Court also agreed that such documents were protected under Article 163 (3) of the Constitution.[70] According to the Court, such documents belonged to a class of documents, the disclosure of which would considerably affect the public interest.[71] The protection under section 123 was later followed in the Orient Paper Mill's case.[72] The High Court said that the privilege under section 123 for non-production could be sought for a decision of a cabinet relating to the 'affairs of State', as it adversely affects the integrity of the cabinet in determination and execution of public policies.[73]

The extent of the protection under Articles 163 (3) and 74 (2) seems to be absolute. A fulfledged protection was allowed by the Sukhdev Singh Court. However, later, the Patna High Court doubted the extent of the protection. In one case[74], the decision of the Council of Ministers relating

---

70. Id. at p. 512.
71. Id. at pp. 501-02.
72. Orient Paper Mills v. Union of India, A.I.R. 1979 Cal. 114.
73. Id. at p. 124.
74. M.P.Mathur v. State of Bihar, A.I.R. 1972 Pat. 93.

to the appointment of the Chief Secretary to the Government was sought to be produced. When protection under Article 163(3) was claimed, the High Court held that the file containing the advice by the cabinet to the Governor was not entirely privileged, and only those portions which indicated the advice were eligible for the protection. The courts thus can look into those unprotected portions of the file.

The decision in Sukhdev Singh's case indicated that the protection of the cabinet documents was absolute by way of treating such documents as a 'class' and also under Article 163(3) of the Constitution. Later, the Supreme Court, in the Judge's Transfer case, held that protection under Article 74(2) would be available only to the advice tendered by the Council of Ministers and not to other materials upon which the cabinet decided.[75] Accordingly, the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material upon which the decision of the Central Government based, was held to be outside the protection of Article 74 of the Constitution.

The decision in Judge's Transfer case does not seem proper. First of all, it is difficult to isolate the actual

---

75. S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149 at p.230.

'advice' from the cabinet decision because it invariably includes the supporting materials also. Secondly, if the materials upon which a cabinet based its decisions are disclosed, it will be easy to infer the advice given by the cabinet. Such a possibility definitely takes away the protection conferred under Article 74 itself.

However, in Doypack Systems case[76], the Supreme Court slightly differed from the view taken in Judges Transfer case. In Doypack Systems case, the appellant sought the disclosure of opinion on proposals of the Textile Ministry in the form of cabinet notes for the approval of the cabinet in the matter of promulgation of an ordinance and for framing of an Act. Protecting such documents under Article 74(2) of the Constitution, the Supreme Court said:[77]

> "It is well to remember that it is duty of this court to prevent disclosure where Article 74(2) is applicable. We are convinced that the notings of the officials which lead to the cabinet note leading to the cabinet decision formed part of the advice tendered to the President as the Act was preceded by an ordinance promulgated by the President."

---

76. M/s.Doypack Systems v. Union of India, A.I.R. 1988 S.C. 782.
77. Id. at p. 798 per Sabyasachi Mukharji, J.

Referring to Judge's Transfer case, Sabyasachi Mukharji, J., further said:[78]

> "Cabinet papers are ... protected from disclosure not by reason of their contents but because of the class to which they belong. It appears to us that cabinet papers also include a paper brought into existence for the purpose of preparing submission to the cabinet..."

It is doubtful whether the class protection should be given to the cabinet documents. Cabinet files relating to the political decisions may be entirely protected. But regarding the commercial functions of the State, a cabinet file may not be protected generally unless it is against the public interest.

Conclusion

Generally the courts give undue weight to the interests of secrecy and less weight to the hardship caused to the litigants. It seems that even in the case of cabinet papers, public policy requires that the public interest immunity may not be widely construed. The courts may consider the relevance, congency and materiality of the document sought for disclosure. As seen in Sankey v. Whitlam, the

---

78. A.I.R. 1988 S.C. 782 at p.799. The Court referred to State of Bihar v. Kripalu Shanker, A.I.R. 1987 S.C. 1554.

character of the proceedings made it very likely that for the prosecution to be successful, its evidence must include the cabinet papers sought by Mr.Sankey. Concerning the importance of documents to the litigation in question, the court may also consider the likelihood and expediency of proof being made by means other than their disclosure.[79]

The courts may be more willing to order disclosure of cabinet documents in a criminal case if it is to support the defence of an accused. For the proof of guilt, the courts may order disclosure of cabinet documents.[80] However, in cases other than criminal cases, the court may not be that much enthusiastic as they are deciding criminal cases.

The very purpose of cabinet secrecy is to promote its proper and efficient functioning and not to facilitate improper conduct. When there is a strong allegation of unlawful interference with one's statutory rights, courts may order for an in-camera inspection of documents.[81]

There is no system of government so perfect that it is immune from the deseases of politically motivated crimes.

---

79. D.C.Hodgson, "Recent Developments in the Law of Public Interest Immunity: Cabinet Papers", 17 V.U.W.L.R. 153 (1987) at p.174.
80. See Sankey v. Whitlam, 142 C.L.R. 1.
81. In Williams v. Home Office, [1981] 1 All E.R. 1151, the Court ordered inspection and production of high level papers in order to resolve the issue whether a prisoner's limited statutory right of personal freedom or liberty had been breached by a particular Home Office policy.

In this respect it is not fair to exclude cabinet documents as a whole from disclosure as evidence, especially when the charge is the grossly improper functioning of the Government. The interest of the community in such cases is so great that it may not be impeded by a mere rule of evidence. Also, it is not proper to leave the decision to admit or exclude those who are themselves charged with misconduct. A desire to cover up the unauthorised acts, whether the origin of them is the higher level authorities or subordinates, is quite natural. The unauthorised acts complained of may constitute a criminal offence and may have some element of moral culpability.[82] Even in cases of unauthorised acts, which are tortious in nature, possibilities of disclosure may be looked into.

Cabinet secrets may not be made open simply on the basis of an allegation. While it is unreasonable to insist that a party discharges initial onus without the aid of the documents, it is also equally unreasonable to disclose the inner workings of the Government to the public merely on the basis of suspicion. Fishing expeditions by the political opponents may be reckoned with in this respect. The need for the evidence to the suit may be shown beyond any doubt. A prior inspection by the court is the via-media.

---

82. I.G.Eagles, "Cabinet Secrets as Evidence", [1980] P.L. 263 at p.275.

In the cabinet, apart from the highly important matters, there will be discussions on matters of minor importance such as construction of new roads, closure of factories, grant or withdrawl of subsidies etc. Such low level decisions do not deserve any immunity. But, when the decision is commercial in form but political in substance, like the purchase of shares as seen in Burmah Oil Co. case[83], disclosure of the documents may be discouraged. Sometimes, it is the very existence of the high level decision the court has to depend. Where a statute provides that a particular decision can only be taken by a specified person or body, the court may receive evidence as to whether and by whom what decision is in fact taken, whenever its validity is challenged. A claim of privilege in the name of cabinet secrecy in such cases does not seem appropriate.

It can be seen that in all common law countries, the new trend is in favour of disclosure, though not so liberal. It is submitted that the cabinet documents may be allowed privilege provided sufficient reasons bearing on harmful consequences are shown. However, before making it open, the courts may go through the documents in camera. The burden of proof no doubt is on the individual who seeks disclosure. Merely because a certain period of time has

---

83. [1980] A.C. 1090.

elapsed, the cabinet documents need not be disclosed. The criterion may be the adverse consequences relating to the public interest. The court is the better forum, in the present set up, to decide such issues.

In a democratic set up, secrecy in cabinet records is against the fundamental principle of accountability of the elected representatives. The people's representatives must have the moral courage and integrity to withstand their opinions before the public. Secrecy in this respect seems to be a hide-out for political corruption. However considering the Indian situations where communal riots, terrorist activities, linguistic clashes, and inter-state and federal-state disputes are quite common, it seems that secrecy in cabinet records may he p the responsible Ministers to express fearlessly and to take positive decisions which on disclosure may make him unpopular among the group from where he comes.

Thus the general policy on cabinet documents may be disclosure and not secrecy. Only on deserving instances cabinet documents may be allowed to be kept undisclosed. The harmful consequences on the functioning of the Government may be appropriate test.

D. INVESTIGATORY RECORDS

The claim of privilege for the investigatory records is based on prevention of injury to the public interest. The consequences of disclosure of such records is manifold. The disclosure may dry up the sources of information in future. The methods and techniques of investigation may come out which may indirectly help the organized law-breakers. It may also help the criminals to escape from the police net. Sometimes it is not disclosure of the contents of the document that would cause harm, but disclosure of the very existence of a document. Also, the fact that no document exists may also help the law-evaders. The frank opinions and conclusions of the officers is also possible to be disclosed to the outsiders which may silence the officers in future.

A sensitive document in this area may look like one which could be legitimately disclosed. For example, a taxpayer may ask for access to files which relate to him. On the face of it, it is an innocent request. But, if one of the files is a taxation investigation file, the existence of it will reveal that he is under an investigation for a breach of taxation law. Also, a knowledge that an informant has given information to the police may lead one to suspect somebody and it may put his life at risk. Thus, Lord Denning opined that such records

would better be privileged on the class claim basis rather than on the contents claim basis;[1] otherwise it would bring in an immense burden on the police authorities, and may also affect the efficiency of the department.

Now, the position of law in this regard, in the United States, England and India may be briefly looked into.

Position in the United States

In the United States, Exemption Seven of the Freedom of Information Act deals with the disclosure of investigative records. Prior to the amendment in 1974, the Exemption Seven authorized withholding of investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.[2] The main purpose of the section was to prevent any harm to the Government's case in a court, by not allowing litigants an earlier or greater access to agency investigatory files.

In the 1974 amendment,[3] Congress substituted the word

---

1. Neilson v. Laugharne, [1981] 1 All E.R. 829 at p.836.
2. Exemption Seven of the Freedom of Information Act before the 1974 amendment read as follows:
   552(b) This section does not apply to matters that are—
   (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
3. The thrust of the congressional concern in the amendment was to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file. An identical proposal had been also made by the American Bar Association's Administrative Law Division. See N.L.R.B. v. Robbins Tyre and Rubber Co., 57 L. Ed. 2d. 159 (1978) at p.170.

'records' for 'files'.[4] This shift in terms to 'records' signifies a legislative intent that each document within a file may be given individual attention when determining, the public's right of access, thus eliminating the tendency to regard the contents of a file as either wholly exempt or wholly discoverable.[5] The amendment also brought in six relatively specific grounds on which withholding could be justified. The grounds include interference with enforcement proceedings, safeguarding the secrecy of investigatory techniques, protecting confidential sources, preserving impartial adjudication, safeguarding personal privacy and protecting the life or physical safety of law enforcement personnel. Any other basis for withholding such records would be unacceptable.

A primary unsettled issue was that whether an investigatory file could lose its exempt status when enforcement proceedings were no longer contemplated or when the file had

---

4. Exemption Seven of the Freedom of Information Act, after the 1974 amendmend, reads as follows:
   552(b) This section does not apply to matters that are—
   (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.
5. Donald C.Rowat, Administrative Secrecy in Developed Countries, Macmillan, London (1979), p.337.

lain dormant for a substantial period of time.[6] The files in such cases may carefully be analysed. Many such files may contain investigative techniques and other secret information. They may be deleted before disclosure.

The language of the section indicates that judicial review of an asserted Exemption Seven privilege requires a two-part inquiry. The requested document must first be shown to be an investigatory record compiled for law enforcement purposes, and secondly, the agency must show that release of the material may have one of the six results specified in the section.[7] In F.B.I. v. Abramson,[8] the Court held that an information originally compiled for law enforcement purposes and which could be validly withheld under the Exemption Seven, would not lose its protection if it was summarized in a new document not created for law enforcement purposes.

A ramification of the decision is that Exemption Seven may now be applied to prevent public disclosure of law enforcement agency records compiled for political reasons if these records contain information from past investigatory

---

6. But a distinction between 'currently active files' and 'files that are no longer serviceable', is questionable because a bureaucrat can easily decide that a requested file is or has suddenly just become a currently active file. See Miller & Cox, "On the Need for a National Commission on Documentary Access", 44 Geo. Wash.L. Rev. 213 (1976) at p.226.
7. Federal Bureaue of Investigation v. Abramson, 72 L.Ed. 2d. 376 (1982) at pp.383-84.
8. Ibid.

documents. In such situations, a court can, using an in-camera proceeding, segregate portions which bring invasions of personal privacy and disclosure may be made accordingly. The court may also consider the purpose for which the material in the record is collected apart from the purpose for which the document is prepared for.

Exemption Seven does not protect law enforcement manuals. It allows only withholding of information compiled in the course of investigation. The fact that Congress intended to protect investigatory techniques does not mean that it wished to protect all such information regardless of the context in which it arose. Thus, a balancing may be necessary for a court to weigh the interests in disclosure and non-disclosure, though the scope of judicial discretion has been cut short by providing six grounds for withholding under the amendment.

Position in England

Investigatory records are generally protected in England. In Neilson v. Laugharne,[9] the plaintiff made a complaint against the police officers who searched his house while he was out, that his house was burgled. Accordingly, under an Act, the Chief Constable conducted an investigation and made a report which contained statements from several persons and found no charge against police officer. Still, the plaintiff filed a suit for damages and sought disclosure

9. [1981] 1 All E.R. 829 (C.A.).

of the report, which was rejected. The Court found that the disclosure of the investigative report would be injurious to public interest and that confidentiality should be maintained to ensure full and frank co-operation of police officers.[10] In an earlier case also,[11] where the plaintiff brought an action for damages for false imprisonment against police officers and sought a discovery of notes and books kept by police, the Court did not allow the disclosure claim. In a recent case,[12] a complaint was made against the police by a mother on the death of her son, Peach, on being struck on head by an unidentified police officer during a public demonstration. The police investigated into it and took statements from witnesses including a companion of the deceased. Later, in an action by the mother, these documents were sought for discovery. This was refused by the Commissioner of Police on the ground of public interest. But the Court rejected the claim made by the Commissioner of Police because the police authority had a general duty to investigate into the death, apart from investigating into a complaint against police officials. Thus, the investigation was made with the above two purposes and the Court found former one as the dominant purpose because Peach died a violent death and it was a matter of public concern to establish the cause of death.

---

10. Lord Denning's reasons for rejecting disclosure were (a) that Neilson was fishing and (b) that statements were taken for the purposes of a private investigation to see if the police had acted improperly. [1981] 1 All E.R. 829 at p.836.
11. Brooks v. Prescott, [1948] 1 All E.R. 907 (C.A.).
12. Peach v. Commissioner of Police of the Metropolis, [1986] 2 All E.R. 129 (C.A.).

In many situations, it may not be wise to disclose to the accused how the police got information including the source, method and other things. In R. v. Johnson,[13] the appellant was seen selling drugs by the police, watching from the premises of a private person, which was used as an observation post. On being charged with possessing and selling drugs, appellant wanted to know the details of the observation post so that he could test the officers by reference to the distance, angle of vision and possible obstructions between the observation post and the place of transaction. It was held that the exact location of the post need not be disclosed, because it would risk the occupiers who had permitted their premises to be used as observation posts.[14] Thus, the desirability of protecting from reprisals those who assisted the police outweighed the principle that there should be full disclosure of the material facts.

It can be seen that the courts generally decide in favour of claim of privilege for investigatory records. However, where investigation of the crime is not the main issue, the documents may be ordered to be disclosed provided there is also a general public interest in disclosure of the document.

Position in India

In India, under section 123 of the Evidence Act, the investigatory records may be protected. In Nanda Singh's case,[15]

13. [1989] 1 All, E.R. 121 (C.A).
14. It may be noted that the court was satisfied that the defendant would nevertheless receive a fair trial.
15. King Emperor v. Nanda Singh, A.I.R. 1925 Oudh 540.

an investigation report made by a Magistrate of First Class into the escape of a prisoner was held to be privileged under section 123. In Vori Madho Prasad Singh's case,[16] the defendant police officer in his report made allegations against the plaintiff, Raja of Kankit, that Raja had taken action preventing Muslims from collecting fuels from the jungle and that it was shameful for a person like Raja to do so. In a suit for damages for libel, the report was sought to be disclosed. Allowing the claim of privilege under section 124, Evidence Act, the Court explained the necessity of secrecy for such records and observed as follows:[17]

> "... it is the imperative duty of the police officer to submit fearlessly and without any apprehension in his mind full facts which are disclosed to him and indeed all the information which is relevant to the inquiry. If a police officer is to labour under the apprehension that later on he would be called upon to substantiate the truth of the allegations made by him in his report, it would be almost impossible for him to make any report at all".

In another instance,[18] plaintiff claimed damages for an alleged libel made by the defendant, Director of Agriculture, who had lodged a criminal complaint that plaintiff had not accounted for certain materials which belonged to a Government Scheme, or

---

16. Vori Madho Prasad Singh v. M.Wajid Ali, A.I.R. 1937 All. 90.
17. Id. at p.96.
    The Court also held that such a report could be considered either as part of the judicial proceedings or as a State proceeding and it was an instance of absolute privilege (at p.93).
18. RajulRoaji Bhai Shah v. Provincial Government of C.P. & Berar, A.I.R. 1951 Nag.212.

used them for her personal use, or disposed of them dishonestly. The report made by the police officer on the complaint was held to be privileged on account of the injury to the public interest. In another case,[19] the investigation report by the Taluk Supply Officer on the black marketing activities of the plaintiff was held to be privileged when sought for disclosure in a suit for defamation.[20] In Harbhajan Singh's case,[21] reports made by Intelligent Bureau on smuggling in Punjab were held to be privileged.

Though the investigatory records as a class are treated as privileged, there are certain types of records which are not given privilege. The statement received from various persons during the course of an investigation may not be given privilege. For the purpose of contradicting the witnesses, the statements given by such witnesses in the investigation proceeding may be asked to be disclosed.[22] In one case,[23] the diary of a foot-constable, who was deputed to follow the movements of a suspect, was held not to be privileged, where the constable also happened to be a witness. Also, where the court finds that a detention of a person was malafide or

---

19. In Re Killi Suryanarayana Naidu, A.I.R. 1954 Mad. 278.
20. See also S.B.Chowdhury v. I.P.Changkakati, A.I.R. 1960 Ass. 210. In this case, police and intelligence reports on a Minister were held to be privileged when sought for disclosure in a suit for defamation.
21. Harbhajan Singh v. State of Punjab, A.I.R. 1961 Punj.215.
22. Nath Appa Rao v. Narulasetti Suryaprakasa Rao, A.I.R. 1951 Mad. 864. See also Kaliappa Udayan v. Emperor, A.I.R. 1937 Mad. 492; and Mohan Singh Bath v. Emperor, A.I.R. 1940 Lah. 217.
23. Mohan Singh Bath v. Emperor, A.I.R. 1940 Lah. 217.

without having reasonable suspicion, the report made by the police officers finding the persons as one of dangerous character, may be asked to be disclosed.[24] On one occasion,[25] the Court opined that the records at a police station about activities of a person and police officer's report on him to superior officer were not privileged.[26]

Where the investigatory records include statements from persons taken publicly, the statements may not get any privilege. Such an enquiry cannot be deemed to be a confidential one. But if the enquiry is conducted secretly, there is nothing wrong is conferring privilege to the documents. The personal opinion and conclusions of the officials may be allowed to claim privilege. The investigatory records may not be disclosed for the purpose of helping someone to establish his rights.

Conclusion

The investigatory records may to be protected from disclosure, the reason being that irreparable damage may result on disclosure. Maintenance of law and order and investigation of crimes are highly important so that no risk may be taken on account of disclosure of related documents. Such documents may be divulged only where an individual is defending charges made against him. In such cases, the court

---

24. Teja Singh v. Emperor, A.I.R. 1945 Lah. 293.
25. Ibid.
26. Ibid.

may make an in-camera inspection and decide whether the document shall be divulged or not. If they are found to be highly necessary for rendering justice to an individual, and also that public interest would be injured on disclosure, the document may not be disclosed and the individual may be released from the charges.

Secrecy is required to the investigatory records which are necessary for the furtherance of the investigation and running of the case. The techniques and procedures adopted by the officials may also require secrecy. Investigatory records containing the names or sources of informers may also be protected. Above all there may be records which could very well be useful for investigations in future. For the better efficiency of the department, these records may also be protected.

Specifying the nature of documents for the purposes of protection under a freedom of information legislation as seen in the United States, may not be wise because there may arise situations which could not be forseen. The result would be disclosure of sensitive documents causing irreparable injury to the public interest. Again, considering the situations in India, where the law and order problem and crime rate are on the ascending scale, it would be undesirable to provide liberal access rights to the public in the case of investigatory records. It would be desirable to confer a residuary power to courts to balance the public interests in disclosure and secrecy.

E. INFORMER PRIVILEGE

Under common law, the courts have a discretion to order a person who had received certain types of information, to disclose the source.

Informer's privilege is the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement. It is the source rather that the substance of the communication that is privileged.[1] The privilege is not to an informer or the intermediary but to the Government. The privilege is lost when the informer takes part in the investigation as an assistant to police.[2]

The earliest reported case in this area is Hardy's case.[3] It was a treason trial and, in the course of examination, questions were put that were designed to elicit the information which had led the Crown to investigate the actions of the defendants. Ruling such questions inadmissible, the Court held that the channels by means of which detection was

---

1. Hyman Scher v. United States, 83 L.Ed. 151 (1838). In this case, the Court allowed a claim for privilege for the source of information regarding an automobile which carried illicit liquor.
2. Roviaro v. U.S., 1 L.Ed. 2d. 639 (1957).
3. (1794) 24 State Trials 199, as quoted in Dennis Pearce, "Of Ministers, Referees and Informers—Evidence Inadmissible in the Public Interest", 54 A.L.J. 127 (1980) at p.134.

made, should not be unnecessarily disclosed. The correctness of this decision was later confirmed in Marks v. Beyfus[4] in which the defendants were charged with conspiracy to cause the Director of Public Prosecutions to institute the prosecution. The plaintiff sought the names of informants from the Director. The Director objected successfully on the ground that it was a public object and so the information ought not to be disclosed on grounds of public policy. The Court said that in a public prosecution a witness could not be asked such questions which would disclose the informer if he was a third person. On informer's privilege, Lord Esher, M.R., said:[5]

> "I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.. But except in that case, this rule of public policy is not a matter of discretion; it is a rule of law, and as such should be applied by the judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not".

This rule of public policy also protects a witness from being

---

4. (1890) 25 Q.B.D. 494 (C.A.).
   Before Marks v. Beyfus also, the courts have recognised the protection of informers. See Home v. Bentinck, 129 E.R. 907 (1820) at p.920.
5. Id. at p.498.

asked a question which would disclose the informer.[6]

The rule is that the identity of police informers shall not be disclosed with the exception where it is necessary to prove the innocence of the accused. It is for the protection of the police function and not for the safety of the informer.[7] Even when the informer himself comes forward for the production of the information, he may not get the discovery of them. In Heimann v. The Commonwealth,[8] the plaintiff, an informer, brought an action for a breach of contract under which he was promised a sum for supplying information. The Court said that discovery of necessary documents would be possible for him only as a contractor and as an informer he could not get any right to discovery.

Earlier the exemption from disclosure of informer documents was generally allowed in the case of police informers. The same protection was allowed in the case of informers to the Graming Board in Rogers v. Secretary of State for the Home Department,[9] in which information regarding the character and reputation was collected from different persons by the Chief Constable for the Gaming Board and the same were given informer's privilege in a libel case against the Chief Constable.[10]

---

6. See A.G. v. Briant, 153 E.R. 808 (1846) at pp.814-15 per Pollock,C.B.
7. J.Stephen Kos, "Crown Privilege: Recent Developments in New Zealand", 10 V.U.W.L.R. 115 (1979-80) at p.125.
8. 54 C.L.R. 126 (1935).
9. [1972] 2 All E.R. 1057.
10. See also, for a similar decision by the Court of Appeal, R. v. Gaming Board for Great Britain; Ex Parte Benaim and Another, [1970] 2 All E.R. 528 (C.A).

It may be noted that the informer was the Chief Constable, a governmental authority. Importance is given to the function of informing itself rather than the person. While the Roger's case confirmed the earlier position, the Alfred Crompton Amusement Mechine's case[11] extended the exemption beyond information communicated directly to the police. The Court included information generally supplied to investigatory officers in circumstances analogous to the supply of information by informers to the police. In this case, the privilege was also allowed to informers who supplied information to the Customs and Excise Department on the prices of certain goods, which was necessary to calculate the tax to be levied from the Company. The Court found that disclosure of the information would be harmful to the efficient functioning of the Department and, if such information was disclosed, the sources of information would dry up.

An important question whether information provided to an organisation, ie., other than the police or pretrial organs of Government, could be protected from disclosure arose in the case, D. v. National Society for the Prevention of Cruelty to Children.[12] In this case, information regarding the alleged maltreatment of a child was given to the voluntary Society, incorporated under a Royal Charter whose purpose included prevention of wrongs to children and taking of action

---

11. Alfred Crompton Amusement Mechines v. Commissioners of Customs and Excise, [1973] 2 All E.R. 1169 (H.L).
12. [1977] 1 All E.R. 589 (H.L).

to enforce laws. The Society was an authorised person to do so under the Act. The Society invited information from the public as to children who might need protection from abuse. In this case, the information it received about a maltreatment was found to be untrue after an inspection by the Society's inspector. But the respondent mother was shocked by the inspector's visit and the news. She wanted to sue the informer and requested for the name of the informer. This was successfully rejected on the ground of public responsibility under the direct authority of an Act of Parliament. The function of the Society for that matter was similar to the local authority and the police. Thus, it was held that the protection given in the case of police informers could also be given in this case. The Society which solicited information from the public under a pledge of confidentiality would suffer a drastic reduction in the flow of information to the danger of many children, were it known that the name of the informant was subject to disclosure in the event of subsequent proceedings against the Society.[13]

The rule of N.S.P.C.C. case was followed in Buckley v. Law Society.[14] In this case, dishonesty was alleged against the appellant solicitor, regarding the money held by him. The Society which had sufficient reasons for suspecting dishonesty, gave notice to him to the effect that the money be transferred to the Law Society because he was suspected. He sought

---

13. Id. at p.604.
14. [1984] 3 All E.R. 313 (Ch.D).

disclosure of informers. The Court said that the Law Society was in a special position in relation to the solicitors generally and found that the Society had many important powers which were exercisable in the public interest. The Society was not only the guardian of the profession but also of the public.[15] Equating the instant case with N.S.P.C.C. case, the Court held that public interest immunity was wide enough, whether the informant was honest and public spirited, or lying and spiteful.

In India, under Section 125 of the Evidence Act, no magistrate or police officer shall be compelled to say whence he got information as to the commission of any offence.[16] Similarly, a revenue officer shall also not be compelled to impart the same kind of information. A police officer could refuse to produce a complaint which is demanded for ascertaining the informer's name.[17]

Though the section does not expressly prohibit a witness, if he is willing to disclose information, the foundation of the right shows that the protection should not be made to depend upon a claim of privilege being put forward, but that it is a duty of the court to exclude evidence.[18]

---

15. Id. at p.317.
16. Section 125 of the Evidence Act reads as follows:
    "No Magistrate or Police Officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue."
17. Bagumal Wadhumal v. Emperor, A.I.R. 1917 Sind 43 at p.44.
18. Weston v. Peary Mohun Das, A.I.R. 1914 Cal. 396 at p.407.

It is absolutely essential to the welfare of the State that the names of spies, decoys or informers should not be divulged. Otherwise few men would choose to assume the disagreeable part of giving or receiving information respecting offences, whether it is out of fear, or shame, or dislike of being mixed up in enquiries of such nature.[19] The consequence would be that a great many crimes would pass undetected and unpunished. The protection given under the section is thus based on the public policy. In India, thus, there is more or less a complete protection to the information regarding informers. Till the authorities come forward to disclose the names, the protection is complete.

Conclusion

There are certain drawbacks for the privilege. The meaning of 'confidential information' itself varies from one department to another. Informing a tax evasion, a commission of a crime, the details of a politician, etc., cannot be based on the same footing. There is no possible way to contest the truthfulness of anonymous accusations. The supposed accused can neither be identified nor be interrogated. He may be the most worthless and irresponsible character in the community. In a court of law, the triers of fact could not even listen

---

19. State of U.P. v. Randhir Sri Chand, A.I.R. 1959 All. 727.

to such gossip, much less decide the most triffling issue on it.[20] Thus, the courts must be careful before allowing an informer privilege.

In a criminal case, the State itself prosecutes the case and has the burden or duty to prove beyond any doubt. In such a system, when the Government asks for a relief from the burden of proof by bringing the privilege, the defence may become more and more weak because sufficient materials are not available. Only in exceptional cases, the privilege may be allowed because, on the face of the claim, it is unjustifiable to allow the State to initiate the proceeding and then demand to punish without sufficient evidence. The burden is on the Government to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of confidential information.[21]

The rationale of the privilege is the desirability of encouraging voluntary disclosure of criminal activities without apprehension of disclosure of identity, thus resulting in furtherence and protection of public interest in effective law enforcement. This privilege recognized the obligation

---

20. It is also worth to remember that one of the techniques which is always used to maintain absolute power in totalitarian governments is the use of anonymous information by Government against those who are obnoxious to the rulers. Jay v. Boyd, 100 L.Ed. 1242 (1956) at pp.1257-59 per Black, J. (dissenting).
21. Jencks v. United States, 1 L.Ed. 2d. 1103 (1957) at p.1114.

of citizens to communicate their knowledge of the commission of crime to the officials. By preserving the anonymity, it encourages them to perform that obligation.[22]

The privilege is also necessary for free and unembrassed administration of justice.[23] In fact, every individual has a duty to inform the authorities of any violation of law taken place in his knowledge.[24] The court will protect such communications absolutely without reference to the motive or intent of the informer or questions of probable cause, the ground being that greater mischief will probably result from requiring or permitting them to be disclosed than from wholly rejecting them.[25] When a disclosure of the source of information is found to be prejudicial to the public interest, privilege may be allowed.[26]

The problem calls for balancing the public interest in protecting the free flow of information against the individual's right to prepare his defence. Whether a proper

---

22. Roviaro v. U.S., 1 L.Ed. 2d. 639 (1957) at p.644.
23. John C.Vogel v. Timothy Gruaz, 28 L.Ed. 158 (1884). In this case, the Court protected an information communicated to an attorney regarding certain offences.
24. See In Re John M.Quarles, 39 L.Ed. 1080 (1895) at p.1081.
25. John C.Vogel v. Timothy Gruaz, 28 L.Ed. 158 (1884) at p.160
26. Jay v. Boyd, 100 L.Ed. 1242 (1956). In this case, the Court allowed an enquiry officer's decision, on an application for suspension of deportation of an ex-communist, made under the discretionary authority based on certain confidential information. There, in the opinion of the enquiry officer, the disclosure of information was prejudicial to public interest. It may be noted that even in an important issue of deportation, where a person's liberty was affected, the privilege was allowed by the Court.

balance renders non-disclosure erroneous, depends on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, significance of the informer's testimony and other relevant factors. It may be left to the discretion of the court.

When a court disallows a claim of privilege, there are only two options before the Government: either to produce the document or to allow the crime unpunished. This policy decision may be taken very cautiously. This discretion is to be exercised by the Government and it cannot be shifted to the court because the Government is more aware of the consequences of disclosure. Thus, a court's role is minimum in this area.

The informer privilege is said to be that of the Government and not of the informer.[27] If the Government is left with an absolute freedom with respect to the making of a privilege and in the process, the privilege was not claimed in a justifiable case, the people would be reluctant to inform of the violations of the laws. In such a situation, enforcement of criminal law would be seriously affected. Though the resultant discredit goes to executive, in a democracy, the public are also equally interested in law enforcement matter. Thus, the claim for informer privilege may not be left with the Government alone. Before waiving it,

---

27. Roviaro v. United States, 1 L.Ed. 2d. 639 (1957) at p.644 per Burton, J.

the informer may be heard by the executive and may be allowed to challenge the decision of the Government to waive the privilege. It is always justifiable to keep the informer's name secret rather than winning a case.[28]

---

28. The State may use the information received from the informer only as a lead and to gather evidence of probable cause apart from the informant's data. Perhaps that approach would sharpen investigatorial techniques. It is doubtful whether there would be enough talent and time to cope with crime upon that basis. It is better to accept that the informer is a vital of society's defensive arsenal. The basic rule protecting his identity rests upon that belief. See State v. Burnett, 42 N.J. 377; 201 A. 2d. 39 per Weintraub, C.J., as quoted in McCray v. Illinois, 18 L.Ed. 2d. 63 (1967) at p.68.

F. THE RIGHT TO PRIVACY

The effect of the right to privacy on the right to information may now be considered. In the discussion that follows, at first the law of privacy is explained, and thereafter, the position of law regarding privacy as an exemption to the right to know is dealt with.

The Universal Declaration of Human Rights[1] and the European Convention for the Protection of Human Rights and Fundamental Freedoms[2] have recognized the privacy interests of an individual. The restrictions on this right is allowed only in certain contingencies.[3] The International Convenant on Civil and Political Rights later in 1966 reiterated the right to privacy referred to in Article 12 of the Universal

---

1. Article 12 of the Universal Declaration of Human Rights, 1949 says:
   "No one shall be subjected to arbitrary interference with his privacy—family, home or correspondence nor to attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".
2. Article 8 of the Convention says:
   1. Everyone has the right to respect for his private and family life, his home and his correspondence.
   2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
3. Ibid.

Declaration of Human Rights. It was adopted by the General Assembly in which India was a member.[4]

The Constitution of India does not confer a right to privacy as such. Such a right can be drawn from different Articles, as drawn in the United States, by way of recognising zones or areas of right to privacy under different Amendments. The right to privacy was considered for the first time by the Supreme Court in Kharak Singh v. State of U.P.,[5] where the validity of the U.P. Police Regulations which authorised "domiciliary visits", was challenged as infringing Articles 19(1) and 21 of the Constitution. After referring to the position of law in the United States, the Supreme Court held that our Constitution did not provide any guarantee to right to privacy. However, the Court opined that "an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of common law right of a man--an ultimate essential of ordered liberty, if not of the very concept of civilization".[6] The Court struck down the

---

4. See Indian Law Commission, Forty-second Report on Indian Penal Code, (1971), pp.336-38.
   For more on right to privacy, see Warren and Brandies, "The Right to Privacy", 4 Harv. L.Rev. 193 (1890); William L.Prosser, "Privacy", 48 Cal.L.Rev. 383 (1960); Alen F. Westin, "Science, Privacy and Freedom: Issues and Proposals for the 1970's" 66 Colum.L.Rev. 1003 (1966); Charles Fried, "Privacy", 77 Yale L.J. 475 (1968); Ruth Gavison, "Privacy and the Limits of Law", 89 Yale L.J. 421 (1980); Jed Rubanfeld, "The Right of Privacy", 102 Harv.L.Rev. 737 (1989); P.H.Winfield, "Privacy", 47 L.Q.R. 23 (1931); and, M.C. Pramodan, "The Right to Privacy", 1990 C.U.L.R. 59.
5. A.I.R. 1963 S.C. 1295.
6. Id. at p.1302.

Regulation not on the basis of the above mentioned common law right but because the 'Regulations' was not a law. They were only executive instructions. Subba Rao,J., dissenting, observed that personal liberty in its wider perspective included the right to be free from restrictions placed on one's movements and also a right to be free from encroachments on his private life.[7] Though the Constitution did not declare the right to privacy, it was treated as an essential ingredient of personal liberty by Subba Rao, J.[8] The decision, however,did not clarify the status and position of the right to privacy.

Ten years later, the Supreme Court in R.M.Malkani's case,[9] almost accepted the value of the right to privacy. In this case, where Article 21 was invoked by submitting that the privacy of the appellant's conversation was invaded, the Court assured that the telephonic conversation of an innocent citizen would be protected against wrongful interference by tapping.[10]

Later, Govind v. State of M.P.,[11] where the facts were similar to Kharak Singh's case,[12] raised the issue of right to privacy. Here,the contention was that the domiciliary visits by the police violated the plaintiff's fundamental right to privacy, forming a part of freedom of movement guaranteed under

---

7. Id. at p.1306.
8. Ibid.
9. R.M.Malkani v. State of Maharashtra, A.I.R. 1973 S.C. 157..
10. Id. at p.164.
    The Court's distinction between the innocent and guilty citizens does not seem proper because the restrictions on Art.21 are possible only by means of a procedure established by law.
11. A.I.R. 1975 S.C. 1378.
12. A.I.R. 1963 S.C. 1295.

Article 19(1)(d) and personal liberty under Article 21 of the Constitution. After going through the position in the United States, Mathew,J., said:[13]

> "... makers of our Constitution wanted to ensure conditions favourable to the pursuits of happiness. They certainly realised the significance of man's spiritual nature, of his feeling and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the government, a sphere where he should be let alone".

The Court was not ready to give a broad definition to the right to privacy though it agreed that privacy concerns the individuals. The Court said that right to privacy was related to and overlapped with the concept of liberty.[14] It also said that right to privacy must be based on a fundamental right implicit in the concept of an ordered society. However, the Court did not clearly state that the Constitution recognized the right to privacy. Wherever the judgement reaches near the right to privacy as a constitutional right, the Court diluted it by assumptions.[15]

---

13. Govind v. State of M.P., A.I.R. 1975 S.C. 1378 at p.1384.
14. Id. at pp.1384-85.
15. Mathew J. said: "The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute". Govind v. State of M.P., A.I.R. 1975 S.C. 1378 at p.1385.
See also K.C.Joshi, "Right to Privacy: An Extension of Personal Liberty", 4 Kurukshetra L.J.131 (1978) at p.141.

Govind's case did not establish the right to privacy. But it was helpful for starting a thorough discussion on the topic. The acceptance of such a right which is invaluable for the dignity and integrity of an individual, is to be welcomed. Later, in Malak Singh's case,[16] where the entry of the plaintiff's name in the surveillance register by the police was challenged, the Supreme Court opined that surveillance would seriously encroach the privacy of a citizen so as to infringe his fundamental right to personal liberty guaranteed by Article 21 and the freedom of movement guaranteed by Article 19(1)(d) of the Constitution.[17]

While the trend being in such a positive way, in Ayyappan Kutty v. State,[18] the Kerala High Court opined that privacy was not an established fundamental right and under Article 21; it could only be treated as pervasive right.[19] In this case, the petitioner was undergoing imprisonment and was expecting an immediate release from the jail. His photograph was published in the taxi stands at this time. This action of the police authorities was challenged as being against the right and liberty conferred under Articles 19 and 21 of the Constitution. The Court giving more weight to the preventive action of the State, though there was no concrete proof of the petitioner's involvement in other pending cases, justified the action. The decision seems to be a retrograde step because the

---

16. Malak Singh v. State of Punjab, A.I.R. 1981 S.C. 760.
17. Id. at p.763.
18. (1986) K.L.T. 383.
19. Id. at p.389.

Court did not give any importance to the reformative and rehabilitative elements. That being the case, the Court also did not give necessary importance to the privacy interests of the plaintiff while allowing the Government to publish his photo in the taxi stands.

Though right to privacy has not been recognised as such under any law, there are provisions in different statutes which help in protecting certain elements of right to privacy.[20] There are also provisions in certain statutes which pose threats to the right to privacy.[21]

Considering the need for recognition of the right to privacy, the Law Commission has recommended insertion of a new

---

20. See sections 441 (Criminal tresspass), 499 (Defamation), 228 A. (Prohibition of printing or publishing identity of victims under sections 376, 376-A, 376-B, 376-C and 376-D of I.P.C.) of Indian Penal Code; sections 122 (Protection of communications made by spouses during marriage) and 126 (Protection of communications made to a lawyer) of the Indian Evidence Act; section 5 of the Banker's Book Evidence Act, 1891 which protects the privacy interests of a customer of a bank; and, section 15 of the Census Act, 1948 which protects the personal details gathered by the Government.
21. Section 26 of the Indian Post Office Act, 1898 confers powers on Central and State governments to intercept postal articles on the occurrence of any public emergency or in the interest of the public safety or tranguility by an order in writing. Regarding any doubt as to the existence of a public emergency, Section 26 says that a certificate in this respect by the Central or State Government is conclusive. See also section 5 of the Indian Telegraph Act 1885, which confers power on Central and State Governments to intercept, detain, or not to transmit or disclose the message relating to any particular subject on the occurrence of public emergency or in the interest of public safety.

section in the Penal Code, making unauthorised photography and use of artificial listening or recording apparatus and publishing such information, listened or recorded, as offences.[22] The Law Commission has also recommended insertion of a new section in the Evidence Act to protect the communications between a family counsellor and persons counselled.[23]

The Second Press Commission has recommended an amendment to section 13 of the Press Councils Act, 1978 in order to protect the right to privacy.[24] In the recommended form, one of the functions of the Press Council, in furtherance of its objects, is to ensure on the part of the newspapers, news agencies and journalists, the maintenance of high standards of public taste including respect for privacy.

Under different restrictions on the State power provided under the Constitution, the right to privacy can be protected against the Government. Article 14 rejects any unreasonable act by Government. No governmental action can be unreasonable to an extent where the right to privacy of an individual is violated without reasonable cause. Thus, violation of right to privacy can be protected under the Article 14 of the Constitution to a certain extent. Article 20 of the Constitution which provides for the privilege against self-

---

22. Indian Law Commission, 42nd Report on Indian Penal Code, (1971), pp.339-40.
23. Indian Law Commission, 69th Report on Indian Evidence Act, (1977), p.730.
24. Report of the Second Press Commission, (1982), p.77, as quoted in E.S.Venkataramiah, Freedom of Press: Some Recent Trends, B.R.Publishing Co., Delhi (1987), p.117.

incrimination also, in some respect, protects the right to pri privacy.[25] Under the privilege against self-incrimination, officials are denied the power to compel one to disclose information about himself.[26] Though it is primarily a protection for an individual against a mighty State, another aspect of the privilege is to protect the privacy of an individual by shielding him from judicial inquisition. The freedom of conscience and religion provided under Article 25 of the Constitution confers the right to privacy in respect of one's interest in religion. No one may be required to account for the religion he believes. The freedom of conscience here provides for the necessary privacy regarding one's religion. Right to privacy is also necessary for a proper enjoyment of the freedom of movement conferred by Article 19 of the Constitution. The fear of surveillance by the neighbour as well as the State is always in impediment to enjoy that freedom.

Apart from the above mentioned Articles, which provide for the right to privacy in different walks of human life, Article 21 also confers such a right on a better and wider scale. The liberty of an individual definitely includes his privacy interests. Article 21, being the repository of all the unenumerated rights, is able to embrace the right to privacy without much difficulty. The restrictions on the right to privacy is thus possible only through a procedure established by law.

---

25. See Charles Fried, 'Privacy', 77 Yale L.J. 475 (1968) at p.488.
26. Ibid.

It is true that common law was not able to introduce the right to privacy as an inherent and inalienable one. Sometimes it may be because of the 'Leviathan' influence on the legal system whereby the people surrender all of their rights in return of physical security. But the American law definitely made a substantial progress in the area of right to privacy. The influence of the social contract theory of Locke, which says that people do not surrender all of their rights but keeps certain of them with them, in the American system, it seems, was instrumental in giving a legal validity to the right to privacy at an earliest period itself. In India, we follow the English system of law in its content and procedure. Some of the fundamental rights provided in our Constitution are similar to certain provisions of the Constitution of the United States on which the right to privacy was established there by the Supreme Court of the United States. Inherently our courts were not equipped to recognize the right to privacy due to the influence of the English law. But constitutional provisions are enough to introduce the right to privacy by an active judiciary. Though such a move was made by Mathew,J., the right has not been recognized finally beyond doubt.

Government and citizen's right to privacy

Surveillance by Government over its citizens is also a fundamental means of social control similar to the controls by parents over children, employers over employees etc.[27]

---

27. Alen F.Westin, "Science, Privacy and Freedom: Issues and Proposals for the 1970's", 66 Colum. L.Rev. 1003 (1966) at p.1044.

As the range of governmental activities widen and as they seek more deeply into the structure of the society, governmental agencies gather more and more information about their subjects especially for whom they provide services, benefits etc., or whom they seek control over. The census made by Government is an excellent example for how the Government collects information. Information about the people is necessary for the Government in framing its policies in an enlightened and democratic way. Also, the law enforcement authorities require more and more information to cope up with the modern law-breakers.[28] What is then required is the collection of more and more information. Dissemination, however, may be made reasonably or only to the extent where it is necessary for the proper functions of the department.

The potential employees of a department are investigated thoroughly into their background. The enquiries go into the areas of a potential employee's personal, professional and political backgrounds also. It is true that the prospective employees passively consent to such an inquiry. But it comes only from a situation where he has no other alternatives. On the other hand, such an investigation is widely accepted as essential to a sound administration. The Government may limit the investigation only to the relevant matters and disclosure of them may be strictly restricted.

---

28. For more details see C.P.Waler, "Police Surveillance by Technical Devices", [1980] P.L. 184.

The psychological tests pave the way for an intrusion into the privacy of the individuals. But such a test necessaril helps the Government to select the right persons for the right posts. What is required in this respect is to keep the evaluation and results confidential. In the public interest, for an efficient administration, such tests cannot be altogether rejected on the ground of privacy.

Persons working in departments relating to military, foreign affairs, atomic energy etc., may be watched by the Government itself. This, it is true, may affect the right to privacy of such officials. But in the interest of national security and foreign relations, such surveillance cannot be stopped. Also, it is true that persons opting for employment in such departments know that there will be such surveillance and their privacy may be affected to a certain extent.

A more difficult problem arises in relation to the private information collected by public and security agencies. The interests of the community demand, that this information may not be open to any other person. If such records are open to others, it will definitely create problems for those in whose cases information is kept by the Government. It may lead to his unemployment.[29]

The machinery of Government demands ever-increasing amount of personal information especially in the areas, such as,

---

29. See Patricia Hewitt, Privacy: The Information Gatherers, N.C.C.L., Robendene, Amorsham (1980), p.1.

taxes, welfare benefits, education, health, administration of justice and legal aid. The data banks in the public sector cannot misuse the information they collect, because such information can only be used for the authorised statutory purposes. Its use otherwise will be ultra vires. It will be irrational to insist the Government that privacy values of individual be preferred always to the requirements of the public interest. Defending privacy does not mean denying information to Government which legitimately needs them in the community's interest. But, proper safeguards on the use of the private information held by governmental agencies may be framed. The authorities may keep such information in confidential files. Only for the purposes for which they are collected, they may be used. On disclosure of such information, inadvertently or negligently or mistakenly, damages may be paid to the individual for the loss suffered to his person. It seems that protection of one's right to privacy acquires a higher priority in a civilized society.

The right to privacy is an inherent and inalienable one in any society, though the degree or depth of it may vary from one society to another. This is because the privacy interests much depends on the culture, religion, political and legal system, scientific progress and such other factors. However, there is a hard core of personal information which is protected from intrusion in almost all societies. Similarly, there will be a hard core of personal information which must be disclosed. The reason for both the privacy and publicity is

nothing but the 'public interest'. In between these two hard cores lies the 'flexible part', which may or may not be protected under the head of right to privacy, depending on the particular circumstances and facts of the situations.

Treating the right to privacy in terms of the control of the personal information, an individual has the maximum and unchallengeable control over the first type of information, and then least, practically no control at all, in case of the other extreme. In case of the 'flexible part' though the control may be with him but may be lost when public interest requires the disclosure. One may be allowed to waive the right to privacy regarding information coming under the flexible part.

The necessity of the right to privacy for an individual, in many instances, is undoubtedly established. It is necessary for the development of the personality, integrity and dignity. It is also necessary for a full enjoyment of personal liberty. Thus, there is nothing wrong in allowing the individual to have the control over the information regarding privacy. The problem then arises is with respect to the extent of this control. The extent of the dignity and self-respect reaches its end when it meets the limit fixed by the society. Within this limit, the control is with the individual. Right to privacy is the right to control information, regarding oneself, which lies only in the "area of privacy". The area of privacy is the area of information regarding a person in the status of 'private'

individual - not a public person - where the public interest cannot require an access to such information. Thus, the right to privacy ultimately depends on the public interest, either to keep certain information private or not. This is because many items of information which may seem to be private, are necessary for the success of several other functions of society.

The better way to solve the situation is to adopt a 'need to know' principle. The privacy required for certain information, which comes under the area of a public man, and publicity required for certain information, which comes under the area of private man, may be analysed after considering the fact whether the public is really in need of such information to the benefit of the society. Thus, so long as the need criterion is not satisfied, privacy of the individual may be protected. The burden of proof to establish the need is on the person who seeks the information.

Even within the individual's sphere, there may arise information though private in nature but which embraces public interest. Before publishing such information, due weight may be given to the individual's right to privacy. The following four principles may be adopted regarding release of information private in nature.

(1) Where there is no public interest in the dissemination of the personal information and by the violation of the right to privacy, harm was caused to the individual, exemplary damages may be paid to the individual suffered.

(2) Where there is public interest in the dissemination of information, the benefits accruing from the dissemination of it may be given weightage. The only insisting demand in such cases is that the individual may be adequately compensated.

(3) Where there is neither public interest nor harm to the individual, on disclosure of such information, the individual may be paid nominal damages.

(4) Where there is public interest and no harm to the individual, there is no need to pay any compensation.

The position of law regarding disclosure of documents relating to one's privacy in the United States may now be considered. Specific instances such as documents relating to drug addiction, income tax records and student's academic files, where privacy is preferred to the public interest to know, are also discussed along with this.

Position in the United States

Exemption Six of the Freedom of Information Act authorises an agency to withhold personal and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.[30] The

30. Exemption Six of the Freedom of Information Act reads as follows:
552(b) This section does not apply to matters that are--
(6) personal and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

congressional concern for the protection of confidential personal data is clear from the sub-section. It is made clear that non-confidential matter was not to be insulated from disclosure, merely because it was stored by the agency in the personal files. Rather, Congress brought an exemption which requires a balancing of individual's right to privacy against the basic purposes of the Freedom of Information Act. Again, an individual may not lose the protection under the Exemption, merely because the information is stored in records other than 'personnel' or 'medical' files.[31]

In the United States, Congress wished to protect information containing personal data which can be identified as applying to an individual where the disclosure may be harmful to the individual.[32] The decisions in this area reveal that familial,[33] medical,[34] financial,[35] and occupational[36] data

---

31. United States Department of State v. Washington Post, 72 L.Ed. 2d. 358 (1982) at p.364.
32. Jerome E.Wallace, "Out of Sunshine and into the Shadows: Six Years of Misinterpretation of the Personal Privacy Exemption of the Kentucky Open Records Act", 71 Kentucky L.J. 853 (1982-83) at p.870.
33. Rural Housing Alliance v. U.S.Department of Agriculture, 498 F. 2d. 83, as quoted in Jerome E.Wallace supra n.32 at pp.870-71. In this case, the Court refused to mandate disclosure of a housing discrimination report which contained information regarding marital status, legitimacy of children, identity of fathers of children, welfare payments, alcoholic consumption, family fights etc.
34. Public Citizen's Health Research Group v. H.E.W., 477 F. Supp.695, as quoted in Jerome E.Wallace, supra n.32 at p.870. In this case, although the Court allowed disclosure of aggregate health care statistics, it said that confidential relationship between physicians and patients contained in the intimate details of an individual medical file created a substantial interest in non-disclosure. Where a physician is a specialist in a particular field, the disclosure of patient's name itself is enough to threat the privacy of the individual.

are the four core types of information which are entitled to protection.

An individual's right to privacy outweighs any benefits conferred upon the public from disclosure of such information. Thus, in Mullin's case,[37] where the plaintiff sought a copy of computer tape, which listed the traffic accidents reported in an year, for the purpose of aiding a study designed to benefit drivers and traffic engineers, was denied on the ground of personal privacy.[38]

---

35. Gregory v. F.D.I.C., 470 F.Supp. 1329, as quoted in Jerome E.Wallace, supra n.32 at p.870. In this case, the Court held that release of personal information such as one's loans, his assets would constitute a clearly unwarranted invasion of privacy.
36. Campbell v. U.S.Civil Service Commission, 539 F. 2d.58, as quoted in Jerome E.Wallace, supra n.32 at p.870. In this case, the Court denied federal employees access to a personal management study of their agency. The Court said that disclosing matters such as individual's job classification, salary and promotion would be serious invasions of privacy.
37. Mullin v. Detroit Police Department, 133 Mich. App.46, 348 Nw. 2d. 708 (1984), as quoted in Note, (1986) U.Detroit L. Rev. 363.
38. But see Society of Professional Journalists v. Sexton, 324 F. 2d. 313 (1984), as quoted in Michelle D.Brodie, "Annual Survey of South Carolina Law: Administrative Law", 37 S.C.L.Rev. 1 (1985). In this case, the Court held that death certificates were public records. The Court rejected the argument that death certificates were medical records. Court said that the certificates were legally mandated conclusory statement on the cause of death and rejected the assertion that the certificates caused invasion of privacy. The Court also said that the right of privacy did not prohibit the publication of information on a legitimate public interest, such as death certificate of a murder victim.

The meaning of 'personal and medical files' is reasonably clear and specific. But defining the boundaries of the term 'similar files' seems to be difficult. The maxim ejusdem generis may be appropriate in this respect. Only documents containing characteristically similar data, that is, information of a highly personal nature containing intimate details of a person are protected from disclosure under the Exemption.[39] In Department of Air Force v. Rose,[40] the Supreme Court said that case summeries of honour and ethics of the cadets, kept in the U.S. Air Force Academy were files belonging to the 'similar files' group because they were related to the discipline of the cadet. The disclosure of these summeries implicated similar privacy values. The term 'similar files' may not be allowed to take a clean sweep of all sorts of files which are remotely personal or medical, restricting the policy of maximum disclosure under the Freedom of Information Act. In the case of 'similar files', an in-camera inspection may be ordered usually.[41]

Under this Exemption, the term 'invasion of privacy' is qualified by the phrase 'clearly unwarranted'. Whether disclosure in a specific instance constitutes an invasion of

---

39. A circuit court has opined that the file must truly contain the kind of highly personal data found in personal and medical files. See Robles v. Environmental Agency, 484 2d. 843 (4th Cir., 1973), as quoted in Donald C.Rowat, Administrative Secrecy in Developed Countries, Macmillan, London (1979), p.334.
40. 48 L.Ed. 2d. 11 (1976).
41. Id. at p.34.

privacy or not, essentially entails an objective and factual determination. Only by balancing the equitable factors presented by the conflicting claims, a court can arrive at a conclusion.[42] The courts may measure the loss of individual privacy that would result from disclosure and then may measure the suitability of the complainant seeking disclosure.[43] In Getman v. N.L.R.B.,[44] the Court balanced the potential value to the public of a study being conducted by two law professors against the possible detriment to the individuals whose names and addresses were sought in connection with the scholarly study. The Court found that the invasion of privacy was not so serious to be clearly unwarranted. But, if the motive of a requester is commercial or private purposes, definitely, the individual's right to privacy will be preferred.[45] In a way, the Mullin's case is thus sidelined.

The extent of protection under the Exemption is important regarding the citizen's access to information. Congress meant to limit the Exemption Six to a narrow class of

---

42. The House Report says that the limitation of clearly unwarranted invasion of personal privacy provides a proper balance between the protection of an individual's right to privacy and the preservation of public's right to information by excluding those kinds of files, the disclosure of which might harm the individuals. See H.R.Rep. No.1497, 89th Cong., 2nd Sess. 11 (1966), as quoted in United States Department of State v. Washington Post, 72 L.Ed. 2d. 358 (1982) at p.363.
43. Note, "Freedom of Information Act: A Seven Year Assessment," 74 Colum. L.Rev. 895 (1974) at pp.954-55.
44. 450 F. 2d. 670 (D.C. Cir. 1971), as quoted in Donald C.Rowat, supra n.39 at p.334.
45. Wine, Hobby, U.S.A. Inc. v. Bureau of Alcohol, Tobacco and Firearms, 363 F.Supp.231 (E.D. Pa. 1973), as quoted in Donald C.Rowat, supra n.39 at p.334.

files containing only a discrete kind of personal information.[46] Rather, the Exemption was intended to cover detailed agency records on an individual which can be identified as applying to the individual.[47] The Courts may determine whether disclosure of documents would constitute a clearly unwarranted invasion of the individual's privacy. Thus, files which contain information, though not personal to any particular individual but causes embarrassment to certain persons on disclosure, are also protected.[48] A wider meaning to 'similar files' thus removes the difficulties.

The need and status of the requester in addition to the purpose underlying the request are also relevant to establish the suitability.[49] The task of the court becomes more difficult when equitable principles are more proportionately balanced. In certain cases, an in-camera inspection may become necessary.[50] In certain cases, courts may prefer a removal of identifying details from the information requested before

---

46. United States Department of State v. Washington Post, 72 L.Ed. 2d. 358 (1982) at p.365.
    In this case, a newspaper filed a request under the Freedom of Information Act for documents indicating whether two Iranian nationals living in Iran held valid American passports or for any other records indicating whether either individual was an American citizen. When challenged the denial of the request, the Supreme Court held that such documents were protected under Exemption Six.
47. Ibid.
48. Ibid.
49. Although standing is normally irrelevant to Freedom of Information Act request, it is necessary to solve such an issue under Exemption Six.
50. Department of Air Force v. Rose, 48 L.Ed. 2d. 11 (1976).

disclosing it.[51] A protective order may also be helpful in certain cases. Thus, an agency or court releasing information for a particular purpose may devise restrictions on subsequent use of the data and may recognize the risk of a violation of the terms of the release. A careful supervision and a contempt citation may deter unauthorized use of the information later.

Need for Protection of Privacy: A Specific Instance: Drug Addiction

Drug addiction has been described as a national problem of staggering proportions and complexity. Apart from the self-ruin, there occurs drug related crimes also. While lawyers see it as a law enforcement problem, the medical men see it as a mental health problem. Anyhow, curing such diseases, requires some sort of secrecy. Otherwise, patients may become reluctant to come forward. Fear of being reported to law enforcement officials and fear of consequent legal action are sufficient to deter most from seeking treatment. The records in such cases may be treated as confidential.[52] However, the

---

51. Ibid.
52. See Whalen v. Roe, 51 L.Ed. 2d. 64 (1977).
In this case, the Court held a statute to be valid which was intended to prevent diversion of drug into unlawful channels. The statute required the data regarding the name of physician, drugs prescribed, dosage, and addresses of patients to be passed over to the Dept. , and then destroyed. The public disclosure of patient's details were prohibited and access to the files were restricted to a limited number of officials. The statute was challenged by certain doctors and patients on the ground of violation of privacy. The Court held that collection and storage of data did not threaten either confidentiality or right to privacy. The decision suggests that the Government's duty to avoid public disclosure of personal information may be noted in

Government may constitutionally require disclosure of personal information when its needs outweigh the consequent harm to privacy. But to justify subordinating of individual privacy to Government's informational needs, safeguards against public disclosure may be made. An individual's right to privacy does not end up in divulgence to the Government but there is a residual interest in preventing further erosion of privacy.[53]

The Privacy Act

In an effort to balance the needs of privacy and the claims to information, Congress passed the Privacy Act in 1974. By passing Privacy Act, Congress demonstrated its dissatisfaction with the inadequate protection afforded to individual privacy in the handling of governmental records. By expressly exempting from its purview any disclosures required under Freedom of Information Act, the Privacy Act pays due deference to the strong policy of liberal public access to government-held information under the Freedom of Information Act. The Privacy Act has an elaborate system for safeguards against unwarranted invasions of privacy.[54]

---

f.n. 52 contd...

the Constitution but the statutory safeguards against public disclosure permitted the court not to determine the constitutionality of publication of information. Thus, the constitutionally protected interest of an individual in avoiding disclosure of private affairs may be equated with the right of the individual not to have his private affairs made public by the Government.

53. Bruce W.Clark, "The Constitutional Right to Confidentiality" 51 Geo.Wash.L.Rev. 133 (1982-83) at pp.142-43.
54. Basically with some exceptions, the Privacy Act protects personal privacy by (1) enabling an individual to ascertain

Public Service and Personal Information

In many areas, the Government may be in need of information relating to the character, reputation and financial position, of individuals and servants. The Government may need such information before making an appointment to high political office or in certain cases before issuing licences.[55] It is

---

f.n. 54 contd...

what governmental records pertaining to him are being held, (2) allowing an individual to prevent the use of such personal records for purposes other than those specified in the Act, (3) granting an individual access to such records and an opportunity to have them corrected, (4) requiring the agencies to handle such records carefully, with painstaking attention to the safeguarding of individual privacy, and (5) subjecting federal agencies to civil suits for personal damages in cases of wilful violations of the Act.

55. In Rogers v. Secretary of State for the Home Department, [1972] 2 All E.R. 1057 (H.L), the Gaming Board was required under an Act to ensure that the licence would comply with the provisions of the Act and the Board had to consider the character, reputation and financial position of an applicant. In performance of this duty, Board made inquiries from Sussex police about the plaintiff and in response, the Chief Constable wrote a letter to the Board. Later Rogers was denied licence for running bingo halls. The plaintiff later claimed that he had received an anonymous copy of the letter and it contained libel against him and sought disclosure of the letter. The Court denied it on the ground of crown privilege. It was found that the Board could not adequately perform its statutory duty unless it could preserve the confidentiality of the communication regarding character, reputation etc., of an individual applicant.

also quite common to have confidential reports on employees by the superior officers. These reports are kept secret also.[56]

One of the areas in which traditionally confidentiality of documents has been operated and provided has been that of personal reports on applicants or employees provided by referees or superiors. The test is whether production of reports of the kind sought was necessary for the fair disposal of the proceedings. In certain cases, this could only be determined after inspecting the relevant documents. When access to confidential personal reports are sought, it must be recognized that the persons concerned with promotion and selection process, or admissions to educational establishments, be it in government or private institutions, need to have frank and honest assessments of applicants. It is a weakness of human nature that if one knows that the subject matter of his report will see the report, he is likely to be more

---

56. See British Railways Board v. Natarajan, [1979] 2 All E.R. 794 (E.A.T).
In this case, the defendant's allegation was tht he had been discriminated because of racial considerations. The allegation was that the assessment which the Board had made on his performance was less good than it ought to have been. Thus, disclosure of documents giving particulars of the Board's assessment of six other employees of the same grade was sought for. It was held that the court or chairman of the tribunal should first determine whether there was a prima facie prospect that examining documents would reveal the relevance of the documents in issue. If sufficient relevance was found, he could examine them in the interest of justice. Thus, examination by the court or tribunal was allowed, but disclosure of such documents to others was restricted by the Court. See also Science Research Council v. Nasse, [1980] A.C. 1028.

guarded in what he writes. Few people like calling a person incompetant, and this is particularly so, if the parties concerned have to work together. But, it is also true that preservation of secrecy is likely to protect the biased and unfair reference.

The confidentiality, in such reports, it seems, is very important. If such reports are made open, definitely there is a chance of losing the candour required for the senior officers in expressing their opinions. Though it is desirable to inform each employee their own grading given in the report, it is not desirable to open up the report as such. The grading may give reasons for it. Thus, the employees may appeal to the senior officer if the reasons are not satisfactory.

Availability of the reports on fellow servants may be crucial in one's case. But there is a competing public interest—the right to privacy of the other employees. Why should one's personal files be revealed to another because the latter says that he should have been promoted instead of the former. In these cases, the courts may be vigilant in inspecting and revealing information contained in the files.

In a system of hierarchy of officials, it is quite necessary for the better functioning of a department to have reports on officials from the superiors. Sometimes, an inquiry itself may be conducted into one's activities. The reports or

such information cannot be an evidence for libel allegation against the superior officers.[57] This is because, if the reports or opinions are made known, the officers will be reluctant to express freely on the fellow-officers. The greater public interest here is the promotion of the efficiency and proper functioning of the public service.

Student's Privacy Interest

Generally, the education authorities maintain a high degree of secrecy in relation to student files. Even if access is permitted, it is at the broad discretion of the authorities and subject to the limitations they may impose. Thus, accurary or validity of decision taken by the education authorities cannot be challenged, for one has no right of access to the files kept by the authorities. The courts have also shown a non-interference policy generally towards the domestic disputes.

The Australian Freedom of Information Act[58] provides the public a legally enforceable right of access to a document of the Commonwealth or its agencies. In an Australian case,[59]

---

57. See Home v. Bentinck, 129 E.R. 907 (1820); Dickson v. Earl of Wilton, 175 E.R. 790 (1859); Beatson v. Skene, 157 E.R. 1415 (1860); Hennessy v. Wright, 21 Q.B.D. 509 (1888); Chatterton v. Secretary of State for India in Council, [1895] 2 Q.B. 189 (C.A); Rogers v. Secretary of State for the Home Department, [1972] 2 All E.R. 1057 (H.L), etc.
58. Freedom of Information Act, 1982.
59. In re James and Australian National University, [1984] A.D.M.N. 02-37, as quoted in G.Warburton, "Taking Student Rights Seriously: Rights of Inspection and Challenge", 8 U.N.S.W.L.J. 362 (1985) at p.366.

the University refused one James and other four graduates access to information held by the University relating to the assessment of their performance as students in relation to the work completed for the Honors Components of the course. It was not the practice of the History Department to allow student access to the record sheets maintained by teaching staff recording their comments as an aid to the assessment of student performance in each unit. The related documents were record sheets, lecturer's notes, notes on Honor's essay, supervisor's certificate of completion of the Honor's thesis, examiner's reports on the thesis and grade compilation sheet maintained by the head of the department. The reasons for seeking access included a desire to identify weak spots in the thesis in order to improve it before publication, maximisation of information available to a student in making course and carreer choices and prevention of allegation of bias and impropriety. The Tribunal found that the documents were not exempt from the Freedom of Information Act. Rejecting the arguments made by the University,[60] Tribunal said that an

---

60. The University argued that disclosure would prejudice or limit the exchange of opinions between examiners. In the assessment process, different examiners are met to resolve their differences of opinion. It depends upon the full and frank exchange of views. This freedom may be limited by the disclosure. Also, disclosure will pressure on the examiners to reconsider or review their position which is an undesirable factor in the assessment process. The students may also classify examiners by reputation as hard and soft markers which is also not in the best interest of the academic freedom. Disclosure may also inhibit young academics to develop their assessment techniques. (Ibid.)

academic in assessing the work must be prepared to make judgements honestly and impartially and be prepared to stand by those judgements. It was also said that pressures flowing from greater accountability were an inescapable concomitant of a more open Government.

Apart from the academic records, educational institutions also possess records on character and conduct, medical records on students, and such other documents on the students. Disclosure of these records may invite violations of the right to privacy of a student. In certain cases, such records may be disclosed for justifiable purposes. In Campbell v. Tameside Metropolitan Borough Council,[61] a school teacher was violently attacked by a student whereby she was severely injured and forced to take an early retirement. The records on the boy were sought by the solicitor who wanted to see whether school authorities had done their duty towards the teacher by informing her about the condition of the student. The education authority rejected the claim of the teacher on the ground of public interest that in future the person who had to write reports on students would not do it frankly if it was known to them that such report might be used in legal proceedings. The Court found it as a case of negligence and held that records should be produced. The privacy element did not come at all in this case surprisingly.

---

61. [1982] 2 All E.R. 791 (C.A).

In the United States, guidelines for educational record keeping have existed since 1970. In 1975, nearly 25 States had laws regarding student records.[62] In 1974, Congress passed the first comprehensive statute on student records--the Family Educational Rights and Privacy Act, 1974 (FERPA). The Act provides for broad parental and student access to student records. It provides for an opportunity to challenge any information which is believed to be inaccurate or misleading. It places strict controls on access to third parties. It also provides that at the age of eighteen or upon entering a post-secondary institution, a student becomes the sole authority regarding access to his files.[63]

Information Regarding Tax

The returns and other documents relating to one's income is highly regarded and generally allowed to be kept confidential under common law. Nowadays, such information is also considered as information relating to one's privacy interests. When issues relating to disclosure of documents relating to tax come before the court, it will consider the interests of the proper functioning of the department. In proper cases, courts may go for an in-camera inspection of the requested document for the purpose of balancing the competing

---

62. See G.Warburton, "Taking Student Rights Seriously—Rights of Inspection and Challenge", 8 U.N.S.W.L.J. 362 (1985).
63. Ibid.

interests.[64] In re Joseph Hargreaves Ltd.,[65] the liquidator of the Company sought records relating to the payment of taxes made by the Company to the Surveyor of Taxes. It was resisted successfully on the ground that it would be against the oath the Surveyor of Taxes had taken and also against public policy. It is of utmost important to the public service that persons should be able to make sure that returns filed by them for those purposes should in no case be disclosed. It is a matter of public concern that persons should have confidence in the secrecy of that procedure. In India, the Income Tax Act protects the tax information.[66]

Though there is an element of privacy regarding the information on one's income, it is also a fact that people has another interest in the better administration of taxation department, especially in Indian conditions where tax-evasion goes on in a big way, and also on the allegations of corruption by the tax officials. It is a fact that the money collected by way of tax is ploughed back to the community. The community's interest thus cannot be seen unimportant. Proper collection of taxes becomes the wealth of every citizen. A via-media, between the privacy interest and the publicity requirement, is to fix an amount and make returns above it open to the public's inspection. So that big cases of tax-evasion could be checked to a certain extent.

---

64. Krew v. Commissioner of Taxation of the Commonwealth, 45 A.L.J.R. 249 (1971).
65. [1900] 1 Ch. 347.
66. See section 138 of the Income Tax Act, 1961.

Conclusion

So long as the Government does not disclose information, there is no confusion. But the question arises where the Government releases a personal information. Tort liability may ensure from giving publicity to private facts where the publication is highly offensive and facts publicised are of no legitimate concern. Government officials are however often afforded immunity from tort liability. Government may not be ready to protect privacy interest by recognizing the tort action. The remedy may then exist in a proceeding where a hearing is provided to the submitter before the personal information is divulged.

A three part inquiry may be appropriate for claims under the right to privacy. As a threshold requirement, an individual can be asked to demonstrate the palpable harm which will result form the disputed disclosure. Once the harm is shown, the balancing test may be applied in which the court may determine whether the information relates to an established constitutional or statutory right. Where the disclosure transgresses the protected rights, the balance turns in favour of the individual. Where privacy interest is less substantial, the legitimate informational need of the Government will usually justify disclosure.[67] Proper hearing may be allowed to the individual before a disclosure of personal information is made.

---

67. Bruce W.Clark, "The Constitutional Right to Confidentiality", 57 Geo.Wash.L.Rev. 133 (1982-83) at pp.143-44.

G. JUVENILE RECORDS

Disclosure of juvenile records is vital as far as a juvenile is concerned because disclosure of certain records may attach a life-long stigma on him. It will detrimentally affect the development of the personality of the juvenile. Thus, whenever disclosure of juvenile records are sought, courts show a reluctant attitude toward such claims. In England, the jurisdiction regarding Wards of Courts of Chancery Division is an ancient jurisdiction deriving from the prerogative of the Crown as parens patriae.

The aim and purpose of the judicial inquiry is the welfare of the infant. For such purposes, the infant is in relation to the court in a special position, distinct from that of other parties—for he is a ward of the court, a "child-in-law" of the court, exercising the ancient prerogative and parental jurisdiction.[1] Since the interest of the infant is the paramount interest and purpose of jurisdiction, disclosure issue may, in the end, remain as matter for the judge's discretion.

The courts confer a very high degree of confidentiality to the juvenile records. Such records are sometimes even not made available to the mother of the child. In one case,[2] where

---

1. Official Solicitor v. K. and Another, [1963] 3 All E.R. 191 (H.L.) at p.196.
2. Id. at p.197.

the parents came to sharp conflicts, the children were made the wards of the court. The official solicitor used to submit confidential reports on the children. Many times the children were taken to medical doctors and each time the solicitor reported. The issue in this case was whether these confidential reports could be disclosed to the mother, the ground being that she was looking after them and the reports were necessary to perform her duties as a parent. It was argued that as a self-respecting mother she was entitled to know what was the condition of the children which called for the repeated medical interviews. It was also argued that the mother as a party to the proceedings must be entitled to see and if found necessary to challenge all the material on which the judge would be acting. The counsel also argued that it was contrary to natural justice that the contentions of party in a judicial proceeding might be overruled by consideration in the judicial mind, which the party had no opportunity of criticising or controverting because he or she did not know what they were. Moreover, the judge might arrive at a wrong conclusion on the undisclosed material. Rejecting all these arguments, Lord Evershed held that the interest of the wards outweighed the interest of the procedural fairness contended by the mother in the balancing process.[3] It was also held that the disclosure of such documents should be made only when the court was fully satisfied

---

3. Ibid.

that real harm to the infant must otherwise ensure.[4]

Where a mother could be refused the disclosure of the juvenile records, it is then no surprise if disclosure of such records is also denied to a councillor of a county council. In R. v. City of Birmingham District Council;Ex Parte O,[5] the councillor had certain doubts about the foster parents because the foster father had served for a short term in the prison. It was held that only the social services committee constituted as per the statute would deal with such matters and disclosure of such records could not be divulged even to the other members of the Council because the duties and responsibilities were transferred from the Council to the committee. Thus, a councillor's claim for disclosure for the purpose on which he had no duty or responsibility, may not be allowed.[6]

---

4. Ibid.
   See also In re D (Infant), [1970] 1 All E.R. 1088 (C.A.). In this case, the mother was not allowed access to such records. Here, when the parents were separated, the children were made the wards of the court and were under the foster parents. Later the mother came back to take the children back. But the local authority thought that the children should stay with foster parents. In this case, the child care officers were allowed to refresh their memories by looking into the old notes and reports they had made. When the mother sought disclosure of them to her also, it was rejected by the Court because the discovery of such documents in a wardship case was contrary to practice and public policy. It was held that a public authority having a statutory duty to keep such records might find it difficult to do its duty fully and properly if such records might come under public scrutiny in future.
5. [1982] 2 All E.R. 356.
6. Id. at p.360.
   In a dissenting note, Donaldson, L.J., said: "Bearing in mind that it is the local authority, and not the individual social worker, which is performing the statutory duty

The juvenile records are kept highly confidential not only from the parents or other persons such as councillor's of Local Government but also from the juvenile himself. In Gaskin v. Liverpool City Council,[7] the plaintiff was brought up by the defendant local authority. The plaintiff had a bad report and he had been sent to a borstal school. He was also punished for six months of imprisonment in a criminal case. He brought an action for damages on the ground that he was not brought up properly and that there was a breach of duty on the part of the defendant under whose care he was. For the case he required several reports, notes and such other records. His claim was rejected by the Council on the ground that the officials would not make reports frankly and freely unless they knew that the reports would be kept confidential. The Court found that confidentiality in such records was necessary for the proper functioning of the child-care-services. Lord Denning

---

f.n.6 contd...

> (the social worker is, as it were, the instrument used by the authority) confidential information given to the social worker is given to the authority. However those who give it are entitled to expect and social workers can reasonably assure them, that save as may be necessary for the performance of the authority's statutory duties, the information will never be divulged to anyone outside the authority or to anyone within the authority who has no need to know.
>
> ... all relevant information acquired by a local authority's social workers in the course of their duties, whether or not it be confidential, is acquired on behalf of the local authority. It becomes local authority's information". (at p.364).

7. [1980] 1 W.L.R. 1549 (C.A.).

opined that complaints of such nature could go to a local government ombudsman.[8] It seems that the mistakes or maladministration committed by a local authority could be rectified by disclosing such records to a respectful omdudsman who has a duty to keep such records secret. Especially when the judicial attitude is that juvenile records are not at all open even to the mother or the juvenile himself, Lord Denning's opinion that such matters may . be left to an ombudsman, seems more relevant.

In the United States, protection is accorded to the juvenile records. However, the State interest in protecting the confidentiality of a juvenile records yeilds to the constitutional right as to cross-examination of witnesses. In Joshaway Davis v. State of Alaska,[9] a theft case, the prosecution witness was a boy on probation by order of a juvenile court. The defendant doubted the boy as a truthful person or not, and then sought for disclosure of his records by cross-examination. The Supreme Court held that the right of cross-examination was more vital than the confidentiality of juvenile records. In these kind of cases, it would be better to treat the juvenile records confidential. The disclosure may sometimes lead to the birth of another criminal in the boy. Even if one criminal is let free, it is better not to give birth to another.

---

8. Id. at p.1553.
9. 39 L.Ed. 2d. 347 (1974).

In India, even after the celebrated decision in Judge's Transfer case,[10] which propounded for a more open Government, it is doubtful whether the courts will be ready to open up juvenile records. In Sheela Barse v. Union of India,[11] the petitioner sought production of complete information on children in jails and other information as to existence of juvenile courts, remand homes and borstal schools. Taking into account the status of the petitioner who had undertaken real social service, the petitioner was allowed access to information and also to visit jails, children's homes, borstal schools, etc., in order to verify the correctness of statements of facts made by officials. However, the Supreme Court made it clear that the information which would be collected by the petitioner were intended to be placed before the court and utilised in that case and not intended for publication or otherwise.[12]

Generally the documents within the hands of a Court of wards will not be disclosed. Also, information passed by court of wards to other authorities are also not allowed to be disclosed.[13] If documents are mere routine documents relating to the management of the estate, they may not be allowed the privilege because it does in no way affect the personality of the juvenile.[14]

---

10. S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149.
11. A.I.R. 1986 S.C. 1773.
12. Id. at p.1777.
13. Collector of Janpur v. Jamna Prasad, A.I.R. 1922 All. 37.
14. Balachandra Dattatraya Bubane v. Chanbasappa Mallappa Warad, A.I.R. 1939 Bom. 237.

It is submitted that the juveniles may be protected from disclosure of their deviational behaviour. The policy is that the youthful errors may be hidden from the full gaze of the public and bury them in the graveyard of the forgotten past.[15] The test before the court may be the injury or stigma resulting from the disclosure. There may arise situations in which opinion or reports from the concerned official may also be protected. It is necessary to protect free and frank opinion of them which in turn is necessary for the protection of the juveniles. If the document may not cause any injury to the juvenile, it may be disclosed. The Court however may make an in-camera inspection before releasing them. An ombudsman in this respect is also a welcome suggestion.

15. In the Matter of the Application of Paul L.Gault and Others, 18 L.Ed. 2d. 527 (1967) at p.544.

H. DOCUMENTS REGARDING TRADE SECRETS

Like the Government, the business community is also secretive in their functioning. The business community is always reluctant to hand over information about its operations to an outside body. It has not accepted the concept of public accountability. However, in certain situations, the businessmen will be forced to provide information to the governmental agencies for the purposes of getting a loan or for applying for a licence or for starting a new venture. The Government here has got a general duty to keep such information confidential and may not divulge them to others. An unauthorised disclosure of the information to a rival or competitive businessman may create much problems.

A breach of confidence, thus by the Government, may invite suits for damages also. Normally, three elements are required for a case of breach of confidence to succeeded in the absence of a contract otherwise. Firstly, the information itself must have the necessary quality of confidence; secondly, the information must have been imparted in circumstances importing an obligation of confidence; and thirdly, there must have been an unauthorised use of that information to the detriment of the party communicated it.[1] The information must be the claimant's private property so that he can assert private right

---

1. P.D.Finn, "Confidentiality and the Public Interest", 58 A.L.J. 497 (1984) at p.499.

of exploitation of it. Also, the parties must have an understanding that one respects the rights of the other in the transferred information. Again, the information must not be a publicly known one.

In the United States, agencies in pursuit of their regulatory, investigatory and general administrative responsibilities, acquire vast stores of information concerning private firms[2] which in turn may be subjected to mandatory disclosure under the Freedom of Information Act. A seizable portion of the accumulated data may be of no commercial value but in many cases, businesses have substantial stake in keeping such information secret.[3] This system of collection and distribution of

---

2. Agencies acquire information about businesses through a number of means. Private firms must often submit information about themselves to obtain certain government benefits such as licence, contracts, etc. Also, for issuance of securities, agencies may require certain information. Certain regulatory programmes require periodic reporting on the ongoing activities. In addition to receiving such voluntary submissions, many agencies are empowered to obtain information through compulsory process. Agency sub-poena powers extend to all data relevant to an investigation. See Stephen S.Madsen, "Protecting Confidential Business Information from Federal Agency Disclosure after Chrysler Corporation v. Brown", 80 Colum. L.Rev. 109 (1980).
3. Certain Acts require businesses to submit racial and sexual composition of workforce. This, if made public, would make undesirable commercial consequences because other companies may analyse and exploit information whereby taking a competitive advantage. Public interest groups might publicize the data in order to expose the business's affirmative action failures. Litigious unions and employees may use the statistics to challenge the business's hiring and promotion practices. See Note, "A Procedural Framework for the Disclosure of Business Records under the Freedom of Information Act", 90 Yale L.J. 400 (1980-81), n.2.

information poses great difficulties for the private firms because competitor or adversaries in litigation may acquire their confidential business information through the Freedom of Information Act.[4]

Exemption Four of the Freedom of Information Act exempts from disclosure records that are trade secrets and commercial or financial information obtained from a person and privileged or confidential.[5] The section seems to be poorly defined. Even though no person could have reasonably intended such a result, the section in clear terms requires disclosure of other business information furnished to the Government with a good faith understanding that it will be kept confidential.[6] The term 'confidential information' refers to the business information, the disclosure of which would either impair an agency's access to such necessary information in the future or subject the submitter of such information to substantial competitive harm or other businesses make use of the

---

4. Confidential business information refers to information generated or possessed by private firms that confers a competitive advantage when kept secret. The term may seem roughly equivalant to the definition of trade secrets. See Stephen S.Madsen, supra n.2,

5. Exemption Four of the Freedom of Information Act reads as follows:

   552(b) This section does not apply to matters that are—
   (4) trade secrets, and commercial or financial information obtained from a person and privileged or confidential;

   Prior to the enactment of the Freedom of Information Act, agencies generally released business information within the files only in response to specific legislative mandate that had been fashioned in order to remedy particular problems. As originally drafted, the Freedom of Information Act contained no exemption for business records. In response to concerns

information free of cost.[7] It does not apply to information that is merely privileged or confidential without being a trade secret, commercial or financial in character.[8] To come within Exemption Four, information that is not otherwise a trade secret must be (1) commercial or financial (2) obtained

---

f.n. 5 contd...

voiced by businesses and agencies during hearings on the proposed Act, the Senate Judiciary Committee added the new provision. See Note, "A Procedural Framework for the Disclosure of Business Records under the Freedom of Information Act", 90 Yale L.J. 400 (1980-81) at p.402.

6. See K.C.Davis, "The Information Act: A Preliminary Analysis", 34 U.Chi. L.Rev. 761 (1967).
7. An allegation against the functioning of the sub-section is that it is widely used as a tool for industrial espionage and is being employed to pry business secrets from the agencies merely for the price of postage stamp. Moreover, the agency officials, being insensitive to commercial or competitive realities, have failed to realize the harms to a particular submitter and to the economy as a whole. A good part of Freedom of Information Act requests are made by businesses. In 1977, nearly half of the Freedom of Information Act requests were submitted by businesses. Apart from it, there were also requests, on behalf of businesses by law firms and other representatives. There are also public interest organisations who request for information to get acquainted with enforcement of public policy and compliance of programs. See Note, "A Procedural Framework for the Disclosure of Business Records under the Freedom of Information Act", 90 Yale L.J. 400 (1980-81) at p.403, n.14.
8. The question then is why the legislators excluded non-commercial, non-financial, privileged or confidential, information from the Exemption. Just as the agencies must be able to promise confidentiality, in order to obtain voluntarily certain commercial and financial data, they need the same power with respect to other types of information. One plausible explanation is that Congress feared that a broad exemption for all privileged or confidential information would be too easily subjected to abuse, since information could be insulated from public access merely by a promise of confidentiality. See Donald C.Rowat, Administrative Secrecy in Developed Countries, Macmillan, London (1979), p.330.

from a person outside the Government, and (3) privileged or confidential. The test for determining whether an information is 'confidential' is whether disclosure is likely either (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the submitter. In Orion Research Inc. v. E.P.A.,[9] an unsuccessful offeror on a negotiated procurement sought access to the winning technical proposal. The agency's refusal was held proper by the Court on the ground that the disclosure would affect the agency's ability to obtain necessary information in future.

In Public Citizen Health Research Group v. E.P.A.,[10] the Court asserted that the term 'trade secrets' in Exemption Four should be defined in its mnarrower common law sense which incorporated a direct relationship between information at issue and the production process. The term was thus defined as a secret commercially valuable plan, formulae, process or device that was used for the making, preparing, compounding or processing of trade commodities and, that could be said to be the end-product of either innovation or substantial effort.

In certain cases, a disclosure by an agency may cause loss to the submitter. It may also affect certain third parties

---

9. 615 F. 2d. 551 (Ist Cir.), as quoted in James A.Dobkin & James X. Dempsey, "Protection of Corporate Secrets in Government Contract Proposals and Bids, 15 Pub.Cont.L.J. 46 (1984) at p.51.
10. 704 F. 2d. 1280, D.C. Cir. 1983, as quoted in Richard S. Fortunato, "F.D.A. Disclosure of Safety and Efficacy Data: The Scope of Section 301(j)", 52 Fordham L.Rev. 1280 (1984).

What is thus required by an agency before disclosure is to balance the conflicting interests involved.[11] In the process, hearing to the concerned persons may also be given.

A typical example in which the conflict of interests between businesses and citizens arises, can be seen in the field of drugs companies. The Federal Food, Drug and Cosmetic Act requires a manufacturer to submit safety and efficacy data on new drugs to the Food and Drug Administration before the drugs can be introducted into inter-State commerce. Consumer groups, practitioners and other drug manufacturers attempt to acquire this data requesting under the Freedom of Information Act. The other manufacturer's interest is to acquire the data free of cost. The submitters oppose disclosure because of the competitive harm resulting. The data, may also be used in other nations. As per the Act, the F.D.A. issues licences to the manufacturers after ensuring safety of the drug after a

---

11. Four broad doctrines have emerged in response to this question. First, the Freedom of Information Act exemptions give an agency the discretion to reject such requests. Second, nothing in the Freedom of Information Act bars or obligates an agency to release or exempt information. But, once it has determined that a requested document need not be released under the mandatory disclosure provisions, no further effort on its part is necessary. The determination in this regard must be made carefully. The third doctrine says that before an agency releases an exempt business record, it must see that such release may not violate the Trade Secrets Act which imposes penalty on an official who discloses trade secrets or confidential data in the absence of legal authorisation. Finaly, if an agency decides to disclose information which falls within the exemptions and also not covered by Trade Secrets Act or similar statutes, the agency must still demonstrate to a reviewing court that it did not abuse its discretion. See Note. "A Procedural Framework for the Disclosure of Business Records under the Freedom of Information Act", 90 Yale L.J. 400 (1980-81) at pp.405-10.

careful perusal of the data. The public interest groups and practitioners have their own reasons. The data may be so large that F.D.A. cannot be able to check them properly and has to rely on many of them. Disclosure may allow a review of these data by scientists, doctors and such other experts. Moreover it is the public who consume the drugs and the doctors who prescribe it. The agency in these circumstances may use its discretion judicially. It may consider whether the release of data will facilitate public evaluation of data or increase public awareness of internal agency procedures or reduce the need for duplicative testing of the new drug.[12] Use of protective orders before releasing the information may be appropriate in these cases and groups or scientists who are capable of testing and verifying the data may only be provided with the data. There are chances of misuse if such information is released to other persons.

Apart from the transfer of secrets handed over by one firm to another by a governmental agency, there arises another problem where the information supplied by one is used for the benefit of the other firm. In R. v. Licensing Authority; Ex parte Smith, Kline and French Laboratories,[13] the applicant had supplied the licensing authority with details

---

12. Richard S.Fortunato, "F.D.A. Disclosure of Safety and Efficacy Data; The Scope of Section 301(j)", 52 Fordham L.Rev. 1280 (1980).
13. [1989] 1 All E.R. 175 (C.A.).

of its research and testing in the development of a drug. Later, another company applied for a licence to market the generic forms of the applicant's drug.[14] It was claimed by this company that the essential similarity between its drug and applicant company's drug could be demonstrated by reference to the research and testing data supplied by the applicant company. The objections made by the applicant was rejected by the court. It was held that the information supplied by the applicant company became a part of the authority's general store of scientific knowledge.[15]

Administrators seek this Exemption sparingly.[16] The officials may well believe that public interest in disclosure outweighs the submitter's interest. Also, the agency gains nothing by invoking the Exemption and may not wish to assume the burden and risk of litigation solely to protect the submitter. Moreover, it is not apparent that Exemption applies to particular documents. It requires a knowledge of submitter's

---

14. Under Article 4(8)(a)(iii) of E.E.C. Council Directive 65/65 as replaced by 87/21, an applicant for product licence in a member State was not required to supply results of tests on his drug if he could demonstrate that his product was essentially similar to a product which had been authorised within the Community for ten years and marketed in a State.
15. The purpose of the rules regulating production and distribution of medical products is the protection of the medical health, the harmonisation of trade within the community and the prevention of unnecessary repetitive tests on humans or animals.
16. Stephen S.Madsen, supra n.2 at pp.112-13.

circumstances, which the agency lacks, to come to a just conclusion. When complied with pre-disclosure pressures and the tremendous number of requests, agency makes inadvertant disclosures.

Contractors and disclosure

In the field of public contracts, the bidders fear agency's disclosure of their bid proposals to competitors. The bidders are often requested to submit proprietory information as a part of their bids. In the case of formally advertised procurements, bids are subject to a public opening requirements.[17] Here, the bidder's claim of confidentiality conflicts with the public opening requirement. An attempt to restrict disclosure may sometimes render the bid unresponsive also. Thus, it is unclear to what extent bidders can prevent public disclosure of the proprietary data included in their bids in the light of public opening requirement.[18]

In Chrysler Corporation v. Brown,[19] the Corporation as a party to various contracts and also to comply with an

---

17. In the case of negotiated procurements, Federal Acquisition Regulations protects the proprietary information. See James A.Dobkin & James X.Dempsey, "Protection of Corporate Secrets in Government Contract Proposals and Bids", 15 Pub. Cont. L.J. 46 (1984) at pp.48-50.
18. See J.H.Lawrence Co. v. Smith, 545 F.Supp.421 (1982), as quoted in James A.Dobkin & James X.Dempsey, "Protection of Corporate Secrets in Government Contract Proposals and Bids", 15 Pub. Cont. L.J. 46 (1984) at p.57. In this case, a reverse FOIA case, the plaintiff sued to enjoin disclosure of pricing data contained in its bid. The officials contended that such information was to be disclosed upon request (Contd...)

Executive Order submitted documents relating to employment practices to an agency. Later, the Corporation was notified that a request for information submitted by the Corporation had reached agency. The Corporation objected to a disclosure but in vain. The Corporation thus filed a suit to enjoin the agency to refrain from disclosing the documents. The Supreme Court found that the congressional concern was with the agency's need or preference for confidentiality and the Freedom of Information Act by itself protected the submitter's interest in confidentiality but only to the extent endorsed by the agency.[20] The exemptions under the Freedom of Information Act were held not to be mandatory bars to disclosure.[21]

Looking from a submitter's angle, a prospective submitter can do nothing to ensure confidentiality. A contract with the agency, for confidentiality may have no validity since it is against the very purpose of the Freedom of Information Act. Also, the duties of officials under an Act cannot be varied by a contract. Where submission is voluntary, the submitter may choose not to submit at all. The submitter may require the agencies, if they consent, to examine the documents

---

f.n.18 contd...

in the case of a public opening requirement. The Court decided, in considering the conflict between confidentiality of trade secrets and public opening requirement that public opening requirement did not supersede a bidder's claim for confidentiality.

19. 60 L.Ed. 2d. 208 (1979).
20. Id. at p.219.
21. Ibid.

at submitter's premises or to return the documents after examination at agency's premises. In this case also, the agency will have copies of documents or agency notes regarding documents and examination. But these documents are subject to disclosure. The only help the agencies can do is to inform the submitter of the request for such documents or of the proposed disclosure, so that submitters can pursue a reverse Freedom of Information Act suit in time.[22] Thus, a submitter invariably has to rely the agency itself to defend his interests.

In certain cases, controlled access may be feasible for a better administration in dealing with contractual matters. An interruption of administrative proceedings by a disclosure may destroy the balance of negotiating strength of the governmental authorities.[23] The Government's case may be weakened by an untimely disclosure. Thus, in cases of ongoing negotiations, it is better to restrict the disclosure till the end of negotiations.

Constitutional Consideration

Confidential business information is often protected as a form of intellectual property under the trade secret laws.[24] However, such protection depends upon the continuing

---

22. Stephen S.Madsen, supra n.2 at p.113.
23. Renegotiation Board v. Bennercraft Clothing Co., 39 L.Ed. 2d. 123 (1974) at p.132.
24. Kewanee Oil Co. v. Bicron Corporation, 40 L.Ed. 2d. 315 (1974).

confidentiality of the information. Information such as formulae, processes, devices etc., confer a limited monopoly over the means of production. But, confidentiality in information such as financial data, customer lists, business plans, etc., benefits the proprietors by shielding their activities from competitor's view. The disclosure of information of the second type does not constitute any severe loss of the submitter. Since disclosure destroys the proprietary rights in the information, in certain situations, courts have to analyse reverse Freedom of Information Act suits in the light of the Fifth Amendment due process and taking clauses.

The due process clause requires the Government to provide procedural safeguards of notice and an opportunity of being heared whenever the Government inflicts loss upon a person by depriving him of a protected interest in liberty or property. In Zotos International Inc. v. Kennedy,[25] the Court upheld a due process challenge to an agency's decision of disclosure under an Act which was made without enabling the plaintiff to present its views. The Court remanded the case to the agency with instructions to establish procedures that would provide for notice and opportunity of being heard.

Ordinarily at the time of submission, neither submitter nor agency can predict whether a Freedom of Information Act request will be made in respect of that particular

---

25. 460 F.Supp. 268 (D.D.C. 1978) as quoted in Stephen S. Madsen, supra n.2 at p.124.

information. Since determination of confidentiality is time consuming, the dead line of ten days fixed under the Freedom of Information Act is insufficient for a predisclosure consultation. Thus, in such a context, imposition of due process is not so easy.[26] But it does not mean that due process is inapplicable. Once it is found that there exists a protected property interest, due process clause applies. It requires a flexible balancing of private and public interests and some type of pre-disclosure hearing is required.[27] It may also be noted that the due process clause provides for procedural protection and does not prohibit deprivation of protected property interests. So the submitters cannot permanently block the disclosure, but can only secure an opportunity of being heard.

Disclosure of confidential business information may also be viewd as taking.[28] The Fifth Amendment does not prohibit taking for public purpose, requiring only that owner must be compensated for his loss. Absolute takings for private purpose is not allowed. In Wearly v. F.T.C.,[29] the Court held

---

26. Stephen S.Madsen, supra n.2 at p.126.
27. A post-decisional hearing is meaningless in the case of Freedom of Information Act disclosures which do not temporarily disrupt interests in submitted data, but destroy them altogether.
28. The property at issue is not the confidential information itself or the documents embodying it but the submitter's legally protected interest in it, that is, his legal right to prevent others from using it.
29. 462 F.Supp. 589 (D.N.J. 1978), as quoted in Stephen S. Madsen, supra n.2 at p.129.

that disclosure under the Freedom of Information Act would constitute an unconstitutional taking of the submitter's property interest in the secret for the private use of the requester. The Court therefore enjoined the agency from disclosing the information.

If disclosure of confidential business information constitutes a taking for public use, the submitters have a valid claim for just compensation. But there are serious objections in considering disclosure as taking. The reasons for treating disclosure as a regulation are the following ones. First of all, the agencies do not prevent the submitter from using the data and do not themselves use it. Secondly, the Government does not receive any benefit from the activity. Thirdly, governmental interference with private property rights will generally be characterised as regulation if it flows from an exercise of police power or from a program designed to advance a substantial public purpose. In the case of Freedom of Information Act disclosure, it promotes the vital end of openness in Government.[30] Despite the reasons for treating disclosure as regulation, the Freedom of Information Act scheme should be adjusted, as far as possible, to provide greater protection for confidential business information.

Conclusion

There are important reasons why the privately generated information should be protected from public exposure.

---

30. Stephen S.Madsen, supra n.2 at pp.131-32.

A comprehensive disclosure policy may impair the agency's access to voluntarily submitted confidential business data. It may also affect the agency's ability to make intelligent decisions. A liberal disclosure will also inflict competitive harm upon the private businesses. Also, the repeated release of such information may discourage private incentives to discover, collect and use commercially valuable information and also forms a disincentive to future innovation.

On the other hand, there are certain reasons for making many business records publicly available. As in any other case, it makes the official conduct transparent and subject to public scrutiny. The disclosure helps the public to have access to underlying private documents upon which agency decisions are taken. By the disclosure, people could assess how the Government controls the private business and also the compliance by the business with the public policies. It enables the public to examine the Government's efforts in preventing private sector abuses.. The disclosure of such information seems to be more in line with the openness policy of the Freedom of Information Act. It renders corporations more accountable for the social consequences of their behaviour.[31]

Thus, there are advantages as well as disadvantages for a disclosure policy of business information. Different

---

31. Note, "A Procedural Framework for the Disclosure of Business Records under the Freedom of Information Act", 90 Yale L.J. 400 (1980-81) at p.411, n.51.

situations may warrant different solutions. The courts may balance the interests on both sides and may take appropriate decision. A lone argument for such a balancing is that an information elicited under a promise of confidentiality should not be divulged by the agency at its sweet will. This argument loses much of its strength on the reason that agencies are charged with regulating the private businesses. Secondly, establishing of a broad exemption for such information may undercut the effectiveness of the Freedom of Information Act. Finally, power to immunize information from public scrutiny upon the bare assertion of confidential solicitation, then rests with the agencies and such a vagrant discretion may lead to abuse.[32]

The Government in cases of public interest may use the data for its own purposes or for purposes of other private persons as seen in R. v. Licensing Authority; Ex parte Smith, Kline and French Laboratories.[33] On use or transfer of the valuable data submitted by a person, it is suggested that the person who submitted may be adequately compensated for the benefit the Government or the private person acquired from it. No one may be allowed to enjoy the fruits of another's labour. The value of the data in terms of money may be fixed after consulting the person who supplied the information.

---

32. Note, "Freedom of Information Act: A Seven Year Assessment, 74 Colum. L.Rev. 895 (1974) at p.950.
33. [1989] 1 All E.R. 175 (C.A.).

I. DOCUMENTS RELATING TO COMMERCIAL TRANSACTIONS

In a commercial transaction, the parties are treated equally and no privilege is allowed to one which is not available to the other. Also, in the business transactions, where one of the parties is State, there is no need to allow privilege to the State, save in exceptional cases.

Formerly, in the laissez faire era, the State had not come out to do business with people. In the modern welfare era, the State comes out and intrudes into many areas which formerly were clear instances of private area. The privilege regarding the documents related to the commercial transactions of a State, thus assumes much importance. In view of the extension of the governmental activities into the areas of trade and commerce, the courts must be particularly careful before deciding the question of privilege. In such cases, a claim of privilege may not be allowed unless it is to safeguard genuine public interests and the scope of the privilege may also not be extended.[1] This is because the documents relating to commercial functions of a State may include documents which are privileged on established grounds such as legal professional privilege, injury to national defence or proper functioning of public service etc.

---

1. Robinson v. State of South Australia, [1931] A.C. 704 (P.C.) at p.715.

Position in England

Where the transactions are not purely commercial, the documents relating to the transactions may get a different status. In Smith v. East India Co.,[2] the plaintiff was the captain of a ship, owned by the Company, which was on a trading voyage. A dispute arose between the plaintiff and the Company in respect of the freight charges to be paid by him to the Company. To eastablish his claim properly, he sought the discovery of certain correspondences between Directors of the East India Company and the Commissioners for the Affairs of India, which were made pursuant to the requirement of a statute. The plaintiff argued that it was for the first time privilege had been claimed for correspondence relating to mere commercial transactions. Also, it was argued that the relationship between Directors and Board of Control was one of agent and principal or mere trusteeship, and not relationship between two officers of administration. But, the Court found that the statute had transferred the territorial possession of the Company to the Crown and there was supervision, direction and control by the Commissioners for the Affairs of India. In order to make those functions effectively, and for the benefit of the public, it was held that the communications must be confidential.

Even if the documents relating to the commercial transactions are not in the possession of the Crown, they may be conferred privilege. In Asiatic Petroleum Co.Ltd. v.

---

2. 41 E.R. 550 (1841).

Anglo-Persian Oil Co.,[3] the plaintiff Company who had contract with the defendant Company for the supply of oil, sued the defendants for damages for breach of contract and, in the process, sought discovery of letters written by defendants to their agents, which contained confidential information from the Board of Admiralty. The Board had also a contract for supply of oil with the defendant Company. The documents were related to the progress of campaign in Persia and disclosure would possibly assist the enemy. The document, it was also argued, contained the policy views, intention of authorities, the position of the Board with regard to supply of fuel oil etc. Following the Smith case,[4] the Court found, after having seen the documents, that the documents could not be disclosed without injury to the public interest.

It can be seen that documents are not given privilege because they are documents related to commercial transactions by the State. The Government sometimes comesout with the defence that such documents are high level policy decisions. In Burmah Oil Co. case,[5] with the object of rescuing the Oil Company from grave financial difficulties, an agreement was entered into between the Oil Company and the Bank, with and under the direction of the Government, where one of the terms was the

---

3. [1916] 1 K.B. 822 (C.A)
4. Smith v. East India Company, 41 E.R. 550 (1841).
5. Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England, [1980] A.C. 1090 (H.L).

sale and transfer of shares in British Petroleum owned by the Company, at a particular rate agreed upon by the Government. Later, the Company brought an action against the Bank for a declaration that the sale was inequitable and unconscionable. In the process, discovery was also sought for documents including those related to the formulation of the Government's policy at the cabinet, other high level documents and information received from other oil companies. The House of Lords held that the documents must be produced for inspection. After inspection, the House of Lords found that none of them had any evidentiary value so as to make an order for their disclosure. If the documents had any evidentiary value, they would have been disclosed. This approach of the judiciary shows the liberal attitude it has taken in favour of those seeking information from the Government to establish their own claims against the Government. There is nothing wrong in such a trend but courts may be careful enough to release only those portions or only the content of the documents related to the dispute before them, which are less injurious to the public interest.

Position in India

Once the State comes out to enter into contractual relations with individual, it can reasonably be assumed that State has waived its immunities available to it as a State. In Peer Mohammed's case,[6] where the contract was for the supply

---

6. Governor General v. H.Peer Mohammed, A.I.R. 1950 E.P. 228.

of shoe laces, the contractor sought disclosure of letters written by one official to another. The claim of privilege under section 123 Evidence Act, the argument being that the documents related to 'affairs of State', was rejected because the Court treated them merely commercial in nature and the disclosure would not be against the public interest. However, the Court opined that in certain situations privilege, could be successfully claimed where it related to security of State.[7]

The procedures in a governmental agency in the case of a contract are many. There will be a lot of communications between different hierarchy of officials, audit reports, reports on accidents, disputes and opinions from the legal advisors. In Amar Chand Butails' case,[8] where the contract was for the supply of food grains, disputes arose regarding a sum which was to be paid to the plaintiff. The plaintiff sought disclosure of the letters from the Chief Conservator to the Accountant General, original reports of the Accountant, reports of the Audit Officer and such other communications made between different officials in order to prove his claim. Rejecting the claim of privilege under section 123, the Court opined that the head of the department could never claim privilege on the ground that the disclosure of the document would defeat the defence raised by the State.[9]

---

7. Id. at p.239.
8. Amar Chand Butail v. Union of India, A.I.R. 1964 S.C. 1658.
9. Id. at p.1661.

Where the disclosure of the documents would adversely affect the public interest, the head of the department must state the reasons within the permissible limits, as to why an injury to the public interest was apprehended from the disclosure of the documents.[10] The court may be satisfied with the danger to the public interest. If the documents are purely routine communications from one official to another having no bearing on public interest, the courts may not hesitate to order the documents to be disclosed. In Midland Rubber Co.'s case,[11] where the contract was for the construction of a road, running through the reserve forest, the contractor was not able to complete the work in time because of the non-co-operation of the Forest Department. Meanwhile the rate of wages and costs increased, leading the contractor to unforeseen losses. In a suit for reimbursement of loss caused to him, he sought the production of the estimate prepared by the Superintending Engineer and the recommendations of the Chief Engineer to the Government. The Court, on a careful perusal of the documents, found that the production of them would not cause any injury to the public interest. The disputed documents were capable of minimising the controversy itself and justice would not have been frustrated, if they were disclosed earlier.

In certain cases, the Government will come out with an argument, that the disclosure of documents may affect the

---

10. State of Rajasthan v. Smt.Kailashwati, A.I.R. 1979 Raj. 221 at p.223.
11. State v. The Midland Rubber and Produce Co., A.I.R. 1971 Ker. 228.

free expression of opinions of the officers. If the documents constitute confidential papers containing opinions of officers in respect of matters of public policy or the documents contain insinuations made against somebody which might expose him to civil or criminal actions, the court may allow the privilege.[12] The opinions of the officials, in all cases, may not be capable of exposing them to civil or criminal actions.

In Kota Match Factory's case,[13] where the plaintiff had an agreement with Government regarding the refund of excise duty, the Court protected the documents which embodied minutes of the discussions between the Minister and the party, and the advice of the Minister, as 'affairs of State' under section 123 of the Evidence Act. The decision does not seems proper, because no public interest would have been affected on disclosure of such documents relating to the contract. In Durga Prasad's case[14] also, the Court took the stand that the documents relating to the demarcation of mining plots made to different contractors were privileged, the reason being that such documents belonged to the class which would be related to the affairs of the State.[15] This decision also seems to be improper on the above said reason.

---

12. See State of Rajasthan v. Smt.Kailashwati, A.I.R. 1979 Raj. 221.
13. Kotah Match Factory v. State of Rajasthan, A.I.R. 1970 Raj. 118.
14. Durga Prasad v. Parveen, A.I.R. 1975 M.P. 196.
15. Id. at p.202.

Where the documents, though relating to the commercial transactions, are made in official confidence between high officials such as Secretary to State Government and Secretary to the Central Government, the privilege may be allowed.[16] Here, the public interest in disclosure of documents of commercial transactions is pushed back by the more important interest in keeping inter-departmental communications secret. Similarly, the legal professional privilege will receive more protection compared to the public interest in disclosure of commercial documents.[17]

Conclusion

Normally the authorities may have a tendency to withhold the commercial documents from disclosure to prevent the financial loss to the department. The courts may carefully analyse the reasons submitted by Government for withholding the documents. The yardstick may be the harm to the public interest. Trade secrets may form another ground. Also, individuals may not be allowed to exploit the techniques and methods developed by the officials under the guise of disclosure. This may happen where the Government had formed a method of work

---

16. See Mutisatilal v. Union of India, A.I.R. 1955 Hyd. 61.
17. Tirath Ram v. His Highness, Government of Jammu and Kashmir, A.I.R. 1954 J.& K. 11. In this case, the contract was for the construction of roads. The plaintiff sought production of communications made by Law Secretary to the Revenue Secretary. The Court allowed the claim of privilege because the documents were found to be in the nature of an advice given by a legal adviser to his client.

which the officers had found out after great efforts. A contractor may not be allowed to see them in a later dispute. Also, where the court finds that the documents are not capable of providing any help to render justice to the case before it, the documents may still be kept undisclosed.

It can be seen that the documents relating to commercial transactions between an individual and Government do not deserve any privilege. Grounds such as national defence, trade secrets, candour required in a department etc., may help the records of a commercial transaction from being disclosed. However, exceptional situations may arise where a contract itself has to be kept secret in the larger public interest.[18]

18. Totten v. United States, 23 L.Ed. 605 (1876). In this case, an action was brought to recover compensation for services, alleged to have been rendered under a contract with President Lincoln where the other party to the contract was to ascertain the number of troops stationed in the insurrectionary States and such other information and to report to the President. The Court held that the existence of such a contract was itself a fact not to be disclosed.

J. LEGAL PROFESSIONAL PRIVILEGE

A lawyer is an officer of the court and is bound to work for the promotion of justice while faithfully protecting the interests of his client. In performing his various duties, however, it is essential that a lawyer works with a certain degree of privacy, free from unnecessary intrusion from opposing parties and their counsels. Proper presentation of a client's case demands that he assembles information, sifts what he considers to be the relevant from the irrelevant facts, prepares his legal theories and plans his strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our legal system to promote justice and to protect the client's interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impression personal beliefs and countless other tangible and intangible ways.[1] A lawyer cannot also take profit out of close relationship formed with his client.[2]

According to the traditional doctrine, the rationale of this head of privilege is that it promotes the public interes because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers

---

1. Hickman v. Taylor, 91 L.Ed. 451 (1947) at p.462 per Murphy,J.
2. See Carter v. Palmer, 8 E.R. 256 (1842) (H.L).

by keeping communications secret.[3] The secrecy encourages the clients to make a full and frank disclosure of the relevant circumstances to the solicitor. The relevant documentary evidence becomes available in such a situation. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exercised by judicial discretion.[4] Nonetheless, there are powerful considerations which suggest that the privilege should be confined within strict limits.[5]

The solicitor-client privilege is the oldest of the privileges for confidential communications dating back to sixteenth century.[6] Originally, it was intended to protect the honour and integrity of a solicitor from being tarnished by disclosure of professional communications made by him. This rationale later gave way to the view that privilege was necessary for the protection of the client and not for the preservation of the solicitor's reputation. Confidential communications which took place after the dispute has arisen between a defendant and a solicitor, who acted as an agent and advisor only, but not as a solicitor, are not privileged.[7] The legal professional privilege will not be allowed to be used to protect communications made to further a deliberate

---

3. Grant v. Downs, 135 C.L.R. 674 (1976) at p.685.
4. Ibid.
5. Ibid.
6. See S.N.Laderman, "Discovery—Production of Documents—Claims of Privilege to Prevent Disclosure", 54 Can. Bar Rev. 422 (1976).
7. Greenlaw v. The King, 48 E.R. 891 (1838).

abuse of statutory power, and by that abuse to prevent others from exercising their rights under the law.[8] The privilege takes flight if the relation is abused.[9]

Since at least 1873, it has been clear that a request for legal advice as well the advice given are both privileged, whether they are written or oral, and whether the subject matter does or does not precede litigation.[10] The object and meaning of the rule has been explained by George Jessel, M.R., in the following words.[11]

> "... that as by reason of the complexity and difficulty of our law litigation can only be properly conducted by professional men, it is absolutely necessary that a man in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim or the substantiating his defence against the claim of others; that he should be able to

---

8. Attorney General v. Kearney, 158 C.L.R. 500 (1985).
9. Clark v. United States, 77 L.Ed. 993 (1933) at p.1000 per Cardozo, J.
10. See Minet v. Morgan, (1873) L.R. 8 Ch. App.361, as quoted in R. v. Board of Inland Revenue; Ex parte Goldberg, [1988] 3 W.L.R. 522 (Q.B.D.). See also Southwark and Vauxhall Water Co. v. Quick, (1878) 3 Q.B.D. 315; The Palermo case, (1884) 9 P.D. 6; Chadwick v. Bowman, (1886) 16 Q.B.D. 561; and Lyell v. Kennedy (1884) 27 Ch.D. 1.
11. Anderson v. Bank of British Columbia, (1876) 2 Ch.D. 644 at p.649.

> place restricted and unbounded confidence in the professional agent and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege and not the privilege of the confidential agent) that he should be enabled properly to conduct his litigation".

The privilege later expanded to encompass communications between the client or his solicitor and third parties, if made for the solicitor's information for the purpose of a pending or contemplated litigation.[12] Although this extension was originated from the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with client's freedom to consult privately and openly with their solicitors; rather it was founded upon the adversary system of litigation in which counsels control, the fact-presentation before the court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim of defence without any obligation to make proper disclosure of the materials acquired in preparation of the case.[13] This particular aspect, thus is not fully in line with the concept of the solicitor-client privilege which has peculiar reference to the professional relationship between two individuals.

---

12. Anderson v. Bank of British Columbia, [1976] 2 Ch.D. 644 at pp.649-50.
13. S.N.Lederman, "Discovery--Production of Documents--Claims of Privilege to Prevent Disclosure", 54 Can. Bar Rev. 422 (1976) at p.424.

The modern justification for the limited solicitor client privilege is to encourage freedom of consultation by clients with their lawyers which could be accomplished only if there is no fear of disclosure of the communications. All the four conditions of Wigmore, the famous author on evidence, are met in respect of this relationship and justify the privilege for it.[14] It is important to note that the essence of the legal professional privilege is the confidentiality of communications which is necessary for the preservation of a socially beneficial relationship. It may be noted that Wigmore's privileged communications test was aimed at protecting the individual who spoke in confidence in a particular relationship. It was not directed at the policy behind the "anticipation-of-litigation" or "work-product" rule which has its genesis in the adversary system, protecting not the communicant, but the evidence gathering solicitor and his client.[15]

One of the problem areas in this field is regarding the protection to be given to documents which were produced with a purpose, inter alia, of getting solicitor's advice. In Birmingham case,[16] certain quandity of hay, belonging to the

---

14. See Wigmore, On Evidence Vol.VIII (Mc Naughton Rev. 1901) 2285, as quoted in 54 Can.Bar Rev.422 (1976) at p.423.
15. See S.N.Lederman, "Discovery—Production of Documents—Claims of Privilege to Prevent Disclosure", 54 Can.Bar Rev.422 (1976).
16. Birmingham and Midland Motor Omnibus Co.Ltd. v. London and North-Western Railway Co., [1913] 3 K.B. 850.

plaintiff and stored at a station of the defendant, was destroyed by fire. The plaintiff alleged negligence on the part of the defendant which denided all such allegations. The defendant however had enquired into the matter and had records relating to such inquiry. In an action for damages, when such records were sought for disclosure, the defendant Company put forward the plea of the legal professional privilege. Buckly, L.J., for the Court of Appeal, held that it was not necessary that the affidavit made by the Company should state that the information was obtained 'solely' or 'merely' or 'primarily' for the solicitor, if it was obtained for the solicitor in the sense of being procured as materials upon which professional advice should be taken in pending or threatened or anticipated proceedings.[17] Hamilton, L.J., on the other hand opined that the principal purpose for which the document had been made should be the criterion for deciding the issue.[18]

Documents may be held to be privileged if they are obtained for the purpose of taking professional advice from a solicitor in view of a contemplated legal proceedings. In Seabrook v. British Transport Commission,[19] disclosure was sought for certain reports made by Commission's officers in respect of an accident in which the plaintiff's husband was killed. The Court upheld the objection raised by the Commission

---

17. Id. at p.856.
18. Id. at pp.861-62.
19. [1959] 2 All E.R. 15 (Q.B.D.).

on the basis of legal professional privilege because the reports were made by the Commission after the litigation was in contemplation and in view of such litigation, wholly or mainly for the purpose of obtaining for or furnishing evidence to the Commission's solicitor. It was for the use of the solicitor to enable him to conduct the defence and to advice the Commission.

Documents may be produced by an authority with different purposes in mind and one of the purposes may be to seek solicitor's advice. Sometimes, the principal purpose of forming a document may be to seek solicitor's advice. In Longthorn v. British Transport Commission,[20] the plaintiff brought an action for damages shortly after an accident. Meanwhile, the Commission had held a private inquiry into the cause of accident in which the plaintiff had also taken part. At the time of inquiry, the Commission did not know that plaintiff would be bringing an action for damages. When disclosure was sought for the report of the inquiry, privilege was claimed on the ground that it came into existence for the purposes, inter alia, of obtaining for and furnishing evidence to the solicitor. The Court found that it was not the main purpose and privilege claim was rejected. Referring to earlier authorities including the Birmingham case, Diplock, J., said that he was not satisfied on the authorities that the mere fact that it

---

20. [1959] 2 All E.R. 32 (Q.B.D).

might be one of the purposes, however insubstantial, was a ground for a claim of privilege.[21] Thus, the Birmingham decision, that a document need not be disclosed if one of its purposes (eventhough subsidiary) was to inform the solicitor with a view to litigation contemplated as possible or probable, was in a way sidelined.

In Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customes and Excise (No.2),[22] the issue was regarding the purchase tax on the amusement machines which was calculated on a formulae relating to the wholesale value of the machine. On dispute, it was agreed that the matter would go to arbitration. The arbitration finding was not agreeable to the Company. In the course of litigation, Commissioners made an affidavit in which they claimed legal professional privilege to certain documents including (a) communication between Commissioners and solicitors in anticipation of litigation, and (b) memoranda, notes, reports, correspondence, etc., passed between Commissioners and officer servants. These documents were prepared, sent or received confidentially with an aim of obtaining or furnishing information and evidence for the purpose of arbitration during the period when arbitration was contemplated or pending. While the first group of documents were held to be privileged, the claim of privilege for the

---

21. Id. at p.38.
22. [1973] 2 All E.R. 1169.

second group was rejected by the House of Lords. The House of Lords found that documents of second group were made with two purposes—one for ascertaining the wholesale value and the other, for the litigation. The first purpose was found to be more important. Lord Cross of Chelsa found the two purposes as two parts of a wider purpose—the ascertainment of the wholesale value—the first purpose to fix the true value, and the second, to help solicitors to prepare for arbitration.[23] Even if arbitration was not anticipated, the Commissioners had to form their own opinion as to the wholesale value. Thus no privilege was allowed. Lord Cross and Lord Kilbrandon showd dissatisfaction with Birmingham principle and preferred to Lord Hamiliton's view in Birmingham case.[24]

The rejection of Birmingham principle is also clear from Waugh v. British Railways Borad[25] in which the plaintiff's husband, driver of a locomotive, was killed in an accident. The widow brought an action for damages and in the process sought discovery of an inquiry report on the accident made by the Board. The Board claimed legal professional privilege for the report, the ground being that it was the practice of the Board to prepare a report on such incidents and send them to various departments and also to the solicitors for the purpose of enabling them to advice the Board and, if necessary, to

---

23. Id. at p.1183.
24. Id. at pp.1183, 1185 respectively.
25. [1980] A.C. 521 (H.L).

defend the proceedings against the Board. The House of Lords found that the dominant purpose of the report was not to get legal advice or to defend a suit and thus no legal professional privilege could be attached to the report. Lord Wilberforce said that the purpose of preparing for litigation ought to be either the sole or at least the dominant one.[26] To carry the protection of the privilege further into cases where that purpose is secondary or equal with another purpose would seem to be excessive and unnecessary in the interest of encouraging truthful revelation of all relevant documents. Lord Simon of Glaisdale also accepted the usage of 'dominant' purpose after considering various other propositions such as "an appreciable purpose", "a substantial purpose", "the substantial purpose", "wholly or mainly for that purpose", "primary purpose" etc.[27] Lord Edmund Davis also preferred the 'dominant purpose" test. He observed that adoption of "sole purpose" test would deny privilege even to material whose outstanding purpose was to serve litigation simply because another and very minor purpose was also being served.[28]

---

26. Id. at p.532.
27. Id. at p.537.
28. Id. at p.544.
For recent decisions see R. v. Central Criminal Court; Ex parte Francis & Francis (A Firm), [1988] 2 W.L.R. 627; British Coal Corporation v. Dennis Rye, [1988] 1 W.L.R. 1113; Goldman v. Hesper, [1988] 1 W.L.R. 1238;and R. v. Board of Inland Revenue; Ex parte Goldberg, [1988] 3 W.L.R. 522 (Q.B.D). In the last mentioned case, the Court found that the documents came into existence for the purpose and only for the purpose of obtaining legal advice and thus they were privileged (at p.532).

Position in Australia

In Australia, the Birmingham principle was rejected by the High Court in Grant v. Downs[29] in which a widow sued a Psychiatric Centre controlled by Government, for damages on the alleged negligence on the part of the Centre on the death of her husband. In the process, the defendant rejected the disclosure claim made by the widow for the report on the death, on the ground of legal professional privilege. One of the purposes for the preparation of the report was to assist in determining whether there had been any breaches of discipline by staff and, if so, what action should be followed. Another purpose was to detect whether there were any faults in the security and general running of the Centre. The last purpose was to have a report to submit before the legal representative of the department for enabling him to advice the department and, in case of a legal action, to act on behalf of the department. Barwick, L.J., stated the principle as follows:[30]

> "... a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection".

---

29. 135 C.L.R. 674 (1976).
30. Id. at p.677.

He preferred the view of Hamilton, L.J., in Burmingham case and opted the term 'dominant' rather than 'primary' or 'substantial'.[31] But the majority of the judges Stephen, Mason and Murphy, J.J., preferred the 'sole' purpose test[32] where the very purpose behind the creation of the document must be for submitting to the legal advisers in order to run the pending or contemplated litigation. Later, in National Employee's Mutual General Insurance Association Ltd. v. Waind,[33] the principle of Grant v. Downs was followed.

The Freedom of Information Act, 1982 exempts the documents relating to legal professional privilege from a citizen's right to get information from the governmental agencies.[34]

Position in the United States

In the United States, in Hickman v. Taylor,[35] the Supreme Court developed the concept of work-product doctrine, that is, anticipation-of-litigation privilege. The Hickman's Court agreed that the memoranda, statements and mental impressions fall outside the scope of an attorney-client privilege and hence were not protected from discovery on that basis.[36] The protective cloak of the privilege was held not to be extended

---

31. Id. at p.678.
32. Id. at p.688.
33. 141 C.L.R. 648 (1979).
34. Section 42.
35. 91 L.Ed. 451 (1947).
36. Hickman v. Taylor, 91 L.Ed. 451 (1947) at p.461.

to information which an attorney secured from a witness while acting for his client in anticipation of the litigation.[37] The privilege also does not concern the memoranda, briefs communications and other writings prepared by an attorney for his use in prosecuting his clients' case. It also does not relate to writings which reflect an attorney's mental impressions, conclusions, opinions and legal theories.[38] However, the Supreme Court recognized the need for a general policy against invading the privacy of an attorney's course of preparation which is necessary for an orderly working of the system of the legal procedure.[39] Thus, under the newly articulated doctrine, the protection is qualified, that is, documents would be discoverable only upon a substantial showing of a necessity or justification.

Position in India

In India, section 126 of the Evidence Act prevents disclosure of any communication by an advocate made to him for the purpose of his employment as an advocate by or on belief of his client, or any advice given by him to his client in the course of the employment.[40] An advocate is also not

---

37. Ibid.
38. Ibid.
39. Id. at p.463.
40. Section 126 of the Evidence Act, 1872 reads as follows:
"No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose

(f.n.contd...)

allowed to disclose the contents of any document which he has become acquainted in the course of the professional employment. However, the protection does not extent to all documents which might have come to the possession of the advocate. He is an agent of the client to hold the document and, if the client is compellable to produce the document, the advocate cannot refuse to produce the document.[41]

An advice of an advocate is also protected from disclosure where the client is the Government. It has been held that the salaried employees of a governmental institution who advises their employer on legal questions and legal matters would get the same protection as others.[42]

---

f.n.40 contd...

of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any illegal purpose;

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation—The obligation stated in this section continues after the employment has ceased."

Sections 126 to 129 of the Act deal with privilege that is attached to professional communications between legal advisor and client.

41. Chandubhai Jethabhai Desai v. State, A.I.R. 1962 Guj. 290 at p.293.

42. Municipal Corporation of Greater Bombay v. Vijay Metal Works, Bombay, A.I.R. 1982 Bom. 6. The communications in this case were protected under sections 126 and 129 of the Evidence Act.

An individual seeking legal advice cannot be required to disclose the information he communicated to the solicitor, nor the advice he received. Also, the legal adviser may not disclose such things. However, a litigant is bound to disclose his own knowledge of relevant facts. It would be curious if because the litigant happens to be a corporation, the rule for that reason is different. The management may claim privilege for reports where one of the purposes, apart from the informing function, is to make available the report to its legal advisers. It is difficult to find why the legal professional privilege should be extended to such materials obtained by a corporation with a double purpose unless it is the dominant purpose behind the creation of the document. Unless the law confines the legal professional privilege strictly within limits, the privilege will travel beyond the underlying rationales and will confer advantage to a corporation which is not enjoyed by an ordinary individual.

Legal Professional Privilege and the Government

In the best interest of the administration of justice, it is necessary that all facts must be brought before the court. It is also in the best administration of justice, legal professional privilege is allowed so that a full and frank disclosure to the solicitor will be made. This situation, no doubt, is necessary as far as private individuals are the parties to a suit.

Where a governmental authority becomes a party to the suit, the position seems to be different. The Government itself has got a duty to function for the best administration of justice. Any kind of withholding of documents in this respect becomes unjustifiable. Thus, Government cannot withhold the facts of a case on the ground of legal professional privilege. Thus, withholding of an inquiry report on an accident cannot be made on the basis of legal professional privilege. What may be allowed for the privilege is the intellectual part played by the legal or other officers of the department for winning the case and the intellectual work done by the solicitors of the Government and the tactics adopted or recommended by the legal officers. In no other case, legal professional privilege may be allowed for documents within the hands of a governmental authority.

Conclusion

It seems that a person's freedom in communication with the lawyer is more important than another's interest in the right to know. However, delicate situations may arise where the client is the Government. An individual may have no other source but only the reports made by the legal adviser. In such situations there is nothing wrong in disclosing the factual parts of the report and keeping the advices secret. This position may be followed whether report was made whether it was the dominant or substantial or one of the purposes.

K. CONFIDENTIALITY

Confidentiality is perceived to be an integral element not in all relationships but only in certain relationships. This lies in the recognition that in some relationships, there are certain important social or public values that have to be fostered and, the preservation or maintenance of these values or interests warrants some degree of confidentiality.[1] In such relationships confidentiality, is rather enforced by the society in the public interest. The enforced confidentiality thus is a means for securing an end which may be necessitated by a number of factors, such as, the maintenance of privacy, the promotion of information flow, the prevention of information abuse, and encouragement to the full and effective utilisation of some types of professional services.[2]

The proper province of confidentiality and the values it serves may be identified properly. Otherwise, there

---

1. Wyatt v. Gore, 171 E.R. 250 (1816).
   In this case, the Court said that an advice sought by a Governor General from the Attorney General of a distant colony who was the only person upon whom such Governor would lean for advice, could not be divulged. The Court also found that, similarly, an advice on the conduct of an officer by the Surveyor General of the distant colony to the Governor could not be disclosed. The Court decided mainly on the ground of confidentiality required for communications arising out of such relationships.
2. P.D.Finn, "Confidentiality and the Public Interest", 58 A.L.J. 497 (1984) at p.502. For example, confidentiality is necessary for the promotion of public and individual health. Similarly confidentiality is also desired in banking and insurances services. However, established authorities support the proposition that there is no basic principle that confidential communications are protected from disclosure in court. See Wheeler v. Le Marchant, (1881) 17 Ch. D. 675.

are two dangers. If one is able to exaggerate the confidentiality as a value, he can suppress the flow of information which actually ought to be divulged in the public interest. On the other hand, if one depricates importance of confidentiality, he can jeopardise the information supply and bring out information which ought not to be expressed publicly.

Trade secrets and commercial ideas are normally protected on the basis of confidentiality. In professional relationships, such as, solicitor and client, and other private relationships, such as, husband and wife, the records are given the protection of confidentiality. Also, in public as well as private institutions, certain records are considered 'private' and unauthorised disclosure of them may cause damage to efficiency. The right of access of an officer or employee of an institution to the information is limited by the "need to

---

3. In the private sector, the courts are generally reluctant to resort to an openness policy. But in exceptional situations the court may take a different view as seen in Lion Laboratories Ltd. v. Evans, [1984] 3 W.L.R. 539. In this case, the Company manufactured and marketed an electronic equipment which has been authorised by the Government for the use of police for measuring intoxication by alcohol by testing the breath of the drivers of motor vehicles. The defendants, who were technicians of the Company took the confidential internal memoranda which doubted the accuracy of the functioning of the instrument. These documents were later offered to a newspaper which wanted to publish them. The two conflicting public interests thus involved were the plaintiff's right to protect the internal confidential documents and copyright in them, and the public's entitlement to information which raised serious doubts about the reliability of the equipment which was thesole evidence on which members of the public had been or were being prosecuted. The Court found the second interest more dominant. Thus, even an internal confidential document of a private company loses its confidentiality on account of the public interest attached to it.

know" principle, ie., no official has any right to acquire any of the authority's stock of information, whether or not confidential, save in so far as it is needed by him in order that he should be able to do his job.[4] Upon the requirements of the public interest, also, confidentiality may be maintained except to the extent that public interest is served by disclosure.[5]

In the public sector, there is a different situation. In an Australian case,[6] the High Court clearly rejected mere confidentiality as a basis for privilege, though it would be a factor before the court when weighing the competant interests. The court will determine the Government's claim to confidentiality by reference to the public interest. A Canadian Court has also opined that in such cases a privilege against disclosure originated from a confidential communication coupled with a paramount public interest in permitting the secrecy relating to the communication or its contents was to be maintained.[7] The British approach, on the other hand, is slightly different. In British Steel Corporation v. Granada T.V. Ltd.,[8] the House of Lords found that a statutory corporation had the same claims to the confidentiality of its information as a private organisation and the public accountability of such body was limited to

---

4. R. v. Birmingham County Council; Ex parte O., [1982] 1 W.L.R. 679 at p.690 per Donaldson, L.J.
5. See P.D.Finn, "Confidentiality and the Public Interest", 58 A.L.J. 497 (1984) at p.506.
6. Sankey v. Whitlam, 142 C.L.R. 1 (1978).
7. R. v. Snider, [1954] 4 D.L.R. 483, as quoted in Christine Boyle, "Confidence v. Privilege", 25 N.I.L.Q. 31 (1974) at p.39.
8. [1981] A.C. 1096.

its statutory duty to report to Parliament. The test is whether the particular document, if disclosed, would be capable of causing injury to its private commercial functions. If so, no disclosure may be made. If it affects the administrative relations, on the other hand, there may be balancing of the competing interests which could be decided by the court. The particular function attached to each document may be found out for the purpose of the above said test.

The extension of the doctrine of confidence beyond commercial secrets has never been challenged and was noted without criticism by Lord Denning in Fraser v. Evans.[9] In Argyll v. Argyll,[10] the doctrine of confidence was applied to domestic secrets such as those passing between husband and wife during marriage. However, in public law, the privilege of non-disclosure is not allowed solely on the basis of confidentiality. The public interest element is always necessarily required by the courts. The rule is that the information cannot be disclosed without injury to the public interest and not that the documents are confidential or official which alone is no reason for their non-production.[11] Thus, confidentiality is not a separate head of privilege. But it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest. Thus, when public

---

9. [1969] 1 All E.R. 8 at p.11.
10. [1965] 1 All E.R. 611 (Ch.D).
11. Asiatic Petroleum Co.Ltd. v. Anglo-Persian Oil Co.Ltd., [1916] 1 K.B. 822 at p.830.

officials receive information from third parties in confidence, the information necessarily has to be divulged because of a greater public interest.[12] Lord Denning, on the other hand, had expressed his dissenting view in the Court of Appeal[13] that a party to litigation was not obliged to produce documents or copies of documents, which did not belong to him but which had been entrusted to his custody by a third party in confidence.[14] It was said to be a privilege which came down from Chancery Court and available to all litigants.[15] Rejecting the views of Lord Denning, Lord Cross said that such an exception would be combining two quite different considerations—the property in the document and the confidential nature of its contents.[16] Lord Denning's rule was also criticised on the point that it has nothing to do with the confidential nature of the contents of the documents and it applied to all documents whether confidential or not.[17]

---

12. See Alfred Crompton Amusement Mechine Ltd. v. Commissioners of Customs and Excise (No.2), [1973] 2 All E.R. 1169 (H.L.).
13. Alfred Crompton Amusement Mechine Ltd. v. Commissioners of Customs and Excise (No.2), [1972] 2 All E.R. 353 (C.A.).
14. Id. at p.380. Lord Denning cited an example to establish the principle. He said: "It frequently happens that a party who thinks he may be involved in litigation goes to a friend who has a material document. The friend allows him in confidence to see it and to make a copy of it. He takes a copy and hands it to his solicitor". (at p.381). Lord Denning was of the opinion that confidentiality in such situations could alone be a strong basis for non-disclosure.
15. Ibid.
16. [1973] 2 All E.R. 1169 at p.1180.
17. Id. at p.1181.

An information if not damaging to the public interest on disclosure may not be given any privilege by the courts. In A.G. v. Guardian Newspapers,[18] it was held that the court would grant an injunction restraining the publication of confidential information acquired by a Crown servant in the course of his employment, if it could be shown that publication of the information would not be contrary to public interest. The Crown must show not only that the information was confidential but also that it was in the public interest that it should not be published. Thus, an injunction would not be granted if all the possible damage to the Crown's interest had already been done by a publication.[19]

It is true that it is difficult for a Government to function under a threat or fear of disclosure of secrets by its employees. However, it would not be appropriate for a court to issue a general injunction restraining future publication of material relating to security service.[20] The most appropriate means of preventing publication of such material lay in the observance by the members of the security service of their life long duty of confidentiality.[21]

The House of Lords, in a recent case,[22] had expressed a liberal view in this regard. In Scotsman's case,[23] a former

---

18. [1988] 3 All E.R. 545.
19. Id. at pp.640-42.
20. Id. at p.646.
21. Ibid.
22. Lord Advocate v. The Scotsman Publications, [1989] 3 W.L.R. 358 (H.L.).
23. Ibid.

member of security service published a book, but only to a limited number of private persons, without getting an authorisation from the Department. One of the receipients handed over the copy to 'Scotsman' which published an article including certain excerpts from the book. It was argued that though the book contained no information capable of damaging the public interest, any unauthorised disclosure of a security service member's work was itself against public interest. Rejecting the argument, the House of Lords held that any further publication of the book would not increase the damage to the public interest and so no injunction could be granted against publication of the book.[24]

Regarding protection on the basis of confidentiality, the House of Lords opined that a person coming to possession of confidential information, knowing it to be such but not having received it directly from the original confider himself, came under an obligation of confidence.[25] Thus, confidentiality alone in certain cases could become a ground for granting an injunction against publication of a secret information. It is true that the fact that an information from the secret service of the Government, whether it is capable of injuring public interest or not, has been leaked, is itself a matter causing injury to the public service.

---

24. Id. at p.362.
25. Ibid. See also The Commonwealth v. John Fairfax Ltd., 147 C.L.R. 39 (1980) at pp.50-54.

In the United States also, similar problems arose. In Snepp v. United States,[26] an individual under express condition of employment with C.I.A. executed an agreement, promising that he would not publish any information relating to the activities of the agency without specific prior approval. Based on the experiences as an agent, he published a book without submitting it for approval. The United States brought an action seeking a declaration that he violated the control, an injunction requiring him to submit future writings for pre-publication review, and an order imposing a trust for Government's benefit on all profits the agent might earn from publishing the book. The Government had a compelling interest in protecting both the secrecy of information relating to national security and, the appearance of confidentiality so essential to the effective operation of foreign intelligence service.[27] In addition to the intelligence from the domestic sources, the C.I.A. obtains information from foreign intelligence services also. The continued availability of information depends upon the ability of C.I.A. to guarantee utmost secrecy.[28] The Court found that there was a violation of the agreement.

Appointment to intelligence services may imply an agreement for keeping secret, the information received. The nature of the service itself implies utmost secrecy. Thus, even if there is no agreement to secrecy, it could be implied

---

26. Snepp v. United States, 62 L.Ed. 2d. 704 (1980).
27. Id. at p.710.
28. Ibid.

In the case of informers also, confidentiality alone cannot form a solid basis for non-disclosure of the information or informant. The fact that information has been communicated by one person to another in confidence is not in itself a sufficient ground for protecting from disclosure in a court of law. The nature of the information or the identity of the informant, if either of these matters would assist the court to ascertain facts which are relevant to an issue, will be considered by the court.[29] Thus, private promises of confidentiality may yield to the general public interest in the administration of justice unless by reason of the character of the information or the relationship of the receipient of the information to the informant, a more important public interest is served, by protecting the information or identity of the informant. In N.S.P.C.C. case,[30] Lord Denning, in the Court of Appeal observed that confidentiality, though not a separate head, was a very a material consideration and courts should not allow confidences to be lightly broken.[31] When information had been imparted in confidence particularly under a pledge to keep it confidential, the courts should respect that confidence and should not compel a breach of it, save where the public interest clearly demands it, but only to the extent the public interest required it.[32]

---

29. D. v. National Society for the Prevention of Cruelty to Children, [1977] 1 All E.R. 589 at p.594 per Diplock, L.J.
30. [1976] 2 All E.R. 993 (C.A).
31. Id. at p.999.
32. Ibid.

The reason for not considering confidentiality as a sole basis to withhold documents is that confidentiality of the information does not provide in itself a satisfactory basis for testing whether relevant evidence should be withheld. Several reasons were adduced by Lord Simon in N.S.P.C.C. case. First of all, it does not sufficiently reflect the true basis on which any evidence is excluded namely the public interest.[33] Secondly, a juridical basis of confidentiality does not explain why in relation to certain classes of excluded evidence, there can be no waiver of the immunity.[34] Thirdly, certain evidence is excluded not because it is confidential, but because it related to affairs of State.[35] Fourthly, the law would operate erratically and capriciously according to whether or not a particular communication was made confidentially.[36] Finally, it is undesirable that exclusion should be conferred by confidentiality irrespective of the public interest. Thus, the test is the higher public interest outweighing the interest of confidentiality.[37]

---

33. D. v. N.S.P.C.C., [1977] 1 All E.R. 589 (H.L) at p.611 per Simon L.J.
34. Ibid.
35. Ibid.
36. Ibid.
37. In Australia also, detriment to the public interest is the criterion. In Commonwealth of Australia v. John Fairfax & Sons, 147 C.L.R. 39 (1980), where the plaintiff Commonwealth sought privilege for certain treaty documents, the High Court held that the plaintiff must show not only that information was confidential in quality and that it was imparted so as to impart an obligation of confidence but also that there would be an unauthorised use of that information to the detriment of the party communicating it. Thus, the Government was required to show the detriment in which it failed.

When disclosure of information is sought from the Government, the Government may sometimes withhold them on the ground, inter alia, of confidentiality and the issue will be decided by the court usually. But a different situation arises when a person threatens or proposes to disclose an information which, in the opinion of the Government, is confidential. The courts have been steadily developing an equitable doctrine that a person should not profit from the wrongful publication or use of information received by him in confidence.[38] In Fraser v. Evans,[39] communication from a public relations office to the Greek Government was held not to attract the protection of law. But the Court, there recognized that this sort of information could, in an appropriate case, be protected.

In India, confidentiality of a document alone is not a sufficient ground to attract protection. It is only a factor

---

38. See Seager v. Copydex Ltd., [1967] 2 All E.R. 415 (C.A). In this case, an unpatented device, disclosed by the inventor to a company, was exploited by the company. It was held that the company had made use of information received in confidence which was not available to the public, and therefore liable for breach of confidence.

    The principle is that a man shall not profit from the wrongful publication of information received by him in confidence. It may be noted, the doctrine applied independantly of any contract. See Saltman Engineering v. Campbell, [1963] 3 All E.R. 413. The doctrine has been used as a ground for restraining the unfair use of commercial secrets transmitted in confidence. Later the doctrine was extended to further areas such as domestic secrets passing between husband and wife. See Argyll v. Argyll, [1965] 1 All E.R. 611.

39. [1969] 1 All E.R. 8.

which will be considered by the court and public interest is the criterion involved making documents privileged.[40]

The relationship between confidence and privilege is important for certain reasons. Firstly, the existence of a privilege may be an indication of the way, society views the need for secrecy with respect to certain functions and, secondly, the questions of privilege may seriously affect these functions.[41] The absence of privilege may, in certain situations, prevent the confidential information from being exchanged.[42]

Generalising the law of confidentiality, an author has suggested that there are three tiers to duties of confidence. Those at the first level are simply presumed, the notable example being the professional's duty and confidence that preserves and promotes values which necessitate enforced secrecy to a certain extent.[43] The concern here is in how these persons discharge their roles in relation to the information acquired. It also protects the information about persons and institutions.[44] At the second level are duties which have been agreed or which in the circumstances should be taken to have been agreed, as

---

40. State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493 at pp.518, 529 per Kapur and Subba Rao, JJ., respectively; State of U.P. v. Raj Narain, A.I.R. 1975 S.C. 865 at p.875 per Ray, C.J. See also S.P.Gupta v. Union of India, A.I.R. 1982 S.C. 149.
41. Christine Boyle, "Confidence v. Privilege", 25 N.I.L.Q. 31 (1974) at p.35.
42. For e.g., in England, there are strong arguments in favour of a special psychiatrists' privilege since lack of privilege may prevent the patient taking his psychiatrist as fully into his confidence. Ibid.
43. P.D.Finn, "Confidentiality and the Public Interest", 58 A.L.J. 497 (1984) at p.508.
44. Ibid.

in the case of trade secrets.[45] Confidence here is linked very much to the maintenance of good faith in mutual dealings. The concern here is more with regulating how information of a particular description should be used in such cases. Ordinarily confidence serves to protect the information of a person or an institution.[46] At the third level, confidentiality is a fetter which will only be imposed upon the dissemination of information where a clear and demonstrable need is made out. The information in these cases ordinarily relates to matters affecting public governance.

Thus it can be seen that in the first level the importance is given to the relationship alone. In the second, the criterion is a combination of the relationship and information. At the third level, it is information alone that is important. The role of the court then is to locate the contested document in the correct level of the three above explained.

Presently the public interest element is the ruling concept in respect of privilege to withhold documents. In the case of a claim for confidentiality also it is the rule. An important point to note is that when documents are supplied by an outside party to the Government, under a contract of confidence, and if such documents are not kept confidential,

---

45. Ibid.
46. Ibid.

the ultimate effect is that the Government may never get similar information from such parties in future. Here, merely for one person's benefit, the documents are divulged. Thus, it is not desirable to block such sources of information for the benefit of a single individual. But disclosure is desirable even in the cases of a contract of confidentiality if the Government has a duty to collect those documents or the third parties are statutorily bound to supply such documents, or there is a situation where the third parties have no other choice but to supply such documents to the Government. In all other cases of voluntary transfers of documents under an agreement of confidentiality, disclosure may not be allowed. Confidentiality as a head may be treated as capable of conferring the privilege to withhold documents.

L. OTHER MISCELLANEOUS AREAS

In the United States, the Freedom of Information Act provides for exemption to certain kinds of documents, apart from the ordinary exemptions like national defence, trade secrets, privacy interests of an individual, investigatory records etc. They are Internal personal rules and practices, Reports on financial institutions, and Geological information. In this study, those types of exemptions are included as the miscellaneous ones. A brief account of them is given below:

Internal Personal Rules and Practices:

The thrust of the Exemption Two[1] is to relieve agencies of the burden of assembling and maintaining documents for public inspection in which public would not reasonably be expected to have an interest.[2] It may also be noted that it is difficult to envisage a situation in which the disclosure of an agency's internal personal rules and practices would cause irreparable injury. Thus, the Exemption may appear to conflict with the Freedom of Information Act's general policy of encouraging maximum disclosure. The explanation to justify

---

1. Exemption Two of the Freedom of Information Act reads as follows:
   552(b) This section does not apply to matters that are—
   (2) related solely to internal personnel rules and practices of an agency;
2. Department of Air Force v. Rose, 48 L.Ed. 2d. 11(1976) at p.26.
   The legislative history shows that the term 'internal personal rules and practices' may have a narrower reach. The similar disclosure requirement under section 3 of the Administrative Procedure Act contained the term 'internal management' which has a wider reach (at p.22).

the Exemption is that Congress believed that what medium of public benefit would accrue from disclosure of the rules and practices could only be purchased at a high cost of agency efficiency.[3] It may be noted that the examples of internal personal rules and practices offered by the Senate Committee include parking regulations, lunch schedules, sick leave policies etc.[4]

Inter-department or Intra-department Communications

The reason which led the Congress to include this Exemption[5] in the Freedom of Information Act is the governmental concern that the release of predecisional materials, such as drafts of opinions and other agency documents would stiffle the free flow of the agency discretion. The congressional report accompanying the Freedom of Information Act recognized that requiring the officials to 'operate in a fish bowl' would in fact chill the entire deliberative process of policy-making.[6] Therefore, the Exemption was included in the statute primarily to encourage open debate among officials and to protect against the premature release of information.

---

3. Note, "Freedom of Information Act: A Seven Year Assessment", 74 Colum. L.Rev. 895 (1974) at p.956.
4. Id. at p.977.
5. Exemption Five of the Freedom of Information Act reads: 552(b). This section does not apply to matters that are— (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
6. See S.Rep.No.813, 89th Cong., Ist Sess.9 (1965), as quoted in 56 Geo.Wash.L.Rev. 880 (1988) at p.882.

The ultimate purpose of the privilege is to prevent injury to the quality of agency decisions. A distinction was thus made between predecisional communications and communications made after the decision; and the former one was protected under Exemption Five.[7] Such a protection helps the decision-maker to receive candid advice.[8] Otherwise, the associates will be reluctant to be candid and frank. The quality of the decision may not be affected by a disclosure after the decision has already been taken. The public is concerned with the final decision with the reasons or basis for it, and not to the information relating to the past deliberative process.

Reports on Financial Institutions

Exemption Eight of the Freedom of Information Act allows withholding of information contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.[9] The purpose of the

---

7. Renegotiation Board v. Grumman Aircraft Engineering Corporation, 44 L.Ed. 2d. 57 (1975). See also N.L.R.B. v. Sears Roebuck & Co., 44 L.Ed. 2d. 29 (1975); and Federal Open Market Committee v. Merrill, 61 L.Ed. 2d. 587 (1979).
8. United States v. Weber Aircraft Corporation, 79 L.Ed. 2d. 814 (1984). In this case, the Corporation conducted two kinds of investigation into an aircrash—a collateral investigation and a safety investigation, the former with litigation, disciplinary action, and administrative proceedings in mind, and the latter with a sole purpose of corrective action in the interest of accident prevention. The witnesses were assured that their statements would not be used for any other purpose. The Court held that safety investigation report was qualified for Exemption Five status.
9. Exemption Eight of the Freedom of Information Act reads as follows:
   552(b) This section does not apply to matters that are—

(Contd...)

Exemption is to ensure the security of the financial institutions. In Shapiro v. S.E.C.,[10] the District Court suggested that neither the national securities exchange nor broker dealer under S.E.C's jurisdiction properly fall under the rubric of financial institutions. The Court reflected a desire to give this Exemption a restrictive reading thereby fostering disclosure. In appropriate cases, identifying details may be deleted before disclosure.

One of the reasons for secrecy in reports on financial institutions is the undesirability in divulging the financial policies followed by the institutions and the criticisms and recommendations made in the reports. The high level decisions regarding the nation's policy on foreign exchange, currency and important credit policies on disclosure would be against the public interest because other nations and multi-nationals may be able to exploit the situation.

Geological Information

Exemption Nine of the Freedom of Information Act authorizes withholding of geological and geophysical information and data including maps, concerning wells.[11] This Exemption was

---

f.n.9 contd...

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

10. 339 F.Supp.467, 470 (DDC) (1972), as quoted in Donald C. Rowat, Administrative Secrecy in Developed Countries, Macmillan, London (1979), p.337.

11. Exemption Nine of the Freedom of Information Act reads as follows:

(Contd...)

added in response to testimony that disclosure of the seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent lot of money in exploration.

At the end of the exemption sections, it is provided that any reasonably segregable portion of the record may be provided to a requester after deletion of portions which are exempt under the section (b). This shows the intent of Congress of maximum disclosure. A record cannot simply be withheld on the ground that a portion of it contained secret information.

---

f.n. contd...

552(b) This section does not apply to matters that are—
(9) geological and geophysical information and data, including maps concerning wells.

M. EXEMPTIONS REQUIRED IN INDIAN SITUATIONS

So far we have seen certain areas which could be reasonably exempted from a citizen's right to know. These exemption areas are relevant in all cases where information statutes are to be enacted. In this section, the area which requires special attention in Indian conditions is examined.

Protection afforded to records relating to defence and diplomatic affairs helps the nation to combat threats to its national security from outside. In order to nullify threats to national security from within the nation also, protection may have to be accorded to certain kinds of documents. Different kinds of threats arise in India against the security. terrorism riots based on region, language and religion are some of them.

The present political, regional, linguistic and communal disturbances, seen in different parts of the nation, point out the need for a stronger national integration. National integration signifies unity in diversity in which both the components are equally valid and mutually inter-dependant. Integration is a process in which the differences of the members are neither suppressed nor compromised but harmonised without loss.

The vastness of the country with people of varying races, religions, languages, customs and life-styles, no doubt, posed problems from time to time. But all through the ages, a stream of unity and currents of synthesis have influenced the ethos of our socio-political life. A nation implies a sense of belonging, a feeling of togetherness and a sense of unity. The strength of the country depends on the strength of all groups which constitute it. Thus requires the necessity for the national integration.

In India, we see fissiparous tendancies based on regional, linguistic, caste and communal factors. This is despite the fact that the Indian Republic is federal and secular in character. The Constitution of India offers a complete equality to all citizens irrespective of the caste, religion or place of birth. In a way, to hold our Constitution high, we must maintain the unity in the country. Any divisive activities may be treated as anti-constitutional.

The main anti-integration activities can be seen in India in the areas such as the terrorist activities, communal riots, regionalism, Centre-State relations and inter-State relations.

Terrorism

Terrorism is a means to an end and not an end in itself. It has objectives of political nature. Terrorists lack power for a straight fight against the Government. Through

the indirect methods such as, hijacking, hostage-taking and killings in open places, they create a reign of terror among the public. The terrorists usually lack support of the people. Thus, through a democratic process they cannot achieve their political ends.

Terrorism is a war against humanity. In most cases, the innocents will be the victims. It is a threat to democracy also. For the maintenance of humanity and democracy, it is necessary to curb terrorism.

The Government in a democratic society by its nature respects the dignity of its citizens. The State exists to serve and protect the individual from the terrorists. Ordinary criminal procedure is found to be inadequate to combat with terrorism. Thus, in India, the Terrorist and Disruptive Activities (Prevention) Act, 1985 was enacted conferring more powers on the executive.

With the increase in availability of modern weapons and better organisation, the terrorists have acquired more strength. This is evident from the situations prevailing in Punjab and Kashmir. In tackling the terrorists, Government may be given wide powers. Many things have to be done secretly. Leakage of information from the Government weakens its force on the one hand and strengthens the terrorists on the other.

In the process of curbing terrorism, the Government acquires lot of information. The authorities will have their own plans and strategies. Various reports will also be there. In the light of the gravity of the problem, it is extremely important that such documents may be given greater protection. A citizen's right to know may be subordinated to the secrecy required. The protection of such documents is, no doubt, necessary for the maintenance of democracy and humanity.

Communal riots

The sporadic outburts of communal frenzy during the past several years, and more particularly in the recent past, must put to shame any civilized society. The Preamble to our Constitution and Articles 14 and 15 of the Constitution show that all citizens irrespective of their community are given equal protection of laws. Growth of secularism is a pre-condition in India for its better nation building process.

The frequent communal riots, between two religious groups or between two caste groups, bring in a feeling of insecurity among the minority communities. It is the duty of the Government to remove such feelings and also to defeat such anti-secular forces. In many situations, for the control of the riots, the authorities require more powers. The feelings of an Indian are strong regarding his religion or caste. Any news of a conflict between two groups is enough to bring him also into the field. This shows the difficulty before the

Government in tackling the problem. It is also a truth that there are religious maniacs who are ever ready to excite and exploit the poor masses.

The Government, in its efforts to curb the communal riots, collects a lot of information. The judiciary has recognized the need for secrecy in such matters. In Re Killi Suryanarayana Naidu,[1] the High Court did not allow disclosure of a report made by authorities on the ground that the disclosure would be prejudicial to public interest where it was suspected to aggravate the conflicts between two factions of the community in a particular place. The Government may have a list of suspecteds, reports on different incidents, intelligence information, plans and strategies to counter a possible riot etc. The citizen's right to know, in these situations, may be subordinated to the overall interest to curb communal riots. The disclosure of the information may also help the organised law-breakers. It may also sometimes lead to a fresh communal riot. The Government is placed in a similar situation where there are conflicts between two groups belonging to different castes.

Similar to the protections required to combat terrorism and communal riots, protective measures may also be necessary where conflicts between two groups based on region or language arise. Also in exceptional cases, certain information bearing on the inter-State and Centre-State relations may also require protection in the better interest of the nation. In certain cases, where compromises are made by either Centre or State, if made open, may make the Government unpopular. But such compromises are essential in the wider national interest.

1. A.I.R. 1954 Mad. 278.

Chapter 9

MISCELLANEOUS TOPICS

In this chapter, certain minor areas connected with the right to know are dealt with. These areas may better be clubbed together instead of treating them separately. The common characteristic of these areas is the right to know element. These areas include statutory privilege, property rights in information, the role of press in a society regarding the right to know of the people, the right to know contained in the principles of natural justice, ombudsman and his access rights to necessary records, employees' right to information against the employer, and similar minor subjects.

A. STATUTORY PRIVILEGE

Most evidentiary rules are designed to ensure that information on which the court decides is reliable. Different rules have a different emphasis and are directed to ensure that the needs of the litigants do not conflict with wider social aims, outside the courtroom.[1] The courts have evolved distinct methods of coping with the intrusion of such extrinsic policy factors into the trial process.[2] They can assess the social consequences on the admission or exclusion by weighing the potential harm to the society. Claims of public interest immunity are now routinely decided by such a case by case balancing process. The court can also exclude all evidences of a particular type because of the potential social harm irrespective of the effect of admission in the case before them. Taking into account of such harms, the legislature may, sometimes, come out with a legislation restricting the disclosure of certain information.

Position in England

In England, there are more than hundred Acts and statutory instruments which empowers the Government to restrict the use of information it acquires.[3] A statute which clearly provides that information could not be given in evidence, seems to be the simplest, the most direct means, to ensure that public

---

1. Ian Eagles, "Public Interest Immunity and Statutory Privilege", [1983] C.L.J. 118 at p.120.
2. Ibid.
3. Ibid.

officials are protected against unwanted demands for information.[4] Such an enactment of express privilege is no guide to the importance of the information it protects or to the status of the persons who hold it.[5]

There are certain justifications for the legislative intervention. It is thought that it may be necessary to secure some legitimate public interest in secrecy which the courts are unwilling to protect, either because of the binding force of precedents or because of a mistaken view of the policy matters involved. Another justification is that the statutes provide certainty to an uncertain area of the law, substituting a firm legislative prescription.[6]

The information which statutes protect could also be made subject of a claim of public interest immunity at common law. There are three approaches on the interaction of these two sources of evidentiary protection.[7] The first says that common law vacates the field when a statute is enacted and those claiming evidentiary privilege must find it in the statute or not at all. The second says that statute and public policy are contained in mutually exclusive compartments, the only point of contact between them is that they relate to the same item of evidence. The third approach

---

4. Ibid.
5. Ibid.
6. Id. at p.148.
7. Id. at p.140.

envisages a symbiosis between statute and common law where the statute constitutes a new head of public policy and the attributes of common law are absorbed into the statutory privilege. It is impossible to tame or trim a statutory privilege by reference to the public interest.[8] Once it is accepted that a privilege has been created by statute, the common law can only contain or extend but cannot contract it.

The secrecy statutes may be of different kinds. Some may provide an express privilege so that disclosure is not at all allowed in any circumstances. In certain other statutes, the secrecy provision may allow disclosure to a named class of persons or to persons permitted by the Minister, or in specified circumstances. Such instances show that requirements of secrecy are not absolute, but limited by the conditions in the statute.[9]

Position in the United States

In the United States, Exemption Three of the Freedom on Information Act authorises the withholding of documents

---

8. Ibid.
9. In Norwich Pharmacal Co. v. Customs and Excise Commissioner, [1974] A.C. 133 (H.L), section 3 of Finance Act, 1967, provided that Commissioners could disclose origin, discription and maker of imported goods provided that the Minister had first notified them that disclosure to a stated person was in the national interest. It was expressly stated that the Minister had no power to authorise the disclosure of an importer's name. Thus, the Commissioners argued that disclosure of an importer's identity to a court was thus prohibited. But the Court rejected this view because the particular form of words did not create a statutory privilege. Thus, where Parliament has taken pains to authorise some forms of disclosures, then it may be assumed that all other disclosures, including forensic disclosure, is forbidden.

which are specifically exempted from disclosure by a statute.[10] Unlike other exemptions, Exemption Three does not specify the documents that may be withheld. There are many statutes that clearly fall within the terms of this Exemption and a question may arise whether the statute applies to the records which are being sought for disclosure.

Under the original form of Exemption Three,[11] in reviewing an agency's decision to withhold a document, the courts were faced with two distinct problems. First, the courts had to determine whether the statute relied on by the agency was sufficiently specific to qualify under an exemption statute. Secondly, it had to determine whether the document requested fell within the category of documents prescribed in the exemption statute.[12]

---

10. The section reads as follows:
    552(b) The section does not apply to matters that are—
    (3) specifically exempted from disclosure by statute (other than section 552(b) of this title), provided 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 to be withheld;
11. Before the 1976 Amendment, the section read as follows:
    552(b) This section does not apply to matters that are—
    (3) specifically exempted from disclosure by statute;
12. Richard Olin Berner, "The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act", 76 Colum. L.Rev. 1029 (1976) at p.1032.
    The Exemption Three contained no built-in-standards as some of the other exemptions under Freedom of Information Act. The legislative history reveals that Congress was aware of the necessity to deal expressly with inconsistant laws and it did not intend to modify the numerous statutes which already had restricted public access to specific records. The Freedom of Information Act could not be read to repeal all such statutes. Otherwise Congress would have undertaken to reassess every delegation of authority to withhold information which it had made before the passing

(f.n.contd..)

Congress amended the Exemption Three after the decision in Robertson's case.[13] Here, the subject matter was certain reports which consisted of the Administrator's analysis of the operation, maintenance and performance of commercial airlines. Section 1104 of the Federal Aviation Act, 1958, permits the Administrator to withhold disclosure of such reports upon receiving an objection, if in his judgement that it would adversely affect the objecting party's interest and not in the public interest. The Administrator received an objection from an air transport association and the reports were withheld when the respondent requested disclosure. The Supreme Court found that Exemption Three confidentiality was necessary for the effectiveness of the programme. By providing a non-disclosure status to the Act, the Robertson case posed a threat to the continued effectiveness of the Freedom of Information Act.[14] With the express purpose of overruling that decision, Congress amended the Exemption in 1976, to make clear its intention to limit the non-disclosure statutes that would qualify under the Exemption.[15]

---

f.n.12 contd...

of Freedom of Information Act. Thus, a statute is required to take away the information rights unless it comes under other exemptions or privileged under other statutes. However, regulations made by an agency cannot take away the right to information.

13. Administrator, Federal Aviation Administration v. Robertson, 45 L.Ed. 2d. 164 (1915).
14. By disregarding the strict interpretation of the terms specifically exempted, the Supreme Court thereby opened a broad avenue for reverse Freedom of Information Act suits. See Comment, "The Consumer Product Safety Act as a Freedom of Information Withholding Statute", 128 U.Pa. L.Rev. 1166 (1979-80) at p.1176.
15. Ibid.

The amended version describes the characteristics what a statute must possess in order to fall within the Exemption. Unlike the original section, the new one offered certain guidelines as to when a statute was sufficiently specific. Congfess has attempted in the new section to cure the defects by enumerating three different ways in which a statute can qualify as an Exemption statute. If must (a) refer to the type of matter to be withheld, or (b) spell out the particular criteria by which an agency must decide when to withhold, or (c) require non-disclosure so as to leave the agency no discretion on the issue.

The amended exemption takes away the discretion from the agency under those exempting statutes. In Baldridge v. Shapiro,[16] in the report published by the Bureau of Census, it was found that the population in the Essex county had fallen down. The Essex county filed a request seeking information from the Bureau of Census relating the person residing in that county. This was refused by the Bureau. The census data serve an important function in the allocation of federal funds to States since the allocation is based on population. When challenged, the Supreme Court found that Census Act was qualified to be an exemption statute where sections 8 and 9 prevented the Bureau from using the data collected for any purpose other than statistical purposes, and also from publishing anything by which an individual or establishment could be

---

16. 71 L.Ed. 2d. 199 (1982).

identified. In borderline cases, however, the courts may look into the purposes served by secrecy. The amended section makes clear that mere references to the 'public interest' are not sufficient criteria for getting exemption status. A statute that merely permits but does not require non-disclosure will not form an exemption statute to the Freedom of Information Act.[17]

Position in India

In India, certain statutes restrict the flow of information from the governmental authorities. Under section 18 of the Atomic Energy Act, 1962, the information regarding the plan, model, drawing etc., of a plant are not to be divulged. Under the Income Tax Act, 1961, the information respecting assesses are restricted, under section 20 of the Act.

Waiver and Secrecy Statutes

Unlike Crown privilege, statutory privilege may be waived. The wishes of both-those from whom the information is derived, and those to whom it is entrusted—are given some weight in the balancing process, though it need not be decisive. But in a Queensland case,[18] the Court took the view that Parliament could never have intended that a statute designed to protect the suppliers be used against them. It may be noted

---

17. Consumer Product Safety Commission v. G.T.E.Sylvania, 64 L.Ed. 2d. 766 (1980).
18. Geraghty v. Woodforth, (1957) Q.W.N. 41, as quoted in Ian Eagles, "Public Interest Immunity and Statutory Privilege". [1983] C.L.J. 118 at p.128.

that a statutory privilege is not only for the interests of the suppliers of information but also intended for the proper functioning of the departments.

Certain statutes may expressely provide for disclosure only with the consent of the suppliers in writing. In such cases, the suppliers retain greater control over the information, conferring them a veto power. Certain other statutes may provide for a consensual disclosure. But, such statutes seldom recognize the real interests to be protected, because the statute is concerned with the person who actually supplies the information. Thus, when a person as an agent, supplies information on behalf of his principal, it can be seen that the persons whose interests are to be protected, are not consulted. Some statutes provide the Ministers unrestricted power to disclose information. Such a power is dangerous because it is possible for a Minister to misuse his power. Thus, disclosure may be made only after affording a hearing to the person whose interests are involved in the information.[19]

In the case of executive privilege, the courts may inspect the document and balance the conflicting interests. In fact, the courts have a positive role to play. In the case of statutory privilege, the role of the court as the ultimate arbiter of admissibility may be considered. Where the statute provides for a procedure for consultation, the courts may

---

19. Ian Eagles, "Public Interest Immunity and Statutory Privilege", [1983] C.L.J. 118 at pp.128-30.

only see that there was a proper consultation. It cannot interfere and substitute its view for that of the Minister. But the courts may very well decide on the fairness of the procedure. The courts may intervene when disclosure is made partially or edited by the officials. In such cases, the court's intervention is justified if any misleading effect is seen in the partial or edited information. The courts may also order for effective consultation of those who are actually interested before disclosure had taken place. The consent or consultation may not be limited to the person the statute requires. Those who are going to be affected by disclosure may also be consulted.[20]

Conclusion

Secrecy provisions are usually designed to complement a statutory power to acquire information by compulsion, or to peruse documents already in existence or to interrogate persons orally or in writing. The suppliers of information will be more willing, whether under a legal obligation or voluntarily, to provide necessary information to the Government if they know that there are provisions to restrict the use of the information they had supplied. Also, the duration of the statutory privilege, and thus the protection toward suppliers, lives until the Act is repealed, even if the information protected had become out of date and harmless on disclosure.[21]

---

20. Id. at p.147.
21. Id. at p.133.

Where a privilege is conferred under a statute, it means that Parliament has already had the balancing process between the conflicting interests and, the wisdom of balance is not open to judicial scrutiny. But, it may be noted that Parliament could not visualise all forthcoming situations before enacting the statute. Thus, the statute may be treated as a policy factor. This is not to undervalue the relevance and weight of the balancing made by the legislature. It means that the statutory privilege may not be treated as conclusive. But such a position, it seems difficult in England because of the supremacy of the legislature. In India, a statutory privilege could well be dethroned under a successful constitutional challenge.

Where an information legislation is to be newly enacted, it will be difficult to consider each area to which secrecy is conferred under a previous statute. It will be better to leave the earlier statutory provisions, conferring secrecy to particular kinds of information as they are, unless the need for such information is really felt.

B. INFORMATION AS PROPERTY

Historically, property has meant land and chattles. The first recognition of property rights in intangibles appears to have been in the sixteenth century and was well established in relation to copyright early in the seventeenth century.[1] The material difference between land and other kinds of property is that while the former is not a creation of man, the latter are creations of man.

The common law has accepted the property rights in information also. In Exchange Telegraph Co.Ltd. v. Gregory & Co.[2], the plaintiff Company had the business of transmitting information relating to business transactions which took place on the stock exchange to various subscribers. The plaintiff published the same information in the form of a newspaper, but some time after. The defendant, a stock-broker, induced one of the subscribers of the plaintiff to communicate the information to him and made the information available by putting up notices on his boards. When challenged, Lord Esher observed as follows:[3]

> "This information—this collecting together of materials so as to give knowledge of all that has been done on the Stock Exchange—is something which can be sold. It is property and being sold to the

---

1. D.F.Libling, "The Concept of Property: Property in Intangibles", 94 L.Q.R. 103 (1978).
2. [1896] 1 Q.B. 147.
3. Id. at pp.152-153.

> plaintiffs was their property. The defendant has, with intention, invaded their right of property in it, and he has done so surreptitiously and meanly".

Later, in Exchange Telegraph Co.Ltd. v. Howard[4] also, the property right to information was accepted. Buckley, J. said:[5]

> "The plaintiffs carry on the business of collecting and distributing informations. The knowledge of a fact which is unknown to many people may be the property of a person in that others will pay the person who knows it for the information as to that fact... The plaintiff here sue, not in copyright at all, but in respect of that common law right of property in information which they had collected and which they were in a position to sell. Their case is that the defendant stole their property, that he has surreptitiously obtained that which belonged to them, and used it in rivalry with them".

Thus, it can be seen that information can be treated as property and protection is available from a court.

In the absence of a system of property rights to information, it is difficult for a modern State, having an information-based economy, to progress.[6] In every field of

---

4. (1906) 22 T.L.R. 375, as quoted in 94 L.Q.R. 103 (1978) at p.107.
5. Id. at p.108.
6. A land mark study in the United States demonstrated that, as long ago as in 1967, twenty-five per cent of the United States' Gross National Product originated with the production, processing and distribution of information and related goods and services. The purely informational requirements of planning, co-ordinating, and managing the rest of the economy (Contd...)

activities, the Government as well as citizens find the importance of information and the investment for acquiring the necessary information. In a way, true to say that more information means more wealth. Thus, arises the need for governmental regulation in the creation and dissimination process of information.

Information generally can be classified into two--information, the value of which can easily or directly be converted in terms of money, and other information. The information relating to copyright, patent, secret formula[7] etc., belongs to the first group. Information relating to labour statistics, census data etc., belong to the second class. Though certain information may not find a market-value, it does not mean that it has no value at all. It only means that at a given point of time, there is no demand for it.

In the present era, the Government is a repository of a vast mass of information. Dissemination of information by the Government may be treated as distribution of property. It is also true that the cheapest provider of information in the future may routinely be a source with access to government files.

---

f.n.6 contd...

took another twenty-one per cent of the G.N.P. The studies in Canada also indicate that about half of the G.N.P. and more than half of Canadian employment are attributable to the production, storage and use of information. See R.Grant Hammond, "Quantum Physics, Econometric Models and Property Rights to Information", 27 McGill L.J. 47 (1981) at pp.47-48.

7. See Re Keene, [1922] 2 Ch.475.

Where a Government distributes its largess,—information--it may follow the principle of equality. The object of dissemination may be reasonable and fair. Thus, it cannot simply disseminate confidential information acquired from private persons, without having sufficient reasons. Similarly, it cannot disseminate information regarding country's defence affairs, one's privacy data, investigatory records etc., in ordinary situations. It cannot also discriminate one person against another unless it is a reasonable classification. The Government may also fix 'price' of information and collect it from the requester.

In India, property rights to information may be recognized in a wider scale. Already the property rights in the areas of patents, copyright and designs are recognized by Parliament. It may be extended to other areas such as information relating to privacy, business secrets, defence matters, legal and other kinds of advices etc. Only in such situations, the information of different kinds could be protected. Once a situation comes where one has to pay for an information, the protection as well as disclosure becomes better. Otherwise the suit against an unauthorised disclosure will always be on the breach of confidence which is not an adequate remedy. By conferring property rights to information, the Government is also able to fix price for the information it provides. In such a case, only those who are really in need of the information will come forward. But care has to be taken while fixing

the prices. It must be reasonable. Where the Government finds the price negligibly small, it can dissiminate such information free of cost.

In India, the property is protected, though not as a fundamental right, under the Constitution. Only after paying an adequate compensation, property of private persons could be taken by the Government. This procedure may also be followed in instances of taking information. However, when the information is one bearing on Article 21 of the Constitution, such as privacy, taking may be preceded by a procedure established by law.

C. NATURAL JUSTICE AND RIGHT TO KNOW

Right to know has been accepted in cases of a dispute between two parties irrespective of the fact that one of them is a governmental agency. In civil cases before a court of law, the discovery provisions of the Civil Procedure Code provide for the right to information regarding the required facts from the opponent.[1] In criminal cases, procedure laid down in the Criminal Procedure Code and provisions of the Evidence Act provide for the right to get necessary information to an accused. Further Article 22 of the Constitution of India directs the detaining authorities to inform the detainee of the grounds for the arrest. Since we follow the accusatorial system, the whole duty of burden of proof is on the State in a criminal case. Thus, the State is bound to disclose necessary information to the court in order to see that the accused is punished. Secrecy may find the accused go unpunished.[2]

Where the administrative authorities decide issues before them, they need not follow the codes followed in the courts. Instead, the guiding principle is that of natural

---

1. Discovery provisions are dealt with separately in another chapter. See pp.
2. In Gardner v. State of Florida, 51 L.Ed. 2d. 393 (1977), the Court found Gardner guilty of an offence and awarded death sentence relying on a pre-sentence investigation report. A portion of the report was however kept confidential by the court. The Supreme Court found it to be a denial of due process.

justice which include two principles bearing on bias and hearing. The principle of hearing requires the authorities to provide a right of being heard to the affected before a decision causing civil consequences is taken. If the right to be heard is to be a real right it must carry with a right to know the case which is made against the individual. He must know what evidence had been given and what statements have been made affecting him. He must also be given a fair opportunity to correct or contradict them.[3] Thus we see that the hearing requirement essentially provides for a right to know to the affected persons.

Non-disclosure of essential documents makes the hearing process a farce. In Local Government Board v. Alridge,[4] public inquiry had been held on an appeal to the Board by the owner of a house against which the Hampstead Borough Council had made a closing order on the ground that it was unfit for human habituation. The owner's complaint was that he was neither allowed to appear before the officer who made the decision nor allowed to see the report of the inspector who held the inquiry. The report was the principal document in the proceedings. The House of Lords giving more weight to the needs of practical administration disallowed the contentions of the owner. It can be seen that the decision was improper

---

3. Kanda v. Government of Malaya, [1962] A.C. 322 at p.338 per Lord Denning, J.
4. [1915] A.C. 120.

because the owner was kept completely at dark regarding the closing order. He was not able to contradict or correct the arguments taken by the inspector.[5]

The right to know the opposing case under the principle of hearing has been accepted by the English courts in a series of cases. In R. v. Deputy Industrial Injuries Commissioner;Ex parte Jones,[6] the Commissioner after hearing the case, obtained a report from an independant medical expert and decided after paying due weight to this report. But the parties were not notified of the report and so were unable to comment on it. On ground of violation of the principle of hearing, the decision of the commissioner was quashed. In R. v. Kent Police Authority;Ex parte Goddon,[7] where a police officer was compulsorily retired after being examined by a medical officer chosen by the police authority, the Court of Appeal held that principle of hearing had been violated because the medical report was not shown either to the officer or to the doctor of the officer..

It is possible to argue that by denying a person the means by which to say anything, he is stripped of the right to hearing itself. It is important to realize that what is being sought from the Government is facts. A litigant requires

---

5. The House of Lords later changed its approach in Ridge v. Baldwin, [1964] A.C. 40.
6. [1962] 2 Q.B. 677.
7. [1971] 2 Q.B. 662.

facts in order to proceed in a suit. Facts are the heart of the legal system and without them a legal proceeding would be a mockery.[8]

The right to hearing embraces not only the right to present evidence but also a reasonable opportunity to know the opposite side.[9] In Morgan v. United States,[10] an order was made by the Secretary of Agriculture, fixing the maximum rates to be charged by the marketing agencies upon the basis of a report made by a governmental agency. The affected parties successfully challenged the validity of the order because they were not allowed to examine the report which formed the basis for framing of the rates.

---

8. See Crompton v. General Medical Council, The times August 24, 1981, a Privy Council decision, as quoted in [1981] P.L. pp.565-66; and Daganayasi v. Minister of Immigration, (1980) 2 N.Z.L.R. 130 (C.A), as quoted in 1981 P.L. pp.408-09. In the former case, the court invalidated the removal of the plaintiff doctor from the Register by the General Medical Council because the plaintiff was not shown the content or the general nature of the reports made by two experts on which the Council based its decision to remove him from the Register. In the second case, the plaintiff was convicted on a charge of remaining in New Zealand after her entry permit. When the court ordered deportation, she appealed to the Minister who has a discretion under an Act, to order not to deport, if he is satisfied that the case presented exceptional circumstances. The Plaintiff's ground of appeal was that one of her children borne in New Zealand suffered from a rare disease which could be properly treated only in New Zealand. The Minister asked for expert comments from a doctor appointed by the Immigration Division as a medical referee. The Minister's unfavourable decision was invalidated by the court because the report and comment, at least prejudicial comments, were not disclosed to the plaintiff.
9. Morgan v. United States, 82 L.Ed. 1129 (1938) at p.1132 per Hughes, J.
10. Ibid.

In India also right to know has been accepted as a part of natural justice. In Dhakeswari Cotton Mills case,[11] the Income Tax Tribunal decided the matter without disclosing an information which had been supplied against him by the departmental representative. The Supreme Court held such a decision violated the natural justice. It was also held that right to hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the authorities. In Brajlal Manilal's case,[12] the appellants application for a mining licence was rejected on the basis of the report from the State Government. The Central Government refused to provide a copy of the report. When challenged, the Supreme Court held that the Government could not decide on the materials kept away from the applicant by which he loses an opportunity to make a representation against the intentions made by the State Government in its report. In another case,[13] the Supreme Court held that cancellation of drug licences of a firm, without disclosing the laboratory test report, was a violation of the hearing requirement of the principles of natural justice. In City Corner case,[14] the appellant's licence to conduct games of skill and dances was revoked, without giving him necessary copies of documents on the basis of which the show

---

11. Dhakeswahari Cotton Mills v. C.I.T., A.I.R. 1955 S.C. 65.
12. Brajlal Manilal Co. v. Union of India, A.I.R. 1964 S.C. 1643.
13. M/s.North Bihar Agency v. State of Bihar, A.I.R. 1981 S.C. 1758.
14. City Corner v. Personal Assistant to Collector, A.I.R. 1976 S.C. 143.

cause notice was issued. The Court quashing the revocation in the instant case, opined that it was not always necessary that such documents should themselves be furnished provided the substance of those documents was furnished.[15]

Disciplinary proceedings against the employees is another important area where the principles of natural justice is strictly followed. In Mohammed Sharif's case,[16] the request to inspect the file pertaining to the preliminary inquiry was refused. The Court held that the respondent had a right to the copy of the report of the inquiry officer who wanted to rely on the report for his conclusions. In Chintamon's case,[17] where a disciplinary action was taken against the respondent for taking bribe, the request from the respondent for a copy of the document containing the statements of the witnesses was rejected. The Court held that the rejection of the request for the documents deprived the respondent of a reasonable opportunity to meet the charges against him.

In order to establish the right to get documents from the authorities as an element of the hearing requirement, it is necessary to show that the authorities had relied on the contested documents. If the authority has not relied on them for arriving at the decision, the affected person cannot successfully

---

15. Id. at p.145
16. State of U.P. v. Mohammed Sharif, A.I.R. 1982 S.C. 937.
17. State of M.P. v. Chintamon Sadashiva, A.I.R. 1961 S.C. 1623.

require the disclosure of the documents.[18] Also, if the substance of the necessary documents are conveyed to the affected party, no claim for the copy of the documents could be successfully made. In T.V.R.V.Radhakrishnan v. State of Tamil Nadu,[19] under the powers conferred by an Act, the State Government gave notice to a Panchayat Union Council to show cause as to why it should not be dissolved under certain grounds. Earlier the District Collector and the Director of Rural Development had made reports on the working of the Council. The claim for copies of these reports was negatived by the Supreme Court on the ground that the reports were given in the form of grounds in the show cause notice. Also, if the gist of the documents has been brought to the notice of the plaintiff, then the non-supply of them will not vitiate the proceedings, as being a violation of the hearing principle.[20]

The right to get documents from the authorities as a right emerged from the hearing requirement, may receive a set back, when the document itself is highly confidential in nature. In James Bushi's case,[21] where the plaintiff was charged with corruption, the request was for the production of the copies of statements made by witnesses in the C.I.D. investigation. A claim of privilege was allowed because if such statements were disclosed, it might virtually become impossible to

---

18. See Krishna Chandra Tandon v. Union of India, A.I.R. 1974 S.C. 1589.
19. A.I.R. 1974 S.C. 1862.
20. See Dhakeswary Cotton Mills v. C.I.T., A.I.R. 1955 S.C. 365.
21. James Bushi v. Collector of Ganjam, A.I.R. 1959 Ori. 152.

collect any information in future.[22] In Dasan's case,[23] the petitioner was terminated from service because on verification of the character and antecedents, it was found that he was not suitable for appointment in government service. The conclusion in this respect was made on the basis of the report made by the C.I.D. officers. A claim for non-disclosure of that report was successfully made by the Government on the ground that the disclosure would dry up the possible sources of information in future.

The right to know under the hearing principle may receive a set back where there is a more dominant public interest. In an English case,[24] the Gaming Board rejected an application for running gaming clubs, without disclosing the sources of adverse opinions it received from different quarters. This was challenged as being violative of the hearing requirement. The Court of Appeal held that the Board was set up by Parliament to cope with disreputable gaming clubs and to bring them under control. If the authorities were to be bound to disclose sources of information and other minute details, it would dry the sources as well as put the informers in peril. It is this interest which was found to be dominant over the hearing requirement.

---

22. Id. at p.155.
23. V.Dasan v. State of Kerala, A.I.R. 1965 Ker. 63.
24. R. v. Gaming Board for Great Britain; Ex parte Benaim and Another, [1970] 2 All E.R. 528.

In enquiries before the high academic bodies regarding disciplinary proceeding against students, the court may not interfere to allow claims of access to records unless there are vagrant violations of fair play based on malafide or bias are brought out.[25] All that is necessary is to give notice of allegations against the students. In Suresh Koshy's case,[26] on the charge of malpractice during the examination, disciplinary proceedings were initiated against the plaintiff by the University. After an enquiry, show cause notice was issued to the student. When challenged on the ground of violation of natural justice, because the copy of the enquiry report was not supplied to the student, the Court rejected the contention on the ground that where the law provided for a show cause notice, it did not follow that the report on the basis of which the notice was issued should be made available to the students. It seems that the ruling is applicable to disciplinary action in academic bodies alone and may not be applicable to other situations.

Where public interest will be seriously affected by a disclosure, the court may allow claims of privilege. In Hira Nath Misra v. Rajendra Medical College,[27] disciplinary action was taken against certain students on the charge of molesting girl students. The report of the committee which

---

25. See Mohindar Singh Janwal v. University of Jammu, A.I.R. 1984 J. & K.40 at pp.42-43.
26. Suresh Koshy George v. University of Kerala, A.I.R. 1969 S.C. 198.
27. A.I.R. 1973 S.C. 1260.

enquired into the matter was not shown to the students. When challenged on the ground of violation of the principles of natural justice, the Supreme Court pointed out that if the report containing the evidence of the girls was disclosed, the girls would have been in constant fear of molestation by the boys and therefore public interest necessitated that the report should not be disclosed to the boys.

Thus, except in few quarters, the right to get documents or to have the contents or substance of the documents which formed the basis of an action against an individual by the authorities, is accepted as a part of the hearing requirement. The right to know such materials or contents of them is a part of the right of one to defend himself. The non-disclosure of it will turn out to be fatal to the hearing proceedings.

Conclusion

Under the concept of natural justice the right to know arises only when the Government acts in a way which results in civil consequences to the individual. Right to know thus has no place independently of its own. Without it, the hearing process may become unfair. In a case where the Government provides the information, it is only to the concerned individual. The public's right to know does not arise in such a situation.

Thus it is not desirable to found the right to know, a broader concept, under the principles of natural justice. The right to know cannot be narrowed to such an extent. However, the right to know under the principles of natural justice can be forcefully and rightly depended in individual cases. The violation of the right to know, built under the principle of natural justice, will turn out to be a violation of either Article 14 of the Constitution for being unreasonable or against Article 21 of the Constitution for infringing the right to life or liberty. But, it is never a violation of one's free speech rights conferred by Article 19(1)(a) of the Constitution of India.

D. EMPLOYEES' AND THE RIGHT TO INFORMATION

Employees may require documents from the Government to defend an action taken, disciplinary or otherwise, against them or to establish a right or benefit from the Government. In many situations, it can be seen that the relevant information is with the Government.

Employee is one of the most important parts of an establishment. Without his intelligent and efficient co-operation, the establishment cannot develop and sometimes cannot even function at all. One of the factors controlling such co-operation is his knowledge about the establishment apart from adequate payments. An employee's right to know, accordingly, is undisputed.

Employees interest in the functioning of an enterprise, private or public, has turn out to be as substantial as those of the shareholders or sometimes more. Access to information and consultation with employees' representatives, in advance of important decisions in the life of an undertaking, have more modest objectives. It's basic premise is that law should require advance information and consultation but the action taken thereafter should be the responsibility of the collective parties. In this regard, the employer may supply information to employee representatives sufficiently earlier and may consult before taking a final decision which has consequences

on the workforce. There are two glosses to these obligations. "Sensitive" documents need not be divulged. Secondly, an employer may characterise an ordinary information as confidential so that the employee representatives are themselves under an obligation not to disclose it to third parties.[1]

One of the most important piece of information, an employee must have, is regarding the occupational health risks.[2] The health hazards posed by occupational disease are largely hidden from the workers. The health risk of employment should be discovered and disclosed to workers for certain important reasons: to respect the autonomy of individuals in making basic life decisions; to legitimate the distribution of risk; and, to enhance the efficiency of efforts to reduce risks.[3] There are certain difficulties also when the employees cannot, sometimes, detect or recognize the occupational disease. Due to the poor knowledge about the health risks, they cannot demand adequate compensation also. The information deficiency also stands in the way of efforts to reduce the health risks through collective bargaining, because a good part of the energy is required to gather such information regarding the health hazards.[4]

---

1. For more details see Christopher Docksey, "Information and Consultation of Employees: The United Kingdom and the Vredeling Directive", 49 M.L.R. 281 (1986).
2. In the United States, nearly 3,90,000 new cases of occupational illness and 10,000 work related deaths occur every year. See Note, "Occupational Health Risks and the Worker's Right to Know", 90 Yale L.J. 1792 (1981).
3. Ibid.
4. Ibid.

Employees working in hazardous conditions may be allowed a risk premium in addition. Only a full disclosure of the health risks will help in fixing an accurate risk premium.

In common law, the employer has a general duty to provide employees with a reasonably safe place to work, to identify latent dangers discoverable by reasonable care and also to make such dangers known to the employees.[5] This general duty includes an obligation to warn employee also. The employer may also inform the nature of the substance used in the business and a scientific understanding of the risks involved.[6] The common law tort is involved usually where there is a failure to warn the employees.

The occupational health risk information may be presented in an 'occupational health impact statement'. It must be served to all employees and also to all job offerees. In case of a failure—when it is not served, or served is false one or an incomplete one—the employee or the job offeree may have a cause of action against the employer.[7] The decision to undertake a dangerous work in exchange for compensation turns out to be an important decision in one's life.

Another area in which employees require information is for the furtherance of collective bargaining. Whenever the employees put forward new demands, they must substantiate with

---

5. Id. at pp.1803-04.
6. Ibid.
7. Id. at p.1809.

facts. Also, in arbitration proceedings, the employees have to prepare grievances in a sound manner for favourable decisions. In all these situations, the employees require information of different nature from the employer.

In the United States, the National Labour Relations Act, 1935 imposes a duty on employers to provide relevant information needed to a labour union for the proper performance of its duties as an employee bargaining representative.[8] In the process, the employer's and employees' interests will be balanced. In N.L.R.B. v. Truitt Manufacturing Co.,[9] the request was for the Company's books and financial data where the Company claimed financial inability to pay an increase in the wages. The Court found it an unfair labour practice under the Act, for an employer to refuse to bargain in good faith with the employees. Hence the Court found the need for disclosure and no counter interests against it. In N.L.R.B. v. Acme Industrial Co.,[10] the employees feared a lay off due to transfer of certain machineries from the Company. The employees' union sent the employer a formal request for specific information as to removal of equipments. It was rejected by the Company. When sued, the Court held that it was an unfair labour practice under the National Labour Relations Act. However, where the employees' right to information is subordinate to any other interests such as privacy, the information may not be divulged.

---

8. See 29 U.S.C.S., section 158(a)(5).
9. 100 L.Ed. 1027 (1956).
10. 17 L.Ed. 2d. 495 (1967).

In England, the law provides for a wide range of information to be provided to trade unions for the purposes of collective bargaining.[11] Regarding health and safety also, there are provisions requiring quite extensive disclosure of information for strategic purposes.[12] Nevertheless, the Employment Protection Act, 1975, excludes disclosure which would cause substantial injury to the employers' undertaking.[13]

Position in India

Under an amendment brought in 1987, the Factories Act, 1946, provides for compulsory disclosure of information regarding the health hazards and dangers, and the measures to overcome them to the employees. The general public in the vicinity are also able to get the same information. The occupier of the factory shall also draw up an on-site emergency plan and detailed disaster control measures for his factory. The occupier of the factory is also bound to lay down measures for the handling, usage, transportation and storage of the hazardous substances inside the premises of the factory and disposal of such substances outside the factory premises. This information shall be published among the workers and the general public living in the vicinity.[14] Furthermore, the common law duty of the employers to inform of the risks involved in the employment will continue to help the employees to gather necessary information.

---

11. Employment Protection Act, 1975.
12. Health and Safety at Work etc., Act, 1974.
13. Section 18(1)(e).
14. See the Amendment Act.

Where a governmental action results in civil consequences to an employee, he may require the necessary information as a part of the second principle of natural justice. The claim is also subjected to the public interest criterion. However, there are instances where an employee is not allowed disclosure of necessary documents even in disciplinary proceedings.[15]

Another area is regarding the protection and promotion of employees. In Harprasad Gupta's case,[16] the plaintiff was first promoted to District and Sessions Judge and later reverted to Civil and Sessions Judge. In the suit, he sought production of certain documents including recommendations of the High Court and certain other documents which had been passed between superior authorities. Allowing the claim of privilege, the Court held that such correspondence was of a confidential nature which in the public interest would not be desirable to be made open.[17] Here, the employee who is terminated or depromoted is in complete darkness regarding the basis of such an action.[18]

In certain situations, documents relating other employees may be required to establish one's case or defend one's position. In Niranjan Dass Sehgal's case,[19] the

---

15. See Emperor v. Mir Mohamed Shah, A.I.R. 1935 Sind 50 and P.S.Narayanaswamy v. State of Madras, A.I.R. 1953 Mad. 228.
16. Harprasad Gupta v. State of U.P., A.I.R. 1963 All. 415.
17. Id. at p.419.
18. See also Mohammed Illyas v. State of Maharashtra, A.I.R.1965 Bom. 156; Union of India v. Rajkumar Gujral, A.I.R.1967 Punj. 387; and H.L.Rodhey v. Delhi Administration, A.I.R. 1969 Del. 246.
19. Niranjan Dass Sehgal v. State of Punjab, A.I.R.1968 Punj.255.

allegation of the petitioner was that the authorities lowered his seniority as against one Jaswant Singh, motivated by undue influence and malafide. He sought for the production of personal files of Jaswant Singh and certain others, alleging that Jaswant Singh's record of service was exceptionally bad. The claim of privilege for these documents was rejected by the Court on the ground that disclosure of them would be detrimental to the public interest. It would have been better, had the court gone into the documents and decided the questions of undue influence and malafide.

Another area where the employees find it difficult to fight against the authorities without having sufficient information is when the provisional employees are terminated after the verification of their character and antecedents. Where the related reports are obtained from the secret services of the State, the courts may not order their disclosure on the ground that it would dry up the sources of information in future.[21] The potential employees also may suffer from this difficulty. Many of them may not even know the reasons why they are removed from the service or are not appointed.

---

20. See Science Research Council v. Nasse, [1980] A.C. 1028 (H.L); and British Railways Board v. Natarajan, [1979] 2 All E.R. 794 (E.A.T), for the position of law in England. In these cases, it was held that the personal files of the fellow-employees would not be divulged even in cases where the allegation was discriminatory treatment toward the plaintiffs.
21. V.Dasan v. State of Kerala, A.I.R. 1965 Ker. 63.

The employees after a long service in an office will be able to create close connections with other employees. One can thus produce copies of documents which others cannot make or one cannot legally have access. In such situations, the courts may not encourage admission of such improperly acquired documents. In Sujith Kantha Neogi's case,[22] where the plaintiff trade unionist was terminated from service, in order to challenge the termination, the plaintiff produced certain secret documents to substantiate his claim. The Court did not allow him to take advantage of the illegitimate action. The High Court said that it would help law coincide with morality and did not look into the documents produced by the plaintiff.[23] In this respect the decision seems proper.

Conclusion

What is required in situations where an employee or potential employee is affected, whether by way of suspension reversion, termination etc., the Government may adopt a liberal policy of disclosure. Whatever be the situation, the gist of the documents may be provided. It is always better for the courts to have an in-camera inspection of the disputed documents, so as to clear the doubts in the minds of the plaintiff. The right to information may also give a proper meaning to the collective bargaining process.

---

22. Sujith Kantha Neogi v. Union of India, A.I.R.1970 A. &N.131.
23. Id. at p.135.

E. OMBUDSMAN AND DISCLOSURE OF RECORDS

Access to information held by Government is a basic pre-condition for the success of an ombudsman system. Even the most routine investigation by an ombudsman into a complaint lodged with him about a matter of administration, involves an evaluation of the basis upon which the decision was taken, the information present before the decision-making authorities and the grounds or reasons for the decisions. The normal procedure which an ombudsman adopts, is to seek a report from the concerned department and, if necessary, relevant files. The question in this respect is the extent to which a department head can respect a request from an ombudsman.

An ombudsman's access to department files may disclose that the information upon which a decision was taken, is in some way inadequate or incomplete. He can also assure that the Government's policies were rightly or wrongly taken. Also, in certain cases, information may also be supplied due to the intervention of an ombudsman. In an Australian case,[1] concerning files of the Department of the Social Welfare, a complainant has asked for the supply of copies of the department's ledger cards relating to his payment of maintenance so that he could satisfy himself that it is an accurate record. His request

---

1. Case No.13257 (1979), Annual Report 47, as quoted in D.J.Shelton, "The Ombudsman and Information", 12 V.U.W.L.R. 233 (1982) at p.244.

arose from a strong indication contained in correspondence which he has received from the department that there has been a failure to record a substantial payment which he has made through a cheque. This request had been declined by the department. In reporting to the ombudsman on the complaint, the Director General of the Department stated that there was no reason why the request could not be fulfilled and ordered the supply of the copies of the ledger cards.

An ombudsman can also play a role in making information available to the general public. He makes information public through the reports he submit to Parliament and through reports on particular issues. He makes information public by way of solving a complaint also.

F. DOCUMENTS RELATING TO TORTS COMMITTED BY STATE OFFICIALS OR BODIES

Nowadays it is common to see people file suits for compensation against wrongs committed by the public officials. In most of the cases, it can be seen that Government comes out with a defence that particular act was a sovereign or governmental function which paves way for sovereign immunity. Apart from this difficulty, the plaintiffs face another difficulty of collecting the facts of the incidents and other details regarding it. As in any other case, here also, full knowledge of facts is necessary to win a case against the Government. In many cases, the Government brings in the claim of privilege so that the information crucially required could be withheld.

Where the documents are related to affairs connected with defence of the country, it is wise not to divulge them, whatever be the importance or gravity or the need of the other party. In Duncan v. Cammell Laird & Co.Ltd.,[1] as already seen,[2] the representatives of those who died sued for damages thrusting mainly on the defective manufacture and designing of the submarine. They required documents including contracts for the submarine, plans, specifications, reports etc. The request was resisted successfully on the ground of public interest. It is true that the plaintiffs were badly in need for the documents

---

1. [1942] A.C. 624 (H.L).
2. For facts see p.121.

to establish their claims. But in the national interest, especially at a time of war, it is undoubtedly reasonable to think that the documents may reach the hands of enemies.[3]

Like the documents regarding defence, the documents relating to police and prison are also given much importance. In Ellis v. Home Office,[4] the plaintiff an undertrial who was admitted to the prison hospital, was violently hit by another who was suspected to be mentally ill and whose door would not have opened at the same time as the door of plaintiff. The plaintiff sought for damages for the negligence of the prison authorities and sought discovery of medical report of the other prisoner, police reports and other statements. The Home Office could successfully reject the discovery on account of injury to the public interest. It seems that the decision is bad because the only way to establish the plaintiff's case was to get the requested documents and the prison administration, it seems, may not be affected by the disclosure of the documents to the plaintiff under a protective order.

Another instance where documents are withheld in a torts case is regarding juvenile records. In Gaskin v. Liverpool City Council,[5] as already seen,[6] the plaintiff wanted to bring an

---

3. In the United States, in Reynolds' case, 97 L.Ed. 727 (1953), the widows of those who died in an air crash where the plane was on a mission of testing secret electronic equipments, the Court allowed privilege for the reports and such other documents. The reason was the public interest bearing on national safety.
4. [1953] 2 All E.R. 149 (C.A).
5. [1980] 1 W.L.R. 1549 (C.A).
6. For facts see p.356.

action for damages for the breach of duty on the part of Council. For the purpose, he wanted records medical and others. This was rejected by the Council successfully on the ground that officials would not make reports frankly and freely unless they know that they would be kept confidential. It would have been better if the documents were disclosed to the court alone in order to decide the issue of negligence.

Though the juvenile records are kept highly confidential, the records of a school boy may be disclosed in certain situations. In Campbell v. Tameside Metropolitan Borough Council,[7] the solicitor for the teacher before bringing an action against the education authorities, wanted to see various reports about the boy so as to know whether the education authorities had done their duties towards the teacher. This was rejected on the ground of public interest that those who made the reports would not make such reports frankly and freely in future. Rejecting this argument, the Court said that the non-disclosure would affect the very decision of the case and the public interest in justice being done in the instant case outweighed the public interest in keeping them confidential. The Court thus ordered production of the documents for an inspection. The decision of the Court seems good. After an inspection where the court finds the documents injurious to public interests, there are other alternative before it. The

---

7. [1982] 2 All E.R. 791 (C.A).

courts may inspect in 'camera' or order production with a condition that plaintiff may not disclose them to any other person and may use them only in the instant case.

When tort is committed in the course of a regulatory measure by a governmental agency, the documents may be produced for the plaintiff who wishes to file a suit. In an earlier Australian case,[8] the plaintiff brought an action against the State to recover damages for the negligent storage of wheat delivered by him to the State pursuant to an Act. To establish his claim properly, he sought discovery of documents regarding certain correspondences, reports of inspectors etc. This was resisted successfully on the ground that such documents were 'State papers' and disclosure of them was against the public policy and interest of the State. But, later, in Robinson v. State of South Australia,[9] where the facts were exactly similar to the above mentioned case, the Privy Council recommended for allowing the claim of disclosure treating the authority as one of the parties to trade, commerce and business.[10]

The decision of the Privy Council is a welcome one. It remitted the case back to the Supreme Court of South Australia. When disclosure of the reports of these type are made, one thing has to be noted. The reports may contain

---

8. Griffin v. State of South Australia, 36 C.L.R. 378 (1925).
9. [1931] A.C. 704 (P.C).
10. Id. at pp.715-16.

observation by inspectors finding fault with particular officials. If reports are made open, it will definitely affect the freedom of inspectors who make reports. Thus in such cases, the contents of the reports, may only be given.

The reports made by the authorities after an accident had occured, are another types of documents which people require from the authorities to establish their claims. In most of the cases, the reports are resisted from being disclosed to the plaintiff on the usual ground of harm to the public interest.[11] In Longthorn v. British Transport Commission,[12] the report of the inspectors on the accident was sought by the plaintiff. It was rejected on the ground that those documents came into existence wholly or mainly for the purposes of obtaining for and furnishing to the solicitor of the Commission to enable him to conduct the defence or to advice the Commission. This claim of legal professional privilege was rejected by the Court because it was only one of the purposes of making the report. If such reports are made after the litigation was in contemplation and in view of such litigation, wholly or mainly for the purposes of obtaining for and furnishing to the Commission's solicitor to enable him to conduct the defence or to advice the commission, the reports may be held to be privileged.[13] If the reports are not made with the dominant

---

11. See Ankin v. London North-Eastern Railway Co., [1930] 1 K.B. 527 (C.A).
12. [1959] 2 All E.R. 32 (Q.B.D).
13. Seabrook v. British Transport Commission, [1959] 2 All E.R. 15 (Q.B.D).

purpose so as to get legal advice to defend a suit, the privilege will not be available and thus reports have to be disclosed.[14]

A plaintiff's or potential plaintiff's right to information regarding the cause of action or details regarding the particular issue can never be neglected by the Government or by the court. Only when, in the balancing process, the interest of confidentiality outweighs the interests of administration of justice, the information may be withheld. When the Government withholds the information in the interest of the whole community, there is no need for a plaintiff to suffer alone for the public's cause. He may be adequately compensated for his loss. The problem here arise is that the compensation cannot be fixed without seeing the documents. The courts may make an inquisitorial search and decide the quantum of damages.

---

14. Waugh v. British Railways Board, [1980] A.C. 521 (H.L).

G. NEED FOR GOVERNMENT HELD DOCUMENTS IN A SUIT

In a suit between private individuals, the duty to produce documents to establish one's own position is left with the party himself. In certain cases, a situation may arise where documents with the Government are required to establish one's case. The Government sometimes may have no connection with the suit. Also, when the Government prepared such documents, it may not have any idea of such a future suit. Again, the authorities might have prepared the documents with certain purposes after spending much time and energy.

When a document is sought for disclosure in a suit between private individuals, the court may allow a privilege claim made by the Government, if the documents are privileged on any account. In Lal Tribuwan Nath Singh's case,[1] the Court allowed a claim of privilege for a will of Maharaja which was required by one party to a property dispute, on the ground that under Section 123 of the Evidence Act, the officer's refusal to disclose was final. In a mortgage case,[2] the Court refused to allow disclosure of certain documents related to wards of court because disclosure of them would be prejudicial to the public interest. The statements contained in such documents were made in official confidence to the Collector.

---

1. Lal Tribuwan Nath Singh v. Deputy Commissioner, Fyzabad, A.I.R. 1918 Oudh 225.
2. Collector of Janpur v. Jamna Prasad, A.I.R. 1922 All. 37.

It would be embarrasing to a proprietor who was financially upset and desired the Court of Wards to take charge of his estate. The statement made in such situation was solely for the purpose of giving information to the Court of Wards.[3]

In Mahabirji Birajman Mandir v. Prem Narayan Shukla,[4] the case diary was given privilege where the suit between the private persons was related to the reconstruction of buildings where the argument was that the case diary had the former plan of the building. In another case,[5] where the issue was the legality of the consideration in a promisory note, the Court did not allow a claim of privilege for certain investigatory records which included copies of the account books of one party to the suit where the case was not at all connected with the one into which the police investigated. The Court said that the case diary is generally privileged though certain parts of them may be disclosed without having any injury to the public interest.[6] In a suit for defamation,[7] the Court did not allow disclosure of report made by authorities on a complaint of blackmarketing by one of the parties to the suit, on the ground that the disclosure would be prejudicial to the public interest where it would aggravate the disputes between the two factions of the community in a particular locality.

---

3. Id. at p.41.
4. A.I.R. 1965 All. 494.
5. Bhaiya Saheb Dajibabhan Kunbi v. Pandit Ramnath Rampratap, A.I.R. 1932 Nag. 358.
6. Id. at p.362.
7. In re Killi Suryanarayana Naidu, A.I.R. 1954 Mad. 278.

In another defamation suit,[8] the Court did not allow the disclosure of certain investigatory reports made by intelligence wing of the police where such documents were sought by the party who had made the allegations. In Durga Prasad's case where the dispute was related to the boundary of mining areas allotted by the Government to the contractor parties, the Court allowed privilege for the communications passed between different officials treating them as unpublished official records and secrets of State. It can be seen that the dispute could only have been solved if such documents held by the Government were made available because the rights for mining were given by the Government itself.

In many situations, citizens may feel the need for government-held documents to establish their own rights against the Government itself. The non-disclosure of them would become sometimes fatal to their cases. The Government usually, to protect its cases against the individuals, claims privilege to such documents by one way or other. An unjustified denial of the document puts the parties to the case in an unequal parity. In an American case,[10] a citizen whose lands were acquired by an agency, sought for the documents regarding valuation of the property. The rejection by the agency was successfully challenged by the citizen before the Supreme Court.

---

8. S.B.Choudhury v. I.P.Changkakati, A.I.R. 1960 Ass. 210.
9. Durga Prasad v. Parveen, A.I.R. 1975 M.P. 196.
10. United States of America at the relation of the St.Louis South-Western Railway Co. v. I.C.C., 68 L.Ed. 565 (1924).

Formerly the courts adopted an approach that whatever be the nature of the document, the public officer-in-charge of the documents was the sole judge of the detrimental character of them and a claim by him would be allowed without going into it further. Thus, in Nagaraja Pillai's case,[11] where the plaintiff sought the disclosure of report made by one officer to another regarding a land over which he claimed a right of an assessment by prescription, the Court allowed the claim of privilege to the report on the ground of injury to public interest as asserted by the public officer. In R.M.D. Chamarbaghwala v. Y.R.Parpia,[12] the Collector of Bombay refused to review a licence on the basis of a policy of Government circulated confidentially for the guidance of the officers. To decide the question whether the Collector exercised his discretion properly or the discretion was fettered by the order by the Government, the order was sought to be disclosed. Though the Court opined that the officer's opinion on the injury to the public interest on disclosure of the document was final, the order of the Government was ordered to be disclosed because the Collector had not given the nature of the injury to the public interest on disclosure. In Iqbal Ahmed's case,[13] the petitioner challenged the detention of his brother by the police. The Government contended that the brother was a

---

11. Nagaraja Pillai v. Secretary of State, A.I.R. 1915 Mad. 1113.
12. A.I.R. 1950 Bom. 230.
13. Iqbal Ahmed v. State of Bhopal, A.I.R. 1954 Bhopal 9.

Pakistan citizen. When he sought disclosure of relevant documents, the Government objected by claiming privilege because the documents were secret in nature and were acquired through secret methods. The Court allowed the claim of privilege, on the ground of injury to the public interest on disclosure.[14] The Court could have better decided the issue of such a fundamental question of citizenship of a person after an in-camera inspection of that document. In Rambholta Ramanna's case,[15] the claim of the petitioner was relating to the ownership and right to cut down trees from forest land. When the dispute came before the Court, under Article 226 of the Constitution, the Court ordered for the production of certain documents for which a claim of privilege was made. Rejecting the argument, the Court called for them under the writ proceedings.[16]

The discovery of documents required by a party to the suit may be favourably considered. Once the need for the document is found to be genuine to defend oneself, the court

---

14. In the United States, in Shaughnessy v. United States, 97 L.Ed. 956 (1953), an alien who left the United States after residing for twentyfive years was not allowed to reenter the United States. The action by the Government was based upon a confidential information which on disclosure was claimed to be injurious to public interest. When the governmental action was challenged, the Supreme Court held that the authorities could not be compelled to disclose such information. See also Jay v. Boyd, 100 L.Ed. 1242 (1956).
15. Sri Rambholta Ramanna v. Government of Andhra Pradesh, A.I.R. 1971 A.P. 196.
16. Id. at p.207.

as well as the Government may take a more liberal approach. However, the public interest consideration may be taken into account whatever be the situation. In all cases, before a rejection of the request for disclosure, documents may be transferred to the court for an in-camera inspection.

Need for government held documents may also arise for a potential litigant. In many situations, the individual may only raise their claims with the help of documents held by the Government. While in the case of a litigation, the discovery process helps a party to the suit, it does not help much a potential litigant. Thus, a system providing access to government held documents is necessary from the point of view of a potential litigant who is badly in need of them to establish his claims. Nowadays, the judiciary shows a favourable attitude towards a litigant's need for government held records.[17]

Under Article 39-A of the Constitution of India, the State is directed to secure justice for its

---

17. In Ram Jethmalani v. The Director C.B.I., S.P.E., C.I.A-1, New Delhi, 1987 Cri.L.J. 570 (Delhi), the plaintiff required certain copies of statements recorded by police officials during an investigation of a criminal case. These documents were necessary for the plaintiff to use in a libel action instituted by him in a foreign court. The Court found the documents as 'public document' under section 74, Evidence Act, and ordered for disclosure to the plaintiff.

citizens.[18] Opportunities ofor securing justice may not be denied to any person by the State. By giving a positive element to the directive principles enshrined under Article 39-A, a potential litigant may forcefully claim disclosure of documents for the purposes of a judicial remedy. The judiciary has shown its intentions in that direction.[19]

---

18. Article 39-A of the Constitution of India reads:
    39-A. Equal justice and free legal aid--The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.
19. Ram Jethmalani v. The Director, C.B.I., S.P.E., C.I.A-1, New Delhi, 1987 Cri.L.J. 570.

H. PRESS AND PEOPLE'S RIGHT TO KNOW

It is interesting to examine the role and responsibility of the press in vindicating the public's right to know. What is it that the public have a right to know? What is the status of the press in informing the public about the functioning of the Government? Does the press possess an affirmative right to access to information?

The function of the press is to provide the public with authentic and accurate information about the public affairs. It is the public's right to receive information that is important. The freedom of the press, thus, is not something which belongs only to the journalist; it really belongs to the public.[1]

In an information system, where access to information is given to any person, no doubt, press could make a valid claim for access like any other person. However, where access to information is limited to certain person or persons, it is doubtful whether the press could make a similar claim. Again, where press claims information from the governmental authorities, on behalf of the public or as a custodian of society's informational interests, problems do arise.

---

1. Harold G.Rudolph, "Freedom of the Press or the Right to Know", 98 S.A.L.J. 81 (1981).

Nowhere it is said that the press is the only spokesman of the public.[2] The primary question is as to who is the public. In a large nation like India, with a pluralistic society—in terms of political, religious, cultural, economic and professional diversities—it is difficult to locate the public. Different social groups have different and sometimes conflicting interests. Along with such differences in interests, the right to know also varies with different social groups.

An argument for conferring special rights to the press seems to be inconsistent with the right to freedom of speech.[3] Such rights may create an unjustified risk of inhibition of information flow resulting from disclosure to a selected group. Special press rights, on the basis of administrative convenience and costs, may not justify the distinction between the press and the public in respect of public access. It is also not certain whether press has the sophistication to recognize and the responsibility not to reveal sensitive and harmful information. The press as a group is likely to be as diverse in its attitudes and sense of responsibility as the public generally. Moreover, conferring the special status to the press on the rationale that it will not disclose part of the information to the public, may induce the press to assume an undesirable self-censorship role which runs counter to the objective of a free flow of information.[4]

---

2. People speaks through the electoral process.
3. Note, "The Rights of the Public and the Press to Gather Information", 87 Harv.L.Rev. 1505 (1973-74) at p.1513.
4. Ibid.

When the press claims that public has a right to know, it is making a claim about the interests of a third party, ie., the public at large. However, the press cannot demonstrate the interests of the public by its claim. This is because by claiming the public's right to know, the press cannot show that the public has interests in knowing about a particular information. It is due to the prevailing criticism, which is true also, against the press for actual or potential manipulation of the public opinion. Different media stand for different and sometimes conflicting interests. Thus, a particular piece of information may be required to be published by one press and at the same suppressed by another. Thus, the press, in certain circumstances, cannot show that information to the press could guarantee an informed public.

In the modern era, the people get information mainly from the print and television media. It is impracticable for individuals to go out for information of public or political interest from the governmental authorities directly and in time. No individual can also spend money to keep him informed. The public no doubt badly needs the press for the information of general public interest. Thus, a good case could be made out in favour of the media as surrogates for rights of the masses of helpless citizens. Thus, the press may get the standing of one and all individuals. The right of the press is thus equal to the totality of the rights of all the individuals in the community.

In the modern world, press has a task of overseeing the operations of democratic institutions. It becomes the eyes and ears of the people. The media may be given priority over the individuals in respect of time where the information is of concern to a good number of people.[5]

The press collects the information and presents to the public, the purpose behind being that an informed public may rationally discuss alternatives. The access rights thus may be utilised by the press with the above purpose in mind. In fact, people expect from the press information enabling them to make judgement over public issues.

---

5. Thus, the results of examinations conducted by various authorities are given to the press before it is passed over to the candidates.

I. DISCOVERY

The object of discovery procedure[1] is essentially to enable each party to get at the facts before trial which serves certain important purposes. First, discovery aids in the disposal of groundless claims and meritless defenses and promotes settlements because when the parties are required to lay their cards before the other, they are much more likely to able to get together leading to a compromise. Secondly, it makes possible for a more intelligent and efficient preparation for trial through elimination of surprise and guess work.[2] Thirdly, it expedites the disposal of cases by clarifying issues, eliminating non-controversial matters and simplifying proof.[3]

Discovery is one of the few exceptions to the adversarial character of common law legal process. It assists the parties as well as the courts, to discover the truth. Also, it helps towards a just determination and saves costs. Usually,

---

1. The term 'discovery' is used to describe the process by which a party to a suit is enabled to obtain answers from the other party on oath to questions as to the facts in dispute between them and also to obtain information and production of documents relevant to the dispute for the purposes of preparing for the trial. See Joseph Jacob, "Discovery and Public Interest", [1976] P.L. 134.
2. Janice Toran, "Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules", 49 Geo.Wash. L.Rev. 843 (1980-81) at pp.851-52.
3. James A.Pike & Henry G.Fisher, "Discovery against Administrative Agencies", 56 Harv. L.Rev. 1125 (1943) at p.1126.

but not always, the critical factor will be whether the party seeking production against Crown has shown that the document would help him.[4] Generally, there is an increasing tendency to allow for greater disclosure at the discovery stage so as to lessen the degree of surprise at trial and to bring to light all facts to be considered in a case upon merits.

At common law, there were two separate rules affecting the production of documents. Firstly, the Crown, by virtue of its prerogative, could not be subject to an order for discovery. Secondly, whether the Crown was a party to the proceedings or not, it could refuse the production of a document if its production would be against public interest.[5]

'Discovery' is one of the children of equity. The practice of obtaining disclosure on oath of relevant document by a Bill in Chancery originated in the reign of Henry VI.[6] Many of the early cases were slander actions in which the plaintiffs were complaining of the reports made about them to superior officers.[7] The disclosure was sought with the purpose of assisting a party in an existing litigation. But, this was

---

4. Air Canada v. Secretary of State, [1983] 1 All E.R. 910 at p.925.
5. Harry Street, "State Secrets—A Comparative Study", 14 M.L.R. 121 (1951).
6. See P.Ingress Bell, "Crown Privilege", [1957] P.L. 28 at p.29.
7. For instances, see Home v. Bentinck, 129 E.R. 907 (1820); Beatson v. Skene, 157 E.R. 1415 (1860); and Hennessy v. Wright, (1888) 21 Q.B.D. 509.

extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, provided it was just and necessary that he should have discovery at that stage.[8] 'Discovery' is available against whom the plaintiff has a cause of action in relation to the same wrong. Also, a discovery may be granted against a person who is not a mere witness but on proof of some wrong-doing and the responsibility for it.[9] The Crown had the same right of discovery against a Corporation as a subject has against a subject in an ordinary action.[10] There was no power to obtain a discovery of documents under the Petition of Right Act, 1860.[11]

In India, section 30 of the Civil Procedure Code deals with the discovery of documents. Under the section, the court has wide powers to order for a discovery of documents either in its own motion or on the application of a party.[12]

---

8. Norwich Pharmacal Co. v. Customs & Excise Commissioners, [1974] A.C. 133 at p.173.
9. Id. at p.188.
10. A.G. v. Mayor and Corporation of New Castle-Upon-Tyne, [1897] 2 Q.B. 384 (C.A.).
11. Thomas v. Queen, (1874) L.R. 10 Q.B. 44.
12. Section 30 of Civil Procedure Code reads as follows:
    Power to order discovery and the like - Subject to such conditions and limitations as may be prescribed, the Court may at any time, either of its own motion or on the application of any party--
    (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
    (b) issue summons to persons whose attendance is required either to give evidence or produce documents or such other objects as aforesaid;
    (c) order any fact to be proved by affidavit.

Discovery process and the Freedom of Information Act--Comparative merits: the American experience

In the United States, after the introduction of the Freedom of Information Act, the litigants against the Government who were in need of documents from agencies, were put in a dilemma of choosing the means of getting them, that is, through the discovery provisions of Rules of Civil Procedure or through the provisions of the Freedom of Information Act. The general disclosure provisions of the Freedom of Information Act and the underlying public policy provided a boon to litigants but the exemptions provided the Government much strength to resist production of documents. The exemptions are not framed in terms of evidentiary privilege. The needs of litigants stand on somewhat different footing from those of the public generally. Nevertheless, it is also true that the exemptions are based on values entitled to weighty considerations.

The discovery provisions under the Rules, similar to the Freedom of Information Act are designed to encourage open exchange of information by litigants in federal courts. Unlike the Information Act, discovery provisions under the Rules focus upon the need for the information rather than a broad statutory grant of disclosure.[13] The provisions under the Rules provide

---

13. Even a most pressing need cannot overcome an exemption under the Freedom of Information Act. See Janice Toran, "Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules", 49 Geo. Wash.L Rev. 843 (1980-81) at pp.851-52.

for access to all information relevant to the subject-matter involved in the case unless it is privileged. Exemption does not automatically constitute a privilege within the meaning of the Rules. Information exempt under the Act may be obtained through discovery, if party's need for information exceeds the Government's need for confidentiality.[14] A requesting party's rights under the Act are neither increased nor decreased by reason of the fact that he claims an interest in the requested information greater than that shared by an average member of the public. However, the Freedom of Information Act is not totally irrelevant to the discovery process. The exemptions show the congressional judgement regarding the propriety of disclosure of certain kinds of documents. Thus, the exemptions may be treated as instructive.

The discovery under the Rules is generous and needs no augmentation by the Freedom of Information Act. In certain respects, disclosure through the Rules seems superior to that is available under the Act. The penalties provided under the Rules for non-disclosure of relevant documents are more severe than those provided under the Information Act.[15] In certain

---

14. See Baldrige v. Peter Shapiro, 71 L.Ed. 2d. 199 (1982) at p.212, n.15.
15. They include citation for contempt, dismissal of case or claim and preclusion from introducing evidence on a particular issue. However, when a governmental agency wrongfully withholds documents, Rules do not provide an effective means of penalizing the agency. See Janice Toran, "Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules", 49 Geo.Wash.L. Rev. 843 (1980-81) at pp.855-56.

cases, courts may issue protective orders in discovery proceedings under the Rules. But the Freedom of Information Act does not envisage such a disclosure method.

In certain respects, disclosure under the Information Act has certain advantages. The Act provides for disciplinary action against the officer who withholds the information.[16] The duty to institute a proceeding arises when a court issues a written finding about the arbitrary or capricious withholding. On the other hand, the Rules do not provide such an effective method for disclosure. Another reason for better access under the Act is that certain evidentiary privileges are broader than analogous privileges incorporated in the Freedom of Information Act.[17] In the Act, the privilege does not cover factual information or opinions on questions of fact. Under the discovery rules it encompasses all documents and other tangible items prepared in anticipation of a litigation.[18]

---

16. Section (a)(4)(F) of the Act reads as follows:
"Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Council shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the official or employee who was primarily responsible for the withholding.
17. For example, attorney work product immunity under Exemption Five of the Freedom of Information Act. See N.L.R.B. v. Sears Roebuck, 44 L.Ed. 2d. 29 (1975).
18. Janice Toran, "Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules", 49 Geo.Wash.L.Rev. 843 (1980-81) at p.862.

The Freedom of Information Act provides that proceedings and appeals should be given preference on the court's docket.[19] The time between denial of disclosure and judicial review is thus likely to be shorter compared to that in the discovery process, where it cannot be reviewed until the trial terminates. The earlier reviewability and more favourable standard for review of decisions under the Freedom of Information Act as compared with discovery requests may result in greater disclosure. Another advantage is that the litigant obtains a thorough review of the disclosure decision. A litigant with a potentially controversial request for information may benefit from such a review.

The use of the Freedom of Information Act cannot be closed before a potential discoverant litigating with the Government for using information legislation as a collateral or exclusive method for obtaining information. The Supreme Court, in one case,[20] has observed that the ultimate purpose of the statute was to enable the public to have sufficient information enabling them to make informed choices with respect the functions of the Government.[21] Thus, it was found that the

---

19. Section 552(a)(4)(D) reads as follows:
"Except as to cases the court considers of greater importance, proceedings before the district court, as authorised by this sub-section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."
20. Renegotiation Board v. Bannercraft Clothing Co., 39 L.Ed. 2d. 123 (1974).
21. Id. at p.136.

disclosure provisions were not for a negotiating self-interested contractor.[22] The Court also found the procedure of using the statute as a tool for discovery, beyond the purposes of the statute.[23]

The availability of dual approach generates some difficulty. To the extent that the discoverant elects one of these methods, there seems to be no problem. Question of propriety arises when the discoverant persues his remedies simultaneously. Although simultaneous prosecutions of separate discovery proceedings burden the courts to the extent that the Freedom of Information Act is not duplicative of the Rules, a party foreclosed from suing under the Act because civil discovery is pending, incures a penalty by reason of his status as a litigant.[24] This is in contravention of the general policy of information legislation. When the Information Act is invoked affirmatively as an alternative or in addition to the discovery Rules, the independent operation of the two systems is not always desirable. Although the information legislation is not primarily aimed at aiding the civil litigant, there are no provisions barring the use of information obtained through the Information Act in a civil suit.[25]

---

22. Id. at p.140.
23. Ibid.
24. Note, "Freedom of Information Act: A Seven Year Assessment", 74 Colum. L. Rev. 895 (1974) at p.929.
25. Janice Toran, "Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules", 49 Geo.Wash. L.Rev. 843 (1980-81) at p.871.

Thus, a compromise line, co-ordinating the Freedom of Information Act and discovery rules is desired wherein the Freedom of Information Act has a status of a supporting mechanism for gathering information as far as a discoverant is concerned.

J. SECTION 76, EVIDENCE ACT

We have seen that sections 123 and 124 of the Evidence Act, 1872, confer a discretion on a public officer to withhold documents which would be prejudicial to public interest to disclose. It is true that such decisions of the public officers are subject to the judicial review. Under section 76 of the Evidence Act, a public officer is however under a duty to give a copy of a public document on payment of the legal fees on the demand of a person who has a right to inspect the same public document.[1] The term 'public document' is defined under section 74 of the Act.[2] First let us see what is a public document.

---

1. Section 76 of the Act reads as follows:
   Certified copies of public documents--Every public officer having the custody of a public document, which any person has a right to inspect, shall give the person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal; and such copies so certified shall be called certified copies.
2. Section 74 of the Evidence Act, 1872, reads as follows:
   Public documents—The following documents are public documents.
   (1) Documents forming the acts or records of the acts
      i) of the sovereign authority,
      ii) of official bodies and tribunals, and
      iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;
   (2) Public records kept, in any State, of private documents.

Public Document

Section 74 provides for two types of public documents: documents forming the acts or records of the acts of the sovereign authority, official bodies and tribunals, and the public officers — legislative, judicial and executive — of any part of India or a foreign country, and public records kept in any State of private documents. All documents other than public documents are private documents.[3]

The term 'record' includes a collection of documents.[4] A document cannot be treated as a public document unless it is prepared by a public servant in discharge of his official duties.[5]

A private document may not become a public document merely because it is filed in a court. To become a public document, it should be a record of the act of a public officer or of a court. A distinction can be drawn between record of the act of the court and the record of the court. A private document is a record of act of private parties and to make it a public document a further act by the public officer or court, by filing it or numbering it, is necessary.

---

3. Section 75 of the Act reads as follows:
   75. Private documents--All other documents are private.
4. In the Matter of Tarit Kanti Biswas, A.I.R. 1918 Cal. 988.
5. Secretary of State v. Chimanlal Jamnadas, A.I.R. 1942 Bom. 161. See also Mehtab Singh v. Kasar Singh, A.I.R. 1923 Lah. 640.

The Right to Inspection

The duty of a public officer to give a copy of the public document arises only where the requester has a right to inspect the same documents. Whether a person has a right to inspect a public document is a question outside the scope of the Evidence Act. The Evidence Act does not deal with it.[6] Such a right may be available at common law and may be governed by other statutory provisions.

In England, under the Public Records,Act, 1958, the documents are placed under the charge and superintendence of the Lord Chancellor. Any person desirous of getting a copy of a document may request for the same with the necessary fees. In India, there is no separate enactment except the provisions of section 76 with regard to the means of obtaining an inspection and copy of public documents.[7] But, nowhere it has been laid down how the right of inspection is to be regulated.[8]

Where the right to inspect and take copies is expressly granted by a statute, the limit of the right depends upon the construction of the statute. However, where such a right is not expressly granted, the extent of the right depends on the interest which the applicant has in what he wants to

---

6. State v. G.Veerana Goud, A.I.R. 1959 Mys. 52 at p.53.
7. Prabhas C.Sarkar & Sudipto Sarkar, Law of Evidence, S.C.Sarkar & Sons, Calcutta (13th ed., 1981), p.722.
8. Ibid.

copy or on what is reasonably necessary for the protection of such interest.[9] The common law right to inspect and take copies of public documents is limited by this principle.

The common law right of inspection has been recognized in India.[10] The person wishing to avail of the right has to show the prima facie interest which needs protection. The public officers in custody of the documents are the trustees for such persons. Regarding the right, Shephered,J., observed:[11]

> "A right to inspect public documents is, however, assumed in Section 76. I think it might be inferred that the legislature intended to recognize the right generally (ie., the right to inspect) for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such document should be given".

The right to inspect and take copies under section 76 may not be rejected or upheld without considering the purpose for which inspection is sought.

The public documents form an exception to the hearsay rule and their admissibility rests on the ground that the facts contained in the public documents are of public interest and

---

9. Mutter v. The Eastern and Midlands Railway Co., (1888) Ch.D.92 at p.106 per Lindley,L.J.
10. R. v. Arumugam, 20 M. 189; Chandi Charan v. Baistab, 31 C.284, both cases as quoted in Prabhas C.Sarkar & Sudipto Sarkar, supra.n.7 at p.722. See also Parasuram v. Cocke, A.I.R. 1942 Bom.26.
11. R. v. Arumugam, 20 M. 189, as quoted in Prabhas C.Sarkar & Sudipto Sarkar, supra n.7 at p.722.

the statements are made by authorised public officials in the course of their official duties. Certified copies of public documents become admissible as proof of the original documents. To be admissible as a public document, it should not only be available for public inspection, but should also have been brought into existence for that purpose.[12] It is with this purpose in mind, the facilities of inspection and taking copies are provided under the Evidence Act. Thus, the ultimate purpose of the inspection and copying requirement is to help the parties to a suit or those closely connected with it. Thus, section 76, in fact, does not become a parallel of a freedom of information legislation. Thus, an information legislation providing an ordinary citizen access to public documents is required.

Destruction of Records

Every institution keeps its records for a long period of time. Old documents in many situations help to solve later problems. Many of them possess precedential value. Old documents provide necessary help to researchers also.

The institutions would find it difficult to keep old documents in tact, in safe conditions. It is not all documents which would be useful in future. Many documents may not be useful at all. There is nothing wrong in destroying such documents after a certain period of time. In India, the

12. Thrasyvoulous v. Papa Christoforos, [1952] 1 All E.R. 179.

Destruction of Records Act, 1917, authorises the specified authorities to make rules for the destruction of documents. In England the Public Records Act, 1958, authorises the Keeper of the Public Records with the approval of the Lord Chancellor and of the concerned Minister for destruction of records.[13]

Care has to be taken before destroying the documents. The classification into destroyable and non-destroyable documents may be made considering the possible need in future and importance of the documents. Different departments may have their own rules for destruction of records considering the need and importance of the documents they have.

---

13. See section 6 of the Act.

K. THE RIGHT TO KNOW AT THE INTERNATIONAL LEVEL

We have seen that the right to freedom of information has become an essential ingredient of a modern democracy. The right has also been recognised by the international community.[1] Freedom of information among the nations has become essential in the cause of peace and for the achievement of political, social and economic progress, and useful in curbing harmful

---

1. Article 19 of the Universal Declaration of Human Rights adopted by the General Assembly of United Nations, 1948 reads as follows:

   Every one has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek receive and impart information and ideas through any media and regardless of frontiers.

   Article 19 of the International Covenant on Civil and Political Rights 1966 adopted by the United Nations General Assembly reads as follows:

   1. Everyone shall have the right to hold opinions without interference.
   2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
   3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary;
      a) For respect of the rights or reputations of others;
      b) For the protection of national security or of public order (ordre public) or of public health or morals.

   Article 10 of the European Convention on Human Rights, 1950 (Rome), reads as follows:

   1. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinima enterprises.
   2. The exercise of these freedoms, since it cafries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are

(Contd...)

propaganda as well as false and distorted information and in providing chance to correct the wrong versions already spread. Apart from these general uses, free interchange of information between States, is useful in specific areas like the ones concerning pirates, terrorists and hijackers and in the area of prevention of environmental pollution where timely warning and exchange of scientific data can promote effective preventive mechanism.[2]

---

f.n.1 contd...

prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

Article 6 E.C.H.R., 1950, reads as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgements shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order, nation's security in a democratic society, where the interests of juveniles or the protection of the private life so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. The United Nations Conference on the Human Environment, 1972, (Stockholm Declaration) while emphasising the need for scientific research and development in the context of environmental problems, required a free flow scientific information and modern technology among the nations especially to the developing nations.

The International Convention on Early Notification of Nuclear Accident, 1986, requires a State to report all the information regarding an accident to all States.

The Organisation for Economic Co-operation and Development (OECD) on Principles of Transfrontier Pollution and Transportation of Hazardous Wastes, 1974, requires a country to provide early information to other countries about the activities which may cause significant risk of transfrontier pollution. The countries also have to exchange scientific information monitoring measures and research.

Freedom of information may also be useful for the individuals all over world where a country lacks the infrastructure for imparting information. However, problems do arise in allowing an unlimited freedom of information at the international level. It is possible for a rich nation to dominate over the poor nation especially in spreading the political and economic idealogies. Any event can be reported interpreting in one's own fashion suiting his idealogy. Thus, a reasonable restriction over the nature of information released by the nations for the intended receipients of other nations is required.

Chapter 10

TOWARD A SYSTEM OF FREEDOM OF INFORMATION

"Freedom of information" is a term used to describe the right of the public to have access to documents in the possession of various organs of the Government. In a broader sense, the term 'freedom of information' involves the question of obligation on the part of the executive to give reasons for their decisions affecting individual members of the community; the right of Parliament and of the courts to information in the possession of the executive for the purpose of determining particular controversies or judging the propriety and merits of particular policies; open law making procedures at the level of subordinate legislation; and open access to departmental rules and the like.[1]

The basic principle of freedom of information legislation is that the members of the public may have a right to access to documents in the possession of the executive unless there are good and cogent reasons why this access should be refused in a particular case. Once this principle is accepted, the next thing to be done is to define the exemptions.

A right to know may not be particularly helpful if there is no way of knowing what there is to know. For a successful freedom of information system, it is necessary for a citizen

---

1. Lindsay J.Curtis, "Freedom of Information: The Australian Approach", 54 A.L.J. 525 (1980).

to know what are all the documents available for disclosure with the Government. Then only a citizen may be able to apply for a copy of the document required by him before the concerned authority. Then a question arises, whether it is possible to sort out the documents available for disclosure. The time, expenditure and energy required for such process is too heavy. However, Government may publish an 'Information Register' which may give a general outline of the information available for disclosure. Publication of such a Register enables people to ascertain agency's position in many matters within its purview. Such a Register may also facilitate in making effective and intelligent requests for information.

The information system may facilitate an individual to inspect and take copies of the required document. However, if such process is inconvenient to the particular government office, a true copy of the document may be provided to the requester, of course, on payment of reasonable charges.

The request made by an individual may give details of the document requested for. There cannot be any fixed rule for this. The test for a valid request is that a reasonable official may identify the document after going through the request. No particular form is necessary for a request.

An information system preconceives the idea of what is a 'Public Record' for which requests flow in. Thus, a definition of 'public record' suitable to a freedom of information system is necessary.

A 'public record' may be defined as any record originated in a governmental authority or any record which validly comes under the possession of the authority. Apart from the factors of 'origin' and 'valid possession', the authority may also have control over the documents. The control factor comes in because, in certain instances, executive has to act upon the orders of the judiciary as well as legislature. In such situations, the documents though originated in the executive, cannot be divulged except with the consent of the legislative or judiciary who holds the real control over such documents.

The word 'originated' means a document formed in an authority. To the second part, an explanation for the term 'validty' seems to be necessary. When an authority acquires records from an outside party in an illegal proceeding, or without having any jurisdiction or justification in law for the purpose of the functioning of the particular authority, the authority may be treated to have acquired the records not validly. Such records do not become public records. Thus, an individual's account books which comes within the hands of the health department may not become a public record because such records need not be required for the functioning of that department. It is rather a function of department of revenue.

Problems may arise in the actual practice because many records which are originated in one governmental authority may be transferred to other authorities. The question then

arises is which authority is the proper one to divulge the records. As far as a requester is concerned it is public record. He is not expected to know the transfer of documents between different authorities. In such situations,what is more relevant is the very purpose for which the record is originated or acquired. The agency may be able to assess the pros and cons of disclosure of that record. Where a request is made for such records, it is the duty of that authority to seek the opinion of the authority in which the record is originated or to refer the disclosure issue to the other authority.

Sometimes, an outside body may transfer records to a government authority. Originally the records are not records of the authority. The outside private body may transfer document to the government authority under a statutory obligation, ie., where the government authority has the power to acquire them, or voluntarily with or without conditions relating to confidentiality in the records.

The citizen's request for documents may be restricted to complete documents. The documents which are only half-prepared or which are incomplete need not be respected. Again, any document, the disclosure of which would impede the functioning of a judicial or a quasi-judicial body,may also be kept in abeyance.

Any authority which is an 'authority' under Article 12 of the Constitution may be treated as an authority in this respect also. Again, private bodies funded and substantially controlled by the Government may be treated as authority in this respect. The documents of such bodies may be divulged on requests for them. People have a right to know how the Government's wealth is utilised whether directly or indirectly.[2] Regarding the question of possession, it may be assumed that there is a constructive possession because no governmental authority may help in terms of money to private groups without having a condition of accountability. Again, when the Government provides the fund, the functions the private bodies will naturally be the functions of the Government itself.

A requester may seek disclosure of documents of varied nature. Some documents may be harmful to the public interest on disclosure and some not harmful. In majority of situations, the public authorities do not find difficulty in distinguishing such kinds of requests. However, in marginal cases, it may be difficult for an authority to arrive at decisions on disclosure in a short period. This situation may be considered before fixing a time limit. Time is also necessary for finding out the requested document and for taking a copy of it. Again, in certain cases, discussion between different officials or

---

2. In Forsham v. Harris, 63 L.Ed. 2d. 293 (1980), the Court held that records of a private body which was funded by an agency were not 'agency records' because no agency had possession of them.

different departments may become necessary to arrive at a decision. Thus, a period of one month may be allowed to authorities to take a disclosure decision and to provide the copy of the requested information.

However, if the Government can show that exceptional circumstances exist and the authority exercises due diligence in responding to a request, the authority may be allowed additional time. If the documents are not with the authority at the time of request, it may require some more time in order to collect the documents. Again, where an authority requires a law suit to recover the documents, additional time may be allowed. A related question in this respect is whether the authority is bound to file a suit to recover its own documents.[3] It is submitted that the authority may be compelled to recover the documents. Otherwise authorities may make a 'hands off' approach to requests that it does not possess them, but with someone else. If an authority is not capable of keeping its own records, or it is unmindful of its records being kept by unauthorised parties, a request may not be refused on such reasons.

Sometimes, the authorities may not be able to comply with the time limit due to heavy increase in number of requests and resulting backlogs. In such situations, the authorities not

---

3. See Kissinger v. Reporter's Committee for Freedom of the Press, 63 L.Ed. 2d. 267 (1980), in which the Court held that in such circumstances, a law-suit was not intended.

equiped properly with necessary administrative machineries, may fail to comply with a time limit fixed earlier.[4] Additional time may be allowed to authorities in these circumstances also.

A request for an information may also show the need for the document and how it is going to be used by the requestor. This will help an authority to classify the requests into different classes, the criterion being the urgency for the disclosure. It is true that disclosure may become not beneficial if provided late where the requestor's intention to make use of it to file a suit against Government or others and it become time-barred after a particular date. At the same time, one may request for information out of mere curiosity to know the working of Government. Yet another may request for certain information to establish one's rights. These requestors may be differently treated. Thus, a classification regarding the priority of disclosure may be made by the authorities.

The effectiveness of an information system is related to the administrative efficiency and its success in providing public access to documents. Such a system becomes efficient only if the midlevel non-expert official could handle requests without much difficulty.

---

4. See Open America v. Watergate Special Prosecution Force, 547 F. 2d. 605 (D.C.Cir.1976), as quoted in Comment, "Open America v. Watergate Special Prosecution Force: Judicial Revision of FOIA Time Limits", 71 N.W.U.L.Rev.805 (1976-77). In this case, the Court found that the increase in requests for information to the F.B.I had resulted in a processing

(Contd...)

An institution within the government authorities is necessary to help the common man in the information requesting process. An ordinary requestor may be helped in requesting an information properly. It is possible that requests may be rejected for defective and improper application. He may also be helped to prepare an appeal in case of refusal of disclosure. Thus, a system which helps an individual in making a proper request may be introduced in an information system.

An efficient administrative set up is necessary for an information system to be successful. The judiciary's role is limited. There are several reasons for it. The number of suits will be too many in cases of rejection of requests. The interference by the court will also be self-restricted due to its ignorance on the importance and consequences on disclosure of different kinds of documents. Again, expenses and cost of litigation restrict the requesters from filing suits. Thus, what is more required is justice from the authorities themselves and only finally from the courts.

Where a concerned officer rejects an application for disclosure, an appeal from him may be allowed to an appellate body who preferably may be the Secretary to the Department

---

f.n.4 contd...

backlog. The Court held that exceptional circumstances exist where an agency was delayed with a volume of request for information vastly in excess of that anticipated by Congress and where the existing resources of the agency were inadequate to deal with the requests. The Court also declared that, when exceptional circumstances exist, the ten days time limit of the FOIA becomes directory rather than mandatory.

or Chairman of the Corporation or Director of an institution. A time limit of fifteen days may be given for this appellate body to take the decision in the appeal. From this body, again an appeal may be allowed to another body which consists a member from excentive, judiciary and legislature. An appeal from this tripartite body may go to the district court.

In the present set up, once a legislation is passed, the legislator has no role in actual implementation or decision-making in respect of that legislation. Such a role removes doubts and confusions among the officers and judiciary in arriving at just conclusions. This body will be more or less free from severe criticisms because it is decided by the three organs of State. This body may be headed by one from judiciary.

Apart from the appellate jurisdiction of the tripartite authority, it may also have an advisory and mediatory role between requestors and authorities. The advisory role has two dimensions: one toward the requestors and the other toward the authorities. An advice from this tripartite authority will be quite different from that may be given by the authorities because an authority's advice may not be free from bias, inconveniences, injury to the reputation of officers etc. Apart from the public, the authorities may also seek advice from the tripartite authority in solving difficult problems. An advice from it relieves an authority from unfounded criticism also.

This tripartate authority, however, may not be conferred with investigative powers. The decision may be taken from the written or oral arguments from both sides. The district court may, however, have the investigative powers. It may review a refusal decision de novo. A person who is not satisfied with the decision of the tripatite authority may be allowed to appeal before a district court.

An efficient tripartite authority could prevent a lot of disputes from going to the courts. The presence of members from the judiciary and legislature make the decisions more democratic as well as judicial.

However, the records relating to sensitive areas such as defence, foreign affairs, trade secrets etc., may better be kept to the authorities and the judiciary only. Information bearing national importance and sensitivity cannot be so lightly taken and may not be disclosed to the tripartite body.

One of the ways by which the information system could be strengthened is to require the authorities to pay for their faulty rejection of requests. Where a requester wins his case in the district court, and if the court finds that the authority unreasonably withheld the document, the requester may be paid the attorney fees.[5] The district court may statutorily be

---

5. For more details on the topic, see Boland Lyn Batzar, "Pro Se Litigant's Eligibility for Attorney Fees under Freedom of Information Act: Crooker v. United States Department of Justice", 55 St.John's L.Rev.520 (1981); Note, "Awarding Fees to the Self-represented Attorney under the Freedom (Contd....)

bound to state this fact in their decisions. However, when a litigant himself argues his case or an attorney argues his case, there seems no need to pay the attorneys fees to them.

It is in Sweden a statute providing free access to public documents was enacted for the first time in the world. The present Freedom of Press Act was adopted in 1949. In fact, it succeeded an Act of 1814. The first Freedom of Press Act came into existance in 1776. In the other Scandinavian nations also, there are freedom of information statutes. An Act of 1977 later amended in 1978 and 1979 provides for access to administrative documents in France. In the United States the Freedom of Information Act, 1966, provides for an extensive access rights. In 1982, statutes were adopted in Canada, Australia and New Zealand providing freedom of information.

In the United Kingdom though there are demands for such a legislation or an amendment of Official Secrets Act to that effect, it has not been carried out. However, section 10 of the contempt of Court Act, 1981, indirectly helps free flow of information in a limited way. The media people could inform the people on areas other than those excluded under the section.

In India, there is no law which provides for access to governmental documents. Though the Janata Government in 1977 had such intentions in that line it did not materialise

---

f.n.5 contd..
of Information Act", 53 Geo.Wash. L.Rev. 291 (1984-85); and Note, "Awarding Attorney Fees to Prevailing Pro Se Litigants", 80 Mich.L. Rev. 1111 (1981-82).

because of its early break down. The ruling Janatha Dal had earlier announced its intention to bring out an information legislation in the election manifesto. The present Chandra Shekher Government has not so far announced its policy in this regard. In India, corruption in the governmental circles is well-known. Openness in the executive functioning will definitely reduce the malady. Moreover, openness will make the governance more democratic. It is high time for introducing a freedom of information legislation in India.

Chapter 11

CONCLUSIONS

Secrecy in governmental functioning causes much suspicion among the people. Openness reduces corruption to a considerable extent. In a democracy, the citizens being the persons to choose their own governors, the right to know from the Government is a pre-condition for a properly evaluated election. Freedom of speech and expression, one of the repositories of self-government, forms the basis for the right to know in a wider scale. The functions which the free speech rights serve in a society also emphasize the need for more openness in the functioning of a democracy.

Presently, the people in India do not enjoy the right to know. Apart from the non-existence of such a right, there are certain factors which help for more secrecy in the Government. The culture of secrecy developed in the Government, the executive privilege allowed by the superior courts to withhold in the general public interest documents in a suit, the classification of documents into secret and others by the officials themselves, and the catch all Official Secrets Act provisions are such factors. However, a change in the attitude in the judiciary can be seen from their recent decisions in favour of openness. Now, the judiciary has come forward to review decisions of officials and also to balance the competing public interests. Regarding classification of documents, the officials

may be compelled to follow certain self-regulatory measures. The Government is found to be reluctant to pursue the provisions of the Official Secrets Act in all cases of leaks of secret information. Even if the classification system is liberalised, or the provisions of the Official Secrets Act are neutralised, the people may not possess a right to know from their Government. What is then required is legislation conferring the right to know.

No right is absolute. It will be subjected to necessary restrictions. Regarding the right to know, certain kinds of information are to be necessarily exempted from the public's knowledge to prevent harm to the public interest.

Regarding documents relating to defence and foreign affairs, it is better to leave the matter to the executive itself with a stipulation that the criteria for marking documents secret should be evolved and made known.

The cabinet records involve the highest level executive decisions in a country. In a democracy, the members of the cabinet are the representatives of the people and function on behalf of the people. Thus, there is no scope of a general requirement as to secrecy to cabinet records. Secrecy, in fact, is against the principle of self-government. However, where disclosure of cabinet records affects the future functioning of the Government, secrecy may be insisted upon in the case of such documents.

Maintanance of law and order and investigation of crimes are highly important in a country like India, where no risk may be taken on account of the public's right to know. However, such documents may be divulged to a person who defends a charge made against him. The informers of crime have a commendable role in combating crime. Those who come forward to help the Government may not be exposed to risk. Their names and identities may be kept confidential in any situation except where the informers themselves come out to divulge their identity.

The right to privacy is an inherent right of an individual. No authority may be given a liberal say in matters regarding one's privacy. One's right to know may not conflict with another's right to privacy. In cases of conflict ,the latter may be generally given primacy compared to the former. Information touching one's privacy may be divulged only where a superior need for such information is established in public interest. In cases of wrong disclosures, damages may be paid to the individual. Again, a hearing may be given to the individual before the decision to disclose the privacy records is made.

The case of juveniles forms another area of exemption. There may be a number of documents relating to the past of a juvenile, the disclosure of which would cause serious harm. The public interest requires full-fledged confidentiality to

such documents. Whenever allegations against the authorities arise, the documents may be disclosed to an institution such as ombudsman.

Trade secrets and commercial information form another area to which exemption from public's right to know may be granted. The competitors in business may become unjustly rich or they may be able to exploit the situation when information of these types is disclosed. Whenever the Government decides to disclose such documents, a hearing may be allowed to the affected parties. Where the Government makes a wrong disclosure, the affected may be compensated for the loss accruing from the wrongful disclosure.

For a full-fledged legal advise, protection to a certain extent is necessary. Where information is sought against the governmental authorities, this principle is also applicable. What is to be protected is not the facts but the advice, the intellectual part played in the process.

Every nation has its own particular situations. Where exemptions to right to know are framed, this fact may also be considered. The Indian situations relating terrorist activities, riots based on language, region, religion and caste are important in this respect. The right to know of the citizens may be regulated in the interests of secrecy required in these areas.

An information system first of all requires the publication of what all are the documents available for public inspection and copying. A nation-wide machinery attached to different offices may be instituted for the purpose. A time schedule for release of documents may add to the efficiency of the information system. Regarding complaints against withholding of information, it is better to resolve them in the administrative mechinery itself, in the first instance. Later, the judicial review may be necessary. For a proper functioning it is also necessary to provide for penal sanctions, in extreme cases of improper withholding of documents from the public.

Considering the economy of India, it may be difficult for the executive to provide for a full-fledged right to know in all cases and in time. Thus, those who request for a document with a particular need to establish a right or to defend himself in any proceedings, may be given priority over those who require information merely for the sake of information.

On the basis of the conclusions reached in this study, a draft Bill has been proposed for the passing of an Access to Public Documents Act. This Bill is appended to this Thesis.

APPENDIX

DRAFT BILL FOR AN ACCESS TO PUBLIC DOCUMENTS ACT, 1990

An act to provide for access to public documents. Be it enacted in the Forty-first Year of the Republic by Parliament as follows:

Chapter 1

PRELIMINARY

1. Extent and commencement--(a) This Act may be called as Access to Public Documents Act, 1990.

   (a) It extends to the whole of India.

   (b) It shall come into force on such date as the Central Government may by notification in official Gazette appoint in this behalf.

2. Definitions--In this Act, unless the context otherwise requires,

   (a) 'Committee on Access to Public Documents' means the committee constituted by the Central Government or the State Government, consisting of a member of

Central or State legislature, as the case may be, a high official from the Central or State executive, as the case may be, and a person having judicial experience, who may act as the Chairman of this committee.

(b) 'Document' includes any representation in writing, any pictorial representation or any recording which can be read, listened to or otherwise apprehended by means of technical aids.

(c) 'Government' means the Government of India or the Government of State as the context requires.

(d) 'Head of the Public Authority' means the head of the department or the head of an office of the department or the head of a governmental institution, appointed by the Government for the purpose of implementation of this Act.

(e) 'Information Litigation' means the litigation before a court of law instituted by a requester against a public authority where the requester is refused access to the documents requested for within the statutory time limit.

(f) 'Information Officer' means the officer appointed by the concerned public authority to receive requests for access to public documents and to primarily decide disputes regarding access to public documents.

(g) 'Information Register' means the register maintained by a public authority which contains the names of documents available to public access.

(h) 'Public Authority' means any authority coming under Article 12 of the Constitution of India except the Union and State legislatures.

(i) 'Public Document' means the document received or prepared or drawn up by a public authority in furtherance of its functions.

(j) 'Request' means the request which reasonably describes the public document so that the public document could be identified from the description.

(k) 'Requester' means the person who requests for access to public document before the public authority.

(1) 'Unusual Circumstances' may be held to be present when there is,

(i) need to search for and collect the requested document from establishments that are separate from the office processing the request,

(ii) need to search for, collect and appropriately examine separate and distinct voluminous documents which are sought for access in a single request, or,

(iii) need for consultation with another public authority or with other offices of the public authority to which the request is made.

Chapter 2

ACCESS TO PUBLIC DOCUMENTS

3. Right of access to public documents--Subject to the provisions of this Act, everyone shall have right of access to public documents.

4. Maintenance of Information Register--Every public authority shall maintain a complete Information Register as far as possible, at all branches for the guidance of the requesters.

Chapter 3

MACHINERY AND PROCEDURE

5. Appointment of Information Officers--Every public authority shall appoint one or more Information Officers for the purposes of examining and determining requests made for access to documents.

6. Requests to be made before the proper public authority--Any request seeking access to a public document shall be made before the public authority where the document is kept, or before the public authority which owns or controls the custody of it.

7. Examination and determination of requests--A request for access to document shall be examined and determined by the Information Officer.

8. Compliance with the request--A request for a public document, addressed to a public authority, shall be complied with unless there is an objection on any of the grounds referred to in section 39.

9. Specification of need and urgency for the documents--The requester, in his request, shall point out the need for the document and the urgency, if any, required in having the access to the requested public document.

10. Dealing of a wrong request--(a) Where a person approaches an office wrongly, the Information Officer may direct him to the proper office to which the person may rightly make a request for access to public documents.

    (b) The Information Officer shall reply within twenty days of receiving such requests.

11. Classification of requests--The Information Officer may classify the requests, as he thinks proper, into ordinary, urgent and very urgent.

12. Certain matters to be taken into account by the Information Officer--The Information Officer, while making a classification, may, however, take into account the need and urgency mentioned by the requester in his request.

13. Determination of requests within specified time-limits-- Upon any request for access to public documents made under section 3, the Information Officer shall determine within,

(a) fifteen working days in the case of very urgent class of requests,

(b) thirty working days in the case of urgent class of requests, and

(c) within fortyfive working days in the case of ordinary class of requests,

after the receipt of a request, whether to comply with such requests, and shall immediately notify the requester of the decision made, and in the case of refusal, the reasons therefore and of the right of the requester to appeal to the Head of the Public Authority and also of the further appeals from the decision of the Head of the Public Authority to the Committee on Access to Public Documents, from the decision of the Committee on Access to Public Documents to the District Court, and from the decision of the District Court to the High Court.

14. Extension of time limits--The Information Officer may, however, in unusual circumstances extend the time limits prescribed under section 13 after informing the requester of the reasons for such extension and the date on which the decision as to access is expected to be rendered.

Provide, however, that such an extension shall not exceed more than,

(a) fifteen working days in the case of urgent class of requests,

(b) thirty working days in the case of urgent class of requests, and,

(c) fortyfive working days in the case of ordinary class of requests.

15. Extension of time limits in exceptional circumstances--Where the Information Officer shows that exceptional circumstances exist and the authority is exercising due diligence in responding to the request, the District Court, if satisfied with the gravity of the exceptional circumstances, may allow additional time to complete the review of documents and the determination as to access.

16. Decision as to access when a request is transferred from one authority to another--Where the public document is a transferred document from another public authority, decision as to access shall be made after consultation with the Information Officer of the public authority from where the document is transferred.

17. Modes of providing access to documents--The Information Officer may provide access to public documents by,

(a) giving a copy,
(b) allowing cognizance to be taken of the contents of,
(c) giving an excerpt or summary of the contents of, or,
(d) furnishing oral information about the contents of the public document to which access is requested.

18. Preference as to mode of access--In choosing between the modes of disclosure referred to in section 17, the Information Officer may be guided by the preference made by the requester and the facilities available to the Information Officer in his office.

19. Levy of charges--The Information Officer may levy such charges as may be fixed by the appropriate Government by rules for providing access to public documents.

20. Fixation of charges--(a) The Government while fixing the charges may take into account the direct costs involved in search, duplication, copying and such other factors.

(b) Where an Information Officer finds that the requested documents has a market value or a possibility of exploitation in the market, he may fix the charges after adding such amount he feels equivalent to the market value of the document.

Chapter 5

RIGHTS OF THIRD PARTIES

21. Hearing to third parties--When an Information Officer feels that access to document may detrimentally affect the interests of a third person, the Information Officer may give a hearing to that person specifying the documents for which access is requested.

22. Procedure in case of no response--Where the third person does not respond to the notice of hearing within fifteen days, he may be treated as having no objection to allowing access to the documents specified in the notice of hearing.

23. Remedy for third persons--Where a third person is aggrieved by the decision of the Information Officer, he may appeal to the Head of the Public Authority, to the Committee on Access to Public Documents from the decision of the Head of the Public

Authority, to the District Court from the decision of the Committee on Access to Public Documents, and to the High Court from the decision of the District Court.

24. Time limit in case of a third party interest--The Information Officer may take an additional period of twenty days than the time limit prescribed under section 13 in cases where a third person has to be heared before a decision as to access to public documents is taken.

25. Decision to be informed to the third person--The Information Officer, the Head of the Public Authority, or the Committee on Access to Public Documents, as the case may be, may inform the third person who has objected to the disclosure of the document, of the decision taken by the Information Officer, the Head of the Public Authority, or the Committee on Access to Public Documents, whether or not the Information Officer, the Head of the Public Authority, or the Committee on Access to Public Documents has accepted or rejected, partly or fully, the submissions made by the third person before the document is disclosed to the requester, to enable the third person to make an appeal against the decision as to disclosure.

Chapter 5

REJECTION AND APPEALS

26. Reasons for rejecting of a request--Where the Information Officer refuses a request, a communication to the requester to that effect may be made specifying the applicable ground given under section 39 under which the request has been rejected or other reasons for refusal.

27. Appeal to the Head of the Public Authority--An appeal from the decision of the Information Officer may be made to the Head of the Public Authority.

28. Period for referring appeal--An appeal by a requester against a refusal of a request for access to public documents shall be made within ten days after he has received the notice of refusal of his request.

29. Procedure in cases of no reply--Where a requester does not receive a reply from the Information Officer to his request for public document within a period of ten days after the time limit fixed under sections 13,14,15 and 24, he may treat this request as refused and may file an appeal.

30. Determination by the Head of the Public Authority--The Head of the Public Authority may make a determination on any appeal made to him within twenty working days after the receipt of such an appeal and may inform the requester of the determination so made within ten days of such determination.

31. Appeal to the Committee on Access to Public Documents--An appeal from the decision of the Head of the Public Authority may be made to the Committee on Access to Public Documents.

32. Jurisdiction of the Committee on Access to Public Documents--

(a) The jurisdiction of the Committee on Access to Public Documents arises only where the rejection of requests is made under the grounds given under sub-sections(l), (m) and (p) of section 39.

(b) In all other cases of rejection of requests, the appeal from the decision of the Head of the Public Authority may go to the District court.

33. Period for rendering the decision--The Committee on Access to Public Documents may deliver its decision within one month of registration of the appeal and may inform the requester within ten days of such decision.

34. Appeal to the District Court--An appeal from the decision of the Committee on Access to Public Documents may be made to the District Court.

35. Judgement to be delivered within a specified time limit--The District Court shall deliver the judgement within four months of registration of an appeal.

36. De novo examination by the District Court--The District Court, on an appeal before it, may determine the matter de novo and may examine the documents in camera if found necessary.

37. Appeal to the High Court--An appeal from the decision of the District Court may be made to High Court.

38. Information to be furnished by public authority to judicial bodies--The public authority shall serve an answer or otherwise plead to any complaint made to the Committee on Access to Public Documents, the District Court or the High Court within ten days after service upon the public authority of the pleading in which such complaint is made.

Chapter 6

EXCEPTIONS

39. Exceptions to the right of access to public documents--The right of access to information shall not include documents containing:

(a) information relating to defence of the nation,

(b) information relating to foreign affairs of the country,

(c) cabinet records which impede the functioning of the cabinet in near future,

(d) records of an investigative body, including department of revenue,

(e) high level decision relating to fiscal policy of the nation such as information relating currency, foreign exchange policy etc.,

(f) reports on financial institutions,

(g) information obtained under a promise of confidentiality which the public authority is unable to obtain except under such a promise,

(h) trade secrets and other business information which provides or is likely to provide an unfair competitive advantage or disadvantage to any person over any other person or a public authority.

(i) information regarding informers,

(j) information relating to juveniles,

(k) information which may impede the functioning of a court of law or a quasi-judicial body,

(l) predecisional memoranda, letters and such other information passed within a public authority or between two public authorities.

(m) internal personal rules and practices of a public authority,

(n) information which relates to or affects an individual's personal affairs unless the individual concerned consents to the release of such documents,

(o) information specifically protected under any other law where the concerned authority under that law has no discretion as to the decision regarding protection of that information,

(p) information which is incomplete and therefore is capable of showing in inaccurate picture,

(q) legal opinions expressed by any officer of the public authority or by an expert from outside the public authority,

(r) information relating to terrorist activities, or,

(s) information relating to riots based on religion, caste, language or region.

40. Documents not related to items given in section 39 but requires secrecy--(a) Where an Information Officer finds a document not coming under the exceptions specified in this Act, but finds it to be a document which on disclosure may cause harm to the public interest, may with the consent of the Head of the Public Authority reject a request for access to such document after referring the matter to the District Court and getting an approval from there.

(b) The District Court may decide the matter within one month after going through the documents and the reasons appended by the Information Officer.

(c) An appeal from the decision made under clause (a) may go to the High Court.

Chapter 7

SUBMISSIONS OF REPORTS

41. Report by the Information Officer--Each Information Officer shall submit a report every year to the respective Head of the Public Authority on the implementation of the Act.

42. Report by the Head of the Public Authority--Each Head of the Public Authority shall submit a report every year to the respective legislature on the implementation of the Act.

43. Report by the Committee on Access to Public Documents--The Chairman of the Committee Access to Public Documents shall submit a report every year to the respective legislature on the implementation of the Act.

Chapter 8

MISCELLANEOUS

44. Segregation of public documents--Any reasonably segregable portion of a public document shall be given access to a requester after deletion of the portions which are protected under sections 39 or 40(a).

45. Protection for acts done in good faith--No suit or other legal proceedings shall lie against an Information Officer, Head of the Public Authority or any other person in respect of anything which is, in good faith, done or intended to be done under this Act.

46. Payment of attorney fees to a prevailing requester--Where a requester has substantially prevailed in an information litigation, the District Court or the High Court may assess attorney fees and other litigation costs incurred, and may order for the payment of the same to the requester.

47. Payment of attorney fees by the concerned public officers--Where the District Court or the High Court finds an Information Officer, the Head of the Public Authority or other officers of the public authority as having unjustifiably denied access to public documents to a person, the District Court or the High Court may order such officer or officers to make such payment as given under section 46 of this Act.

48. Documents that came into existence before the Act--In the case of documents that came into existence before the coming into force of this Act, the appropriate Government may frame by rules to restrict the right to access to public documents, in cases where it is satisfied that the documents have not been preserved in such a way as to facilitate compliance with the request for information without disproportionate trouble in terms of labour and costs.

49. Removal of doubts and difficulties--If any difficulty arises in giving effect to the provisions of this Act, the appropriate Government may, by order published in the official Gazette make such provision or give such direction not inconsistent with the provisions of this Act, as appears to it to be necessary or expedient for the removal of the doubt or difficulty and the order of the Government in such cases shall be final.

50. Rules to be framed by the Government--The appropriate Government may, by notification in official Gazette, make rules for carrying out the provisions of this Act.

51. Rules to be laid before Parliament-Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, where it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, this rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under the rule.

TABLE OF CASES

BIBLIOGRAPHY

Books

Chaturvedi, T.N., Secrecy in Government, Indian Institute of Public Administration, New Delhi (1980).

Galnoor, Itzhak, Government Secrecy in Democracies, New York University Press, New York (1977).

Hewitt, Patricia, Privacy: The Information Gatherers, N.C.C.L., Robendene, Amorsham (1980).

Maheshwari, S.R., Open Government in India, Macmillan, New Delhi (1981).

Marsh, Norman S., Public Access to Government--Held Information, Stevens, London (1987).

May, Erskine, Parliamentary Practice, Butterworths, London, (19th ed., 1976).

Meiklejohn, Alexander, Political Freedom: The Constitutional Power of the People, Harper Brothers, New York (1980).

O'Brien, David M.,The Public's Right to Know: The Supreme Court and the First Amendment, Praeger, New York (1981).

Pateman, Carole, Participation and Democratic Theory, University Press, Cambridge (1970).

Rourke, Francis E.,Secrecy and Publicity: Dilemmas of Democracy John Hopkins Press, Baltimore (1961).

Rowat, Donald C., Administrative Secrecy in Developed Countries, Macmillan, London (1979).

Yudof, Mark G., When Government Speaks: Law and Government Expression in America, University of California Press, California (1983).

Articles

Abe Krash & Raoul Berger, "Government Immunity from Discovery", 59 Yale L.J. 1451 (1950).

Abraham D.Sofaer, 'Book Review on Executive Privilege: A Constitutional Myth by Raoul Berger', 88 Harv.L.Rev.281(1974).

Abraham D.Sofaer, "Executive Privilege: An Historical Note", 75 Colum.L.Rev. 1318 (1975).

Alan Boyle, "Freedom of Expression as A Public Interest in English Law", [1982] P.L. 574.

Alen F.Westin, "Science, Privacy and Freedom: Issues and Proposals for the 1970's", 66 Colum.L.Rev. 1003 (1966).

Alexander Meiklejohn, "The First Amendment in an Absolute", (1961) Sup.Ct.Rev. 245.

Allen W.Mewett Q.C., "State Secrets in Canada", 63 Can.Bar Rev. 358 (1985).

Amy Fier, "Disappointed Government Contract Bidders: The Second Circuit Re-evaluates Its Position on Standing", 51 Brooklyn L.Rev. 191 (1984).

Ansley B.Barton, "United States v. Nixon and the Freedom of Information Act: New Impetus for Agency Disclosure?", 24 Emory L.J. 405 (1975).

Arnold Kean, "Confidentiality of Civil Aviation Information in the United Kingdom", 1 Annals of Air and Space Law 83 (1976).

Arthur Selwyn Miller, "Privacy in the Corporate State: A Constitutional Value of Dwindling Significance", 22 J.Pub.L. 1 (1973).

Arthur Selwyn Miller & Henry Bartholomew Cox, "On the Need for a National Commission on Documentary Access", 44 Geo.Wash.L.Rev. 213 (1976).

Bernard Schwartz, "Executive Privilege and Congressional Investigatory Power", 47 Cal.L.Rev. 3 (1959).

Blasi, "The Checking Value in First Amendment Theory", (1977) Am.B.Found.Research J. 521.

Boland Lyn Batzar, "Pro Se Litigant's Eligibility for Attorney Fees under Freedom of Information Act: Crooker v. United States Department", 55 St.John's L.Rev. 520 (1981).

Boris I.Bittker, "Federal Income Tax Returns--Confidentiality vs. Public Disclosure", 20 Washburn L.J. 479 (1980-81).

Bruce Teicher, "Informational Injuries as a Basis for Standing", 79 Colum.L.Rev. 366 (1979).

Bruce W.Clark, "The Constitutional Right to Confidentiality", 51 Geo.Wash.L.Rev. 133 (1982-83).

Burt A.Braverman & Wesley R.Heppler, "A Practical Review of State Open Records Laws", 49 Geo.Wash.L.Rev. 720 (1980-81).

C.Edwin Baker, "Realizing Self-realization: Corporate Political Expenditures and Redish's 'The Value of Free Speech' ", 130 U.Pa.L.Rev. 646 (1982).

C.P.Walker, "Police Surveillance by Technical Devices", [1980] P.L. 184.

C.S.Emdon, "Documents Privileged in Public Interest", 39 L.Q.R. 476 (1923).

Charles Fried, "Privacy", 77 Yale L.J. 475 (1968).

Charles H.Kock Jr., "The Freedom of Information Act: Suggestions for Making Information Available to Public", 32 Md.L.Rev. 189 (1972).

Christine Boyle, "Confidence v. Privilege", 25 N.I.L.Q. 31 (1974).

Christopher Docksey, "Information and Consultation of Employees: The United Kingdom and the Vredeling Directive", 49 M.L.R. 281 (1986).

Claudia Rast, 'Case Note', (1980) U.Detroit L.Rev. 363.

Comment, "Open America v. Watergate Special Prosecution Force: Judicial Revision of FOIA Time Limits", 71 Nw.U.L.Rev. 805 (1976-77).

Comment, "Pro Se Litigant's Eligibility for Attorney Fees under Freedom of Information Act: Crooker v. United States Department of Justice", 55 St.John's L.Rev. 520 (1981).

Comment, "Publication under the Freedom of Information Act of Statements of General Policy and Interpretations of General Applicability", 47 U.Chi.L.Rev. 351 (1979-80).

Comment, "Public Disclosure of Internal Revenue Service Private Letter Rulings", 40 U.Chi.L.Rev. 833 (1972-73).

Comment, "Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection", 70 Nw.U.L.Rev. 995 (1975-76).

Comment, "The Consumer Product Safety Act as a Freedom of Information 'Withholding' Statute", 128 U.Pa.L.Rev. 1166 (1979-80)

Comment, "United States v. Nixon and the Freedom of Information Act: New Impetus for Agency Disclosure?", 24 Emory L.J. 405 (1975).

D.C.Hodgson, "Recent Developments in the Law of Public Interest Immunity: Cabinet Papers", 17 V.U.W.L.R. 153 (1987).

D.F.Libling, "The Concept of Property: Property in Intangibles", 94 L.Q.R. 103 (1978).

D.H.Clark, "Administrative Control of Judicial Action: The Authority of Duncan v. Cammell Laird", 30 M.L.R. 489 (1967).

D.J.Shelton, "The Ombudsmen and Information", 12 V.U.W.L.R. 233 (1982).

Daniel R.Modes, "The Status of Law Enforcement Manuals under the Freedom of Information Act", 75 Nw.U.L.Rev. 734 (1980-81).

Dennis Pearce, "Of Ministers Referees and Informers: Evidence Inadmissible in the Public Interest", 54 A.L.J. 127 (1980).

Dennis Pearce, "The Courts and Government Information", 50 A.L.J. 513 (1976).

Diane Amann, "Publicker Industries v. Cohen: Public Access to Civil Proceedings and a Corporation's Right to Privacy", 80 Nw.U.L.Rev. 1319 (1987).

Edward Shils, "Privacy: Its Constitution and Vicissitudes", 31 Law & Contem.Prob. 281 (1966).

Elias Clark, "Holding Government Accountable: The Amended Freedom of Information Act", 84 Yale L.J. 741 (1974-75).

G.Warburton, "Taking Student Rights Seriously: Rights of Inspection and Challenge", 8 U.N.S.W.L.J. 362 (1985).

Garth Nettheim, "The Principle of Open Justice", 8 U.Tasmania L.Rev. 25 (1984).

Gerald F.O.Cunnel Jr., "Recent Cases", 52 U.Cin.L.Rev.921 (1983).

H.Storey, "Infringement of Privacy and its Remedies", 47 A.L.J. 498 (1973).

H.N.Janisch, "Analysis--The Canadian Access to Information Act", [1982] P.L. 534.

Harold G.Rudolph, "Freedom of the Press or the Right to Know", 98 S.A.L.J. 81 (1981).

Harry Street, "State Secrets--A Comparative Study", 14 M.L.R. 121 (1951).

Henry Bartholomew Cox & Arthur Selwyn Miller, "On the Need for a National Commission on Documentary Access", 44 Geo.Wash.L.Rev. 213 (1976).

Henry G.Fischer & James A.Pike, "Discovery Against Federal Administrative Agencies", 56 Harv.L.Rev. 1125 (1943).

Herman Wolkinson, "Demands of Congressional Committees for Executive Papers", 10 Fed.Bar J. 103 (1949).

Hunt of Tanworth, "Analysis--Access to a Previous Government's Papers", [1982] P.L. 514.

I.G.Eagles, "Cabinet Secrets as Evidence", [1980] P.L. 263.

Ian Eagles, "Cabinet Secrets in New Zealand", [1982] C.L.J. 11.

Ian Eagles, "Public Interest Immunity and Statutory Privilege", [1983] C.L.J. 118.

J.Stephan Kos, "Crown Privilege: Recent Developments in New Zealand", 10 V.U.W.L.R. 115 (1979-80).

J.E.S.Simon, "Evidence Excluded by Considerations of State Interest", [1955] C.L.J. 62.

James A.Dobkin & James X.Dempsey, "Protection of Corporate Secrets in Government Contract Proposals and Bids", 15 Pub.Cont. L.J. 46 (1984).

James A.Pike & Henry G.Fischer, "Discovery against Federal Administrative Agencies", 56 Harv. L.Rev. 1125 (1943).

James R.Newman, "Control of Information Relating to Atomic Energy", 56 Yale L.J. 769 (1947).

James X.Dempsey & James A.Dobkin, "Protection of Corporate Secrets in Government Contract Proposals and 15 Pub. Cont.L.J. 46 (1984).

Jane Swanton, "Protection of Privacy", 48 A.L.J. 91 (1974).

Janice Toran, "Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules", 49 Geo.Wash.L.Rev. 843 (1980-81).

Jed Rubenfeld, "The Right of Privacy", 102 Harv.L.Rev. 737 (1989).

Jerome E.Wallace, "Out of Sunshine and into the Shadows: Six Years of Misinterpretation of the Personal Privacy Exemption of the Kentucky Open Records Act", 71 Kentucky L.J. 853 (1982-83).

Jerome F.Ponsoldt, "Balancing Government Efficiency and the Protection of Individual Liberties: An Analysis of the Conflict between Executive Branch 'Housekeeping' Regulations and Criminal Defendants' Right to a Constitutionally Fair Trial", 19 Harv.C.R.-C.L.L.Rev. 349 (1984).

John A.Hoglund & Jonathan Kahan, "Invasion of Privacy and the Freedom of Information Act: Getman v. N.L.R.B., 40 Geo.Wash.L.Rev. 527 (1971-72).

John J.Mitchell, "Government Secrecy in Theory and Practice: "Rules and Regulations" as an Autonomous Screen", 58 Colum.L.Rev. 199 (1958).

Jonathan Kahan & John A.Hoglund, "Invasion of Privacy and the Freedom of Information Act: Getman v. N.L.R.B., 40 Geo.Wash. L.Rev. 527 (1971-72).

Joseph Jacob, "Discovery and Public Interest", [1976] P.L. 134.

Joseph Jacob, "Some Reflections on Governmental Secrecy", [1974] P.L. 25.

Joseph W.Bishop, "The Executive's Right of Privacy: An Unresolved Constitutional Question", 66 Yale L.J. 477 (1957).

Joyce R.Starr & Robert M.Mc Namara, "Confidentiality of Narcotic Addict Treatment Records: A Legal and Statistical Analysis", 73 Colum.L.Rev. 1579 (1973).

K.C.Davis, "The Information Act: A Preliminary Analysis", 34 U.Chi.L.Rev. 761 (1967).

K.C.Joshi, "Right to Privacy: An Extension of Personal Liberty", 4 Kurukshetra L.J. 131 (1978).

Karen Czapanskiy, "Time Limits under the Freedom of Information Act: Another Problematic New Property Reform", 44 Md.L.Rev. 38 (1985).

Kathryn J.Giddings, "The Current Status of the Right of Adult Adoptees to Know the Identity of Their Natural Parents", 58 Wash.U.L.Q. 677 (1980).

Kenneth D.Salomon & Lawrence H.Wechsler, "The Freedom of Information Act: A Critical Review", 38 Geo.Wash.L.Rev. 150 (1969-70).

Kenneth L.Karst, "The Files: Legal Control over the Accuracy and Accessibility of Stored Personal Data", 31 Law & Contem.Prob. 342 (1966).

Kent Greenawalt, "Free Speech Justifications", 89 Colum.L.Rev. 119 (1989).

Kurt H.Nadelman, "Non-disclosure of Dissents in Constitutional Courts: Italy and West Germany", 13 Am.J.Comp.L.26 (1964).

Kurt H.Nadelmann, "The Judicial Dissent: Publication v. Secrecy", 8 Am.J.Comp.L. 415 (1959).

Lawrence H.Wechsler & Kenneth D.Saloman, "The Freedom of Information Act: A Critical Review", 38 Geo.Wash.L.Rev. 150 (1969-70).

Lindsay J.Curtis, "Freedom of Information: The Australian Approach", 54 A.L.J. 525 (1980).

Lisa A.Mednick, "Awarding Fees to the Self-represented Attorney under the Freedom of Information Act", 53 Geo.Wash.L.Rev. 291 (1984-85).

Louis D.Brandies & Samual D.Warren, "The Right to Privacy", 4 Harv.L.Rev. 193 (1890).

Louis Fisher, "Confidential Spending and Governmental Accountability", 47 Geo.Wash.L.Rev. 347 (1978-79).

M.C.Pramodan, "The Right to Privacy", [1990] C.U.L.R. 59.

M.D.Kirby, "Access to Information and Privacy: The Ten Information Commandments", 55 U.Cin.L.Rev. 745 (1987).

Mark S.Wallace, "Discovery of Government Documents and the Official Information Privilege", 76 Colum.L.Rev. 142 (1976).

Martin H.Redish, "The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression", 39 Geo.Wash.L.Rev. 429 (1970-71).

Martin H.Redish, "The Value of Free Speech", 130 U.Pa.L.Rev. 591 (1982).

Mary M.Cheh, "The Progressive Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls", 48 Geo.Wash.L.Rev. 163 (1979-80).

Michael Allyn,Stroud, 'Note', 57 Tulane L.Rev. 1564 (1963).

Michael R.Lemov, "Administrative Agency News Releases: Public Information versus Private Injury", 37 Geo.Wash.L.Rev. 63 (1968-69).

Michelle D.Brodie, "Annual Survey of South Carolina Law: Administrative Law", 37 South Carolina L.Rev. 1 (1985).

Milton M.Carrow, "Governmental Non-disclosure in Judicial Proceedings", 107 U.Pa.L.Rev. 166 (1958).

Note, "A Procedural Framework for the Disclosure of Business Records Under the Freedom of Information Act", 90 Yale L.J. 400 (1980-81).

Note, "Awarding Attorney's Fees to Prevailing Pro Se Litigants", 80 Mich.L.Rev. 1111 (1981-82).

Note, "Awarding Fees to the Self-represented Attorney under the Freedom of Information Act", 53 Geo.Wash.L.Rev.291 (1984-85)

Note, "Discovery from the United States in Suits between Private Litigants--The 1958 Amendment of the Federal Housekeeping Statute", 69 Yale L.J. 452 (1960).

Note, "Executive Immunity from Judicial Power to Compel Documentary Disclosure", 51 Colum.L.Rev. 881 (1951).

Note, "Government Privilege Against Disclosure of Official Documents", 58 Yale L.J. 993 (1949).

Note, "National Security and the Amended Freedom of Information Act", 85 Yale L.J. 401 (1975-76).

Note, "Occupational Health Risks and the Worker's Right to Know", 90 Yale L.J. 1792 (1981).

Note, "Open Meeting Statutes: The Press Fights for the 'Right to Know' ", 75 Harv.L.Rev. 1199 (1962).

Note, "Plugging the Leak: The Case for a Legislative Resolution of the Conflict between the Demands of Secrecy and the Need for an Open Government", 71 Va.L.Rev. 801 (1985).

Note, "The C.I.A's Secret Funding and the Constitution", 84 Yale L.J. 608 (1974-75).

Note, "The Executive Evidential Privilege in Suits against the Government", 47 Nw.U.L.Rev. 259 (1952).

Note, "The Freedom of Information Act: A Seven Year Assessment", 74 Colum.L.Rev. 895 (1974).

Note, "The Information Act: Judicial Enforcement of the Records Provision", 54 Va.L.Rev. 466 (1968).

Note, "The Military and State Secrets Privilege: Protection for the National Security or Immunity fof the Executive?", 91 Yale L.J. 570 (1981-82).

Note, "The Right of the Press to Gather Information", 71 Colum.L.Rev. 838 (1971).

Note, "The Supreme Court 1973 Term", 88 Harv.L.Rev. 41 (1974).

P.Ingress Bell, "Crown Privilege", [1957] P.L. 28.

P.D.Finn, "Confidentiality and the Public Interest", 58 A.L.J. 497 (1984).

P.H.Winfield, "Privacy", 47 L.Q.R. 23 (1931).

Patrick Birkinshaw, "Freedom of Information: The Elected Member and Local Government", [1981] P.L. 545.

Paul A.Freund, "The Supreme Court, 1973 Term Forward: On Presidential Privilege", 88 Harv.L.Rev. 13 (1974).

Paul Hardin, "Executive Privilege in the Federal Courts", 71 Yale L.J. 879 (1962).

Paul S.Grobman, "The Constitutionality of Statutorily Restricting Public Access to Judicial Proceedings: The Case of the Rape Shield Mandatory Closure Provision", 66 B.U.L.Rev. 271 (1986).

Peter Burns, "The Law and Privacy: The Canadian Experience", 54 Can.Bar Rev. 1 (1976).

R.Grant Hammond, "Quantum Physics, Econometric Models and Property Rights to Information", 27 McGill L.J. 47 (1981).

Radin N.A., "The Right to a Public Trial", (1932) Temple L.Q. 381.

Raoul Berger, "Congressional Subpoenas to Executive Officials", 75 Colum.L.Rev. 865 (1975).

Raoul Berger, "Executive Privilege: A Reply to Professor Sofaer", 75 Colum.L.Rev. 603 (1975).

Raoul Berger, "The Presidential Monopoly of Foreign Relations", 71 Mich.L.Rev. 1 (1972-73).

Raoul Berger & Abe Krash, "Government Immunity from Discovery", 59 Yale L.J. 1451 (1950).

Raymond Wacks, "Book Review on Secrets: On the Ethics of Concealment and Revelation by Sissela Bok", 50 M.L.R. 125 (1987).

Richard Allen Vance, "Discovery of Government Attorney Work Product Under the F.O.I.A.", 71 Kentucky L.J. 919 (1982-83).

Richard Olin Burner, "The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act", 76 Colum.L.Rev. 1029 (1976).

Richard S.Fortunato, "F.D.A.Disclosure of Safety and Efficacy Data: The Scope of Section 301(j)", 52 Fordham L.Rev. 1280 (1984).

Robert G.Nath, "Upjohn:A New Prescription for the Attorney--Client Privilege and Work Product Defenses in Administrative Investigations", 30 Buf.L.Rev. 11 (1981).

Robert M.McNamara & Joyce R.Starr, "Confidentiality of Narcotic Addict Treatment Records: A Legal and Statistical Analysis", 73 Colum.L.Rev. 1579 (1973).

Robert N.Spencer, "The Hospital Incident Report: Asset or Liability", 22 A.F.L.Rev. 148 (1980-81).

Ruth Gavison, "Should We Have A 'General Right to Privacy' in Israel", 12 Is.L.R. 155 (1977).

S.I.Benn, "The Protection and Limitation of Privacy", 52 A.L.J. 601 (1978).

S.I.Bushnell, "Crown Privilege", 51 Can.Bar Rev. 551 (1973).

S.N.Lederman, "Discovery--Production of Documents--Claim of Privilege to Prevent Disclosure", 54 Can.Bar Rev. 422 (1976).

Samual D.Warren & Louis D.Brandies, "The Right to Privacy", 4 Harv.L.Rev. 193 (1890).

Sharon Anglin Treat, "The New Jersey Right to Know Act", 38 Rutger's L.Rev. 755 (1986).

Stanley A.Cohen, "Freedom of Information and the Official Secrets Act", 25 McGill L.J. 99 (1979).

Stephan J.Toope & Alison L.Young, "The Confidentiality of Tax Returns Under Canadian Law", 27 McGill L.J. 478 (1982).

Stephen S.Madsen, "Protecting Confidential Business Information from Federal Agency Disclosure after Chrysler Corp. v. Brown", 80 Colum. L.Rev. 109 (1980).

Thomas A.Piriano Jr., "Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Toward a More Objective Standard", 60 Cornell L.Rev. 109 60 Cornell L.Rev. 109 (1974-75).

Thomas C.Hennings Jr., "The People's Right to Know", 45 A.B.A.J. 667 (1959).

Thomas I.Emerson, "Colonial Intentions and Current Realities of the First Amendment", 125 U.Pa.L.Rev. 737.

Thomas I.Emerson, "First Amendment Doctrine and the Burger Court", 68 Calif.L.Rev. 422 (1980).

Thomas I.Emerson, "Legal Foundations of the Right to Know", (1976) Wash.U.L.Q. 1.

Thomas I.Emerson, "Toward a General Theory of the First Amendment", 72 Yale L.J. 877 (1963).

Victor H.Polk Jr., "Publication under the Freedom of Information Act of Statements of General Policy and Interpretation of General Applicability", 47 U.Chi.L.Rev. 351 (1979-80).

Wellington, "On Freedom of Expression", 88 Yale L.J. 1105 (1979).

Wesley R.Heppler & Burt A.Braverman, "A Practical Review of State Open Records Laws", 49 Geo.Wash.L.Rev. 720 (1980-81).

William Birtle, "Big Brother Knows Best: The Frank's Report on Section Two of the Official Secrets Act", [1973] P.L. 100.

William J.Brennan Jr., "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", 79 Harv.L.Rev. 1 (1965).

William L.Prosser, "Privacy", 48 Cal.L.Rev. 383 (1960).

William M.Beaney, "The Right to Privacy and American Law", 31 Law & Contem.Prob. 253 (1966).

Yvonne Cripps, "Judicial Proceedings and Refusals to Disclose the Identity of Sources of Information", [1984] C.L.J. 266.