DEMOCRACY, PARTICIPATION AND *LA TRANSPARENCE*: FREEDOM OF INFORMATION IN FRANCE AND AUSTRALIA

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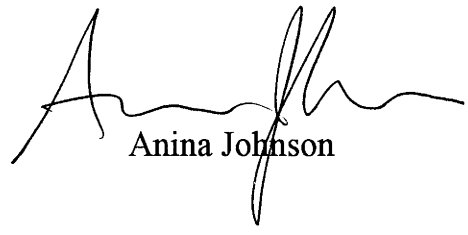
I confirm that this thesis is my own work and that all sources used have been acknowledged.



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ABSTRACT

Democracy works when the public has access to information about government. An informed public can participate in administrative decisions, criticise government action and truly choose their elected representatives. The High Court has recognised the importance of information in a representative democracy. The legislatures in France and Australia have acknowledged this by enacting Freedom of Information legislation providing for a right of access to documents. The exceptions to this right reflect the public interest in maintaining a certain level of secrecy about government activity. The question is whether the legislation is sufficient to meet democratic needs. Balancing the competing obligations of secrecy and openness is an ongoing exercise. Of importance is ensuring that the privatisation of the public sector and the use of outsourcing do not detract from the public's ability to oversee the spending of public money. Effectiveness is also influenced by the review process, the attitude of the bureaucracy and government, and the extent to which the right is used by the media, lobby groups, lawyers and academics.

This thesis explores and contrasts the Freedom of Information regime both in France and that under the Freedom of Information Act 1982 (Cth) ("the FOI Act "). It pays particular attention to the way in which the issues noted above can impact upon the democratic objectives of the FOI legislation. The study shows that the FOI regimes in both countries facilitate access, but that there are several opportunities for improvement. Drawing on the insight gained from the study of the French system, this thesis offers a number of possible modifications to the Australian legislation. Two key changes are suggested. First the establishment of a FOI Commissioner to review agency decisions and undertake an educative and performance monitoring role. On review, the Commissioner should have the opportunity to seek advice from a panel of administrative experts. Secondly, that the right of access be extended to private organisations which carry out public activities, but only where documents relate to those activities. The definition of "public activities" should reflect the extent of administrative control over the body, the degree to which public money pays for the service, and any "government" powers exercised by the body. Access applications should be made directly to the private organisation, who would incorporate the cost of such a service into their contract price. This thesis submits that these changes would provide the Australian public with a robust FOI Act that would enhance the quality of Australian democracy.

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INTRODUCTION

The High Court decisions on freedom of speech have provided public lawyers with fresh inspiration as to how democracy in Australia should work. It is a vision which places great importance on the role of information in a modern society. Citing an earlier decision of Justice McHugh the High Court in *Lange* held:

> In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matter relevant to the exercise of public functions and powers vested in public representatives and officials.[1]

The Freedom of Information Act 1982 (Cth) ("the FOIA") has a critical role to play in providing the public with the information it needs to understand the decisions being made by administrators and to react to or participate in those decisions.

For some time, the FOIA has been criticised as being inadequate for its democratic task. Users of FOI have complained of broad exemptions, uncooperative bureaucrats and inefficient review mechanisms. Further the FOIA was drafted for a bureaucracy of the late 1970s. Government and administration have changed considerably since that time, with increasing emphasis on corporatising, privatising and outsourcing. The crucial role of information in this privatised public sector means that, despite its faults, the FOIA is too important to simply abandon to inadequacy.

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[1] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 264.

In seeking original ideas to remedy these problems, it was decided to look outside of the common law system and towards a country with a long history of democracy and public participation in power – France. There are many advantages to researching the French FOI regime. French economic and political structures are sufficiently similar to make comparison with Australia meaningful. In addition, very little English work has been done on FOI in France, which meant that a considerable resource lay untapped. Comparative work also has its own inherent values. In exploring and coming to grips with a different system, the researcher questions and reaches a new understanding of the characteristics of the researcher's own system. Under the influence of Dicey, French administrative law has traditionally been viewed as the antithesis of the English common law system. *Droit administratif* forms a completely separate jurisdiction, with a long history of treating public players as having different obligations, rights and duties from private citizens. Its judges are in fact expert administrators rather than lawyers. The close study of a particular area of administrative law provided a chance to test the assumption that administrative law in Australia and France was radically different, and at the same time benefit from any new ideas that difference could offer.

This thesis begins by considering the FOIA. The purpose here is not to provide a thorough examination of the Act. It is to explore the democratic objectives of the Act and then consider the case law and practice to see whether the FOIA achieved its goals. This is done in Chapter One, which is divided into three parts. Part A explores the rationale of public access to government documents. Part B considers the case law in relation to two exemption provisions, internal working documents and business affairs documents. The purpose was to see if the rationale was reflected in the interpretation of these exemptions. Part C follows the process of applying for documents under the FOIA, to test compliance by the administration and review bodies with the democratic objectives of FOI. The Commonwealth FOIA was chosen for this study because it has the longest history , and as it operates at a national level is probably the closest equivalent to the French FOI law. The constraints of a thesis of this nature prevented me from exploring any other FOI regimes.

Chapter Two explores the French regime of public access to government documents. The aim here was to give as full an understanding of the nature of FOI in France as possible, given the constraints of space. Part A sets out the background to the French FOI law, considering the history of secrecy in France and the gradual progress that has been made

towards transparency. The discussion of FOI jurisprudence is divided in two parts. In Part B, the important concept of administrative document is examined. This is followed in Part C by an analysis of those documents which are not accessible. Specific consideration is given to the exceptions which are the equivalent of those discussed in an Australian setting in the first chapter. Part D explores the procedure involved in making an application for documents, at both the initial and review stages. Finally, in Part E there is consideration of the impact of the law of the European Community on access to documents in France and an overview of proposed amendments to the FOI law.

The final chapter of the thesis draws together the earlier two chapters. It begins with an examination of the benefits and difficulties of comparative work in this context. Rather than suggest an overthrow of the Australian system in favour of the French approach, the third chapter considers a number of themes for change. Some draw direct inspiration from the way in which France has dealt with the problems now being faced in Australia. Others came out of the insights I obtained by stepping outside of my own legal system to explore another. As a whole, they provide suggestions for improving the FOIA so that it continues to serve the Australian public well as we move towards the next century.

The law is stated as at 15 November 1999. All translations are my own.

CHAPTER I AUSTRALIA

The literature in Australia indicates that there is widespread disappointment with the way in which the FOIA operates. The intention of this Chapter is to analyse the rationale of the FOIA and then consider whether this objective is being achieved in practice. This will be done in three parts. In the first part, I examine the various interpretations of the objective of the FOIA, including consideration of the role played by the notion of the public interest. Of considerable relevance to these discussions of democracy and the public interest in Australia are the High Court cases on the constitutional doctrine of free speech. There is discussion of the impact of these decisions on the interpretation of the objectives of the FOIA. In the second part, I compare the objective of the FOIA with the way in which it is interpreted in practice, by reference to the case law on two of the exceptions in the Act, ss.36 and 43. Both sections deal with topical issues: firstly excluding access to the documents which precede policy decisions and secondly those documents which relate to business affairs. The final part considers how the application and review process works in practice, to determine if this process assists or hinders the democratic objectives of the FOIA.

This chapter does not pretend to provide a complete overview of the FOIA, that is beyond the scope of this thesis. Constraints of space prevent me from exploring other common law systems of FOI, whether they be in the Australian States or in the United States. The one exception to this rule is a brief study of the FOI Commissioners in WA and Queensland, which serves as a comparison to the AAT model of review.

A.Rationale of public access to government documents

Before determining whether the FOIA has been effective in achieving its goals, it is necessary to first establish what those goals might be. This section begins with a brief overview of how the FOIA came into being. It then reviews academic and judicial notions of the rationale for the FOIA. This review centres around several key ideas in the FOIA,

namely democracy, accountability and the public interest. In the past decade, the High Court has commented on the role of these concepts or values in Australia's constitution. Such an important discussion can not be ignored, because it throws new (and highly influential) light on the meaning of these terms in an Australian context and because it is possible that these decisions will lead to a new approach to the interpretation of the FOIA.

1. Legislative and political history of the FOIA

The push for an Australian FOIA was inspired by the passage of the United States' Act in 1966. This concrete example of democracy at work coincided with an increasing recognition that Westminster tradition of secrecy did not always serve the Australian people well.[2] In 1972, the Whitlam government was elected on a platform of "open government" and the Attorney General Lionel Murphy established an Interdepartmental Committee to consider the United States' FOIA and how it could be adapted for adoption in Australia.[3] In December 1974, the Committee reported, suggesting that FOI legislation be adopted.[4] It suggested some modification to the US legislation to reflect Australia's constitutional requirements, including provision for a minister to issue a conclusive certificate exempting documents. Nonetheless, the Report was criticised by the Royal Commission on Australian Government Administration for failing to properly adapt the proposed FOI Bill to the constitutional and administrative limits of Australia.[5]

A second Interdepartmental Committee was established in 1976 to again consider FOI legislation, this time under the Fraser government. It expanded the proposals put forward in the 1974 report, maintaining the general principle that a person should have a right of access to any administrative documents which did not fall within closely defined exceptions, without any need to provide a reason or demonstrate a legitimate interest.[6] The establishment of this second Interdepartmental committee coincided with increasing public lobbying for FOI. A public interest group, "Freedom of Information Legislation Campaign" was established. Its members included politicians from both major parties,

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[2] See for example, J Spigelman, *Secrecy: political censorship in Australia*, (1972) as cited in P Bayne, *Freedom of Information* (1984) at 4.
[3] Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982* (1995) at 19; P Bayne, above note 2 at 4.
[4] Attorney-General's Department, *Proposed Freedom of Information legislation: report of Inter-Departmental Committee*, (1974).
[5] P Bayne, above note 2 at 4.

members of the trade union movement, journalists, academics, students, environmentalist and feminist groups.[7]

In 1978 the FOI Bill was introduced into the Senate by the then Attorney-General, Senator Peter Durack QC. Within 3 months, it had been referred by the Senate to the Standing Committee on Constitutional and Legal Affairs. The Committee undertook a thorough investigation and produced a report in November 1979 recommending 93 changes, most of which advocated broader legislation.[8] The government responded to the Committee's report on 11 September 1980, disagreeing with most of the key recommendations. A revised Bill, known as the FOI Bill 1981 was introduced into the Senate on 1 April 1981 and received the Royal Assent on 9 March 1982. It became operational on 1 December 1982.

The FOIA has been subject to three substantive amendments. In 1983, the Act was amended to provide a greater right of access (although not as great as the government had originally promised)[9] and to allow the AAT to review refusals. In 1986 the fees charged for obtaining documents under the FOIA were increased and expanded. Amendments in 1991 implemented recommendations made by the Senate Standing Committee report produced in 1987. They clarified the interpretation of some provisions, including the exemption provisions and simplified the procedure for making a request and imposing charges.[10]

2. Academic and Judicial Evaluation of the Rationale of the FOIA

Part of the purpose of this thesis is to compare the rationale of the French and Australian regimes for accessing government information, and to also compare those rationales to the reality of trying to obtain government documents in each country. The political history of the FOIA, explored above, sheds some light on the question of the reason behind FOI. This section will explore the "purpose" of the FOIA as understood from an analysis of the Act itself. Section 3 of the Act provides a legislative assessment of the object of the Act.

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[6] ALRC/ARC, above note 3 at 20.
[7] ALRC/ARC, above note 3 at 20; P Bayne, above note 2 at 5.
[8] P Bayne, above note 2 at 5; ALRC/ARC, above note 3 at 21.
[9] P Bayne, above note 2 at 6.
[10] ALRC/ARC, above note 3 at 21-23.

Judicial and academic commentary on the section provides a partial understanding of the purpose of the FOIA. The other fundamental concept in the Act is that of the public interest. This concept is used throughout the FOIA and there is an analysis of its definition, and use.

a) Notions of the object of the FOIA

One of the standard tools of legislative interpretation is to ascertain the purpose of an act, and then adopt the interpretation which best furthers that purpose. For this reason alone, the notion of the object of the FOIA is a significant one. A discussion of the object as viewed by commentators and review bodies alike sets the scene for an analysis of the practical operation of the FOIA.

Unusually for legislation of its era, the FOIA contains a clause setting out the objects of the Act. The clause reads:

> (1) The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by:
>
> > (a) making available to the public information about the operations of departments and public authorities and, in particular, ensuring that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and
> >
> > (b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities; and
> >
> > (c) creating a right to bring about the amendment of records containing personal information that is incomplete, incorrect, out of date or misleading.
>
> (2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to

facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

On reading s.3 there are three things come immediately to mind. Firstly, the section appears to be intent on breaking down the boundaries of government secrecy and opening up public access to information. Section 3(2) suggests that the legislature intended this change to be pursued with vigour. Secondly, concepts such as democracy, open government, accountability and sovereignty of the people are not mentioned. Thirdly, despite the breadth of change foreshadowed, the legislature has preserved some documents as secret in order to protect "essential public interests". These impressions will be explored below.

(1) Breaking down government secrecy

There seems to be little doubt that the Westminster system cherished the notion of secrecy amongst its public servants.[11] Justice Kirby, speaking extra-judicially described it as "the bureaucratic philosophy of 'Nanny knows best'."[12] It was a notion which was strongly entrenched in the Australian bureaucracy.[13] As President of the New South Wales Court of Appeal, Kirby commented that the purpose of the NSW FOIA was to break down the traditional anonymity of public servants and to remedy the feeling of powerlessness felt by individuals who are affected by their decisions.[14] This idea can be seen in the Commonwealth FOIA. In *Re Sullivan and Department of Industry Science and Technology*[15] the Tribunal took this notion one step further when it held that the FOIA was an Act which was addressed to ordinary Australians (rather than lawyers) and its provisions should be given their ordinary Australian meaning. The Tribunal specifically included within the compass of the term "ordinary Australian" the public officials who are the original decision makers on FOI applications.[16]

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[11] K Bishop, "Openness in Public Administration: Can the Government Keep a Secret?" (1997) 5 *AJAL* 35 ; forward by Justice Kirby in A Cossins *Annotated Freedom of Information Act New South Wales* (1997); P Bayne, above note 2 at 4; A Cossins, "Revisiting Open Government: Recent Developments in Shifting the Boundaries of Government Secrecy Under Public Interest Immunity and Freedom of Information Law" (1995) 23 *FLR* 226 at 228.

[12] A Cossins (1997), above note 11 at vii.

[13] P Bayne, above note 2 at 2.

[14] *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 at 625-626.

[15] *Re Sullivan and Department of Industry, Science and Technology (No 1)* (1996) 23 AAR 59.

[16] Ibid. at 64-67.

In practice, as many commentators have noted, FOIA has not been so successful in breaking down the secrecy that surrounds the administration of government.[17] The administration's continuing addiction to secrecy can be seen in the energy with which it pursues claims for exemption, and the arguments used to make those claims.[18] For example exemptions claimed for documents created at a high level frequently cite the need for confidentiality and frankness between public officials. These claims are discussed in detail below.[19] As a result many commentators have said that it is necessary to break down this culture of secrecy for the FOIA to work effectively.[20] To prevent acts of maladministration, "such as intentional procedural delay, deliberate misplacement of documents and failure to commit information and communications to writing" there must be a change in the public service culture to one of openness.[21] Legislation alone will not bring about the required reform.

(2) Democracy and accountability

Despite the fact that theories of democracy are not explicitly mentioned in the FOIA, the democratic underpinning of the Act has been widely accepted in both judicial and academic circles. There are of course a number of different views as to what is meant by "democracy".[22] The ALRC found that the fundamental reason for freedom of information rests on the people's right to open and accountable government. FOI increases public scrutiny of and participation in government; allows for access to personal information and develops the quality of democracy.[23] Commenting during the parliamentary debate on the FOIA, Kim Beazley said:

> The basis of democracy is not responsible government, separation of powers or any other constitutional formula ... [It] is that each individual in society has a right to

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[17] ALRC/ARC, above note 3 at 35–36.
[18] R Snell, "Obviously Four Unbelievers: Adequacy of searches under FOI, an act of faith?" (1994) *FoI Review* 15; R Snell, "The Ballad of Frank and Candour: Trying to Shake the Secrecy Blues from the Heart of Government" (1995) June 1995 *FoI Review* 34 and also the comments of M Ricketson, "Freedom *from* Information" (1996) 63 *FoI Review* 26; A Cossins (1995), above note 11 at 299.
[19] See B1 below from page 26 onwards.
[20] K Bishop, above note 11 at 46 -47; M Kirby, "Freedom of Information: The Seven Deadly Sins", London (17 December 1997) at 10; P Bayne, "Freedom of Information in Australia" in T W Bennett (ed), *Administrative Law Reform* (1993) 197 at 225; R Snell (1994), above note 18 at 36; P Finn, "The Abuse of Public Power in Australia - Making our Governors Our Servants" (1994) 5 *Public Law Rev* 43 at 52.
[21] K Bishop, above note 11 at 47.
[22] P Bayne, "Freedom of Information and Political Free Speech" in T Campbell and W Sadurski (eds), *Freedom of Communication* (1994) 199 at 201-203.
[23] ALRC/ARC, above note 3 at 11.

> determine how he or she is collectively governed. Implicit in this is a right of access to information on how decisions are made that directly and indirectly affect our lives.[24]

The High Court has now given some indication of its view of the foundations of Australian democracy, and these will be discussed in more detail below.[25]

The importance of information in a democracy has been widely recognised.[26] The critical concept (in terms of a representative democracy at least) is that people can not properly cast their vote if they are unaware of the actions of government. The 1979 Report of the Senate Standing Committee on the FOI Bill gave three democratic justifications for having effective freedom of information legislation. They were the right of the individual to view his or her own government records, the increased accountability arising from more open government and the increased level of public participation which would result.[27] On this basis, Bayne has suggested that Australia is better described as a participatory democracy rather than a representative one as citizens needs to both "exercise the vote in a more rational manner and, from time to time during its period of office, seek to influence the behaviour of government."[28]

Review bodies have generally acknowledged that the FOIA is designed to give applicants a right of access to documents. Some have gone further and considered the reasoning behind such a right. In one of the early FOI cases, *Nationwide News v NCSC* the public interest in open government was given as the reason for the FOIA.[29] The Tribunal in *Re Cleary* held

> There is no doubt that the FOI Act is predicated on a set of values which have at their core the promotion of democratic processes of government.[30]

However, the Tribunal in *Re Cleary* went on to find that s.3 only assists where the legislation is ambiguous. The AAT has recognised the ability of people to participate in

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[24] Speech given in the House of Representatives on 19 August 1981, cited in P Bayne, above note 2 at 7.
[25] See below from page 23.
[26] See for example the decision of the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[27] See Senate Standing Committee on Constitutional and Legal Affairs, *Report of the on the Freedom of Information Bill* (1979) at 21 –22.
[28] P Bayne, above note 22.
[29] *News Corporation Ltd v National Companies and Securities Commission* (1984) 5 FCR 88 at 105.
[30] *Re Cleary and Department of The Treasury* (1993) 18 AAR 83 at 87.

government as part of the object of the FOIA,[31] citing the High Court free speech cases in support.[32]

FOI also increases government accountability to the people. The importance of this was commented on by Fitzgerald, in his report into the Queensland political system:

> The ultimate check on public maladministration is public opinion which can only be truly effective if there are structures and systems designed to ensure that it is properly informed. ... Information is the lynch pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.[33]

Accountability to the people is significant for a number of reasons. If, as Finn suggests[34] public officials are trustees of the sovereign power of the people then they should be accountable to their masters. In any event, the information held by government does not belong to it, but is held on trust for the people. As Ricketson put it, "Well, if you could not get hold of documents about yourself held by people whose salaries you pay for through taxation, what could you see?"[35]

There is a second, more practical reason for the need for openness in government and direct accountability to the people. As a result of the size of the administration together with the powers of political parties[36] the Westminster notion of Ministerial responsibility to parliament for the actions or misjudgments of the administration can no longer be said to be effective.[37] The people of Australia need to scrutinise the administration themselves and to do so effectively, they need information. FOI is thus an important part of making the people's ownership of government into a more "robust reality".[38] The need to make government accountable to the people has been recognised by the Tribunal. It has done so

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[31] *Re Sullivan and Department of Industry, Science and Technology (No 1)* (1996) 23 AAR 59 at 66.
[32] *Re Sullivan and Department of Industry, Science and Technology (No 1)* (1996) 23 AAR 59 at 66; see also *Re Cleary and Department of The Treasury* (1993) 18 AAR 83 at 87.
[33] Cited in A Cossins (1995), above note 11 at 256.
[34] P Finn, above note 20.
[35] M Ricketson, above note 18 at 27.
[36] P Finn, above note 20 at 48; M Kirby, above note 20 at 12.
[37] P Finn, above note 20 at 49; M Kirby, above note 20 at 12.
[38] M Kirby, above note 20 at 12.

by reference to the object or purpose of FOI,[39] but also by giving weight to the public interest in exposing the workings of the administration.[40]

(3) Maintaining government secrecy in the public interest

Section 3(1)(b) FOIA creates a general right of access to information, other than where exceptions to this right are necessary to protect the public interest. The question is how to balance the right with its exceptions.

The ALRC considered that the main purpose of the FOIA was to give a right of access to information, that reference to the exceptions in s.3 distracted tribunals from that purpose and that the FOIA should be amended accordingly.[41] When commenting on the Victoria FOI Act, the High Court held that it was proper to give the Act a construction which promoted free access to information. The Court therefore adopted a narrow construction of a provision which in its view did not promote such a purpose.[42] The importance of accessing information has been said to have received further endorsement from the freedom of speech cases.[43] It is certainly an approach that appears consistent with the legislative history and purpose of the Act, as well as with the legislature's intention as expressed in s.3(2).[44] As such, commentators have urged review bodies to accept that the FOIA should be construed in a way which leans towards granting access.[45]

However, despite the decision in *Victorian Public Service Board v Wright*[46] the Federal Court has declined to adopt a "leaning" approach to the Commonwealth FOIA. This reluctance to give precedence to access over the exemptions has been evident for some

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[39] For example *News Corporation Ltd v National Companies and Securities Commission* (1984) 5 FCR 88 at 105; *Re Sullivan and Department of Industry, Science and Technology (No 2)* (1998) 49 ALD 743 at 752.
[40] For example *Re Walker and the Federal Commissioner of Taxation* (1995) 30 ATR 1037 at 1039; *Re Cook and Comcare* (1996) 23 AAR 19 at 28-29; *Re Hanbury-Sparrow and Department of Foreign Affairs and Trade* (Administrative Appeals Tribunal, Senior Member Bayne, 10 September 1997, unreported) at paras 54–56.
[41] ALRC/ARC, above note 3 at 32.
[42] *Victorian Public Service Board v Wright* (1986) 160 CLR 145 at 154.
[43] P Bayne, "The Objects of the Freedom of Information Acts and their Interpretation" (1995) 2 *AJAL* 114 at 118; A Cossins (1995), above note 11 at 230; P Bayne, above note 22 at 210.
[44] *Arnold v Queensland* (1987) 6 AAR 463 at 472-473 per Wilcox J; see also P Bayne, "Freedom of Information and Democracy: a Return to the Basics?" (1994) 1 *AJAL* 107 at 110–111.
[45] P Bayne, above note 44 ; P Bayne, above note 22; P Bayne, above note 43; P Bayne, "Recurring Themes in the Interpretation of the Commonwealth Freedom of Information Act" (1996) 24 *FLR* 287; A Cossins, above note 11; T Moe, "Section 38: a Provision of First or Last Resort" (1994) *FoI Review* 26; R Snell, above note 18; R Snell, "Journey from the comfort zone: a few steps towards open government" (1995) *FoI Review* 3.

time. In an early decision on the FOIA, the Full Court of the Federal Court in *News Corporation v NCSC* held:

> It has been suggested that the form of s.3 is such that the court when considering rights of access should lean towards an interpretation of the provision of the Act but when considering exemptions should lean towards a narrow interpretation....
>
> In construing our Act [as distinct from the US FOIA] we do not favour the adoption of a leaning position. The rights of access and the exemptions are designed to give a correct balance of the competing public interest involved. Each is to be interpreted according to the words used, bearing in the mind the stated object of the Act.[47]

This approach was cited with approval by Burchett J in *Arnold v Queensland* where he held that it was "too late to regard s.3 as introducing any bias into the construction of the exemptions in the *Freedom of Information Act*."[48] The exemptions were as much a part of the Act as the right of access accorded by ss.3 and 11.[49] Although the matter was heard after the decision of the High Court in *Wright* it appears that the latter was not cited to the Court in *Arnold*.

When the matter came to be considered again by the Full Federal Court in *Searle v Public Interest Advocacy Centre*[50] Bayne, as counsel, brought the decision of *Wright* to the attention of the Full Court. The Court restricted the scope of *Wright* to situations where the court was required to resolve an inconsistency in the legislation, but accepted that in that case, the section should be interpreted in light of the object of the Act. However, the Court rejected the broader proposition that it should adopt a leaning approach.[51] In cases, such as *Searle* where there was no strict inconsistency, even where the provisions were vague and ambiguous,[52] there is no obligation on the court to have regard to the provisions of s.3.

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[46] *Victorian Public Service Board v Wright* (1986) 160 CLR 145
[47] *News Coporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64 at 66 per Bowen CJ and Fisher J.
[48] *Arnold v Queensland* (1987) 6 AAR 463 at 482.
[49] Ibid, but contrast the judgement of Wilcox J at 472-473 in the same case.
[50] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111.
[51] Ibid. at 114 –115.
[52] P Bayne, above note 43 at 118.

Thus, for the present, it is settled that the FOIA is not to be construed in a manner which favours access to information. The free speech cases may prompt the Court to reconsider its position on this point,[53] but its reluctance to do so in the past makes such a change unlikely. Nonetheless, the ruling in *Searle* has not prevented the Tribunal from using the public interest test to give great weight to the public interest in disclosure, thus creating a form of "leaning" approach.[54]

b) Notions of the public interest

The question of the public interest in the disclosure or non-disclosure of documents regularly arises under the FOIA. It is worth considering for two reasons. Firstly, it reveals how review bodies perceive the rationale of the FOIA and the role of government. Secondly, when weighing competing public interest claims, they face the choice of following traditional notions of government secrecy or giving weight to the public interest in open and accountable government. This section will consider the theoretical basis of the public interest and discuss some of the more controversial public interest factors which have been considered by review bodies from time to time.

The role of the public interest in the exemptions has been extensively examined.[55] The Australian Law Reform Commission report *Open government: a review of the federal Freedom of Information Act 1982* includes an analysis of whether public interest tests should be specifically included in some of the exemption provisions. It is beyond the scope of this thesis to examine all but two examples which will be explored below. Here, it is sufficient to draw attention to some of the aspects of the public interest at a general level.

The public interest arises for consideration in the FOIA in four different ways.[56] In s.36(1)(b), the exemption only applies if disclosure would be contrary to the public interest. In other sections (such as ss.33A(5), 39(2), 40(2)) the exemptions apply unless

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[53] P Bayne, above note 43 at 118; A Cossins (1995), above note 11 at 230; P Bayne, above note 22 at 210.
[54] *Re Salem Subramnian and Refugee Review Tribunal* (Administrative Appeals Tribunal, Deputy President McMahon, 6 February 1997, unreported) at para 24.
[55] ALRC/ARC, above note 3; P Bayne, above note 2; P Bayne, "Freedom of Information" *Laws of Australia* (1996).

disclosure would, on balance, be in the public interest. Other sections (such as ss.41 and 43) make no specific reference to the public interest, referring instead to the concept of "reasonableness". However, review bodies have consistently held that the concept of reasonableness requires consideration of the public interest.[57] Finally, ss.33 and 44 provide a legislative conclusion to the public interest question, by providing that if a document falls within the description provided for in those sections then it would be contrary to the public interest to disclose it.

The use of the public interest in the FOIA has been applauded because its flexibility is in keeping with democracy as a dynamic concept.[58] It allows a review body to give weight to new cases, such as the High Court freedom of speech cases,[59] or to find a new balance in light of current public thinking. There are many factors which could be considered part of the public interest in releasing documents. Some are of interest to the public at large. In addition, a person may have a more personal interest in the release of documents.

(1) The interest of any member of the public

Under the FOIA, any person, for any reason (or for no reason at all) may apply for documents. There is no test of standing.[60] Underlying the Act is an implicit recognition of a "public right to know" about government.[61] Because the public as a whole has "a right to know", there is always a level of public interest in the release of documents. The right to know is linked to the notion that the public is sovereign and is the true owner of government information. Arguably, government only ever holds information as trustee.[62] A right to know is also part of accountable government.[63] The accountability principle is

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[56] P Bayne, above note 2 at 94; P Bayne, above note 55 at para 72; *Re Bartl and Secretary, Department of Employment, Education ,Training and Youth Affairs* (Administrative Appeals Tribunal, Melbourne, Deputy President McDonald, 29 September 1998, unreported) at para 19.

[57] *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111; *Re Actors Equity Association of Australia and Australian Broadcasting Tribunal* (1984) 7 ALD 584; P Bayne, above note 55 at para 73; M Paterson, "FoI and information privacy: a reasonable balance?" (1992) 66 *Law Institute Journal* 1001 at 1001-1002.

[58] ALRC/ARC, above note 3 at 96; P Bayne, above note 44 at 109; P Bayne, above note 44 at 293.

[59] P Bayne, above note 44 at 289; A Cossins (1995), above note 11 at 248–249.

[60] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 126-127; P Bayne, above note 55 at para 75.

[61] *Re Kamminga and Australian National University* (1992) 15 AAR 297 at 300.

[62] A Cossins (1997), above note 11; Forward by Justice Kirby; *Colakovski v AustralianTelecommunications Corporation* (1991) 29 FCR 429 per Heerey J at 441; P Bayne, above note 44 at 319.

[63] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 264-265; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570-571.

reflected in the fact that there is a public interest in knowing that an Act[64] or agency[65] is properly administered. This principle has been recently used by the Tribunal to introduce a public interest test into government claims for confidentiality under s.45.[66] These considerations balance against the public interest in maintaining the privacy of individuals and businesses, [67] and in the proper workings of government.[68]

Twelve years after the introduction of the FOIA, the ALRC re-evaluated the use of the public interest by review bodies and put forward a list of factors which should and should not be considered when balancing the public interest. Factors to be considered were:

- The general public interest in government information being accessible.
- Whether the document would disclose the reasons for a decision.
- Whether disclosure would contribute to debate on a matter of public interest.
- Whether disclosure would enhance scrutiny of government decision making processes and thereby improve accountability and participation.

Factors which could be considered irrelevant were:

- The seniority of the person who is involved in preparing the document or who is the subject of the document.
- That disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information.
- That disclosure would cause a loss of confidence in government.
- That disclosure may cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.[69]

The approach of the ALRC seems to have influenced Tribunals to adopt a different approach to the public interest.[70]

One new area of concern is the suggestion that part of the public interest test (for the disclosure of personal or business affairs at least) requires that the information be of

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[64] *Re Walker and the Federal Commissioner of Taxation* (1995) 30 ATR 1037 at 1039.
[65] *Re Cook and Comcare* (1996) 23 AAR 19 at 28-29.
[66] *Re Sullivan and Department of Industry, Science and Technology (No 2)* (1998) 49 ALD 743.
[67] *Colakovski v AustralianTelecommunications Corporation* (1991) 29 FCR 429 at 438 per Lockhart J.
[68] *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 at 246.
[69] ALRC/ARC, above note 3 at 96-97.
[70] See discussion of *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 23 AAR 142 below at page 39.

"demonstrable relevance to the affairs of government".[71] The approach arose as the result of remarks made by Heerey J in *Re Colakovski*:

> But if the information disclosed were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed, I think disclosure would be unreasonable.[72]

There have been criticisms of this approach, suggesting that it will narrow the public interest test, that His Honour incorrectly interpreted the US approach and in any event did not intend his comments to be binding.[73] It seems that the American courts adopted this approach to prevent what they saw as the abuse of the FOIA by business seeking information about competitors and markets rather than about government.[74] As Fraser pointed out, s.3(1)(b) creates a general right of access to any information in the possession of government.[75] There is no need for the documents to be relevant to the workings of government. However, Heerey J's approach need not necessarily narrow the definition of public interest. Provided that the notion of "affairs of government" is given a broad interpretation, it simply offers a useful test for balancing privacy interests with the public interest in disclosure.

Some recent decisions of the Tribunal have followed the reasoning of Heerey J. In *Re Scholes and Australian Federal Police*[76] the Tribunal considered whether to release police documents relating to investigations and complaints made about the applicant's activities. The Tribunal's summary of the relevant issues included:

> In order to decide whether or not a proposed disclosure of personal information would be unreasonable the tribunal must balance competing public interests. The first is the public interest in ensuring that personal information about individuals is not necessarily to be disclosed on applications for access to documents. The other public interest is that of having access to information held by government agencies

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[71] *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 at 441 per Heerey J.
[72] Ibid. at 441.
[73] R Fraser, "Freedom of Information and Privacy: Some Recent Developments and Issues" (1994) *FoI Review* 74; P Bayne, above note 44 ; M Paterson, above note 57 .
[74] F H Cate, D A Fields and J K McBain, "The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act" (1994) 41 *Administrative Law Review* 41; M Paterson, above note 57; W B Lane and N Dixon, "Government Decision Making - Freedom of Information and Judicial Review" in B Horrigan (ed), *Government Law and Policy: Commercial Aspects* (1998) 104.
[75] R Fraser, above note 73 at 77.
[76] *Re Scholes and Australian Federal Police* (1996) 44 ALD 299.

> which is relevant to the affairs of government where the disclosure will contribute to a public gain.[77]

There was some evidence before the Tribunal that the AFP had not carried out its functions properly. Citing Heerey J's decision, the Tribunal concluded there was a strong public interest in the documents being released and that this interest outweighed the privacy interests of the complainants. The Tribunal expressly held that it was in the interest of the general public that the documents be disclosed and that this existed regardless of any personal interest that Scholes might have in the documents.[78]

A differently constituted Tribunal in *Re Dale and Australian Federal Police*[79] cited with approval the judgement of Heerey J and the decision in *Re Scholes*.[80] Part of the Tribunal's remarks in *Re Dale* can be said to reflect the views of Heerey J:

> .. the importing of a public interest test does not mean that the test should be regarded as one relating to the interest of the public. The mere fact that the passages, if published would receive wide publicity and interest does not make their publication a matter of public interest. The photographs of paparazzi are sought and published because there is an interest, by members of the public, in viewing those photographs. It is not necessarily true to say, however, that publication of those photographs is in the public interest.[81]

Bayne has raised the possibility that the reasoning of Heerey J has, in practical terms, cast an onus on the applicant to establish the public interest in favour of disclosure.[82] This is certainly unjustified and would restrict access under the FOIA. Heerey J's test should ensure that it is the interest of any member of the public (rather than a specific interest of a personal applicant) which is used to determine the public interest. This approach is consistent with the democratic objectives of the Act. In applying the test, it is still important that a broad definition of "government affairs" is used. Even apparently innocuous pieces of information, such as the accommodation costs of the Solicitor General, can be relevant to public scrutiny of government spending.

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[77] Ibid. at 343.
[78] Ibid. at 344.
[79] *Re Dale and Australian Federal Police* (1997) 47 ALD 417.
[80] Ibid. at 424.
[81] Ibid. at 425.
[82] P Bayne, above note 44 at 320.

(2) The interest of a particular person as a dimension of the public interest.

Just as the public in general has a right to know about the activities of government, so too, in certain circumstances an individual can claim a special right to know about particular documents. Patterson described it this way:

> ... an individual's need to know is a matter of public interest despite its ostensibly private nature because it is generally in the interest of the community for people who have genuine need for information to be able to obtain access to it.[83]

In the early decision of *Re Witherford and Department of Foreign Affairs*[84] the Tribunal expressed concerns that if it denied the applicant access to information about himself that could not be released to the world at large it would considerably narrow the scope of the FOIA and preclude access to many personal documents.[85] The Tribunal in *Re Burns and Australian National University*[86] found that if a person's "need to know" was large then the public interest would be commensurately enlarged.[87] The Tribunal in *Re Kamminga and Australian National University* took a similar approach saying that there was a public interesting in the applicant's right to know, which was different from the applicant's personal interest in knowing.[88] This approach does raise two problems. The first is how to reconcile it with s.11(2) of the FOIA and, the second is the concern that this approach may also be used to find a corresponding interest against disclosure where the applicant requests documents out of "mere curiosity".[89]

Section 11(2) FOIA was introduced in 1991, after the decision in *Colakovski* and reads:

> (2) Subject to this Act, a person's right of access is not affected by:
>
> (a) any reason the person gives for seeking access; or
>
> (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

The Explanatory memorandum to the amendment says that s.11(2) was introduced so:

> ... that agencies should not impose a threshold requirement that persons seeking access to documents demonstrate a specific reason or need for access. ... As the Committee recognised that motive and need to know may be relevant to specific

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[83] M Paterson, above note 57 at 1001.
[84] (1983) 5 ALD 534
[85] Ibid. at 535-536.
[86] *Re Burns and Australian National University* (1984) 1 AAR 456.
[87] Ibid. at 460.
[88] *Re Kamminga and Australian National University* (1992) 15 AAR 297at 300.

> procedural matters or the application of particular exemptions in the Act, new subsection 11(2) is expressly made subject to the other provisions of the Act.[90]

On its face, s.11(2) suggests that an applicant's personal interest in obtaining access is not relevant to considerations of the public interest under the Act, an approach that was adopted in *Re Green and AOTC*,[91] although this was not the intention of the legislature.

The question of the meaning of s.11(2) also arose in *Re Hanbury-Sparrow and Department of Foreign Affairs and Trade*.[92] The Tribunal held that the section:

> ... is directed only to precluding reference to the reasons given by the Applicant, and does not preclude reference to her or his position judged objectively. This is a restrictive interpretation but it is one which will promote the objects of the Act.[93]

While I agree with the effect of the Tribunal's decision in that matter, with respect, I can see little difference between "objectively judging the position of the applicant" and "forming a belief as to the applicant's reasons". The latter is prohibited by s.11(2)(ii). The term "affected by" can be construed in two ways, that is as either a negative or a positive affect. A court should therefore prefer the construction which supports the purpose of the Act and the intention of the legislature.[94] Given the intention expressed in the explanatory memorandum, a preferable approach would be to construe the section so that it reads "a person's right of access is not *adversely* affected by...any reason..." This would provide a threshold test, with the public interest in disclosure measured against a neutral applicant, one with no reasons for seeking access. The section would not preclude an applicant from attempting to increase their chances of obtaining the documents by establishing an additional personal interest in the documents.

Prior to the introduction of s.11(2) Bayne argued that disclosure should be assessed on the basis that "every person" has a right of access to documents. His concern was that a failure to adopt this approach might lead the Tribunal and administrative decision makers

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[89] P Bayne, above note 22 at 202; M Paterson, above note 57 at 1003.
[90] Explanatory Memorandum to the *Freedom of Information Amendment Bill 1991* at para 12.
[91] *Re Green and AOTC* (1992) 28 ALD 655 at 662; *Re Russell Island Development Association Inc and Department of Primary Industries and Energy* (1994) 33 ALD 683 at 695.
[92] *Re Hanbury-Sparrow and Department of Foreign Affairs and Trade* (Administrative Appeals Tribunal, Senior Member Bayne, 10 September 1997, unreported).
[93] *Re Hanbury-Sparrow and Department of Foreign Affairs and Trade* (Administrative Appeals Tribunal, Senior Member Bayne, 10 September 1997, unreported) at para 64; an approach also suggested by Bayne in P Bayne, above note 44 at 321.
[94] s. 15AA Acts Interpretation Act 1901; *Cooper Brookes (Woollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 per Gibbs CJ at 304-305.

into requiring an applicant to demonstrate the need for a document.[95] The fact that s.11(2) was introduced indicates concern on the part of the legislature that decision makers were rejecting applicants' claims on the basis that the applicant did not have a "good" reason for seeking the documents.[96] The comments made by the Tribunal in *Re Dale*, cited above, indicate that such an approach may find favour with review bodies.[97] The whole tenor of the FOIA indicates that this approach is incorrect and that an applicant does not need a reason for seeking access. Despite this, common sense suggests that some applicants have a greater interest in obtaining certain documents than the public at large. Access to one's own file is the foremost example. In my view, s.11(2) does not prevent a decision maker from having regard to an applicant's reasons for seeking access, if those reasons add weight to the public interest in disclosure.

3. The High Court "free speech" cases

In 1992, the High Court handed down the first in a series of revolutionary constitutional cases. The decisions in *Australian Capital Television*[98] and *Nationwide News*[99] held that there was an implied constitutional freedom of political discussion. The concept has been adapted by the recent decisions in *Lange*[100] and *Levy*[101], so that it can now be said that there is a limit on the power of Commonwealth, State and territory governments which prevents them from legislating so as to impinge upon the freedom of communication necessary to protect certain aspects of representative government that are identified in the Constitution.[102] Freedom of communication was held to be "an indispensable incident of that system of representative government which the Constitution creates…".[103] Although the freedom of political speech cases were decided long after the introduction of the FOIA, they provide judicial guidance on the meaning and content of representative government in modern Australia and also make some very pertinent comments on a citizen's right to access information of the government.

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[95] P Bayne, above note 2 at 99-100.
[96] M Paterson, above note 57 at 1003; P Bayne, above note 2 at 97-102.
[97] M Paterson, above note 57 at 1003.
[98] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
[99] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
[100] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[101] *Levy v Victoria* (1997) 189 CLR 579.
[102] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568 and 571. The extent to which the freedom of political communication covers the discussion of State matters is still uncertain.
[103] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559.

In a unanimous decision in *Lange v Australian Broadcasting Corporation,*[104] the Court held that the fundamental characteristics of a representative democracy in Australia were: the free election of representatives; the fact that Ministers were responsible to parliament; and the availability of free referenda.[105] The importance of these characteristics has been consistently emphasised in previous High Court decisions.[106] The basis for the doctrine of representative government was described by Justices Deane and Toohey as "the thesis that all powers of government ultimately belong to and are derived from the governed".[107] As was discussed earlier, one of the rationales for an effective FOIA is that an election can not properly be described as "free" unless the electors are in a position to make an informed choice about the performance of the government.

Bayne has raised the question of whether there is now an implied right of freedom of information.[108] The High Court's emphasis on accessing information as part of the political process gave rise to this suggestion.[109] Further support was found in the judgement of McHugh J in *Australian Capital Television v Commonwealth*:

> It may be that the rights to convey and receive opinions, arguments and information conferred by ss.7 and 24 are not confined to the period of an election for the Senate and House of Representatives. It may be that the rights inherent in those sections are simply part of a general right of freedom of communication in respect of the business of government of the Commonwealth. In that connection, it is significant that it was recognised early on that, by necessary implication, the Constitution gave rights of access to federal officials and records.[110]

In considering this question, the first issue is the definition of the term "right". Is it something which may limit legislative power (which is not truly a right) or something which can compel executive action? Despite the language used by McHugh J in *Australian Capital Television*, there are so few "rights" in the Australian constitution that it is more realistic to argue for a limit on legislative power. This view seems consistent with

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[104] Ibid.
[105] Ibid. at 559.
[106] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 , per Deane and Toohey JJ at 70; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[107] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 per Deane and Toohey JJ at 70.
[108] P Bayne, above note 43 at 110; A Cossins (1995), above note 11 at 265-266.
[109] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 per Brennan J at 47.

McHugh J's later comments in *Theophanous v Herald & Weekly Times Ltd*[111] where he indicated that while he had left the question open in *Australian Capital Television* he had now had the opportunity to reconsider and decided that he was unable to infer a general right of freedom of communication.[112] It is beyond the scope of this paper to fully consider the question, but it seems from McHugh J's comments in *Theophanous* that there is no constitutional right to access government information. Given the High Court's decision in *Lange* (discussed below) the existence of such a right may not be so important.

In *Lange*, the High Court stressed the importance of access to government held information. It endorsed a comment by McHugh J in the earlier decision of *Stephens v West Australian Newspapers Ltd.*[113] In that case, His Honour said

> In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matter relevant to the exercise of public functions and powers vested in public representatives and officials. Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government administration, or in any part of the country, is not of relevant interest to the public of Australia generally. If this legitimate interest is to be properly served, it must also follow that on occasions persons with special knowledge concerning the exercise of public functions of powers or the performance by public representatives or officials of their duties will have a corresponding duty or interest to

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[110] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 232.
[111] *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104.
[112] Ibid. at 206.
[113] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

> communicate information concerning such functions, power and performances to members of the general public.[114]

The Court in *Lange* held that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.[115] As a result, the common law of defamation was extended to provide a category of qualified privilege for those who publish, to the general public, information concerning government or political matters.[116] The Court also considered whether the Defamation Act (NSW) was inconsistent with the freedom of communication. It seems from this that legislation which is inconsistent with the Constitutional guarantee of freedom of speech could be struck down. It is therefore arguable that the FOIA (or the interpretation of the FOIA) could also be subject to the test of constitutional inconsistency.[117] The Court's statement in *Lange*, is authority for the proposition that under the FOIA only a pressing public interest should prevent documents from being disclosed.

Another theme found in the free speech cases which can be usefully applied to the jurisprudence of freedom of information is the question of balancing the public interest. There is considerable judicial support for the strong interest in the public having access to information about government and being able to criticise and comment on government activities. The Court has specifically held that "a narrow view should not be taken of the matters about which the general public has an interest in receiving information."[118] For example, in *Nationwide News* Deane and Toohey JJ held

> Indeed, the traditions and standards of our society dictate a conclusion that, putting to one side times of war and civil unrest, the public interest is never, on balance, served by the suppression of well-founded and relevant criticism of the legislative, executive or judicial organs of government or of the official conduct or fitness for office of those who constitute or staff them.[119]

One way of ensuring that criticism is well founded is to release sufficient information to fully explain government decisions. Thus, the High Court can be said to support access to a wide variety of information and place great weight on the public interest in accessibility

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[114] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 264-265; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570-571.
[115] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571.
[116] Ibid. at 571.
[117] Ibid. at 573.
[118] Ibid. at 570-571.

of information. The practical effect of this decision can be seen in relation to internal working documents, discussed below.[120]

The free speech cases are not, however, authority for unfettered access to documents. The High Court has consistently declared that the freedom of political communication is not an absolute one and that it must be balanced against the other interests of the public in a democratic society, such as society's interest in maintaining individual privacy.[121] Thus, in *Lange* the Court held that

> The content of the freedom to discuss government and political matters must be ascertained according to what is for the common convenience and welfare of society. That requires an examination of changing circumstances and the need to strike a balance in those circumstances between absolute freedom of discussion of government and politics and the reasonable protection of the person who may be involved, directly or incidentally, in the activities of government.[122]

In each case, the Court has had to balance interests which weigh for and against a freedom of political communication.[123] Thus, despite the strong support found in these cases for the public interest in disclosure, they are also authority for the balancing of all public interest considerations.

B. The application of the rationale: A case study of two exceptions

The above discussion examined several conceptions of the rationale of the FOIA. Part B will consider whether the jurisprudence regulating access to documents lives up to these noble aspirations. The principle barriers to accessibility under the FOIA are the exceptions to the general right of access. If they are interpreted broadly, the right of access

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[119] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 79.
[120] Discussion beginning on page 26.
[121] See notes 113, 122.
[122] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 565-566, see also at 562 where the court posits a "reasonably adapted and appropriate test" which must include considerations of the public interest.
[123] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 144-145, 188-189 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 53, 68-69, 78-79; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 per Brennan CJ at 255; per Dawson J at 263, per Toohey and Gummow JJ at 267-268, per Gaudron J at 271-272, per McHugh J at 277-278, per Kirby J at 290-291; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104 per Mason CJ, Toohey and Gaudron JJ at 134-189 and per Deane J at 178-179; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 per Brennan J at 244-245, per McHugh J at 265-266; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 565-566.

diminishes. It is beyond the scope of this thesis to examine all of the exceptions and so only two will be considered. The first concerns the exemption for internal working documents. Access to policy documents allows access to the thought processes of the administration. Too broad an application of this exception can threaten the objectives of the FOIA. The second exception is likely to become the major focus of future debates on the FOIA. It provides an exception for documents that contain business information. With the current Commonwealth government committed to increased outsourcing of public services,[124] the question is whether this will affect the public's right of access to documents about those services and reduce government accountability.

1. Internal working documents

In his 1995 article, "Journey from the comfort zone: a few steps towards open government."[125] Snell noted that while government agencies have been fairly forthcoming when applicants apply for information about themselves, the story is somewhat different when applicants seek other forms of government information. In particular, documents which record the policy making process appear to be closely guarded. It is the extent of the release of non-personal or policy information which tests the efficacy of FOI in enhancing democracy.[126]

Section 36 of the FOIA provides for an exemption for documents which relate to the deliberative processes of government. It also requires that the decision maker and appellate bodies consider whether disclosure of such documents would be contrary to the public interest. As such, it is an excellent case study of how government and the judiciary view the role of the administration, and how they evaluate the public interest in disclosure of documents against the public interest in government secrecy.

One of the landmark decisions on the public interest test is *Re Howard and Treasurer of Commonwealth of Australia*.[127] This decision, given by Davies J, provided a list of factors which militated against disclosure. I will discuss the decision in *Re Howard* and its

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[124] Attorney General's Department, *Freedom of Information Act Annual Report 1997/98* (1998).
[125] R Snell, above note 45.
[126] R Snell, above note 45 at 3-4; P Bayne, above note 44; K Harrison, "Access to FoI policy documents - the experience of the Public Interest Advocacy Centre" (1986) 6 *FoI Review* 74.
[127] *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626.

acceptance by other review bodies. The merit of the *Re Howard* factors will also be analysed in light of the High Court's decisions in the freedom of speech cases. The 1996 decision of *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs*[128] led to suggestions that that influence of *Re Howard* was waning and that in the future it would be more difficult for government to establish a public interest against disclosure pursuant to s.36(1). The decision in *Re Chapman* and the decisions which have followed it will be explored with a view to evaluating the future path of this exemption.

a) Section 36 and the "deliberative processes"

Section 36 relevantly reads:

> Internal working documents
>
> (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act:
>
> (a) would disclose mater in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
>
> (b) would be contrary to the public interest.

Section 36 (3) provides for a Minister to issue a conclusive certificate and s.36(5) provides that the exemption does not apply to factual material.

From the terms of s.36(1) it is clear that the first test to be satisfied is whether a document falls within the section. The most commonly cited test for whether a document records part of the deliberative processes of an agency is that in *Re Waterford and Department of Treasury.*[129] In that case, the Tribunal commented:

> As a matter of ordinary English the expression "deliberative processes" appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. "Deliberation" means "The actions of deliberating: careful consideration with a view to decisions" (see the *Shorter Oxford English Dictionary*). The action of deliberation, in common

[128] *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 23 AAR 142.
[129] *Re Waterford and Department of Treasury* (1984) 1 AAR 1.

> understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular course of action. Deliberations on policy matters undoubtedly come within this broad description.[130]

This definition catches a large number of documents. Although the Tribunal has gone on to find that these documents should not include every document on the file[131], nonetheless the cases indicate that it is not just policy documents which fall within the boundaries of the exemption. Included within the scope of s.36(1)(a) are drafts of letters or documents,[132] documents suggesting possible courses of action,[133] documents recording a preliminary exchange of facts,[134] documents which record the views of Ministers or public servants,[135] and assessments of funding applications[136] This broad approach has been widely adopted.[137]

There are competing views on the breadth of this subsection. In *Harris v Australian Broadcasting Corporation*,[138] Beaumont J seemed to view "deliberative processes" as limited to policy processes, although in the context of that case he was not obliged to decide.[139] Bayne has suggested that it was Beaumont J's intention to limit the notion of deliberative processes to processes which form part of the policy forming process.[140] In his view, the Full Federal Court, hearing the matter on appeal appeared to adopt Beaumont J's approach.[141] In its decision in *Harris v Australian Broadcasting Corporation*,[142] the Full Federal Court did not specifically consider the issue and in my view it is difficult to

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[130] Ibid. at 19-20.
[131] *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626 at 630.
[132] *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64.
[133] *Re Lianos and Secretary Department of Social Security* (1985) 2 AAR 503.
[134] *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626 at 630.
[135] *Re Lianos and Secretary Department of Social Security* (1985) 2 AAR 503.
[136] *Re Conngan Aboriginal Corporation and Aboriginal and Torres Straight Islander Commission* (Administrative Appeals Tribunal, Deputy President Barnett, 30 September 1998, unreported).
[137] *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64; *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626; *Re Lianos and Secretary Department of Social Security* (1985) 2 AAR 503; *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 23 AAR 142; *Re McGarvin and Australian Prudential Regulation Authority* (Administrative Appeals Tribunal, Deputy President McDonald, 30 July 1998, unreported).
[138] *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.
[139] Ibid. at 245.
[140] P Bayne, above note 55 at para 97; see also *Public Service Board v Scrivanich* (1985) 8 ALD 44.
[141] P Bayne, above note 55 para 97.

draw that conclusion from the brief comments that their Honours make on the nature of the deliberative process.[143] Certainly the cases which followed have tended to prefer the *Re Waterford* test.

b) Re Howard

A broad definition of "deliberative processes" makes it possible for s.36 to prevent disclosure of a large number of documents. For this reason, the nature and breadth of the public interest test in s.36(1)(b) are crucial when considering the ease with which members of the public can obtain access to government policy and working documents.

The decision in *Re Howard and Treasurer of Commonwealth of Australia*[144] concerned an application by John Howard for documents provided by the government to the Australian Council of Trade Unions during the formulation of the 1984/5 Budget. The documents concerned were covered by a conclusive certificate. Pursuant to s.58(5) FOIA, Davies J only needed to concern himself with the question of whether there were reasonable grounds for concluding that the disclosure of the documents would be contrary to the public interest.[145]

Citing Australian, American and English authorities in support, Davies J summarised the public interest considerations as he saw them. He held:

> ...it is possible to postulate that in each case the whole of the circumstances must be examined including any public benefit perceived in the disclosure of the documents sought but that:
>
> (a) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;
>
> (b) the disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;
>
> (c) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;

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[142] *Harris v Australian Broadcasting Commission* (1984) 1 FCR 150.
[143] Ibid. at 155.
[144] *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626.

(d) disclosure, which will lead to confusion and unnecessary public debate resulting from disclosure of possibilities considered, tends not to be in the public interest;

(e) disclosure of documents which do not fairly disclosure the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.[146]

Davies J went on to note that the FOIA was a recent Act. At that stage, the Tribunal had not heard any evidence of a lack of candour and frankness on the part of civil servants as a result of the Act. He foreshadowed that as time passed and review bodies became more aware of the operation of the Act, it would be easier to ascertain whether disclosure of public working documents would be in the public interest.[147]

Two comments can be made about His Honour's conclusions. Firstly, it appears that His Honour may have been simply summarising the various public interest factors for the convenience of review bodies who were coming to grips with a new Act. There is a suggestion that in the future review bodies should require greater evidence from respondents to support their public interest claims and that the public interest factors listed may change or fade over time. However, in the interim His Honour's judgement turned the public interest test on its head. Rather than presuming that disclosure would take place unless there was substantial evidence of a public interest against it, he sought proof that it would be in the public interest for the documents to be disclosed. His Honour's judgment led the way for claims that certain categories or classes of documents would be prima facie exempt, as there would inevitably be a public interest against their disclosure.[148] This approach goes against a plain reading of s.36(1)(b). Nonetheless, it continues to be cited and followed by the AAT.[149]

c) Following Re Howard?

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[145] Ibid. at 628.
[146] Ibid. at 634-635.
[147] Ibid. at 635.
[148] P Bayne, above note 20 at 217-219; P Bayne, above note 44 at 295- 300.
[149] *Australian Doctors' Fund Ltd v Commonwealth of Australia* (1994) 19 AAR 343; *Re Aldred and Department of Foreign Affairs and Trade* (1990) 20 ALD 264
Re Kamminga and Australian National University (1992) 15 AAR 297

The public interest factors put forward in *Re Howard* have been considered in many of the decisions which followed it. In some, the review body chose to adopt Davies J's formulation of the public interest and rejected the applicant's claim for documents. Others appear to have accepted the factors as formulated by Davies J but have gone on to find that there is insufficient evidence to establish that the public interest is at risk in that case. A few decisions have rejected as a public interest consideration one or more of the factors proposed by Davies J. However, despite the passage of time and the early stage in FOIA jurisprudence at which *Re Howard* was handed down, its restrictive test continues to prevail over the broader public interest tests argued for by applicants.[150] On occasion, the *Re Howard* factors have been accepted without criticism.[151] Yet, even where a review body seems uncertain about the true public interest in the arguments put forward in *Re Howard* it generally concluded that there is no evidence to support the *Re Howard* factors rather than reject the approach outright.[152] I will examine each of the "*Re Howard* factors" in turn, tracing its acceptance or otherwise.

(1) High office

It is hard to deny that when documents are created or exchanged at a high level of government they are likely to concern issues which would both be of concern to the public and generally sensitive in nature. In several cases, the AAT has been asked to accept the proposition that there is a general public interest in the non-disclosure of documents which form part of the decision making process at a high level.[153] It is a proposition which arguably finds more support following the High Court decision in the *Northern Land Council* case.[154]

In *Re Rae* the AAT emphatically rejected this view and found that if high level public documents are more likely to have characteristics that make it contrary to the public interest to release them, then it was those characteristics which were important and not the level at which the documents were created.[155] Any other finding would, it held, dilute the

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[150] P Bayne, above note 20 at 215 – 221.
[151] *Re Aldred and Department of Foreign Affairs and Trade* (1990) 20 ALD 264.
[152] See heading 6 below.
[153] *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589 at 663; *Re Fewster and Department of Prime Minister and Cabinet (No 2)* at 140.
[154] *Commonwealth v Northern Land Council* (1993) 176 CLR 604; P Bayne, above note 44 at 304; A Cossins (1995), above note 11 at 241.
[155] *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589 at 603.

public interest requirement in s.36(1)(b) and deny the effect of ss.3 and 11 of the FOIA.[156] In *Re Fewster(No 2)* the Tribunal, rejected what was termed the "s.36 disguised class claim" made by the respondent.[157] The finding was reached despite the fact that the Tribunal felt that the prospect of disclosing Prime Ministerial documents was very offensive to its sensibilities. Nonetheless, it felt constrained by the plain wording of the FOIA which made no distinction based on the authorship of the documents.[158] As such, it came close to rejecting the claim as a possible head of public interest.

(2) Communications made in the course of the development of policy

The Tribunal's decision in *Re Rae v Department of Prime Minister and Cabinet*[159] raised the issue of ongoing policy development. The fact that governments frequently change their minds was recognised by the Tribunal:

> It will rarely be possible to say of any policy document that it reflects the ultimate view of government from which there will be no departure. If the fact of a document not accurately reflecting current government policy were a determinative public interest consideration, no policy document would ever be released, for it is always possible that some person some day might read such a document in the mistaken belief that it represents current thinking.[160]

Re Rae suggests that there must be some other public interest at stake to sustain a claim for non-disclosure of an interim policy document,[161] for example where people criticised in a report have not yet had the opportunity to comment on the criticism.[162]

(3) Inhibit frankness and candour in future pre-decisional communications

The candour and frankness argument is one which is frequently put to the Tribunal[163] and one still claimed by decision makers at first instance.[164] It has often been argued that

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[156] Ibid.
[157] *Re Fewster and Department of Prime Minister and Cabinet (No 2)* at 140 citing from the judgment of Deputy President Hall in *Re Fewster and Department of Prime Minister and Cabinet (No 1)*.
[158] *Re Fewster and Department of Prime Minister and Cabinet (No 2)* at 141.
[159] *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589.
[160] Ibid. at 606.
[161] Ibid.
[162] *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64.
[163] *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626; *Re Lianos and Secretary Department of Social Security* (1985) 2 AAR 503; *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589; *Re Fewster and Department of Prime Minister and Cabinet (No 2)*;*Re Aldred and Department of Foreign Affairs and Trade* (1990) 20 ALD 264; *Re Cleary and Department of The Treasury* (1993) 18 AAR 83; *Re Russo and Australian Securities Commission* (1994) 28 ALD 354; *Re Chapman and*

public servants would refrain from giving frank and candid advice if they suspected that their advice might be accessible in the future. Alternatively, they would only express their true views verbally.[165] It is an argument which the Tribunal has expressed itself to be unlikely to follow without firm evidence.[166] Nonetheless, the candour and frankness argument, when put in a different way, still appears to be persuasive. In *Re Rae* for example, the Tribunal found that if disclosure of the document were to inhibit the conduct of negotiations over a proposed development in the Daintree, then that constituted a reasonable ground for a public interest claim.[167]

Alternatively the frankness and candour claims may focus on the confidential circumstances in which the document was prepared or exchanged, and the consequent expectation of public servants that their comments would remain private. This argument was given some weight in the earlier cases on s.36.[168] At that time it was likely that the documents concerned were written either before the FOIA came into operation or in the first few years of its operation. In those circumstances, it would be reasonable to argue that officers would have given frank views, perhaps expressing themselves in rather "blunt" terms[169] in reliance on the confidentiality of what they wrote.

Yet, within 5 years of the FOIA coming into operation such an argument should surely have seen its demise. Ignorance of the FOIA is no excuse, and no civil servant should now be able to claim that a document was written with an expectation that its contents would remain confidential, a fact recognised by the Federal Court in *Searle.*[170] The Tribunal has also recognised that public officers should be writing in a reasoned and unbiased manner,

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Minister for Aboriginal and Torres Strait Islander Affairs (1996) 23 AAR 142; *Re Conngan Aboriginal Corporation and Aboriginal and Torres Straight Islander Commission* (Administrative Appeals Tribunal, Deputy President Barnett, 30 September 1998, unreported); *Re McGarvin and Australian Prudential Regulation Authority* (Administrative Appeals Tribunal, Deputy President McDonald, 30 July 1998, unreported).

[164] R Snell, above note 18.

[165] *Re Russo and Australian Securities Commission* (1994) 28 ALD 354 at 358-359; *Re Cleary and Department of The Treasury* (1993) 18 AAR 83 at 89.

[166] *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589 at 604; *Re Russo and Australian Securities Commission* (1994) 28 ALD 354 at 359; *Re Cleary and Department of The Treasury* (1993) 18 AAR 83 at 91; *Re Fewster and Department of Prime Minister and Cabinet (No 2)* at 141; *Re Fallon Group Pty Ltd and the Federal Commissioner of Taxation* (1995) 31 ATR 1164

[167] *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589 at 608.

[168] *Re Lianos and Secretary Department of Social Security* (1985) 2 AAR 503 at 528.

[169] Ibid. at 520.

[170] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 127; *Re Kamminga and Australian National University* (1992) 15 AAR 297 where the Tribunal held that the question of confidentiality was only relevant if the nature of the confidence was sufficient to sustain a claim under s.45 FOIA.

so that their documents are always fit for public consumption.[171] Yet, ironically, the generous interpretation given to the exemption provisions of the FOIA seems to have allowed public officials to continue in the belief that the Act does provide protection for their sensitive documents,[172] and may also confirm their view that these documents will remain confidential.

(4) Lead to confusion and unnecessary public debate

The decision in *Re Cleary and Department of Treasury*[173] is one which, rather surprisingly, upheld a claim on the basis that it would be misunderstood by the public if the documents were released. The documents in *Re Cleary* were covered by a conclusive certificate, restricting the scope of the Tribunal's decision to the question of whether there were reasonable grounds for making the claim. The documents in question were economic forecasts prepared for the government by the Joint Economic Forecasting Group. The Tribunal vigorously scrutinised and rejected the respondent's claims that the documents would be too sensitive to be released or that they would reveal the methodology used by the JEFG. The respondent's final claim was that the documents could be misunderstood by the public. During his evidence, the applicant conceded that the ordinary lay person would not be able to read the report, and nor would many journalists. O'Connor J concluded that the documents would be misunderstood by the public, which was a reasonable basis for the agency to resist disclosure.[174]

In accepting that the public must be able to understand the documents if they are to be released, O'Connor J adopted a rather complex test. Firstly, such an approach runs contrary to the object of the FOIA. There is no requirement for an intelligence test to match applicant to subject matter prior to granting a request. Pursuant to the general right of access provided for in s.11, an applicant ought to be able to ask for documents which she or he will not understand, documents which are in a foreign language, in fact any documents at all. In addition, the decision raises the question of who is to constitute "the public" when considering whether it will be confused. It seems it is not sufficient that the

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[171] *Re Conngan Aboriginal Corporation and Aboriginal and Torres Straight Islander Commission* (Administrative Appeals Tribunal, Deputy President Barnett, 30 September 1998, unreported) at para 29.
[172] P Bayne, above note 20 at 221, citing the Senate Report on the Operation and Administration of the Freedom of Information Legislation (1987).
[173] *Re Cleary and Department of The Treasury* (1993) 18 AAR 83.
[174] Ibid at 92.

applicant understands the documents. Must the average FOI user or the man on the Clapham omnibus also understand?

Secondly, such an approach runs against the grain of the High Court decision in *Commonwealth v John Fairfax and Sons Ltd* [175], where Mason J held at p 52:

> .... It can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.

His Honour's judgement emphasises the importance of being able to access all information. If government were able to hold back "confusing" information this would stifle the proper public debate which His Honour considered to be vital to democracy. Nonetheless, the possibility of confusion continues to be accepted, either in whole[176] or in part,[177] as a justification for restricting access.

(5) Documents which do not fairly disclosure the reasons for a decision which may prejudice the integrity of the decision-making process

This public interest claim often overlaps with the public interest in not disclosing documents relating to policy formation.[178] Review bodies have accepted that it would damage the integrity of the decision making process for the public to be aware that certain items were included in a draft policy document or correspondence which were, on reflection, rejected in the final version.[179] It is appropriate, and consistent with the rules of natural justice to withhold draft documents which contain criticisms or allegations which have not been substantiated.[180] However, I find it more difficult to understand why it is contrary to the public interest for the public to be allowed to see that politicians or civil servants have changed their minds. Again, there is a sense of the review body allowing the

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[175] (1980) 147 CLR 39.
[176] *Re Fallon Group Pty Ltd and the Federal Commissioner of Taxation* (1995) 31 ATR 1164.
[177] *Re Walker and the Federal Commissioner of Taxation* (1995) 30 ATR 1037.
[178] *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589 at 609.
[179] *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589 at 609; *Australian Doctors' Fund Ltd v Commonwealth of Australia* (1994) 19 AAR 343 at 356.
[180] *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64 at 80; *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 at 563.

public officer to save face, as if it were a sign of weakness to alter one's position or to back away from an initial course of action.

The claim is based on a rather odd presumption. If the public can not access any information about the way in which the decision was reached, then it may assume that the decision was made in a principled manner. If however, the public were to access only part of the reasons for decisions, then it will come to suspect the integrity of the decision making process. Given that the stated aim of the FOIA is to provide the public with information about how government works, and to therefore move away from obliging the public to rely on presumptions of governmental honesty, this is an unusual public interest category. Bayne has suggested that the appropriate response to a claim of this nature is to suggest that the agency release further documents to clarify the nature of the decision making process and to allow the full story to be told.[181]

(6) Rejecting *Re Howard* on the evidence or at law?

Although it appears that there has been a rejection of the sort of class claims put forward in *Re Howard* the criteria themselves remain remarkable pervasive. For example the Tribunal in *Re Russo v Australian Securities Commission,*[182] justified its decision to disclose the documents on the following basis:

> We find that the documents do not relate to policy, there is no evidence before us as to the likelihood of a diminishment in candour and frankness between officers, disclosure of the documents will not lead to confusion and unnecessary debate and the reasons for recommendations in the documents are extensively set out.[183]

Similarly, in *Re Cleary* the Tribunal found that there was insufficient evidence to support the arguments put forward by the respondent that some fairly sensitive and high level documents (joint economic forecasts) were confidential. The Tribunal found that while the documents were supplied on a confidential basis there was no reason why the government could not publicise them at a later date if it chose to do so. The Tribunal concluded that such a claim was not reasonable. Yet, it did not take the logical next step (as was

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[181] P Bayne, above note 44 at 303.
[182] *Re Russo and Australian Securities Commission* (1994) 28 ALD 354.
[183] Ibid. at 359.

suggested in *Searle*[184]) and reject "confidentiality" as a head of public interest under s.36(1)(b).

It seems, that rather than doubt the authority of the non-disclosure stance adopted in *Re Howard*, the Tribunal prefers to be stricter about the evidentiary burden that it will require of the respondent.[185] Does this failure to rigorously re-examine *Re Howard* matter to anyone other than academics? In my view, the failure has had a practical effect. It has condoned agency practice of using, time and again, the *Re Howard* criteria to deny access at first instance and on internal review. This causes delay for the applicant, and can prevent disclosure if applicants do not to proceed to the AAT. If however, the *Re Howard* factors had been subject to considered jurisprudential analysis, and rejected by review bodies either in whole or in part, agencies may have been more reluctant to put up their "boilerplate" claims for exemption.

d) Can Re Howard stand together with freedom of political speech?

There are a few examples of direct contradiction between *Re Howard* and the High Court decisions. One of the clearest relates to the public interest in preventing "misleading or unnecessary public debate". When formulating his list of public interest factors, Davies J clearly relied on the following extract from the judgement of Lord Reid in *Conway v Rimmer* [1968] AC 910 at p 952:

> To my mind the most important reason [for not disclosing cabinet documents] is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of these ready to criticise without adequate knowledge of the background and perhaps with some axe to grind.[186]

This approach is difficult to reconcile with the High Court's appraisal of the importance of citizens being able to assess information about government and criticise its activities.[187]

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[184] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 127. The Court held that with the commencement of the FOIA, there could no longer be an "understanding of absolute confidentiality". The right of access provided by the Act applied, regardless of any undertakings by an officer to the contrary.

[185] *Re Fallon Group Pty Ltd and the Federal Commissioner of Taxation* (1995) 31 ATR 1164.

[186] *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626 at 634.

[187] See above at page 24.

Review bodies should perhaps heed the comments of Mason CJ in *Australian Capital Television*:

> All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process.[188]

Given that there is High Court authority for the proposition that public discussion and criticism of government is generally in the public interest,[189] claims for exemption which rely on the possibility that release of documents would lead to public debate or unnecessary criticism of the government should be very closely scrutinised.

In *Australian Capital Television* Mason CJ also found that there was an onus on government to "explain and account for their decisions and actions in government and to inform the people so that they may make informed judgements on relevant matters."[190] This contradicts the suggestion in *Re Howard* that there is a public interest in not releasing documents which reveal only part of the reasons for decision. Rather than claim an exemption for information which is misleading, it is submitted that government has a responsibility to correct any misapprehension which may arise.[191]

In addition to these specific examples, the High Court has given strong support to the idea of the public interest in open and accountable government, and the role that access to information about government has to play in allowing citizens to participate in a democracy.[192] In some of the earlier free speech cases, it was suggested that the ultimate power of the government was with the people of Australia.[193] There are also numerous references to the constitutional principle of accountable government.[194] It is worth

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[188] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 145.
[189] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Mason CJ at 138-139, McHugh J at 232; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 per Brennan J at 49-50, 53, per Deane and Toohey JJ at 74-75 and 79; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104 per Mason CJ, Gaudron and Toohey JJ at 122.
[190] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 139.
[191] P Bayne, above note 44 at 303.
[192] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 211-212, 231; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 47-48 ; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 264-265; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570-571.
[193] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 per Brennan at 47, per Deane and Toohey JJ at 70-72; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Mason CJ at 137.
[194] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Mason CJ at 138.

repeating part of the judgement from *Lange*. After noting the significant impact of the bureaucracy and the administration on the lives of all Australians, the Court found that:

> Each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.[195]

In my view, the High Court cases are authority for an approach to s.36 FOIA which gives substantial weight to the public interest in disclosure, while carefully scrutinising claims made for exemption. This is particularly so when the grounds of exemption are based on preserving an atmosphere of confidentiality in the government and/or the reputations of civil servants. This new approach runs contrary to that taken in *Re Howard* and the cases which followed it. If an external review body wished to chart a course away from *Re Howard*, it can now cite High Court authority in support.

e) Re Chapman – a breakthrough?

In June 1996, the AAT, constituted by Deputy President McDonald, handed down its decision in the matter of *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs*.[196] The matter concerned the government's declaration under s.10 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* protecting Aboriginal sacred sites from being damaged by the construction of a bridge on Hindmarsh Island in South Australia. The applicant had been refused access to a letter from the Minister for Aboriginal and Torres Strait Islander Affairs to the Prime Minister. In the letter, the Minister informed the Prime Minister that he would be required to make a decision on a declaration in relation to the Hindmarsh Bridge before the next Cabinet meeting. He consulted the Prime Minister about a proposed course of action and asked for the opportunity to speak with him. The submissions of the applicants, cited by the Tribunal in its judgement, relied on the democratic objectives of the Act, saying that release of the letter raised issues of Ministerial accountability to parliament, the public interest in scrutinising the actions of a Minister and in knowing more about a matter of widespread public concern.[197]

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[195] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571.
[196] *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 23 AAR 142.
[197] Ibid. at 148–149.

In considering the public interest test, the Tribunal cited the *Re Howard* factors, but noted that it was an early attempt to define the public interest and that they had been criticised by academics and other review bodies (including the two Information Commissioners). Rather than find that *Re Howard* was wrongly decided, the Tribunal highlighted the paragraph of Davies J's judgement which said that the public interest would become clearer in time. On this basis, the Tribunal found that Davies J saw the principles enunciated in *Re Howard* as flexible and governed by experience. *Re Howard*, said the Tribunal, was a product of its era.[198] It cited the ALRC report and following that approach, rejected as possible public interest considerations:

- the fact that the consultation was at the highest level of government;
- that the issues were highly controversial;
- that the Minister needed to consult with complete frankness.

It did however consider other factors to be public interest considerations favouring non-disclosure:

- the fact that the Minister's original decision had been set aside by the Federal Court and that the Minister therefore had to make a new decision in a context of considerable controversy (although the controversy itself would not be a sufficient public interest factor);
- the decision of the Minister had wide ramifications for Aboriginal people, property interests and Commonwealth/State relations and there was an interest in the Minister being able to put forward a proposal and seek a reaction from a senior colleague prior to making a final decision, for which he would be accountable to parliament.

It is was the second of these considerations which led the Tribunal to find that it was in the public interest that the document not be disclosed.[199]

Prior to *Re Chapman*, the criteria in *Re Howard* have frequently been adopted in a framework for decision making, although the Tribunal had often found that there was insufficient evidence to sustain a public interest claim. *Re Chapman* questioned the assumptions relied on in *Re Howard*. It is perhaps on this basis that it has been cautiously hailed as the beginning of a new era in review of the public interest claims under s.36 FOIA, and one which gives due regard to the democratic intentions of the Act.[200]

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[198] Ibid. at 156-157.
[199] Ibid. at 158-159.

The Tribunal is not bound by the principles of stare decisis, but there are some cases (such as *Re Howard*) which seem to capture the attention of the Tribunal and lead on to similar decisions. The question is now whether *Re Chapman* will be one of those landmark cases. There appear to have been only a few cases handed down by the Tribunal which relate to s.36(1)(b) since the decision in *Re Chapman*. These will be briefly explored to try and gauge the Tribunal's future direction.

Only on one occasion so far, has the Tribunal specifically followed the decision in *Re Chapman*, and found that a claim that

> "... disclosure may expose the respondent to public discussion and criticism and possibly to embarrassment ... [was] clearly not a ground of public interest, as was pointed out in *Commonwealth v John Fairfax & Sons Ltd and Ors*".[201]

In *Re Salem Subramnian and Refugee Review Tribunal* the Tribunal adopted the approach put forward in *Re Chapman* and found that the right of access to documents should be given considerable weight when considering the public interest.[202]

The other decisions of the Tribunal which deal with internal working documents do not refer to *Re Chapman* in this context.[203] The decision in *Re Coongan Aboriginal Corporation* rejected blanket "candour and frankness" claims and acknowledged the democratic foundations of the FOIA.[204] The decision in *Re Cosco Holdings* also rejected the frankness and candour argument, but cited in support the very early decision in *Re Murtagh and Commissioner of Taxation*.[205] In *Re Bartl and DEETYA*[206] neither *Re Howard* nor *Re Chapman* is cited, but the Tribunal rigorously examined and rejected the respondent's claims that frankness and candour in discussion between governments and private bodies made it against the public interest to release draft documents.

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[200] P Bayne, above note 44 at 300.
[201] *Re Salem Subramnian and Refugee Review Tribunal* (Administrative Appeals Tribunal, Deputy President McMahon, 6 February 199, unreported) at paras 25 –27.
[202] Ibid. at para 24.
[203] *Re Conngan Aboriginal Corporation and Aboriginal and Torres Straight Islander Commission* (Administrative Appeals Tribunal, Deputy President Barnett, 30 September 1998, unreported); *Re Cosco Holdings Pty Ltd and Department of Treasury* (Administrative Appeals Tribunal, Deputy President Forgie, 27 February 1998, unreported); *Re McGarvin and Australian Prudential Regulation Authority* (Administrative Appeals Tribunal, Deputy President McDonald, 30 July 1998, unreported).
[204] *Re Conngan Aboriginal Corporation and Aboriginal and Torres Straight Islander Commission* (Administrative Appeals Tribunal, Deputy President Barnett, 30 September 1998, unreported) at paras 29, 32 and 33.
[205] (1983) 1 AAR 419.

In the lengthy decision of *Re McGarvin and Australian Prudential Regulation Authority*, the Tribunal specifically accepted various *Re Howard* criteria, although they were not labelled in those terms. It accepted that some documents were too sensitive to be released,[207] that there was a public interest in ensuring that officers were not inhibited from recording their views on sensitive issues,[208] that officers need to be able to communicate frankly[209] and that where the documents did not disclose any particular pattern, it would be confusing and misleading to the public to release them.[210] Ironically, the Tribunal in this matter was constituted by Deputy President McDonald, who also handed down the decision in *Re Chapman.*

For the present, *Re Chapman* does not seem to have started a new approach to the interpretation of s.36. Nonetheless, the critical approach adopted by some Tribunals to the public interest claims put before them suggests that the *Re Howard* criteria are losing influence.

f) The future of the public interest test in s.36(1)

It is time for the public interest criteria in *Re Howard* to be gracefully retired. As *Re Chapman* recognised, Davies J allowed future review bodies an escape route when he foreshadowed that the public interest criteria may well change over time. Experience has shown that in many circumstances, the public interest factors simply have no evidentiary basis. In addition, given the subsequent High Court decisions relating to government information and accountability, it appears that the public interest criteria suggested in *Re Howard* are now contrary to authority. *Re Chapman* has paved the way for a new approach, that suggested in the ALRC report. To date, it appears that the Tribunal is not quite ready to follow.

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[206] *Re Bartl and Secretary, Department of Employment, Education ,Training and Youth Affairs* (Administrative Appeals Tribunal, Melbourne, Deputy President McDonald, 29 September 1998, unreported).
[207] *Re McGarvin and Australian Prudential Regulation Authority* (Administrative Appeals Tribunal, Deputy President McDonald, 30 July 1998, unreported) at paras 63, 87 and 102.
[208] Ibid. at paras 38, 53, 54, 90.
[209] Ibid. at paras 43, 49, 107.
[210] Ibid. at paras 46 and 97.

2. Access to business documents

Information can end up in government files in many ways. Businesses provide government with information and documents in compliance with statutory obligations, as part of an application for a licence or approval, pursuant to a government survey or in a tender for a government contract. In many instances the business will send the information to government itself. In other circumstances, if for example there has been a consumer complaint or survey, the business may not be aware that the government holds certain information. Traditionally, business has preferred to keep its information secret. Section 43 FOIA was intended to ensure that the usual manner of business operations were not unduly interfered with by the coming into operation of the FOIA.[211]

In the 15 years since the introduction of the FOIA the relationship between government and business has changed considerably. The distinction between the public and private sectors is becoming increasingly blurred.[212] Services which traditionally have been performed by government are now carried out by the private sector. Government too is now selling many services which it formerly provided for free, often in competition with the private sector. The changing role of the public and private sectors raises the question of whether the private sector should still be able to claim that its information should remain secret. In discussing this issue I will consider the rights of access to business information currently available under the FOIA. The next question is whether these rights are sufficient, in light of the changing nature of government, to achieve the goal of accountability.

a) Rights of Access under the FOIA

Section 43 provides an exemption for documents which may be loosely termed "documents relating to business affairs". Section 43 divides neatly into four parts, providing a different test for exemptions for trade secrets, information of commercial

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[211] *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 at 250; P Bayne, above note 2 at 193. In the United States of America it has been alleged that FOI had been widely "abused" by private enterprise trying to gain information about competitors, rather than the activities of government, F Cate, above note 74 at 43.

[212] For example C Sampford. "Law, Institutions and the Public/Private Divide" (1991) 20 *Federal Law Review* 185.

value, information which would unreasonably affect a person adversely and information which would, if disclosed, prejudice the future supply of information. The section relevantly reads:

> (1) A document is an exempt document if its disclosure under this Act would disclose:
>
> (a) trade secrets;
>
> (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
>
> (c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information:
>
> (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
>
> (ii) the disclosure of which under this Act could reasonably be expected to prejudice the future supply of information to the Commonwealth or any agency for the purpose of the administration of a law of the Commonwealth or of a Territory of the administration of matters administered by an agency.

The exemption provided for in s.43 does not protect the professional information of a person working within an agency, nor the business information of the agency itself.[213]

The scope of each part of s.43 will be considered in turn.

(1) Trade Secrets

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[213] *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 per Beaumont J at 250; *Re Dyki and Federal Commissioner of Taxation* (1990) 22 ALD 124 at 136; P Bayne, above note 55 at para 143.

The most authoritative statement on the scope of the exemption for trade secrets is found in the unanimous Full Federal Court decision of *Searle Australia Pty Ltd v Public Interest Advocacy Centre*.[214] There the Court acknowledged that the term "trade secrets" had been used for a long time, both by courts and legislators. Although there was authority for the proposition that the term was prima facie "a technical legal expression", the Court in *Searle* held that in the context of the FOIA, the term should be given its ordinary meaning. Nonetheless, the Court considered it appropriate to have regard to the English decision in *Lansing Linde Ltd v Kerr*[215] for assistance with the basic concept of a trade secret. In that case, it was held that a trade secret must be "information used in a trade or business, and secondly, that the owner must limit the dissemination of it or at least not encourage or permit widespread publication".[216] By disseminating information it can lose its secretive quality.[217] There is no need for a trade secret to contain technical information. The formulae for medical or health products or a list of customer names and addresses could all be trade secrets if they were treated as secret and would provide competitors with an advantage if obtained.[218] Whether information constitutes a trade secret for the purposes of the FOIA is a question of fact for the decision maker.[219]

Following the decision in *Searle*, the AAT in *Re Pfizer and Department of Health Housing and Community Services* noted that dimensions or parts of products which are already on the market, and can therefore be inspected and reverse engineered are unlikely to be trade secrets.[220] In that case, the Tribunal accepted that information on the formulation and manufacture of a particular drug constituted a trade secret, but that departmental investigations into the drug would not otherwise reveal trade secrets.[221] In the unreported decision of *Caruth and Department of Health, Housing, Local government and Community Services*[222] the Tribunal exempted documents containing principles of manufacture, test results of various sorts, methods of analysis, limits of decomposition, standard deviations and an evaluator's report, on the basis that the documents contained trade secrets as

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[214] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111.
[215] (1990) 21 IPR 529.
[216] per Staughton LJ at 536, cited in *Searle* at 120.
[217] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 121.
[218] Ibid. at 120-121.
[219] Ibid. at 121.
[220] *Re Pfizer Pty Ltd and Department of Health Housing and Community Services* (1993) 30 ALD 647 at 675.
[221] Ibid. at 677.
[222] *Caruth and Department of Health, Housing, Local Government and Community Services* (Administrative Appeals Tribunal, 18 June 1993, unreported).

defined in *Searle*.[223] The Tribunal went on to find that the quality of secrecy in information which may otherwise have been a trade secret could have been lost as the product was available for inspection, testing and measurement. It nonetheless fell within the second category of exemption provided for in s.43, namely information with a commercial value.

(2) Information of commercial value

At face value, making commercial information publicly available does not enhance the accountability of government nor the objects of the FOIA. Nor was the FOIA introduced in order to "change the character of a field of commerce by intrusion into it of principles of disclosure".[224] Nonetheless the section is a very broad one, and exempts from access a considerable amount of information relating to the businesses that deal with government. Although in other parts of the FOIA, the use of the word "reasonable" has been held to incorporate a public interest test, that is not the case here.[225] The meaning of "could reasonably be expected to" has been the subject of discussion, but the Court in *Searle* effectively decided the question when it held:

> ... the question under s 43(1)(b) is not whether there is a reasonable basis for a claim for exemption but whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed. These two questions are different. The decision-maker is concerned, not with the reasonableness of the claimant's behaviour, but with the effect of disclosure.[226]

For an exemption under s.43(1)(b) to apply, the decision maker would usually have evidence available to show that the commercial value of the information would or could be expected to be destroyed. It would then be for the decision maker to determine if that expectation was a reasonable one.[227]

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[223] Ibid. at para 53.
[224] *Re Actors Equity Association of Australia and Australian Broadcasting Tribunal* (1984) 7 ALD 584 at 594.
[225] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 123; see also C Finn, "Getting the Good Oil: Freedom of Information and Contracting Out" (1998) 5 *AJAL* 113 at 115.
[226] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 123.
[227] Ibid.

There is little judicial guidance on the meaning of the term "commercial value",[228] leaving external review bodies to rely on the ordinary sense of the word or dictionary definitions. Much of the information accumulated by business is valuable precisely because it is not known to its competitors. Yet, commercial value may certainly attach to things which are otherwise published.[229] Even arranging widely known information in a different way so as to provide better service to customers or more efficiently carry out tasks is commercially valuable information. Releasing the information may allow competitors to compete with equal time or cost savings.[230] It has also been argued that information which shows or suggests that a product is unsafe may be commercially valuable because it would be detrimental to the company to release it.[231]

The Court in *Searle* noted that in practice it might difficult to distinguish between information exempt under s.43(1)(a) and s.43(1)(b). For example, although in *Searle* the Court suggested that customer information could be trade secrets,[232] in *Re Rogers Matheson Clark and Australian National Parks and Wildlife Service*[233] the Tribunal held that customer names were valuable commercial information and exempt under s.43(1)(b).[234] However, provided a review body is satisfied that a document falls within the scope of one or other exception, it is probably unnecessary to make the distinction.[235]

(3) Disclosure of information which could adversely and unreasonably affect a person

Despite the breadth of ss.43(1)(a) and (b), s.43(1)(c)(i) contains a "catch all" provision to prevent the release of information which although not of commercial value or a trade secret would nonetheless harm the business affairs of a person if released. The impact of this section is tempered by a public interest test, which arises from the use of the word "unreasonably" in the section. The section sets up a two stage test. The first is whether the

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[228] P Bayne, above note 55 at para 145.
[229] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 125; *Re Pfizer Pty Ltd and Department of Health Housing and Community Services* (1993) 30 ALD 647 at 677; *Caruth and Department of Health, Housing, Local Government and Community Services* (Administrative Appeals Tribunal, 18 June 1993, unreported) at para 54
[230] *Re Pfizer Pty Ltd and Department of Health Housing and Community Services* (1993) 30 ALD 647 at 606.
[231] Ibid. at 677.
[232] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 121
[233] *Re Rogers Matheson Clark and Australian National Parks and Wildlife Service* (1991) 22 ALD 706.
[234] Ibid. at 714.
[235] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 122.

release of the information could be reasonably expected to adversely affect the business or professional affairs of a person and the second is whether such an adverse affect is unreasonable.

The meaning of "business or professional affairs" has received some consideration. Where information is sought about activities carried out by a person in the course of his or her employment (rather than in their own business), then those affairs do not constitute business affairs. However, information sought about illegal activities in an otherwise lawful business is nonetheless part of the business affairs of that organisation and is eligible for exemption.[236]

The term "professional" has been construed in a fairly traditional manner. Following the definition in the *Maquarie Dictionary* Beaumont J in *Young v Wicks*[237] held that a profession is "a vocation requiring knowledge of some department of learning or science, esp. one of the three vocations of theology, law and medicine". On this basis, he held that a pilot was not a professional for the purposes of the FOIA and her affairs would not be covered by the exemption.[238] Following this approach the Tribunal has held that the activities of a taxation auditor are not professional, as auditors with the Australian Taxation Office are not required to have tertiary qualifications.[239]

There was initially some confusion as to the meaning of the phrase "reasonably expect" in this context. In *Attorney-General's Department v Cockcroft*[240] Sheppard J held that to expect something to occur required that there be more than a possibility or a risk of the event occurring.[241] The majority of the Court (Bowen CJ and Beaumont J) found that the words should be given their ordinary meaning, so that reasonable meant something other than irrational, absurd or ridiculous. Their Honours held that it was undesirable to try and paraphrase the words using the notion of probability or likelihood.[242] The Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre*[243] held that the practical application of the two views in *Cockcroft* were likely to achieve the same outcome. If obliged to choose

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[236] *Re Bayliss and Department of Health and Family Services* (1997) 48 ALD 443 at 455, a case which concerned the illegal importation of certain medical instruments by a medical practitioner.
[237] *Young v Wicks* (1986) 13 FCR 85.
[238] Ibid. at 90.
[239] *Re Dyki and Federal Commissioner of Taxation* (1990) 22 ALD 124.
[240] *Attorney- General's Department v Cockcroft* (1986) 10 FCR 180.
[241] Ibid. at 194.
[242] Ibid. at 190.

between the two approaches, the weight of authority was with the ordinary meaning approach taken by the majority.[244]

The second part of the test is worded in a rather odd manner, as was pointed out in the early decision of *Re Actors' Equity Association of Australia and Australian Broadcasting Tribunal*:

> The difficulty that we have with Mr Simos' argument on this point is that we have to give some life to the word "unreasonably". The concept of there being a "reasonable" adverse effect seems an odd one. It is certainly less so if the use of the word "unreasonable" imports the notion of balancing public and private interests in or to the effect of the formulation suggested by Mr Grey. Such an interpretation in effect introduces a modified concept of the public interest.[245]

The approach taken in *Actors' Equity* was upheld by the Full Federal Court in *Searle*. It held that a public interest in disclosure would be factor to take into account when determining if it was reasonable to disclose the information.[246] Following similar principles to those discussed above[247] the Court found that a great effect on a business may nonetheless be outweighed by an even greater public interest (such as the right to know about unsafe or criminal practices) in disclosure.[248]

The Tribunal in *Actors' Equity* recognised that there is no right to total corporate privacy. Corporations, it held, are created by statute and therefore properly subject to regulation. However, it did consider there to be a greater public interest in releasing information which involved interactions between government and business rather than information simply acquired from business pursuant to a statutory obligation.[249] In *Actors' Equity* the Tribunal held that the disclosure would have an adverse effect on the business of the television stations involved and that such an effect was unreasonable in the circumstances.

One of the more interesting cases which concerned the balancing of the public interest in this context arose out of Greenpeace's request for documents relating to the overseas

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[243] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111.
[244] Ibid. at 123.
[245] *Re Actors Equity Association of Australia and Australian Broadcasting Tribunal* (1984) 7 ALD 584 at 591.
[246] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 125.
[247] See Chapter 1 A2(b) above from page 14.
[248] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 125.

consignees of kangaroo meat and skins.[250] There was considerable evidence to suggest that Greenpeace would use the information to target those who imported kangaroo meat or skins with the aim of getting them to change their business practices. The businesses who exported the kangaroo products were licensed to do so under the *Wildlife Act (Regulation of Exports and Imports) Act 1982*. The Tribunal considered the competing interests to be the commercial interests of the applicants in protecting their lawful businesses, and the public interest in knowing who exports kangaroo products and to whom. On balance, the Tribunal considered that if an industry operating lawfully within the Wildlife Act was to be "closed down" then that was a decision for parliament and not for the Tribunal. Accordingly it decided it was not reasonable to disclose the documents.

With respect, Tribunal appears to have been mistaken on two grounds. Firstly, it presumed that the kangaroo exporting industry would be closed down by the disclosure of the documents, a conclusion that does not seem available on the facts. Thus, it effectively asked itself the wrong question when balancing the public interest. In any event, if the object of the FOIA is to allow people to better participate in a democracy, then legal protests must be in the public interest.[251] The Tribunal's decision seems to suggest that if an industry is operating under statutory license (or perhaps with statutory supervision) then its activities must be endorsed by parliament and necessarily in the public interest. Yet, one aim of accessing business information under the FOIA is to allow the public to check that industries are in fact operating within their statutory guidelines and that statutory regulators are carrying out their functions properly. The Tribunal did not seem to give any weight to these considerations. Certainly, the decision in *Re Rogers Matheson Clark* is a good example of the difficulties of balancing commercial and public interests, a difficulty which is likely to become more acute.

(4) Disclosure of information which could affect the future supply of information

Although s.43(1)(c)(ii) contains wording similar to that found in s.43(1)(c)(i) it omits the critical words "unreasonably affect" and there is no obligation to then weigh up the public

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[249] *Re Actors Equity Association of Australia and Australian Broadcasting Tribunal* (1984) 7 ALD 584 at 592.
[250] *Re Rogers Matheson Clark and Australian National Parks and Wildlife Service* (1991) 22 ALD 706.
[251] *Levy v Victoria* (1997) 189 CLR 579.

interest for and against disclosure.[252] The decision maker need only decide whether it could reasonably be expected that the future supply of information would be prejudiced. The interpretation of "reasonably expect" was initially formulated in respect of s.43(1)(c)(ii). Sheppard J in *Cockcroft* held that for a decision maker to conclude that an event was "reasonably" expected, the decision maker must have real and substantial grounds for thinking that the production of the document could prejudice supply. He acknowledged that this was quite a stringent test, but one which did not go so far as to require proof on the balance of probabilities.[253] However, as was discussed in the context of s.43(1)(c)(i), the court in *Searle* considered that the words should be given their ordinary meaning, which is to say an expectation that was not irrational, absurd or ridiculous.[254]

There have been a number of practical applications of the exemption. For example, in *Re Ralkon Agricultural Co Pty Ltd and Aboriginal Development Commission*[255] the court was obliged to consider whether release of a report prepared by a cattle surveyor would prejudice the future supply of information. In making its decision, the AAT found that as the report was prepared by a professional, he should provide a proficient and competent report and expect to defend the report if necessary. Any other professionals supplying reports to the respondent could reasonably be expected to adopt a similar approach. On this basis, the Tribunal held that there the future supply of information was not likely to be prejudiced.[256] In other instances, the name of the person who was the source of information was not disclosed in the documents and there could be no prejudice to that source of information.[257]

If there is a chain of businesses or governments passing on information, the prejudice need not be to the immediate source of that information. The example used in *Re Angel and Department of Arts, Heritage and Environment*[258] concerned information about wood chipping licenses and the activities of wood chipping companies. The Tasmanian government had obtained information from woodchipping companies and had passed it on to the Commonwealth. Although disclosure of the documents was not likely to prevent the Tasmanian government from supplying the Commonwealth with information in the future,

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[252] *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 113.
[253] *Attorney- General's Department v Cockcroft* (1986) 10 FCR 180 at 196.
[254] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 123.
[255] *Re Ralkon Agricultural Co Pty Ltd and Aboriginal Development Commission* (1986) 10 ALD 380.
[256] Ibid. at 399 –400.
[257] *Re Bayliss and Department of Health and Family Services* (1997) 48 ALD 443 at 456.

it would have been sufficient to show that it would prevent the woodchipping companies from supplying information to Tasmania.[259]

b) The FOIA, Outsourcing and Accountability

A core objective of releasing information under the FOIA is to improve government accountability. The way in which governments choose to provide services to the public is changing rapidly. There is a growing distinction between agency policy makers, who decide which services are provided, and the people who provide those services.[260] Much of the role of service provider is now being contracted out to private business. This raises many questions about the accountability of government and more specifically about whether the FOIA will apply to these private contractors. The Public Service Commissioner has commented,

> in outsourcing delivery from those interested in the public good to those motivated by commercial gain, there will need to be a means to ensure that public good does not become subverted by private interest. This, perhaps, is the key challenge which will face administrative law as we enter the next millennium.[261]

The FOIA is clearly an important tool – but is it up to scratch?

(1) Access to Documents

Issues of public concern regarding outsourcing include: the quality and quantity of service provided by the contractor, the risk of corruption, the extent of conflicts of interest in the awarding or regulation of the contract and whether agency claims about the benefits of outsourcing are accurate.[262] For the public to participate in a meaningful discussion on these topics, advocate for change, or put in a complaint there will need to be access to a variety of documents. Finn suggests the following:

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[258] *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 113.
[259] Ibid. at 126-127.
[260] M Aronson, "A Public Lawyer's Responses to Privatisation and Outsourcing" in M Taggart (ed), *The Province of Administrative Law* (1997) 40 at 56-58.
[261] P Shergold, "Administrative Law in the Changing Public Service Environment" (1997) 10 *AIAL Forum* 4 at 8.
[262] C Finn, above note 225 at 119–122.

- documents which outline the terms of the contract between the agency and the contractor;
- documents (principally correspondence) which relate to the process by which the agency oversees the performance of the contract; and
- documents created by a current contractor but required for a fair and equitable tender process in the future.

Without the contractual documents, the public will not know what services it is entitled to receive, the terms of any community service obligations or any of the methods of enforcing such agreements. Armed with this information, members of the public may be able to demonstrate that the service they received is sub-standard.[263] They will know whether the community itself has rights against the contractor, and if such rights do not exist, they will be able to lobby the responsible agency to take action on its behalf. If the contract should contain better enforcement measures, or community service obligations, or if the agency has not been properly monitoring the performance of the contract, the public has the opportunity to hold the agency accountable for poor management of its outsourcing arrangements.

Once a contractor has been operating a service for some time, the contract is likely to come up for tender again. By this time, the detailed due diligence information will be in the hands of the latest contractor, rather than the government. Unless the government has included a clause in the contract requiring the contractor to supply it with sufficient information, it will be very difficult for other businesses to put in a successful tender. Unless the information is available under FOI, there is the danger that what was a public monopoly will change to becoming a private monopoly instead.[264]

The definition of "agency" in the FOIA clearly excludes private contractors.[265] Thus, they are under no FOI obligations at present. Even if the required information is held by government, the public will face problems obtaining documents as they are often exempt as either trade secrets, of commercial value, damaging to the business if released or confidential pursuant to s.45 FOIA. Most commentators have concluded that the types of documents described above, which are vital to agency accountability in the provision of

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[263] Ibid. at 122–123.
[264] Ibid. at 123.
[265] See s.4 of the FOIA.

services will not be available under the FOIA if the service is contracted out.[266] It is a conclusion with which I respectfully agree.

(2) Is private sector accountability sufficient?

There are mechanisms of control available to the private sector and it has been suggested that these are a sufficient substitute for the FOIA.[267] Government may insist on contractual terms to oblige the contractor to carry out the services in a way which is for the general public benefit, including the stipulation of standards and quantity of service, or providing an obligation to undertake community service obligations.[268] An alternative is to allow the rules of the competitive market place to regulate the provision of services, with consumers exercising their right to go elsewhere if the service provider is unsatisfactory.[269] A third remedy available within the private sphere is for government to set standards for the delivery of public services.[270] Finally, a consumer may be able to take legal action, either for a breach of the Trade Practices Act or in tort.[271]

There are problems with each of these remedies. It is difficult to draft contractual terms relating to notions of public good and community service which are enforceable.[272] Those who are most dependant on government services are often those with the least power, status and information. This imbalance makes it difficult for these consumers to exercise contractual rights, and legal remedies are often out of reach.[273] Finally, there may be only one or two businesses contracted to provide a particular agency service. If the citizen (or consumer) suffers from an extra disadvantage, such as physical disability, infancy, transport restrictions or limited English skills, their choice of service provider may be

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[266] C Finn, above note 225 at 127; J Sprott, "Privatisation, Corporatisation and Outsourcing: A Critical Analysis from the Consumer Perspective" (1998) 5 *AJAL* 223 at 229; Administrative Review Council, *The Contracting Out of Governmernment Services* (Report No. 42, 1998) at 52,

[267] Administrative Review Council *Administrative Review of Government Business Enterprises*, Discussion Paper, AGPS, Canberra, 1993, par 4.19.

[268] J Sprott, above note 266 at 231-232; N Seddon, "Ministerial Control after Contracting Out - Pie in the Sky?" (1997) 13 *AIAL Forum* 25 at 25-26; P Shergold, above note 261 at 7.

[269] J Sprott, above note 266 at 234-235; P Shergold, above note 261 at 7.

[270] P Shergold, above note 261 at 7.

[271] J Sprott, above note 266 at 235-236.

[272] N Seddon, above note 268 at 26.

[273] J Sprott, above note 266 at 232.

further reduced, making the safe guard of "consumer choice" and competition non-existent.[274]

To ensure that both government and private contractors remain accountable to those who pay for their services, there is a need to expand the scope of the FOIA. This issue was most recently considered by the Administrative Review Council in its report *The Contracting Out of Government Services*.[275] The Council concluded that the best approach would be to deem documents which relate directly to the performance of the contract and which are in the possession of the contractor to be in the possession of the government agency. People would then have a statutory right to access the information, by making a FOI request to the agency.[276]

The ARC also considered whether the exemption provisions needed to be narrowed for the FOIA to be effective. The majority of members concluded that ss.43 and 45 provided a good balance between the protection of the commercial interests of the contractors and interest of members of the public.[277] A minority of the Council disagreed. They found that the current wording of the sections led to a situation where "rights of access to information relating to government services ... [were] lost or diminished because of the contracting out process."[278] This is because it was assumed that it would be against the public interest to disclose information of commercial value or to prejudice the future supply of information to government. In the minority's view, both ss.43(1)(b) and (c)(ii) warranted the inclusion of a public interest test. In support of their argument, they noted that in Tasmania and Western Australia, there had been no discernible ill effects from adopting this approach.[279] They also voiced their concerns that without such an approach, there was a risk that less and less public expenditure would be subject to public scrutiny.[280] The discussion earlier in this paper of the scope of s.43 shows how much information can be excluded from public access by claiming the exemptions provided for in s.43. I would therefore agree with the conclusions of the minority of the ARC.

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[274] Ibid. at 233.
[275] Administrative Review Council, *The Contracting Out of Governmernment Services* (Report No. 42, 1998).
[276] Ibid. at 57.
[277] Ibid. at 68.
[278] Ibid. at 73.
[279] Ibid. at 75.
[280] Ibid.

In my view, contractors must be prepared to accept a considerable degree of public scrutiny as the price of a government contract. Finn has suggested that this should literally be the case with a potential tenderer placing a commercial value upon its "confidential" information.[281] The market can then determine an appropriate price for a government contract. If private contractors place too great a value on their privacy, it may be cheaper and more efficient to return to the public sector to provide an efficient, cost effective and accountable service. At the moment however, there does not seem to be a shortage of potential applicants for government contracts.

(3) Information about Government business practices

As part of accountability for public funds, it is important that information on the business practices of government agencies is accessible under the FOIA. There is a need for both fiscal and political accountability. As Allars has pointed out, the services traditionally provided by government are services which are consumed collectively.[282] "Services" such as education, health, transport, urban planning, power and communication enable each individual to function in modern society. When these services are corporatised, the need to ensure that they are still provided in a way which is open and fair remains. As public services, the public should be able to participate in discussions and disputes about the quality and quantity of the services it consumes.[283]

The exemption provided for by s.43 does not extend to the business affairs of agencies or undertakings themselves.[284] However, many Government Business Enterprises have an exemption in Schedule 2 for their commercial affairs.[285] In his speech to the British Section of the International Commission of Jurists given on 17 December 1997, Justice Kirby warned the British against including too many exemptions in their FOI Act. He said, "..if they are established by statute and if they draw on the Consolidated Revenue, the arguments for including them in the ambit of FOI legislation are substantial. Their executives will squeal endlessly, if Australian experience is any guide ..."[286] The joint

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[281] C Finn, above note 225 at 128.
[282] M Allars, "Private Law But Public Power: Removing Administrative Law Review from Government Business Enterprises" (1995) 6 *Public Law Rev* 44 at 45.
[283] Ibid. at 45.
[284] *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.
[285] ALRC/ARC, above note 3 at 212.
[286] M Kirby, above note 20 at 6.

ALRC/ARC report on the FOIA noted that there was a public interest in the effective management of public assets and that in some circumstances a GBE had been set the task of doing this in a "private" environment.[287] The report concluded that where a GBE predominantly carries out its activities in a competitive environment it should not be subject to the FOIA. GBEs not operating in a competitive environment were to be fully subject to the FOIA.[288] The difficulty, as recognised in the report, lies in the midway point, where organisations such as Telstra compete on a commercial basis with other companies but also provide a very significant public service.[289]

The report does not question why the presence of "competition" must mean that the rules of administrative law should no longer govern the players.[290] Nor does it seem to consider the relevance of whether the GBE deals with public assets. Allars suggests that the need for competitive neutrality between the government and private sectors has become an end in itself.[291] In my view, when considering whether the FOIA should apply to a body's activities, factors such as the use of public assets and the need to provide a public service are more important than issues of competitiveness.

The decision in *Re Sullivan and Department of Industry Science and Technology*[292], provides a useful example of how the Tribunal could approach the question of business information in a different way. This is despite the fact that the case concerned s.45 rather than s.43 of the FOIA. The Tribunal in *Re Sullivan* [293], composed by Mr Bayne sitting as Senior Member, considered an application for documents held by the respondent department relating to a private company (ATG) set up by the Commonwealth. The respondent came to hold the documents because the officers of ATG were also officers of the respondent, but seconded to the ATG. A claim for exemption in respect of one of the documents was made under s.45 FOIA. The Tribunal found that the claim was not made out on other grounds, but went on to discuss claims for confidentiality where the documents are government documents. The foundation of this approach was the decision of Mason J in *Commonwealth v John Fairfax and Sons Ltd*[294], which was later adopted in

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[287] ALRC/ARC, above note 3 at 212-213.
[288] Ibid. at 214.
[289] Ibid. at 215-216.
[290] M Allars, above note 282 at 76.
[291] Ibid. at 76.
[292] *Re Sullivan and Department of Industry, Science and Technology (No 1)* (1996) 23 AAR 59.
[293] *Re Sullivan and Department of Industry, Science and Technology (No 2)* (1998) 49 ALD 743.
[294] (1980) 147 CLR 39.

Esso Australia Resources Ltd v Plowman.[295] The Tribunal cited a lengthy extract from the decision of Mason CJ in *Plowman*, part of which read:

> ... there may be circumstances, in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration, which would give rise to a "public interest" exception. The precise scope of this exception remains unclear.
>
> The courts have consistently viewed governmental secrets differently from personal and commercial secrets ... As I stated in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 51, the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure. ....
>
> The approach outlined in *John Fairfax* should be adopted when the information relates to statutory authorities or public utilities because, as Professor Finn notes, in the public sector "(t)he need is for compelled openness, not for burgeoning secrecy". The present case is a striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?[296]

The Tribunal concluded:

> Thus, if ATG is a public body for the purposes of the *Fairfax* doctrine, the question will be whether I am satisfied that the public interest requires that any matter in document 1 which otherwise would found an action for breach of confidence should not be disclosed.[297]

Having found that the ATG was a public body, the Tribunal considered whether the public interest required that the document not be disclosed. It weighed the public interest in the ATG being able to function efficiently and profitably against the public interest in the ATG being accountable for how it exercised its functions. On balance, the Tribunal considered the public interest favoured disclosure.[298]

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[295] (1995) 183 CLR 10.
[296] at 31-32.
[297] *Re Sullivan and Department of Industry, Science and Technology (No 2)* (1998) 49 ALD 743 at 751.
[298] Ibid. at 752-753.

To provide blanket exemptions for GBEs wherever they deal with competitive matters is contrary to the general principles of accountability found in the FOIA. Rather than adopting such a blanket exemption, it would be preferable for the decision maker to consider the public interest factors involved. Given the current wording of the exemption found in Schedule 2 it is difficult for decision makers to adopt this approach at present. The decision in *Re Sullivan* shows that it is possible for decision makers and review bodies to undertake this balancing process in the context of the FOIA. As such, it is an area where reform is appropriate.

(4) Receiving benefits in exchange for information – who should reap the reward?

Information may be provided to government under obligation (for example, in compliance with a statute) or it may be supplied voluntarily. In many cases, businesses receive a benefit in exchange for parting with the information, such as the right to manufacture and sell a drug, run a television station or carry out a lucrative government contract. In *Re Actors' Equity* the Tribunal drew a distinction between information which is "truly 'government' documents" and information which is supplied to government pursuant to a statutory obligation.[299] The Tribunal's comments raise the question of whether the way in which business information is acquired should affect whether it falls within the exemption provided for in s.43. The ALRC viewed information held by government as a national resource.[300] On this basis, if business is receiving a benefit from government in exchange for information, should there not also be a liberal approach to the access and use of that information by the public. There are also good accountability reasons for disclosing documents when business has received a benefit in return for supplying government information. The release of information allows the public to assess if government is properly regulating businesses under its control, or if the agency concerned has been "captured" by the industry it is meant to regulate.[301] In addition, there is a public interest in knowing whether there are any political reasons associated with the awarding of

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[299] *Re Actors Equity Association of Australia and Australian Broadcasting Tribunal* (1984) 7 ALD 584 at 592.
[300] ALRC/ARC, above note 3 at 33.
[301] P Bayne, above note 2 at 194.

contracts,[302] or whether a conflict of interest or perhaps corruption influences the awarding of government contracts.[303]

At present, external review bodies do not seem to be adopting this sort of approach. In *Re Rogers Matheson Clark*[304], *Re Pfizer*[305] and *Re Caruth*[306] the business concerned provided government with information in order to receive the considerable benefit of being able to operate their government endorsed business. Yet, the Tribunal was at pains to emphasise that the businesses had supplied the information voluntarily and how helpful this co-operation was for the government. There was no recognition that the business concerned also benefited from the co-operation. The review bodies also suggested that at least part of the information had been supplied on a confidential basis and that government should uphold this duty of confidence. The enforceability of government obligations of confidence in this context has however been questioned as unconstitutional[307] or at least subject to the stringent test provided for in *Commonwealth v John Fairfax and Sons Ltd.*[308]

C.Accessing documents under the FOIA

Although the content of FOI legislation is important, ultimately it is the manner in which it is implemented by the administration that determines its success or failure.[309] The following is a critical analysis of the application and appeals procedures under the FOIA which will then be compared with the procedure of the FOI Commissioners in Western Australia and Queensland.

1. Applications to an agency

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[302] Such as the claims made by the Industry Council that the procedures for awarding training contracts by the WA State Training Board to the WA Chamber of Commerce and Industry were not followed and that the process was politically motivated. See *The West Australian* 21 January 1999 at 4.
[303] C Finn, above note 225 at 121-122.
[304] *Re Rogers Matheson Clark and Australian National Parks and Wildlife Service* (1991) 22 ALD 706.
[305] *Re Pfizer Pty Ltd and Department of Health Housing and Community Services* (1993) 30 ALD 647.
[306] *Caruth and Department of Health, Housing, Local Government and Community Services* (Administrative Appeals Tribunal, 18 June 1993, unreported).
[307] T Brennan, "Undertakings of Confidence by the Commonwealth - are there limits?" (1998) 18 *AIAL Forum* 8.
[308] (1980) 147 CLR 39; see *Re Sullivan and Department of Industry, Science and Technology (No 1)* (1996) 23 AAR 59.
[309] P Bayne, "External Review of FOI Decisions by the Information Commissioners" (1995) 3 *AJAL* 57 at 66.

An applicant wishing to obtain documents from the administration must make a written request to the responsible agency, department or Minister (the term "agency" will be used from here on). The request should include whatever information is reasonably necessary to identify the document(s) which are the subject of the request.[310] If a request has been directed to the wrong agency, that agency has an obligation to assist the applicant to direct it to the correct agency.[311] An agency may also pass on a request if it thinks the relevant documents are more likely to be in the hands of another agency.[312] The FOIA sets a 30 day time limit for a decision on a request, although there is scope for the agency to delay its response if it is not possible to reply within this time.[313] Access can be granted either in whole, in part or not at all. Where access is refused, reasons for decision must be provided.[314] Access can be by either inspection or obtaining a photocopy.[315]

If the applicant is not satisfied with a decision provided by the agency, then within 30 days, she or he may apply for internal review of that decision. Internal review is available for the full or partial refusal of access as well as decisions relating to fees and charges. A review must be conducted by a person other than the original decision maker and the reviewer is obliged to make a fresh decision.[316] Generally speaking, internal reviews are conducted by the principal officer or very senior officers within an agency.[317] The ALRC/ARC report recommended that internal review not be compulsory as it lengthened the review process and could deter applicants from continuing on to the AAT.[318]

The timeliness and cost of FOI applications have often been criticised.[319] On average in 1997/98, 76% of requests received a decision within 30 days.[320] This figure reflects the fact that the bulk of FOI requests are routine applications for personal information.[321] Agencies

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[310] s.15(2) FOIA.
[311] s.15(4) FOIA.
[312] s.16 FOIA.
[313] s.15(5) FOIA.
[314] s.26 FOIA.
[315] s.20 FOIA.
[316] s.54 FOIA.
[317] Attorney General's Department, *Freedom of Information Act Annual Report 1997/98* (1998) at 22.
[318] ALRC/ARC, above note 3 at 169.
[319] ALRC/ARC, above note 3 at 179; M Kirby, above note 20 at 7; P Bayne, "The Costs of Freedom of Information" (1986) 1 *FoI Review* 2; L Dalton, "FoI - the irony of the information age" (1994) 68 *Law Institute Journal* 848 at 850; D James, "A Federal Freedom of Information Commissioner Looking behind the ALRC/ARC Final Report" (1998) 76 *FoI Review* 50 at 84.
[320] Attorney General's Department, *Freedom of Information Act Annual Report 1997/98* (1998) at 7.
[321] Department of Veterans' Affairs, Department of Immigration and Multicultural Affairs and Centrelink between them received 89% of the requests: Attorney General's Department, *Freedom of Information Act Annual Report 1997/98* (1998) at 3.

who were likely to be dealing with non-personal information took considerably longer. Within the Departments of Environment, Defence, Transport, Foreign Affairs and Treasury, at least 59% of applications took longer than 30 days.[322]

Turning to consider the question of cost, the FOIA provides for an application fee of $30 and a fee of $40 to seek internal review.[323] An agency is also entitled to levy charges for the time taken in processing a FOI request. An agency may charge $15 an hour when searching for documents and $20 an hour for the time it takes to reach a decision on granting access. In addition, the agency may charge 10c a page for photocopying.[324] Before charging an applicant for a request the agency must give the applicant written notice of the likely charge and the opportunity to accept or dispute the charge.[325] The agency can waive fees or charges on the basis of financial hardship or the general public interest in providing access to the documents.[326] In 1997/98, agencies collected only 26% of application fees and 34% of charges.[327]

Recent discussion of media use of the FOIA suggests that agencies can set very high charges in an endeavour to deter media applications for documents.[328] The charges levied by agencies vary considerably. Charges are only notified in respect of 5% of applications.[329] Nonetheless, the statistics provided by the FOIA Annual Report suggest that costs are higher for non-personal information. While the average cost of a Veterans' Affairs request is 52c, the average cost of Treasury request if $343.96. For Transport and Regional Development and the Customs Service the cost is $158 and the ASC charges an average of $164.58 per request.[330] One of the other items of interest is the level of charges

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[322] Percentage of number of requests which were responded to after 30 days: Department of Defence – 59%; Department of Foreign Affairs and Trade – 60%; Department of Transport – 63%; Treasury – 68%; Department of Environment - 84%. The slowest agencies were the Great Barrier Reef Marine Park Authority and AusIndustry who took longer than 30 days to respond to all of their requests. However a slow response time in this situation could indicate a complex request in a sensitive area made to an agency that has little experience in the FOIA. Attorney General's Department, *Freedom of Information Act Annual Report 1997/98* (1998) Appendix C at 38-40 These examples are illustrative only and do not necessarily include all agencies who might fall within this category.

[323] reg. 5 Freedom Of Information (Fees And Charges) Regulations 1982.

[324] Schedule to Freedom Of Information (Fees And Charges) Regulations 1982.

[325] s.29 FOIA.

[326] s.30A FOIA.

[327] Attorney General's Department, above note 322 at 12.

[328] N Waters, "Freedom of information works for the media in New Zealand" (1998) 77 *FoI Review* 66 at 66; R Snell, "In search of the Freedom of Information constituency: Case 1 - the Media" (1998) 78 *FoI Review* 81 at 83; R Coulthart, "Why the FoI Act is a joke or "don't shoot the media, we're doing our best"" (1999) 81 *FoI Review* 43 at 43; N Waters, *Print Media Use of Freedom of Information Laws in Australia* (1999) at 22.

[329] Attorney General's Department, above note 322 at 12.

[330] Ibid. at 11.

notified to the applicant, compared with the charges collected. Anecdotal evidence suggests that agencies tell applicants that the charges on an application will be very high, perhaps in an attempt to deter applicants, but when pushed will reduce the fees.[331] Some of the more striking examples include:[332]

Agency	**Charges notified**	**Charges collected**
Dept of Communications and the Arts	$22,769	$424
Dept of Defence	$20,934	$2,377
Dept of Environment	$33,721	$1,935
Dept of Finance and Administration	$35,813	$1,072
Dept of Primary Industries and Energy	$30,887	$1,768
Dept of Treasury	$55,920	$7,943

There is no explanation offered for such substantial differences. It may be that the agency acted in the public interest by waiving a significant portion of the fees. Alternatively the applicant, perhaps intimidated by the substantial costs involved, withdrew the application altogether. In addition, it seems that charges under the FOIA are not always levied in accordance with the regulations.[333] Sometimes, high charges are warranted when the application is a fishing expedition, rather than a pointed request on a particular topic. Journalists and opposition parliamentarians have been accused of this type of request.[334] Lawyers too make large requests to obtain documents prior to the discovery process or prior to commencing litigation.[335]

Although the amount of fees and charges collected is increasing the fees and charges still only cover 3% of the total cost of the FOIA.[336] The Annual Report estimates the total cost of FOI to the Commonwealth (81 agencies) at $12 191 478. This includes staff time for both requests and internal reviews, office costs, photocopying costs, legal fees of the agency and any litigation costs paid to the applicant.[337] The average cost per request was

[331] R Coulthart, above note 328 at 43.
[332] Reproduced from statistics provided in Appendix D to Attorney General's Department, above note 322 .
[333] Attorney General's Department, above note 322 at 15.
[334] N Waters, above note 328 at 66; P Bayne, above note 319 at 2; N Waters (1999), above note 328 at page 17.
[335] This reflects the author's experience while working for the Crown Solicitor's Office in Western Australia.
[336] Attorney General's Department, above note 322 at 12.
[337] Attorney General's Department, above note 322 at 17-21.

$374 although the cost per request varied between $59 and $25,555. Five agencies processed their requests for under $200 per request, while 10 agencies reported an average cost of above $10,000.[338] Despite these high costs, information sought under FOI is by definition information that people are interested in seeing. Ricketson compared the cost of FOI to the Victorian government ($3 million) with the amount it spent on providing leafleted information ($75 million) which it wanted people to see.[339] The cost of FOI seems cheap by comparison. Equivalent figures for the Commonwealth are not readily available.

The time and cost of an application are important, but so too is the agency's attitude to FOI. Commonwealth agencies have been accused of deliberately avoiding FOI by using post-it notes and oral briefings.[340] Deficient record keeping is also detrimental to rights of access under FOI.[341] In May 1996 a Senate Standing Order introduced a requirement that agencies provide a list of any new files or parts of files created in the previous six months.[342] Originally this order allowed a much better understanding of the way in which the government recorded and stored information. Now however, the file titles have become more obscure to hide controversial issues and the exemption clauses are more regularly relied on.[343] Another measure of an agency's willingness to disclose information is the extent to which it provides full disclosure of the documents. In 1997/98 81% of FOI requests were granted in full, 15% were refused in part and 4% were refused in full.[344] Again, individual agencies varied greatly. Telstra, the Department of Health and Family

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[338] The Trade Marks Office processed 724 requests for an average cost of $59, the Department of Veteran's Affairs processed 14 641 requests for an average of $78 while the Australian Maritime Safety Authority had 13 requests at an average of $25 555 each. AusIndustry processed 7 requests for an average of $23 774 and the Australian Securities Commission had 50 requests costing an average of $12 357 each. Attorney General's Department, above note 322 at 21-22.

[339] M Ricketson, above note 18 at 28.

[340] L Dalton, above note 319 at 850; J Waterford, "Old FOI fears find new lease of life in Tribunal" (1990) 27 *FoI Review* 28 at 29.

[341] P Wilmshurst, ""The University has recently discovered two documents": Two Cinderellas - records management and FOI" (1998) *FoI Review* 84; R Coulthart, above note 328 at 45; A Roberts, "Monitoring Performance by Federal Agencies: A Tool for Enforcement of the Access to Information Act (Working Paper)", School of Policy Studies Queen's University, Ontario, Canada (1999) at 1.

[342] Senate Standing Order, Orders for documents, 5. Indexed lists of departmental and agency files 30 May 1996 J.279, amended 3 December 1998 J.265.

[343] R Coulthart, above note 328 at 44-45.

[344] Attorney General's Department, above note 322 at 5.

Services, the ASC and Customs made the greatest number of refusals in full.[345] A slightly different group of agencies granted the least number of applications in full.[346]

It is difficult to draw firm conclusions from these statistics. For example, the annual report does not describe which exemptions were claimed. So, it is impossible to say if an agency only deleted the names of third parties or if it culled most of the material on a sensitive issue. A more comprehensive set of statistics, and an analysis of the performance of individual agencies might enable commentators to have a more accurate understanding of which agencies are refusing to play the FOI game.[347]

2. Review by the Administrative Appeals Tribunal and appeal to the courts

The AAT dealt with 122 applications under the FOIA in 1997/98.[348] An appeal from an internal review decision should be lodged with the AAT within 28 days, although the Tribunal may extend the time limit.[349] An application can be by letter or on a written application form.[350] The agency who made the decision is then obliged to provide the Tribunal and the applicant with a statement setting out the facts, evidence and reasons for decision as well as any relevant papers within 28 days.[351] A conference is held 6-10 weeks after the application was received. Conferences allow both sides to put their story and try to reach an informal settlement. They also provide an opportunity to obtain further evidence where that is necessary. More than one conference may be held where matters are complex.[352] Mediation is also offered by the Tribunal and 80% of all cases settle at this stage.[353]

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[345] Tesltra 45.9%, Department of Health and Family Services 21.7%, Australian Securities Commission 21.2% and Australian Customs Service 20% Attorney General's Department, above note 322 at 6.
[346] The Department of Prime Minister and Cabinet granted only 10.5% of applications in full. The Australian Federal Police granted 12.2%, the Department of Transport and Regional Development 12.8%, Telstra 16.5% and the Australian Securities Commission 16.5%. Attorney General's Department, above note 322 at 7.
[347] A Roberts, above note 341 at 8.
[348] Attorney General's Department, above note 322 at 15.
[349] s.29 *Administrative Appeals Tribunal Act 1975.*
[350] s.29 *Administrative Appeals Tribunal Act 1975.*
[351] s.37 *Administrative Appeals Tribunal Act 1975.*
[352] Administrative Appeals Tribunal, *Leaflet: What is a conference, what is it for?* (1999) .
[353] Administrative Appeals Tribunal, *Leaflet: Have you considered mediation?* (1999) . There are no statistics available on the time taken for FOI matters, or the rate at which they settle at mediation.

If the matter has not settled, it proceeds to a hearing. This is generally held 10 weeks after the last conference.[354] At the hearing the agency has the onus of showing that its decision was justified.[355] The onus of proof is the balance of probabilities.[356] The Tribunal's reasons for decision are either given orally or handed down at a later date. The AAT has undertaken to hand down written reasons within two months.[357] Using the time line provided by the AAT seven months are likely to pass between the date of application and the provision of written reasons on a decision.[358]

The cost of an application to the AAT can be a significant deterrent for users of the FOIA. Initially, a filing fee of $505 is payable, although this can be waived in circumstances of financial hardship. This fee alone is likely to deter those seeking access to documents out of "mere" interest in the workings of government. Although legal representation is not obligatory before the Tribunal, FOI access applications can be complex and vigorously defended. Applicants may feel obliged to engage counsel in order to properly argue their case.[359] The costs of engaging counsel can of course be prohibitive. One recent estimate of the costs of appealing a FOI decision to the AAT, using counsel and expert witnesses was $15,000-$20,000.[360]

The other factor affecting external review of FOI decisions is the atmosphere of the proceedings themselves. Although it is a tribunal, many commentators have argued that the AAT behaves too much like a court.[361] This adversarial approach emphasises the inequality of resources between parties and encourages the administration to see the public as an opponent.[362] The *Administrative Appeals Tribunal Act 1975* allows proceedings to be conducted in a more informal and inquisitorial manner and some members of the Tribunal have adopted this approach.[363] By seeking further evidence or witnesses the Tribunal can get a better understanding of the truth of a matter.[364] Good administration

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[354] Administrative Appeals Tribunal, *Leaflet: What is a hearing?* (1999) .
[355] s.61 FOIA.
[356] *McKenzie v Department of Social Security* (1986) 65 ALR 645 at 648.
[357] Administrative Appeals Tribunal, *Charter of the Administrative Appeals Tribunal* (1999) .
[358] Provided that only one conference is held.
[359] For example the experience of the Public Interest Advocacy Centre recounted in K Harrison, above note 126 at 74, who engaged counsel after an intervening party engaged a QC to argue their case.
[360] R Coulthart, above note 328 at 44.
[361] P Bayne, above note 20 at 222; K Harrison, above note 126 ; D James, above note 319 at 54-55.
[362] J Dwyer, "Overcoming the Adverserial Bias in Tribunal Procedures" (1991) 20 *FLR* 252 at 254-258.
[363] s.33(1) *Administrative Appeals Tribunal Act 1975*; J Dwyer, "Fair Play the Inquisitorial Way: A Review of the Administrative Appeal Tribunal's Use of Inquisitorial Procedures" (1997) 5 *AJAL* 5.
[364] J Dwyer, above note 362 at 260-265; J Dwyer, above note 363 at 14 –28.

requires that the Tribunal have before it all the necessary evidence.[365] There are problems with adopting such an approach. Firstly the Tribunal does not have the funds to call witnesses or pursue extra inquiries. It can only make suggestions to the parties. Adjournments granted to obtain extra evidence lead to delays in the hearing of the matter. Finally, neither Members nor the legal profession are trained in inquisitorial methods and lawyers appearing before the Tribunal often resist moves towards a more inquisitorial process.[366]

There has also been criticism of the quality of AAT's decisions. Only 122 of the 7330 applications lodged with the AAT in 1997/98 were for review of a FOI matter.[367] Many members of the AAT lack a deep understanding of FOI laws. This lack of expertise means that the object of the FOIA is not clearly understood and AAT decisions are less likely to make a concerted push for open government. There are currently moves to reform the AAT, by transforming it into a two tier structure, with 6 specialised divisions at the first level.[368] These divisions would be more closely linked to the relevant ministerial portfolios.[369] Second tier review would only be available by leave, where principles of general interest are raised.[370] While this reform raises serious questions about the independence of the new Administrative Review Tribunal, it does offer the possibility of better FOI decisions. The government's aim is for the ART to develop a flexible, non-adversarial, informal and accessible process.[371] In many cases, the agency will not attend the hearings, but simply put the relevant file before the Tribunal.[372] There is also the possibility that the ART will be obliged to follow government policy when making its decisions.[373] Although often criticised, this approach may be favourable to improved FOI review. If a government department could be persuaded to accept (for political reasons) a

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[365] J Dwyer, above note 363 at 34.
[366] Ibid. at 32.
[367] Attorney General's Department, above note 322 , Table 5.2.
[368] Current estimates suggest that this reform will not eventuate before at least 2001: R Creyke, *The Administrative Appeals Tribunal – What's Happening?*, Current Issues Brief No 8 1999-2000, Department of the Parliamentary Library, Information and Research Services, (1999) at 2- 3.
[369] R Bacon, "Recent Developments Concerning Tribunals in Australia", Public Law Weekend, Australian National University (7 November 1998) at 7; P Bayne, "The silver lining in the dark cloud of the proposed Administrative Review Tribunal", Public Law Weekend, Australian National University (7 November 1998) at 2.
[370] R Creyke, above note 368 at 2.
[371] S Pidgeon "Reforming the System: Proposed Reform in the Federal Arena", paper presented to the *Seminar on the Management of Disputes Involving the Commonwealth*, Canberra, (1999) at 8.
[372] S Pidgeon, above note 371 at 8.
[373] R Creyke, above note 368 at 4-5.

policy favouring openness in government and a liberal approach to releasing information under FOI, this could be used to oblige the ART to take a similarly broad approach.

FOI would come within the Commercial and General Division and because members would not have to deal with five major areas of the AAT caseload, they would have more regular involvement with FOI decisions.[374] The need for greater FOI expertise amongst Tribunal members was recognised in the 1995 ALRC/ARC report.[375] A specialised Tribunal should have a better understanding of the legal and policy issues involved in FOI. It would have much closer contact with the relevant government departments and with the policies operating in those departments.[376] The best outcome of this closeness would be that the Tribunal use its superior expertise[377] and distance from departmental pressures to make well reasoned decisions, consistent with the purpose of the FOIA, but respectful of the policies and work practices of the administration. Decisions of this sort are far more likely to change bureaucratic decision making practices than are decisions of a distant review body.[378]

Should an applicant decide to appeal to the Federal Court (or higher) the time and costs increase enormously. It is very difficult to conduct court proceedings without the help of lawyers and the court filing fees add to these costs. In addition, before the Court, an applicant runs the risk of paying the costs of the government agency if their appeal is lost. *The Age*'s retreat from regular FOI use may be partly attributed to losing a court appeal, which left it with a legal bill for more than $50,000.[379] An appeal to the Federal Court can only be made where there has been an error of law by the Tribunal.[380] However, the broad exceptions of the FOIA leave plenty of scope for errors of law. The above discussion of the interpretation of the FOIA demonstrated a number of areas where the Federal Court has been unsympathetic to claims for broader rights of access to documents.[381] Those on the bench today were mostly trained in an era when government secrecy was the norm and it is likely that they have sympathy with that idea. When Federal Court judges have been asked

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[374] R Bacon, above note 369 at 4.
[375] ALRC/ARC, above note 3 at 173.
[376] P Bayne, above note 369 5-7, 13.
[377] Although whether Tribunal members will actually have any greater expertise than original decision makers is questionable R Bacon, above note 369 at 8.
[378] P Bayne, above note 369 at 16.
[379] N Waters (1999), above note 328 at 22.
[380] s.44(1) *Administrative Appeals Tribunal Act 1975.*

to exercise a discretion in interpreting the FOIA, they have tended to favour access over secrecy.[382]

3. An alternative approach - a FOI Commissioner

Queensland and Western Australia have adopted a different approach to review of FOI decisions. Both states have set up a FOI Commissioner with powers to investigate and review the decisions of agencies.[383] The Commissioners are required to carry out this task "with as little formality and technicality and with as much expedition"[384] as is possible under the Act. The aim is to provide "a speedier, cheaper, more informal and more user-friendly method of dispute resolution that the court systems or tribunals".[385] In both jurisdictions, the review process is commenced by a letter to the Commissioner attaching a copy of the decision complained of.[386]

The Commissioner will generally require the agency to produce the documents for inspection.[387] The Commissioners attempt to resolve the matter by informal means. In WA, the Commissioner's staff try to persuade an agency to release any documents which while technically exempt appear innocuous. Once staff are aware of the questions the applicant seeks to have answered, alternative means of providing the information are explored. The agency may agree to create a new document explaining the information, provide an oral briefing or give access to other documents that answer the applicant's questions. At other times, the Commissioner's staff explain that an exemption is properly claimed by the agency and encourage the applicant to withdraw the complaint.[388] The conciliation process has allowed the Commissioner the opportunity to change the

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[381] For example: the decision in *Searle v Public Interest Advocacy Centre* (1992) 26 FCR 111 where the Court declined to interpret the FOIA in a way which leaned towards disclosure and also took a broad interpretation of words "reasonably expect" in s.43(1)(c)(ii).
[382] M Kirby, above note 20 at 9.
[383] s.71(1) *Freedom of Information Act 1992 (Qld)*; ss.63 and 65 *Freedom of Information Act 1992 (WA).*
[384] s.72(1)(b) *Freedom of Information Act 1992 (Qld);* s.72(1)(a) *Freedom of Information Act 1992 (WA).*
[385] Office of the Queensland Information Commissioner, *Annual Report 1997/1998* (Report No. 6, 1998) at para 1.10.
[386] P Bayne, above note 309 at 59; Information on WA Commissioner's web site which can be found at www.foi.wa.gov.au.
[387] P Bayne, above note 309 at 60. Bayne raises a query as to whether the WA practice of requiring production of the whole of the agency FOI file would continue and the author can confirm that in her experience, the FOI Commissioner continues to ask for the agency file.
[388] Office of the Information Commissioner Western Australia, *Annual Report 1997/1998* (Report No. 5, 1998) at 4.

procedures and policies in agencies, having a direct effect on the normative standards of the administration.[389]

If this conciliation process fails, the matter proceeds to a formal review. The formal review need not comprise a hearing and need not be held in one continuous process.[390] This allows the Commissioner to obtain more information from the parties or to encourage them to conduct better searches for documents.[391] The Commissioners may also call witnesses.[392] The strong commitment to open government on the part of FOI Commissioners also surfaces in their formal decisions.[393] The Commissioners' decisions are binding and are appealable to the relevant Supreme Courts.[394]

On issues of cost and speed, the FOI Commissioners, and in particular the WA Commissioner perform well. There were 189 applications in WA during 1998/99. Only 26 complaints proceeded to a formal decision (14%) and on average, complaints were dealt with within 41days.[395] The response time from the Office of the Queensland FOI Commissioner for the previous financial year is less impressive, with 61% of cases resolved within 12 months.[396] It resolved 66% of applications by informal methods.[397] An increase in informality generally corresponds to a reduction in time and costs. Informal proceedings are likely to be more comfortable for one-off applicants, particularly those who are unrepresented. The WA FOI Commissioner reported that 88% of clients were satisfied with the review process.[398]

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[389] Office of the WA FOI Commissioner, above note 388 at 5; P Bayne, above note 309 at 66.
[390] P Bayne, above note 309 at 60-61.
[391] P Bayne, above note 309 at 61; For example *Jesser and University of Southern Queensland*, (unreported, Qld FOI Commissioner, 23 September 1997).
[392] P Bayne, above note 309 at 62; ss.85 and 86 *Freedom of Information Act 1992 (Qld);* ss.72 and 73 *Freedom of Information Act 1992 (WA).*
[393] For example the weight given to the public interest in open government in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at 81-7 and in the same case the forthright rejection of the *Re Howard* criteria as being inconsistent with the purpose of FOI legislation at 96-111 an approach followed by the WA Information Commissioner in *Re Veale and Town of Bassendean* (unreported, WA Information Commissioner, No D00494).
[394] ss.89(1) and 97 *Freedom of Information Act 1992 (Qld);* ss.76(2) and 85 *Freedom of Information Act 1992 (WA).*
[395] Office of the Information Commissioner Western Australia, *Annual Report 1998/1999* (Report No. 6, 1999) at 24 and 28.
[396] Office of the Qld FOI Commissioner, above note 385 at para 2.10 This is apparently due to a backlog of difficult cases, which should be dealt with over the next two years following the allocation of extra resources.
[397] Office of the Qld FOI Commissioner, above note 385 at para 2.11.
[398] Office of the WA FOI Commissioner, above note 395 at 28.

Both Commissioners undertake an educative role. The Queensland Commissioner uses the contact between his office and agency staff to explain how to understand and apply the FOI Act in a particular case.[399] The WA Commissioner takes a more pro-active role. To ensure the independence of the review process, a separate group provides assistance to applicants and agencies.[400] In 1998/99 it answered 2,425 telephone enquires of which about one third came from agencies. In 1997/98 the Commissioner's Office was invited by the Department of Family and Children's services to develop "best practice" standards for dealing with FOI issues.[401] The group also provides briefings and workshops for community groups, agencies and organisations and publishes a number of brochures and bulletins.[402] The statistics collected by the Commissioner are more detailed than those for the Commonwealth FOIA and allow the Commissioner to better monitor compliance by each agency.[403] In 1998/99 the Commissioner provided a "report card" on the FOI performance of five agencies, covering timeliness, cost, searches, decision-making, responsiveness and openness. A visit to the agencies was part of preparing this report. It is an innovation the Commissioner intends to continue in future reports.[404] It was proposed in ALRC/ARC report that a Commonwealth FOI Commissioner be established to undertake this educative role, leaving review with AAT.[405]

It is difficult to undertake a true comparison between the AAT and the FOI Commissioners as the AAT does not provide any specific FOI statistics. Some basic comparisons can however be made. The AAT process takes at least 6 weeks (time to the first conference) and a minimum of 5 months to get a hearing date and perhaps a further 2 months to obtain the reasons for decision. The average time for resolving a complaint in WA is 41 days. There is a $505 filing fee for the AAT and no cost attached to applying to the Commissioners. Although both Commissioners criticised the attitude of some agency staff towards FOI, it is clear that both Offices have good relations with agencies. This informal contact encourages agencies to seek their assistance for specific and endemic problems. A

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[399] Office of the Qld FOI Commissioner, above note 385 Executive Summary.
[400] Office of the WA FOI Commissioner, above note 395 at 21.
[401] Office of the WA FOI Commissioner, above note 388 at 5.
[402] Office of the WA FOI Commissioner, above note 395 at 29-31.
[403] The Commissioner collects statistics on the number of applications for personal and non-personal information, the number of applications from the media and Members of Parliament, which exemptions were most cited when refusing access and the outcomes of review of complaints: Office of the WA FOI Commissioner, above note 388 at 10-23.
[404] Office of the WA FOI Commissioner, above note 395 at 2, 4-16.
[405] ALRC/ARC, above note 3 at 62.

combination of explanation and persuasion must stimulate faster changes to administrative norms than is possible under the AAT review process.

D.Conclusion

The FOIA was enacted with a definite democratic purpose in mind. By increasing public knowledge about administrative decisions it was hoped to encourage and facilitate public participation in those decisions and in government generally. The importance of information in a democracy has since been emphasised by the High Court decisions in the freedom of speech cases. There is no doubt that FOI has improved public access to information. Yet, the case study of the interpretation of two exemption provisions showed that the system is far from perfect.

In the first instance, review bodies (encouraged by agencies) have adopted a rather paternalistic approach to the public interest in the release of documents. In an effort to prevent the public becoming confused, misled and under informed, they have refused access to documents. There is also a sense that review bodies do not wish to meddle too much in the functioning of bureaucracies. Generally speaking however, the AAT now subjects agency claims of a public interest in exemption to close scrutiny, and requires evidence of harm before denying access.

The problems caused by the business affairs exemption are due in large part to the changes in the provision of services by government. It can no longer be said that the information held by government about business is not really relevant to the workings of government itself. Much of the work of government is now carried out by private enterprise. The public needs information from both businesses working for government and from government itself to participate in discussions about government services. Those who use government services need information to challenge the quality, quantity and cost of the services they receive. The FOIA is inadequate to this task.

For the majority of users of the FOIA, probably those seeking their own files, the statistics indicate that it is relatively quick and relatively cheap. However it is clear that at times the cost of seeking documents can be very high, and can take far longer than the required 90 days. For certain users, the FOIA provides little assistance in obtaining information about

government. Although the AAT was designed as an informal, inexpensive, inquisitorial review body, its procedures more closely resemble a court. The filing fee alone is enough to deter the "merely curious" from pursuing review of a FOI application. Although the details of the new ART are not yet complete, it is possible that it will provide some positive news for FOI applicants. There is also hope offered in the Commissioner model used in WA and Queensland. To date none of the law reform reports have recommended that the Commonwealth change to Commissioner based review, but the analysis undertaken here suggests that it would be a preferable approach.

CHAPTER II FRANCE

French administrative law has long fascinated the common law world. The French system is generally set up as a contrast with the common law approach to regulating the actions of the State.[406] From the naive eyes of an Australian, France also has a long history of democracy, freedom and citizenship epitomised by the French Revolution of 1788. When looking for inspiration to revive the Australian FOIA, France seemed the obvious answer. There is little written on the French FOI law in English. This chapter attempts to give a good understanding of the functioning of FOI in a French context. It covers both the jurisprudence of the French FOI law and the practical aspects of accessing documents. For the sake of clarity, comparisons with Australia are not covered here, but in Chapter Three.

For consistency and ease of understanding, I have tried to refer to French concepts using Australian terms. The French terms are generally included in the footnotes if clarification is necessary. In France, any part of the administration, whether local, regional or national, is called "administration", because the prime characteristic of each body is that it exercises public power.[407] The term can be used in the singular or plural: "les administrations" or "une administration". I have used the term "agency" to refer to any part of the French administration. Similarly, French lawyers refer to legislation by the date on which it was promulgated. The principal law governing access to documents is known as the law of 17 July 1978.[408] This system is generally used throughout this chapter, except where a law is discussed at length, in which case I have given it an abbreviated name. The law of 17 July 1978 is referred to as the French FOI law.

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[406] Dicey's work, *Law of the Constitution* (10th ed. 1959) is the obvious example, but the fascination continues with for example the recent work of authors such as J Allison, "Theoretical and Institutional Underpinnings of a Separate Administrative Law" in Taggart, M (ed) *The Province of Administrative Law* 71.

[407] J Allison, above note 406 at 73.

[408] The full title is *La loi du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal*, which translates as "the law 17 July 1978 relating to assorted measures to improve relations between the administration and the public and assorted measures of an administrative, social and fiscal nature."

A. Overview of Access to Documents in France

To properly understand how any FOI law works, it is important to view it in context. Part A provides background information and a brief overview of the relevant legislation. French commentators claim for their country the doubtful distinction of being one of the most secretive in the world.[409] The French FOI law was only a small part of ongoing attempts to make France a more transparent democracy. Against this background there is an overview of the French FOI law including consideration of its democratic objectives. Unfortunately, the French FOI law is not the only law which governs access to documents. The way in which other legislation overlaps with the main FOI law concludes this Part. This outline will provide a context in which to situate the detailed discussion of the French FOI law found in Parts B and C.

1. The history of secrecy within the French administration

France has a long tradition of administrative secrecy.[410] French writers from Balzac onwards have testified to an administration which was "oppressive, distant and inhumane"[411] and which regarded the citizen as a subject to be treated with suspicion, mistrust and even hostility.[412] The original justification for administrative secrecy was that it allowed the administration to make its decisions in a neutral environment free from private pressures, in order to better serve the public interest.[413] It has since developed an almost military attitude, relying heavily on ideas of sovereignty, commandment, hierarchy and centralisation, taking decisions unilaterally and without any need to be accountable to members of the public.[414] As early as 1771 the Conseil du Roi[415] was criticised for not providing any information about the finances of the State.[416] When France became a

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[409] B Lasserre, N Lenoir and B Stirn, *La Transparence administrative* (1987) at 5; J Lemasurier, "Vers une démocratie administrative: du refus d'informer au droit d'être informé" (1980) *Revue du Droit Public* 1239 at 1240.

[410] G Braibant, in preface to B Lasserre et al, above note 409 ; J-Y Vincent, "Accès aux documents administratifs" fasc 109-10 *Juris-classeur Administratif* (1996) at para 2.

[411] " oppressive, lointaine, inhumaine" J Lemasurier, above note 409 at 1240.

[412] J Lemasurier, above note 409 at 1240.

[413] C Spanou, "Les associations face à l'information administrative: le cas de l'environment" in Centre universitaire de recherches administratives et politiques de Picardie (ed), *Information et transparence administrative* (1988) 128 at 145.

[414] J Lemasurier, above note 409 at 1240-1241.

[415] The King's Council.

[416] B Lasserre et al, above note 409 at 5.

Republic, the tradition was maintained and enhanced.[417] Not only did the administration not consider itself accountable, it viewed files as the personal property of the civil servant who created them.[418] The public, although often hostile towards bureaucrats was resigned to or forced into a state of ignorance.[419] Within the French public service, secrecy helped establish and maintain a cohesive group, with rules and a life of its own. It also served to distinguish this privileged group from the rest of society – those without knowledge.[420] It is this ingrained attitude that Commission d'Accès aux Documents Administratifs[421] ("CADA") considers is the most difficult challenge to ensuring effective access to documents.[422]

The legal foundations for administrative secrecy were always rather vague, even non-existent. Secrecy was an administrative practice and tradition that was supplemented by legislation on some points.[423] This vagueness allowed secrecy to be maintained without having to provide a justification for it.[424] It has been suggested that until there was a right of information, there was no need for comprehensive legislation governing secrecy.[425] Certainly, the Conseil d'État has held that there is no right to administrative documents or information without an express legislative provision authorising access.[426]

Nonetheless, there are a number of legislative provisions which authorise administrative secrecy.[427] Article 226-13 of the New Penal Code provides that any person who becomes aware of a secret as a result of their position or profession is liable to a year of

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[417] C Spanou, above note 413 at 128.
[418] B Lasserre et al, above note 409 at 156; J Laveissière, "L'accès aux documents administratifs" in Centre universitaire de recherches administratives et politiques de Picardie (ed), *Information et transparence administrative* (1988) 11 at 13.
[419] J Laveissière, above note 418 at 13.
[420] C Spanou, above note 413 at 144.
[421] The Commission for the Access to Administrative Documents was established as part of the French regime of accessing administrative documents. It will be the subject of a detailed discussion from page 142 onwards.
[422] Commission d'Accès aux Documents Administratifs, *L'accès aux documents administratifs* (Report No. 5, 1988) at 12; Commission d'Accès aux Documents Administratifs, *L'accès aux documents administratifs* (Report No. 1, 1981) at 9; see also recent comments in M-C Rouault, "Les droits des citoyens dans leurs relations avec les administrations" (1998) *Droit Administratif - Editions du Juris-Classeur* 6 at 7.
[423] C Spanou, above note 413 at 129; J Lemasurier, above note 409 at 1244; J Laveissière, "En marge de la transparence administrative: le statut juridique du secret" *Mélanges Jean-Marie Auby* (1992) 181 at 184.
[424] B Lasserre et al, above note 409 at 5.
[425] J Laveissière, above note 423 at 184-185.
[426] *CE Ass., 18 novembre 1949, Carlier* Leb. 1949 at 490; *CE, 12 mars 1954, Gauthier* Leb. 1954 at 821; *CE Sect., 14 novembre 1980, Secretaire d'État PTT c/Collet* AJDA 1981 80.
[427] J Laveissière, above note 423 at 8.

imprisonment and a fine if they reveal that secret.[428] An earlier equivalent to article 223-13 formed the basis of ministerial circulars defining the secrecy obligations of civil servants.[429] Article 26 of the law of 13 July 1983 also obliges civil servants to keep all the secrets set out in the Penal Code.[430] This prohibition from disclosing confidential information extends to discussing the matter with another administration, or even colleagues.[431] Article 26 also prohibits communication of documents except where authorised by the laws providing for access to documents.[432] Given that the laws which govern access to documents are far from clear, this threat of sanctions could encourage civil servants to wait for a decision from CADA or a higher authority rather than release documents which fall within an uncertain area of the law. It is ironic that article 27 of the same law provides that civil servants must satisfy the public's requests for information, within the limits imposed by article 26. Indeed, civil servants have to walk a fine line between their obligations of secrecy and the need for transparency in the public sector and in particular access to documents.

In its 1995 report on secrecy and transparency, the Conseil d'État provided a very balanced analysis of the competing needs of transparency and secrecy. It recognised that a society will always need some secrets, because it can not count on its enemies or even its own citizens not to take advantage of sensitive information.[433] However, it considered that there was little benefit in imposing broad obligations of secrecy, such as the obligation of professional secrecy discussed above. It would be preferable to provide precise standards applicable to a given profession or set of circumstances.[434] It also remarked that the traditional balance needs to be reversed with more openness from the administration and more individual privacy vis a vis the State.[435] The law governing access to documents is part of the attempt to strike a new balance.

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[428] *La révélation d'une information à caractère secret par une personne qui en est dépositaire soit par état ou par profession, soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 100 000F d'amende.* Revealing information of a secret nature, where the secret was confided in the person either because of their station or their profession, or because of their duties (whether they hold that post in a permanent or temporary capacity) is punishable by a year of imprisonment or a fine of 100 000FF.

[429] The equivalent provision was Article 378 of the (Old) Penal Code; B Lasserre et al, above note 409 at 7.

[430] Loi no 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires. Loi dite loi Le Pors

[431] Conseil d'État, *Rapport Public 1995* (Report No. 47, 1996) at 61.

[432] Ibid. at 60.

[433] Ibid. at 138.

[434] Ibid. at 140.

[435] Ibid. at 137.

2. Towards transparency

For as long as there has been secrecy in administration, French people have advocated more openness of government. The French use the term "transparence" which translates as transparency. To understand the way in which access to documents is viewed in France, it is important to first consider the broader concept of transparency and its manifestations. The term transparency is used in both academic and ordinary writing and is far broader than a right of access to documents.[436] In France, "transparency" involves encouraging the administration to act in a democratic manner.[437] It incorporates ideas of public involvement in administrative decisions, reasoned administrative decisions, enhancement of the rule of law as well as dissemination of administrative information. The Conseil d'État considered that transparency benefited the public by:

- providing a counterbalance to the prerogative powers of the government and the administration;
- allowing for control over government, not only by those bodies whose function it is to oversee the acts of government but by any citizen;
- reducing the risk of inaccurate information circulating about the activities of public bodies or officers either in the form of propaganda or unfounded rumours; and
- protecting the administration from the temptation of arbitrary action, bowing to pressure groups, giving out special favours or providing incorrect information.[438]

These ideas crystallised in the 1970s, inspiring a fresh assessment of the French administration. Changes were made which tried to maintain a balance between transparency and secrecy, so that democracy was enhanced yet public servants were protected from constant surveillance.[439]

The notion of transparency has a long history. A form of government gazette has existed since 1631, and from 1870 it has been a requirement that all laws, decrees, ordinances, ministerial decisions as well as some judicial and administrative decisions be published in

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[436] For example Conseil d'État, above note 431; B Lasserre et al, above note 409 ; J Laveissière, above note 423 at 181. The term is also in the press in a variety of contexts for example in *Le Monde* 17 March 1999 at 20 in relation to public expectations of a European government which is accountable and does not resort to favouritism and *Libération* 26 May 1999 at 17 where the method used to allocate public housing is questioned.

[437] J Laveissière, above note 423 at 181.

[438] Conseil d'État, above note 431 at 138.

[439] Ibid. at 139.

the *Journal Officiel*.[440] The notion of transparency is also reflected in the constitution with article 15 of the 1789 Declaration of Human Rights which provides that any member of society has the right to ask the administration to account for its actions.[441] In practice, however the process of transparency is far more ad hoc and less expansive than article 15 would suggest.

Parliament plays a role in surveying administrative transparency. Parliamentarians may ask questions of the government on any matter of public interest.[442] Parliament itself receives over 100 reports each year on the activities of the administration and it may also set up commissions to look into administrative management, finances and the provision of public services.[443] Institutions other than parliament also undertake the task of producing public reports relating to the activities of the administration. The Cour des Comptes[444] and its predecessors have been producing reports since 1320. These reports are similar to those of the Australian auditor-general and cover the activities of the national administration, local authorities, public enterprises and social security regimes. Most of the independent administrative authorities[445] also publish annual reports. The difficulty is that the administration is not required to follow the recommendations made in the reports and there is no general rule for which reports are made publicly available. The press coverage received by these reports makes them a useful way of conveying information to the public without necessarily providing a means of control over administrative action.[446]

By contrast, public inquiries do allow the public to obtain access to (some) of the information that interests them and provides an occasion for public comment on and influence over an administrative decision. Public inquiries were originally held prior to the acquisition of land to protect a citizen from an unjustified deprivation of property.[447] Pursuant to the law of 12 July 1983 a public inquiry must now be held prior to carrying out of any works which will affect the environment, so that the public is informed and can contribute its comments, suggestions and counterproposals. The inquiry must be

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[440] B Lasserre et al, above note 409 at 13-17; Conseil d'État, above note 431 at 26-27.
[441] La Société a le droit de demander compte à tout Agent public de son administration.
[442] B Lasserre et al, above note 409 at 31-43.
[443] The French term is "commissions d'enquête et control".
[444] This translates as the "Court of Auditors", which has administrative responsibility for supervising ministers and high officials who are responsible for expenditure and judicial responsibility for examining the correctness of public accounts. C Dadomo and S Farran, *The French Legal System* (2 ed, 1996) at 102-103.
[445] The French term is "autorités administratives indépendentes".
[446] B Lasserre et al, above note 409 at 29-30.
[447] R Hostiou, "Enquêtes publiques" (1983) *AJDA* 606 at 606.

publicised for two weeks prior to commencing and must last at least one month.[448] The commissioner (or commission) of inquiry has considerable powers of investigation, including the power to require people to attend and to communicate documents to the public. The commissioner may also organise public hearings, a notion which is quite common in an Anglo-Saxon context but new to the French legal system.[449] At the end of the inquiry, the commissioner provides a public report on his or her reasons for decision. The decision of the commissioner need not be followed by the administrative body carrying out the works, although a refusal to abide by the commissioner's decision may itself be appealed.[450]

From the 1970s onwards, the notion of transparency began to gain greater importance within the French legal system. The updating of the laws governing public inquiries just discussed were part of this move. France was at the forefront of a mini-revolution transforming administrative structures.[451] A number of new laws were introduced to try and imbue the French administration with greater transparency, the major features of which will now be discussed. The most significant law for the purposes of this thesis, the French FOI law will not be considered here but will be discussed in depth later.

A "mediateur" or ombudsman was established under the law of 3 January 1973 with the function of intervening between the citizen and the administration. The mediateur is an independent administrative authority with considerable powers to investigate complaints made about the actions of the administration. The mediateur also has the task of considering the ethics or conduct of the administration and whether the powers granted to the administration are appropriate.[452] The most powerful weapon available to the mediateur is the ability to publicise her or his decisions and criticisms of the administration, either directly to the press and/or in the annual report to the President. The suggestions made by the mediateur have contributed significantly towards greater transparency within the administration.[453]

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[448] Ibid. at 607.
[449] Ibid. at 608; B Lasserre et al, above note 409 at 163.
[450] B Lasserre et al, above note 409 at 163.
[451] Braibant in the prologue to B Lasserre et al, above note 409 .
[452] B Lasserre et al, above note 409 at 52.
[453] Ibid. at 51-53.

Prior to the law of 3 January 1979, access to archives was largely governed by two Revolutionary laws.[454] The new law intended to rationalise and simplify the conditions of access to the national archives and provide a better balance between informing the public and the maintaining necessary restrictions.[455] All administrative documents must be incorporated into the public archives. Most documents are to be released 30 years from the date of their creation. There are several categories of exceptions which provide for longer delays before release of the documents. These categories protect individual privacy (medical files, personnel files or court files) and matters of state security.[456] If a document is "administrative" within the meaning of the French FOI law, access is regulated by that law.[457] It will therefore be available immediately, unless an exemption can be claimed under article 6 of the FOI law. However, once 30 years have passed, the document is dealt with under the law relating to archives. The exemptions provided for in article 6 no longer apply and the document is freely available.[458]

The law relating to computerisation, files and freedoms ("the Information Privacy law")[459] had its genesis in 1974 when the administration proposed cross referencing social security numbers on all computerised administrative files. The project was intended to reduce paperwork, but the public and media expressed serious concerns, heightened by the fact that the social security number continued the national identity number set up under the Vichy government to identify Jews and gipsies.[460] The government abandoned the project and instead set up a commission to consider the question of how to protect individual liberty in the context of the increasing use of computerised data bases. The commission's report provided the foundation for the Information Privacy law which came into operation in January 1978.[461] The law aims to protect individuals from the abuse of computerised databases and in particular large master files. It controls the collection and use of any data which is processed by a computer and which could be used to identify a natural person. The law places strict limits on the use of the social security number and the collection of

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[454] J Laveissière, "Le statut des archives en France" (1980) *Revue administrative* 253.
[455] B Lasserre et al, above note 409 at 153; J Laveissière, "Le statut des archives en France" (1980) *Revue administrative* 253 at 264.
[456] Article 7 of the law of 3 January 1979.
[457] Article 6 of the law of 3 January 1979.
[458] *CE Sect.,8 avril 1984, ministre des affaires étrangères c/ Mme Jobez* Leb. 1984 at 178.
[459] La loi relative à l'informatique, aux fichiers et aux libertés du 6 janvier 1978.
[460] B Lasserre et al, above note 409 at 68, 88-89; H Maisl, "Le citoyen "internaute" entre liberté d'accès aux documents administratifs et protection des donnés personnelles" (1997) 81 *Revue française d'administration publique* 77 at 79.
[461] B Lasserre et al, above note 409 at 68-69.

information about a person's race, political beliefs, religion or trade union membership.[462] When information is collected (for example by questionnaire) the person must be advised who will use the information, whether they are required to respond to the questions, the consequences of failing to respond and any rights of access to the information.[463] The Information Privacy law also allows individuals to access their own nominative information, where that information is contained in a file. Should information held on a file be incorrect, the individual can request the correction or deletion of that information.[464] To oversee the application of the law, the Commission nationale de l'informatique et des libertés ("CNIL")[465] was established. The CNIL is an independent administrative authority, with independent funding and members drawn from the parliament, several courts and people with expertise in information technology. Under the law, any public authority that intends to set up a computerised data base or carry out processing must seek prior approval from the CNIL.[466] CNIL may either reject the request or put restrictions on the project. Private bodies who intend to carry out data processing need only notify CNIL of the nature of the project.[467]

The law of 11 July 1979[468] provides a limited right to reasons for administrative decisions, provided that the decision is unfavourable and falls within one of eight categories. These categories relate to the refusal of an advantage or the imposition of a sanction. The reasons given must consider the legal and factual basis for the decision and should not use a standard form response.[469] For example, when giving reasons for deportation, it is insufficient to simply say that a foreigner is a threat to public order[470] but it is enough to list the criminal convictions of a foreigner before concluding that he is considered too dangerous to be allowed to reside in France.[471]

The law of 19 July 1976 requires that environmental impact studies be undertaken for any project or works which by their size or their nature might threaten the natural

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[462] Article 31; see for example authorisation provided to the tax office by CNIL to use the social security number in very limited circumstances described in *Libération* 26 & 27 June 1999 at 15.
[463] Article 27.
[464] Article 36.
[465] National Commission for Computerisation and Freedoms.
[466] Articles 15 and 19.
[467] Article 16.
[468] La loi du 17 juillet 1979 relative à la motivation des actes administratifs et à la amélioration des relations entre l'administration et le public.
[469] Article 3.
[470] *CE Sect., 24 juillet 1981, Belasri* Leb. 1981 at 322.
[471] *CE, 11 juin 1982, ministre de l'Intérieur c/ Rezzouk* Leb. 1982 at 226.

environment.[472] A study must not only present an analysis of the effect of the project on the environment but must also explain why that particular project was chosen rather than any other. This study must be made public. It is possible to seek a stay of the project if no study (or only an inadequate study) has been done, and in order to obtain a stay, the applicant need only show that moderately serious consequences will result if the project goes ahead.[473]

The new laws discussed above and below are part of the move within France to improve the relationship between the State and the individual. This is reflected in the administration's use of the term "usager" (user) rather than "administré" (a person subject to the administration).[474] There have also been more formal moves towards improving relations. The decree of 28 November 1983 established a charter for improving the relationship between the administration and its clients. It requires the administration to acknowledge receipt of applications made by individuals, to advise them who is responsible for the matter, the time limit for reaching a decision and any avenues of appeal.[475] This was reinforced by a Prime Ministerial circular issued in 1985 requiring public servants to include their name and work address on any correspondence.[476]

The most recent of these moves was the introduction of a bill on 13 May 1998, which is currently being debated before parliament.[477] It is entitled "a law relating to the rights of citizens in their relations with the administration"[478] and aims to increase transparency, democratise the administration and put it truly at the service of the citizen ("the Rights of Citizens Bill").[479] The anonymity of public servants is removed, efforts have been made to standardise administrative decision making processes and to improve access to financial information about the State.[480] It aims to improve the citizen's knowledge of the law, by requiring the administration to organise a simple right of access to the rules which they

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[472] Loi n° 76-663 du 19 juillet 1976 relative aux installations classées pour la protection de l'environnement.
[473] B Lasserre et al, above note 409 at 160-161.
[474] J-P Duprat, "Les administrations économiques et financières et leurs usagers", Journée d'étude de Bordeaux, Université de Montesquieu-Bordeaux IV (21 March 1996).
[475] B Lasserre et al, above note 409 at 167.
[476] B Lasserre et al, above note 409 at 228.
[477] The French term is a "projet de loi", which is a bill introduced by government as opposed to a private members bill.
[478] The French phrase is "droits de citoyens dans leurs relations avec les administrations".
[479] M-C Rouault, above note 422 at 6.
[480] Articles 4, 12, 13, 14-22.

create as well as codification of existing laws and regulations.[481] Finally the law sets up new offices where the public can access the most commonly used administrative services in one place.[482] The FOI law, the Information Privacy law, the laws relating to archives and the mediateur are amended. This bill will be discussed in more detail in Part E.

The notion of "transparence" or transparency has a long history and a very broad meaning in the context of the French legal system. It is a term that is used in both public and private discussions.[483] It is firmly linked to ideas of democracy and the assumption that the public is curious about the workings of government and eager for information. The list of legislative changes is itself testimony to an ongoing battle to change the secretive nature of French government and administration.[484] This is the context in which the French FOI law operates.

3. The French FOI law

In the space of one year, the French government and Parliament made a dramatic move away from the tradition of secrecy by passing three laws which provided for various rights of access to the documents of the French administration. The Information Privacy law and the Archives law were discussed above. The French FOI law will be the focus of this section.

a) The political and legal history

As discussed above, France in the 1970s was caught up with debates as to how to change the administration to make it more transparent.[485] The government had become increasingly involved in regulating "private" issues such as commerce, industry, the professions and social life. In addition, under the Constitution of the Fifth Republic,

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[481] Articles 2 and 3.
[482] Articles 24-26.
[483] For example, *Le Monde* 17 March 1999 at 20and *Libération* 26 May 1999 at 17. French friends (non-lawyers) of the author immediately recognised and had their own concept of "transparence" although they had rarely heard of access to documents per se.
[484] J-P Costa, "La Commission d'accès aux documents administratifs (CADA)" (1996) 12 *RFD am* 184 at 188; C Spanou, above note 413 at 157; *Le Monde* 17 March 1999 at 20.
[485] G Braibant, "Droit d'accès et droit a l'information" *Mélanges Robert-Édouard Charlier* (1981) 703 at 704; J Laveissière, above note 418 at 13.

matters that previously had been governed by legislation were now regulated by the executive alone. This shift reduced the opportunity for obtaining information through the medium of public debates in parliament.[486]

The government began to address the issue of access to documents as early as 1971, when a commission was set up by the Prime Minister to coordinate the conservation of and access to administrative documents. In 1974, it suggested granting a right of access to documents. A similar suggestion was made by the mediateur in his report of 1975 and several private members bills[487] were put forward by members of the Parliament. The government did not take up any of these suggestions. Instead in 1977 it set up a Commission on the co-ordination of administrative documentation[488] with the task of considering rights of access to documents. The intention was not to abandon the tradition of secrecy, but to create a list of documents to which access would be granted. However, in its first report the Commission concluded that this was an unmanageable task and proposed that it provide a list of documents that should be kept secret, so that any other document became accessible.[489] Nonetheless, it was the efforts of parliamentarians rather than the government which brought about legislative change.[490] The French FOI law originally had nothing to do with access to documents. [491] Members of parliament proposed an amendment to include a right of access to documents and this then gained bipartisan support. The government provided no opposition other than by trying to limit the scope of the law through restrictive amendments. The law was promulgated on 17 July 1978. Only rarely have parliamentarians managed to independently bring about legislative reforms under the 1958 Constitution.[492]

The content of the FOI law will be discussed in detail in Parts B, C and D. An overview of the law is provided here. The scope of the FOI law can be found in four articles. Article 1 provides that everyone has the right to access administrative documents, provided that they

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[486] J Lemasurier, above note 409 at 1242.
[487] The French term is "proposition de loi".
[488] Commission de coordination de la documentation administrative and known as the Commission Ordonneau after its President.
[489] B Lasserre et al, above note 409 at 72-74; Commission d'Accès aux Documents Administratifs, *L'accès aux documents administratifs* (Report No. 6, 1990) at 9-10.
[490] H Maisl, above note 460 at 78.
[491] The French title of this law is "portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal".
[492] B Lasserre et al, above note 409 at 69-70; CADA, above note 489 at 9-10.

are non-nominative (that is, that they do not identify a person).[493] It provides an extensive list of the items which are considered to be administrative documents. There is no obligation to give reasons for seeking access to the documents. Article 2 lists the types of bodies or organisations from which documents may be sought. Article 6 provides that a document need not be released if its contents would undermine one of the secrets or government functions listed. Finally, article 6*bis*, introduced by amendment in 1979, extends the law to allow individuals to access their own nominative (or personal) information, where it is not held on a computer file.[494] There is another (little used)[495] right, which allows a person to annex their own comments to any unfavourable comments made about them in an administrative document.[496]

Importantly, the FOI law also establishes CADA, an independent administrative authority which was given the responsibility of overseeing the right of access to documents established by the law.[497] Where a person has their access application rejected CADA provides a non-binding opinion on the legality of the rejection to the administration. Secondly, it provides advice to administrative bodies on any question relating to the implementation of the law. Thirdly, it suggests changes to the law or the regulations governing access to documents. CADA also publishes a biannual report which often contains its suggestions for change.

b) The object of the French FOI law

The French FOI law established a broad right of access to administrative documents, qualified by a list of exceptions. In doing so, it completely overturned the old legal order.[498] The object of the law was so radical that the parliamentarians who drafted the law

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[493] The definition of nominative is a complex one and will be considered from page 120.
[494] The decision of the Conseil d'État in *CE, Ass. 19 mai 1983 Bertin* Leb. 1983 at 208 held that the Information Privacy Law prevailed over the FOI law to the extent that rights of access under the two laws overlap. The way in which article 6*bis* interacts with the provisions of the Information Privacy Law will be considered in Section 4 below.
[495] Commission d'Accès aux Documents Administratifs, *L'accès aux documents administratifs* (Report No. 3, 1984) at 6.
[496] Article 3.
[497] Article 5.
[498] Conseil d'État, above note 431 at 17.

shied away from using traditional legal terms or legislative structure.[499] To quote the commissaire du gouvernement, Labetoulle:

> the law obeys a logic and uses concepts which are quite foreign to traditional modes of thinking and expression in French law and administrative law in particular and over which it superimposes itself with the same indifferent detachment as the clouds that float in the sky, ignoring borders, territorial boundaries, customs and usage of the countryside over which it passes.[500]

He suggested that the law was better understood and interpreted by reference to the sociological ideas that are its foundation rather than traditional legal jurisprudence.[501]

The parliamentary debates of the time show that the object of the law was to allow people to access information about government decisions on matters of public interest, in order to improve their understanding of the issues.[502] As such, it is intrinsically linked with the idea of enhancing democracy and participation.[503] Administrative information had always been available to private parties with sufficient power. A general right of access to documents restored democracy in that it gave the public a right which previously had only been available to the elite.[504] It aimed to balance the desire for transparency with the need for some secrecy to protect individual rights and the efficient functioning of the administration.[505] Exactly where to draw the line between openness and transparency has been the subject of considerable discussion. Pacteau suggested that access to documents involved more than simply satisfying the public's curiosity about how a decision was taken. Rather, it should offer the public an opportunity to act or at least react to the decision making process in order to influence the outcome.[506]

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[499] Labetoulle and D Delpirou, "Conclusions sur Conseil d'État Sect., 7 octobre 1983, *Vinçot* et note D Delpirou" (1984) *CJEG* 49 at 52-53.

[500] "La loi ...obéit à une logique et utilise des concepts parfaitement étrangers aux modes de penseés et d'expression du droit français traditionnel et notamment du droit administratif, sur lesquels elle est venue se superposer avec à peu prés le même détachement indifférrent que celui avec lequel des nuages cheminet dans le ciel, en ignorant les frontières, les divisions territtoriales, les coutumes, les usages et les reliefs des pays qu'ils survolent." Labetoulle and Delpirou, above note 499 at 53.

[501] Labetoulle and Delpirou, above note 499 at 53.

[502] Commission d'Accès aux Documents Administratifs, *Guide de l'accès aux documents administratifs* (3 ed, 1997) at 41.

[503] CADA (1981), above note 422 at 10; G Braibant, above note 485 at 704; J Laveissière, above note 418 at 11.

[504] C Spanou, above note 413 at 145.

[505] Conseil d'État, *Pour une Meilleure Transparence de l'Administration* (1998) at 9; Conseil d'État, above note 431 at 17.

[506] B Pacteau, "Répertoire analytique sur Conseil d'État Sect., *Ministre d'urbansime et logement c/ Association Atelier libre d'urbansime de la région lyonnaise*" (1983) *Rev. admin.* 473 at 474.

There have been criticisms of the decisions of the Conseil d'État, with both CADA[507] and other commentators suggesting that it has created exceptions where none existed in the text[508] or interpreted the existing exceptions too widely.[509] This more cautious approach is consistent with the view of Lasserre and Delarue that the object of the law was to provide a right of access, not to oblige the administration to enter into a co-decision making process with the public.[510] The practical effect of these arguments can be seen in the development of the jurisprudence relating to the exclusion of preparatory documents.[511]

In each of its reports CADA publishes a comprehensive analysis of who uses the right of access to documents and what sort of documents are requested. Not surprisingly, the number of people using the law to access documents has been steadily increasing since its introduction.[512] It is still predominantly used by individuals to access their own personal records often prior to litigation.[513] There is a small group of people or associations who make the bulk of the requests for general interest documents.[514] However in 1993 CADA noticed a significant increase in the use of the law by Greenpeace to obtain access to documents relating to the disposal of waste.[515] Contrary to the American or Australian experience, there is little use by business or the press.[516] In 1990 CADA described the typical user of the law as male, more than 40 years old and with a good education, living in a city and, either a civil servant or retired.[517] Despite great efforts to increase the public knowledge of the law, there is little to suggest that this profile has greatly changed.

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[507] CADA (1988), above note 422 at 20; Commission d'Accès aux Documents Administratifs, *L'accès aux documents* administratifs (Report No. 4, 1986) at 13; CADA, above note 495 at 14

[508] E Honorat and E Baptiste, "Accès aux documents administratifs: 30 juin 1989, OPHLM de la ville de Paris c/ Charmes; 16 juin 1989 OPHLM de la ville de Paris c/Syndicat des services publics parisiens CFDT; 16 juin 1989 Banque de France c/ Huberscwhiller" (1989) *AJDA* 603 at 605-606.

[509] S Daël, "La non-communicabilité des documents préparatoires - conclusions sur Conseil d'État, Sect. 23 décembre 1988, *Banque de France* C. *M. Huberschwiller* et Conseil d'État, 16 juin 1989, *Banque de France* C. *M. Huberschwiller*" (1989) 5 *RFD am* 973 at 977; G Goulard, "L'accès aux documents administratifs - quelle portée pour le contribuable" (1993) 6 *Revue Jurisprudentielle Fiscale* 447 .

[510] B Lasserre and J-M Delarue, "Accès du public aux documents administratifs" (1983) *AJDA* 402 at 404; a similar comment was made by Dondoux, "Conclusions sur Conseil d'État, Sect., 11 février 1983, Ministre de l'urbansime et du Logement c/Association <<Atelier libre d'urbanisme de la région lyonnaise>>" (1983) *CJEG* 374 at 378.

[511] The notion of preparatory documents is discussed from page 97 onwards.

[512] Commission d'Accès aux Documents Administratifs, *L'accès aux documents administratifs* (Report No. 8, 1995) at 70.

[513] CADA (1988), above note 422 at 16.

[514] CADA, above note 512 at 74.

[515] Ibid. at 69.

[516] CADA (1988), above note 422 at 17.

[517] CADA, above note 489 at 16.

4. Alternative regimes which simultaneously govern access to documents

The FOI law is not the only way of accessing administrative documents in France. There are a number of other laws which provide a more limited right of access and which overlap with the principal law. This section considers the impact of the Information Privacy law and other more general laws on the right of access to documents available under the French FOI law.

a) The Information Privacy Law

Both the Information Privacy Law and the FOI law provide for a right of access to nominative information which is held on a file (computerised or otherwise) by the administration. However, each sets out a different procedure and right of access. As both CADA and CNIL strived for transparency, they reached opposing definitions of "nominative."[518] The Information Privacy Law only covers files which contain nominative information. It therefore includes a broad definition of nominative in article 4,[519] designed to allow a broad right of access to files. CNIL considers that a file is nominative if it contains the name or address of a person, or even a number such as a social security number or phone number.[520] By contrast, CADA chose a strict definition because it wanted to limit the number of documents excluded from the scope of the FOI law.[521] Documents which identified individuals were only excluded if they also included an adverse comment or value judgement about the person identified.[522] The Conseil d'État implicitly confirmed that this was the correct approach to take (under the FOI law) when it held that a document containing the name of a person is not sufficient to make it a nominative document.[523] But there are situations when the jurisdictions of the two laws overlap, that is when the file in question is an administrative one. The question then arises

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[518] L Touvet and J-H Stahl, "Accès aux documents administratifs" (1994) 10 *AJDA* 679 at 685.

[519] *Sont réputées nominatives au sens de la présente loi les informations qui permettent, sous quelque forme que ce soit, directement ou non, l'identification des personnes physiques auxquelles elles s'appliquent, que le traitement soit effectué par une personne physique ou par une personne morale.*
Nominative in the context of the present law means information which allows, in whatever form, whether directly or otherwise, the identification of a natural person who is the subject of the information and this definition applies regardless of whether the data was processed by a natural or legal person.

[520] B Lasserre et al, above note 409 at 77;Lasserre and Delarue, above note 510 at 405.

[521] CADA, above note 502 at 47.

[522] CADA (1981), above note 422 at 50.

[523] *CE Sect., 30 mars 1990, Mme Degorge Boëtte* Leb. 1990 at 85; Conseil d'État, above note 505 at 14.

as to which definition of nominative should be applied. In its decision of *Bertin*[524] the Conseil d'État held that the Information Privacy law prevailed. This means that when information is held by the administration on a computerised file, the term "nominative" is given the broad definition used in the Information Privacy law and access is severely restricted.

Although to this extent the conflict has been resolved, at a practical level, inconsistencies remain. If administrative information contains the name of a person and is held on a computerised file, the document is governed by the law relating to computerisation and is only accessible by the person named. The same information, if found in a document and not on a computerised file is likely to be accessible to anyone, provided that the name is not accompanied by adverse remarks about the named person. Then the problem lies in determining what is a file and what is a document.[525] Although the French word for file was originally used in the sense of a card index, the French terms are no more precise than their English equivalents.[526] The legislation contains no definition and there have been no decisions on the topic to date. When the problem arises the administration must differentiate between files and documents without really knowing what they are looking for or understanding the value of the exercise.[527]

The conflict creates problems which can be exploited by both applicants and the administration.[528] Further, as the administration becomes increasingly computerised, more files containing the name of individuals will come within the scope of the Information Privacy Law and access will be denied to the public at large.[529] Legislative reform has begun in the form of the Rights of Citizens Bill, which is likely to provide that all administrative documents fall under the access regime of the French FOI law, regardless of whether the file is computerised or not. It remains to be seen whether this new law brings the integration promised.[530]

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[524] *CE, Ass. 19 mai 1983, Bertin* Leb. 1983 at 208.
[525] Conseil d'État, above note 505 at 16;Lasserre and Delarue, above note 510 at 406.
[526]Lasserre and Delarue, above note 510 at 406. The French terms are "fichier" and "document" respectively.
[527] CADA, above note 507 at 12.
[528] Conseil d'État, above note 505 at 16.
[529] Ibid. at 14-16.
[530] M-C Rouault, above note 422 at 8.

b) Other laws

The FOI law is the only French law which grants a general right of access to administrative documents. However, prior to 1978 some documents were accessible within a specific field or context. The FOI law did not override these rights and they continue to coexist. Generally in France a law of specific application will override one of general application but that is not always the case for the laws relating to access to documents.[531] This approach has been criticised where the specific rights are narrower than the general rights provided for by the FOI law.[532] Laws which override the FOI law include: the right under the Electoral Code[533] to access the lists of people who voted in an election;[534] under the Employment Code[535] to the lists of employees likely to be made redundant[536] and the laws relating to access to criminal records. The latter were already part of a comprehensive regime specifically designed for this sensitive area.[537]

In some cases, the FOI law does not allow access to certain documents. However, if there is a right of access provided for under a specific law, then that right prevails. For example, in town planning matters documents which would normally be available under the FOI law are not accessible until the inquiry is finished. Access to a limited number of documents is sometimes authorised by the law governing the inquiry. These include the file relating to the old town planning scheme, the municipal council resolution to pursue a new scheme, the document signed by the mayor fixing the date of the inquiry and the Prefect's[538] requirements for the development of a new scheme.[539] In some cases, particularly under the Urban Planning Code[540] a pilot study will be prepared, which would ordinarily be accessible once it was completed.[541] However, where an inquiry takes place, the documents become non-accessible until after the inquiry is finished and a decision taken. In this way, access to documents is closely linked with the notion of preparatory

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[531] Touvet and Stahl, above note 518 at 681.
[532] Conseil d'État, above note 505 at 53; Conseil d'État, above note 431 at 163.
[533] Code électoral.
[534] *Directeur général des Archives de France* (CADA, 11 June 1992, unreported); *Maire de Sainte-Geneviève-des-Bois* (CADA, 15 December 1994, unreported); CADA, above note 502 at 30.
[535] Code du travail.
[536] *DRTE d'Île-de-France* (CADA, 16 March 1995, unreported); CADA, above note 502 at 31.
[537] B Lasserre et al, above note 409 at 159.
[538] The Prefect is appointed by the French national government to undertake certain supervisory duties in departments (the French equivalent of provinces).
[539] *CE, 7 octobre 1983, Poisson* Leb. 1983 at 399; Touvet and Stahl, above note 518 at 680; Conseil d'État, above note 505 at 52; CADA, above note 502 at 85.
[540] Code de l'urbanisme.

documents which will be discussed below. A reflection of the complexity of obtaining access in these circumstances can be seen in the Eighth Report of CADA, where a table stretching over five pages sets out which documents are available at each stage of the procedure of a public inquiry.[542]

Prior to the passing of the FOI law, a number of acts and codes provided for access to certain documents within their jurisdiction.[543] Under the Code général des collectivités territoriales,[544] there is a right to access the reports from the municipal council, the budgets and accounts and the decisions of the mayor.[545] It is possible to view the documents under this Code, but the right to have a photocopy of the documents only exists under the FOI law.[546] There is a right of access to the electoral roll,[547] the roll listing the payment of local taxes,[548] to cadastral plans[549] and to some information about associations constituted under the law of 1 July 1901.[550] An applicant can therefore choose which law he or she wishes to rely on. For example, in *Clément*[551] the applicant asked the Prefect for the names, addresses, professions, dates and places of birth of the directors of local associations. Not all of this information would be available under the FOI law. On appeal the Conseil d'État held that because Clément had based his request on the law of 1 July 1901 he was not obliged to follow the procedure set out in the FOI law and in addition was entitled to the addresses and professions of the directors.[552] The Conseil d'État does try to interpret the special laws in a way that is consistent with the FOI law.[553] This is not easy because the disparity in the special laws makes it difficult to develop a consistent theory.[554] The Rights of Citizens Bill proposes giving CADA the power to rule on access applications made under these alternative regimes.[555] In doing so, the law would make it obligatory to seek CADA's assistance before pursuing any other avenues of appeal.[556]

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[541] CADA, above note 502 at 32.
[542] CADA, above note 512 at 36–40 and see generally chapter 3 from page164.
[543] Conseil d'État, above note 505 at 53; CADA, above note 502 at 34-36.
[544] The equivalent of municipal government.
[545] Articles L 2121-26 du Code général des collectivitiés territoriales.
[546] *Lefevre* (Conseil d'État, 11 January 1985, unreported).
[547] Articles L 28and R 16 du Code électoral.
[548] Article L 104b du Livre des procédures fiscales.
[549] La loi du 7 messidor an II.
[550] Article 5 de la loi du 1 juillet 1901 and art 2 du décret du 16 août 1901.
[551] 17 janvier 1994, unreported.
[552] Touvet and Stahl, above note 518 at 680.
[553] Ibid. at 683.
[554] Conseil d'État, above note 505 at 53.
[555] Proposed article 5-1 of the French FOI law as amended by the Rights of Citizens Bill.

Against the background of this overview I will now examine the legal aspects of the provisions of the French FOI law in detail.

B.Administrative Documents

The French FOI law relies heavily on the notion of "document administratif" or administrative document. It was a term unknown to French jurisprudence before the law was introduced.[557] Fleshing out the meaning of the term involved setting limits on the scope of the law and reflects the need to balance transparency with the efficient functioning of the administration. These difficult jurisprudential questions came before CADA many years before they were considered by the administrative courts and the paths adopted by CADA continue to be very influential.

1. The concept of a document

Article 1 of the French FOI law does not provide a formal definition of document. Rather, it sets out a comprehensive list of the types of documents which are covered by the law. Included are:

> all dossiers, reports, studies, minutes, statements, statistics, directives, instructions, circulars, ministerial notes and replies which involve an interpretation of the law or a description of administrative procedures, opinions, except for the opinions of the Conseil d'État or the Tribunaux Administratifs, forecasts and decisions whether recorded in writing, visually, in a sound recording or computerised data which is non-nominative.[558]

CADA has always treated the list as illustrative only. One of the key items listed in article 1 is a "dossier", which can be roughly translated as "folder" in the sense of a manilla folder which might contain assorted documents.[559] CADA therefore allows access to any

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[556] Proposed article 5 of the French FOI law as amended by the Rights of Citizens Bill.
[557] Labetoulle and Delpirou, above note 499 at 52
[558] Sont considérés comme documents administratifs au sens du présent titre tous dossiers, rapports, études, comptes rendus, procès-verbaux, statistiques, directives, instructions, circulaires, notes et réponses ministérielles qui comportent une interprétation du droit positif ou une description des procédures administratives, avis, à l'exception des avis du Conseil d'Etat et des tribunaux administratifs, prévisions et décisions revêtant la forme d'écrits, d'enregistrements sonores ou visuels, de traitements automatisés d'informations non nominatives.
[559] I will continue to translate the term as "dossier".

document which is contained in a dossier.[560] It is an approach which the Conseil d'État has implicitly accepted by allowing access to contractual documents, although the term contract is not listed in the law.[561] The Rights of Citizens Bill updates the definition of document to include those held on a computer and which are obtainable using a normal processing operation.[562] There are however some documents which are not considered to be administrative documents and are therefore not accessible. These will be discussed below.

a) Documents which can be released

To be subject to the law, a document must physically exist at the time a request is made. An environmental group was unable to obtain copies of balance sheets, analyses or commentaries made on the level of radiation in Lorraine after the accident at Chernobyl, because the administration had not created any such documents.[563] Nor is there any obligation to provide access to a document which is already publicly available.[564]

If a document did exist but is then lost or destroyed, the administration is not required to provide a copy.[565] CADA and the administrative judge are aware that such a ruling is open to abuse and the Tribunal Administratif and the Conseil d'État have both refused to accept the agency's plea that they do not have a copy of a particular document and told it to check for the document again.[566] There are still occasions on which CADA at least has had to admit defeat, such as in its decision in *Mathis* (2 April 1987)[567] where the applicant asked for the list of train stations subject to a local tax. The SNCF[568] said that it had stopped producing such a document after 1 June 1986. CADA expressed surprise that a public body should have abandoned the creation of a document which had a significant impact on the cost of the ticket for the user. However, in the face of SNCF's claim it could only grant access to the last document created.

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[560] CADA, above note 502 at 10-11.
[561] *CE, 3 fevrier 1992, Societé Sécuripost, ministre du P&T et espace c/Societé Libertés-Services* Leb. 1992 at 50.
[562] Proposed amendment to article 1 of the French FOI law.
[563] *Thomas, 8 janvier 1987* 5th report of CADA at 104.
[564] *CE, 23 octobre 1987, Bertin* Leb.. 1987 at 739.
[565] J-Y Vincent, above note 410 at para 61.
[566] See cases cited in J-Y Vincent, above note 410 at para 63.
[567] *Mathis, 2 avril 1987* 5th Report of CADA at 102.
[568] The national railway company.

b) Documents which can not be released

Although there is nothing in the French FOI law which denies access to incomplete or preparatory documents, CADA and the Conseil d'État have both developed a jurisprudence which excludes these types of documents.[569]

(1) Incomplete documents

From the outset CADA formed the view that drafts, sketches, informal notes and reports involving only an exchange of views did not merit the name "document" and were therefore not included within the scope of the law.[570] It justified this decision on the basis that:

1. The administration must be guaranteed a certain freedom of movement so as to be able to withdraw or change its projects. This would be hindered by premature communication of its decisions.
2. There was a need to ensure that citizens had equal knowledge of public decisions. To allow some people to have access to projects before others could be inequitable and lead to undesired results such as property speculations arising out of town planning decisions.[571]

The second argument is illogical given that the law creates an equal right of access to documents for all people. As one author suggested, it is likely that some of these public decisions are being leaked in advance anyway, but only to those with sufficient power or money. A broad right of access would deprive these leaks of their value and enhance democracy.[572] Nonetheless, the idea of excluding access to incomplete documents is generally supported, on the basis that the purpose of the law was not intended to oblige the administration to hand over every scrap of paper in its possession.[573] The crucial issue is determining when a document is complete.

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[569] The Rights of Citizens Bill proposes amending article 2 of the French FOI law so that the right of communication will not apply to incomplete documents .
[570] CADA (1981), above note 422 at 53.
[571] Ibid. at 53-54.
[572] J Denis-Lempereur, "Le myth du libre accès aux documents administratifs" (1984) *Administration* 55 at 57.
[573] J-Y Vincent, above note 410 at para 64.

The matter was considered by a Section of the Conseil d'État in its decision of 11 February 1983, *Ministre de l'Urbanisme et du Logement c/ Association "Atelier libre d'urbanisme de la région lyonnaise* ("Alurely").[574] The matter involved a request for access to a report prepared by the commission in charge of designing a town planning scheme. Following the usual procedure, the commission carried out a series of studies after which it proposed a draft scheme. The final scheme would be presented to the public only after discussion, amendment and approval by certain public bodies and the municipal council. The Conseil d'État held that article 2 "only applies to those documents which are in a finished form and not to those which are in a partial or provisional state or which are in the process of being developed." Until the commission had adopted a draft scheme its report was still being developed and was an incomplete document.[575]

In his conclusions, the commissaire du gouvernement Dondoux acknowledged that there was nothing in the legislation that exempted access to incomplete documents. In fact, the matter had been specifically considered by parliament and the proposal rejected. Nonetheless, he felt it important to imply such a restriction into the legislation.[576] The earlier release of the documents could lead to public discussion of the administration's stance, setting up a co-decision making process with the public. Dondoux considered that the legislature did not intend this result as the law only guaranteed freedom of information and not a new form of decision making.[577]

Despite the legislature's comments to the contrary, Lasserre considered such an approach accorded with the intention of the legislature. It allowed the administration to make their decisions in peace, while still allowing the public a right of access. Pacteau noted that while there is a danger in information being released too early, if it is released too late there is no time for citizens to react to the decision making process.[578] Yet, both he and Lasserre considered that the reasoning process of the Conseil d'État in this matter was a fair one.[579] Despite the divergence of opinion on the purpose of the law, it seems that the

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[574] Leb., 56.
[575] "...ne s'applique qu'à des documents achevés, et non aux états partiels ou provisoires d'un document tant qu'il est en cours d'élaboration; *CE. Sect., 11 février 1983, Ministre de l'urbanisme et du logement c/ Association <<Atelier libre d'urbansime de la région Lyonnaise>>* Leb.. 1983 at 56 at 57.
[576] Dondoux, above note 510 at 377.
[577] Ibid. at 378.
[578] B Pacteau, above note 506 at 474.
[579] Lasserre and Delarue, above note 510 at 404; B Pacteau, above note 506 at 475.

court and the commentators were persuaded by the fact that CADA considered the law unworkable in practice if access to all documents were allowed.[580]

The Conseil d'État has also excluded access to documents on the basis that they are "internal" to an administration, a concept already used in French administrative law, to exclude access to documents.[581] The move was widely criticised as being unclear, unnecessary and as moving away from the spirit of the law.[582] The Conseil d'État had the opportunity to use the notion of "internal documents" in its 1989 decision of *Huberschwiller*[583] but, following the conclusions of its commissaire du gouvernement, it chose an alternative path.[584] Although there were fears that this would become an established part of the jurisprudence, it seems unlikely to be followed now.[585]

(2) Preparatory documents

From the outset, CADA refused access to what it termed preparatory or preliminary documents.[586] Preparatory documents are those which are finished but which are part of a decision making process which is already under way. Access to these documents is not excluded, but delayed until a decision has been reached.[587] Again, the basis of CADA's approach was a fear of paralysing the administrative process by the inappropriate release of documents.[588] It is an approach adopted under the amendments in the Rights of Citizens Bill, which states that documents which prepare an administrative decision which is in the process of being developed are not accessible.[589] The question of what is a preparatory document requires careful consideration of the nature of the document, the stage reached in the decision making process and whether the document could be isolated from the process.

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[580] B Pacteau, above note 506 at 474.
[581] *CE, 27 juin 1986, Association SOS Défense* Leb. 1986 at 537; RFD adm. 1987 at 465.
[582] J-M Auby, "L'accès aux documents administratifs internes d'organisation des services - note sur Conseil d'État, 27 juin 1986, Association <<S.O.S Défense>>" (1987) 3 *RFD am* 465 at 468-9; J-Y Vincent, above note 410 at para 98.
[583] *CE, 16 juin 1989, Banque de France c/Huberschwiller* Leb... 1989 at 689; AJDA p 634 at 983.
[584] Daël, above note 509 at 983.
[585] J-Y Vincent, above note 410 at para 99.
[586] CADA (1981), above note 422 at 54-55; Commission d'Accès aux Documents Administratifs, *L'accès aux documents administratifs* (Report No. 2, 1982) at 31.
[587] CADA (1981), above note 422 at 56.
[588] Ibid. at 54.
[589] [Le droit à communication] ne concerne pas les documents préparatoires à une décision administrative tant qu'elle est en cours d'élaboration. Proposed amendment to article 2 of the French FOI law by the Rights of Citizens Bill.

For example, a report for use by the conseils des ministres[590] could not be released until after the conseil des ministres had issued a decree on the subject to which the report related. However, a report prepared for a municipal government body and which provided it with technical assistance did not prepare the way for any decision and could be released immediately.[591] CADA was conscious of ensuring that a claim of a document's "preparatory character" was not used as an escape route by the administration and only rarely allowed such a claim.[592]

The Conseil d'État has reached a similar conclusion to CADA but followed a different path. In *Alurely* the commissaire du gouvernement considered with some hesitation that the Conseil d'État should follow CADA and exclude access to preparatory documents. He suggested that access could be refused where allowing access to complete documents would reveal the contents of incomplete ones. By linking the exception to the notion of incompleteness, he was able to avoid the term "preparatory". Defining preparatory is problematic in this context, as one document generally prepares the way for another.[593] The crucial criterion here seems to be not the preparatory nature of the documents, but the fact that they are inseparable from incomplete documents.[594]

The same notion was adopted in the case of *Huberschwiller*.[595] The case involved a request by Huberschwiller for reports prepared by the Banque de France for use by the governors in the reorganisation of some departments of the bank.[596] The bank opposed access on the basis that the documents were incomplete. In his conclusions, the commissaire du gouvernement Daël said that the documents were complete but were part of a complex and quite structured procedure which had a limited time period for completion. After reading the documents he felt that they were part of a stage in the decision making process from which they could not be isolated and they should not be released.[597] The Conseil d'État reiterated that article 2 of the law only applies to documents which are complete and not those which are partially completed or in a temporary state or which are in the process of

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[590] The equivalent of cabinet.
[591] CADA (1981), above note 422 at 55.
[592] Ibid. at 55; CADA, above note 586 at 55.
[593] Dondoux, above note 510 at 378.
[594] B Pacteau, above note 506 at 475.
[595] *CE, 23 décembre 1988 Banque de France c/Huberschwiller*, Leb. 1988 at 464 and *CE, 16 juin 1989, Banque de France c/Huberschwiller* Leb. 1989 at 689.
[596] The Banque de France is similar to the Reserve Bank in Australia in that it has considerable regulatory powers. However it can also operate as an ordinary bank.
[597] Daël, above note 509 at 984.

being elaborated upon. It went on to say that by reason of the indivisible character of the process in which the reports were involved, they did not have the character of documents under the French FOI law. Although neither the Conseil d'État nor the commissaire du gouvernement used the term "preparatory documents" in *Huberschwiller*, a commissaire du gouvernement commenting in 1993, defined preparatory documents as those which are complete yet inseparable from a decision making process which had not reached its conclusion at the date of the request.[598]

The approach taken in *Huberschwiller* has been criticised as lacking in common sense and in moving away from the object of the law.[599] Honorat argued that by excluding completed documents, the Conseil d'État effectively excluded from the French FOI law a whole range of important documents that the legislature wanted to be accessible.[600] Further, the legislature had already made provision for the protection of high level preparatory documents by including them in the exemptions found in article 6. It could be argued that this was the only restriction on access to preparatory documents that the legislature considered necessary.

Nonetheless, the exclusion of complete but inseparable documents continues. CADA's most recent statistics show that 28% of its refusals to provide access are justified on the basis that the document is a preparatory one.[601] The Conseil d'État has refused access to documents from the dossier requested by the Garde des Sceaux[602] from the inspection générale des finances[603] which related to State spending on legal aid. It held that that the document could not be separated from the decision making process that the Garde des Sceaux was involved in and that there was therefore no right of communication of the document.[604] CADA, now supported by the jurisprudence of the Conseil d'État continues to defer access to preparatory documents.[605]

Perhaps the most complex example arising out of this jurisprudence is the procedure for accessing town planning documents. The same document can alternate between being

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[598] S Fratacci, "Conclusions sur Conseil d'État, Sect., 8 octobre 1993, *M. Hudin*" (1993) *AJDA* 873 at 876.
[599] Honorat and Baptiste, above note 508 at 605.
[600] Ibid. at 605.
[601] CADA, above note 512 at 76.
[602] The equivalent of the Australian Attorney General.
[603] The equivalent of the Australian Auditor General.
[604] *CE, 15 avril 1992, Ministre de la justice c/ Association S.O.S. Défense* Leb.. 1992 at 185.
[605] CADA, above note 502 at 79-81.

incomplete and preparatory.[606] One example is where a person seeks access to the designs for a town planning scheme.[607] The designs are inaccessible because they are preparatory documents during three stages of the process: a) while the project is being developed by the working party; b) once it has been approved by the working party and c) once the project has been adopted by the municipal council. The next stage in the process is a public inquiry. Here, the Code de l'urbanisme[608] temporarily overrides the French FOI law. The Code denies access to the designs, making them unavailable during the public inquiry. Following the closure of the inquiry and even before the municipal council has made its final decision, the designs are again accessible under the French FOI law.[609] This changing accessibility reflects the fact that CADA considers that the preparatory stage of a change to a town planning scheme finishes when the municipal council adopts a proposed scheme and establishes a public inquiry to examine its proposal.[610]

2. The concept of "administrative"

The second defining feature of the French FOI law is the use and interpretation of the concept of "administrative". Only *administrative* documents fall within the parameters of the FOI law.

a) What sort of bodies or organisations must provide access to their documents?

Article 2 sets out the bodies which are subject to the French FOI law. It provides that documents which emanate from the various administrations of the State, municipal government, public bodies or "private bodies which are in charge of managing a public service" are all accessible.[611] Both the central and the regional parts of the national administration are therefore included, as is any public establishment whether it has an

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[606] Ibid. at 81-87.
[607] The French term is "documents graphiques".
[608] Urban Planning Code.
[609] CADA, above note 512 at 37.
[610] CADA, above note 502 at 83.
[611] Les documents administratifs sont de plein droit accessibles aux personnes qui en font la demande, qu'ils emanent des administrations de l'État, des collectivités territoriales, des établissements publics ou des organismes, fussent-ils de droit privé, chargés de la gestion d'un service public.

administrative or commercial function.[612] The documents of the independent administrative authorities, such as the CNIL[613] and the Commission des opérations de bourse are also subject to the law.[614] The Rights of Citizens Bill proposes amending this definition to include any public or private body which manages a public service.[615] This change reflects the fact that in France a public body can act in a private capacity (for example as the owner of private land) and a private body can act in a public capacity (when it is a provider of public services).[616] Examples of the way in which this distinction operates will be discussed below.

The concept of private organisations which manage a public service has existed for many years in French administrative law.[617] For example, from 1842 until 1983, the construction of railway lines and the provision of rail services was undertaken by commercial bodies.[618] The arrangements between the private company and the State are governed by a concession contract.[619] This sets out the service to be provided and imposes conditions on the company to ensure that services are maintained with proper regard to the public interest. The company has the opportunity to make a profit from the provision of these services, but also carries the risk of any losses.[620] Originally only commercial and industrial public services were run in this way.[621] More recently companies have been given the opportunity to carry out administrative services as well. For example, most of the French system of social security payments is run by private mutual societies, who both collect contributions and make payments. In addition, many professional associations are given a legal responsibility for regulating their sphere of activity. Hunting and fishing associations are responsible for allocation of hunting permits, stocking reserves (or rivers) with game or fish and taking action against poachers. Long distance freeways[622] are constructed and run by private companies.[623] Where these organisations (be they private

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[612] J-Y Vincent, above note 410 at para 35.
[613] *CE Sect., 8 octobre 1993, Hudin* Leb. 1993 at 262.
[614] *CE, 20 mars 1992, David* Leb. 1992 at 127.
[615] To be included in article 1 of the French FOI law as amended.
[616] L N Brown and J S Bell, *French Administrative Law* (4 ed, 1993) at 134.
[617] The French term is "les organismes de droit privé gerant un service public" see for example R Chapus, *Droit administratif général* (11 ed, 1996) at 150-176.
[618] R Chapus, above note 617 at 132. In 1983 French railways were nationalised again and are currently run by the State. Ibid. at 135.
[619] The French term is "contrat de concession".
[620] R Chapus, above note 617 at 133.
[621] Ibid. at 132-133. Gas, electricity and water have all been provided by private companies at various times in French history.
[622] The French term is "autoroutes".
[623] R Chapus, above note 617 at 133-135.

companies or associations) make decisions which affect the carrying out of a public service, their decisions are considered to be administrative decisions and fall within the jurisdiction of the Conseil d'État.[624]

In keeping with the way the term administrative document is used in the law, CADA originally tried to distinguish between documents or dossiers relating to the administrative functions of a body and those which related to private or commercial issues. Within two years, it had decided that this approach was too difficult to apply in practice and produced unjustifiable results. It reverted to the more straightforward view that any document emanating from one of the bodies listed in article 2 was accessible.[625] It was an approach which it maintained for a long time,[626] but it would appear from the third edition of its guide to accessing documents that it has now fallen into line with the more restrictive decisions of the Conseil d'État.[627]

The Conseil d'État set out its approach in *Vinçot* and *Le Borgne* each of which concerned a request by an employee of a private mutual society for access to documents relating to their conduct as employees.[628] The society provided social insurance and social security schemes for employees in the agricultural sector and was therefore a private organisation managing a public service. The commissaire du gouvernement considered that "administrative document" could be interpreted in two ways. The first was to take the traditional judicial view of "administratif", which would restrict access to documents from a private organisation to those directly concerned with its public function. The second was to allow access to any document emanating from a body listed in article 2, on the basis that it was not possible to divide an organisation's activities into public and private. With hesitation, the commissaire du gouvernement recommended the second approach.[629] The Conseil d'État disagreed and found that documents created in the context of a private law contract between a mutual assurance group and its employees were not by their nature and subject within the scope of the French FOI law. In doing so, the Conseil d'État narrowed

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[624] Ibid. at 138-139. This is an extremely simplified explanation of the way in which the Conseil d'État divides the actions of an organisation into public and private in this setting.
[625] CADA, above note 586 at 29-30.
[626] J-Y Vincent, above note 410 at para 38.
[627] CADA, above note 502 at 17-19.
[628] The matter was first considered in *CE Sect., 7 octobre 1983, Vinçot* Leb. 1983 at 401 and *Mme Le Borgne*, (1983) C.J.E.G at 49 after which it was sent to the Tribunal des Conflits to determine whether the Conseil d'État had sufficient jurisdiction over private bodies to make a ruling. The Tribunal des Conflits said that it did and the final decision was given in *CE., 24 janvier 1986* Leb. 1986 at 536.
[629] Labetoulle and Delpirou, above note 499 at 52-54.

the application of the law and set up the difficult task of determining whether the document was administrative by reference to its nature and subject.[630]

It was thought that such an approach may have been limited to the documents relating to private bodies. But the Conseil d'État has extended the principle to public bodies.[631] Amadou rented an apartment from the City of Paris and requested access to the dossier concerning his rental agreement. The City of Paris argued that the contract between it and Amadou was governed by private law and that therefore the dossier was not an administrative one. The commissaire du gouvernement argued that an administrative document should be any document emanating from a body listed in article 2 of the law. He considered this consistent with the intention of the legislature, as indicated in the travaux préparatoires[632] and supported by CADA's practical experience of trying to apply a public/private distinction.[633] The Conseil d'État declined to follow the conclusions of its commissaire and instead held that documents which relate to a contract between an individual and a public body acting as landlord are part of the private domain and are not by their nature or subject within the French FOI law.[634]

The impact of *Amadou* was watered down somewhat in the decision of *CE, 16 juin 1989, OPHLM ville de Paris c/Syndicat des services public parisiens CFDT.*[635] There, a trade union tried to obtain access to the minutes of the deliberations of the administrative council of the Office Public d'HLM de Paris ("OPHLM")[636] relating to the construction of buildings. The Conseil d'État went beyond the private law atmosphere and looked at the fact that the meetings were directly linked to the public objective of the office.[637] This move away from the restrictive approach of *Amadou* was reinforced recently when the Conseil d'État again granted access to the minutes of the administrative council,[638] despite

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[630] B Pacteau, "Répertoire analytique sur Conseil D'État, 24 janvier 1986, *Mme Le Borgne* et *Vinçot*" (1986) *Rev. admin.* 141 at 142-143.
[631] *CE, 26 juillet 1985, Amadou* Leb. 1985 at 243.
[632] The reports and discussions which were before the parliament and used by it when passing the law. An equivalent would be an Explanatory Memorandum or Second Reading Speech.
[633] P-A Jeanneney, "Limite du droit à la communication d'un document nominatif - conclusions sur Conseil d'Etat, Sect., 26 juillet 1985, *M Amadou Robert*" (1986) 2 *RFD am* 179 at 181-182.
[634] Ibid. at 183.
[635] *CE, 16 juin 1989, OPHLM ville de Paris c/Syndicat des services public parisiens CFDT* AJDA p 634.
[636] The Paris public housing office.
[637] Honorat and Baptiste, above note 508 at 604.
[638] Maire de Nice 7th Report of CADA at 42.

the fact that the OPHLM is now a public establishment with a commercial or industrial character.[639]

b) The nature and subject of the document

As more public services become privatised the question of whether documents relate to a public function becomes more significant.[640] There has not been a definitive decision on what is meant by the "nature or subject" of a document. The key factors appear to be whether the document is created by an administrative body and whether it relates to public functions. The Conseil d'État's decision of 20 July 1990 in *Ville de Melun et Association <<Melun-Culture-Loisirs>> c/ Vivien et autres*[641] discusses in depth how a private association's activities can be subject to a right of access. The decision involved access to the accounts of the private association called Melun Culture Loisirs. The first step was to determine whether the body carried out a public function and thus whether it fell within article 1 of the FOI law. Although the association did not exercise any public or government type of powers,[642] the fact that it was created by the town of Melun, the mayor was President of the association as of right, it coordinated or ran all of the cultural and social activities in the town and received more than half its income from the town led the commissaire du gouvernement and the Conseil d'État to conclude that it was carrying out a public function. The Conseil d'État held that as the accounts of the association showed the conditions under which it exercised its public function they were by their nature and subject administrative documents and accessible.[643]

CADA adopted the same analysis in response to a request made to the Mayor of Bordeaux for access to an audit report of the local football club, carried out in the context of a financial scandal. CADA considered that given the club was funded mostly by the town of Bordeaux, the report was undertaken at the request of the town council and paid for out of

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[639] This is a standard form of organisation recognised in French administrative law as being similar to a Government Business Enterprise.
[640] J Cosson, "La Poste et la communication des documents administratifs" (1993) 34 *Juris PTT* 22.
[641] *CE, 20 juillet 1990, Ville de Melun et Association <<Melun-Culture-Loisirs>> c/ Vivien et autres* Leb.. 1990 at 220.
[642] In French these powers are known as "pouvoirs pérogatives" although the translation of prerogative powers is inexact. The usual examples of the exercise of these types of powers are the ability to levy fees or charges, impose fines or to make decisions which are appealable in the administrative courts.
[643] *CE, 20 juillet 1990, Ville de Melun et Association <<Melun-Culture-Loisirs>> c/ Vivien et autres* Leb.. 1990 at 220.

the town budget, it was therefore an administrative document that everyone had a right to access.[644]

By contrast, the fact that an exercise of public power is involved can be significant. The decision in *Chambre des notaires du département du Cher*[645] involved determining whether a dossier concerning a decision to refuse an honorary membership was an administrative document. The commissaire du gouvernement considered that because granting membership involved the exercise of government powers and a refusal could be challenged in the administrative courts, the dossier used in the decision making process was administrative.[646] In the *Huberschwiller* decision, the commissaire du gouvernement carried out an extensive analysis of the legislation creating the Banque de France to determine whether the reports into the reorganisation of the bank related to its private or public functions. He concluded that they related in part at least to its public activities and therefore the documents could be administrative ones.[647]

A contract between a public body and a private one is likely to be administrative if the contract relates to public duties. For example, CADA was asked to provide an opinion on accessing the notes on the prices paid in public supply contracts. CADA held that any documents relating to the determination of prices between the administration and a private contractor related to the cost of public services and were accessible.[648] A similar conclusion was reached by the Conseil d'État when asked to provide access to a contract between the minister for postal services and a private body affiliated to the postal service. It held that the contract related to the public functions and not the private management of the company involved and the documents were therefore accessible.[649] The question of whether the application of the law to the French postal service will be restricted to its public activities has been raised by one author, who suggested that it could lead the postal service to restricting the scope of those activities.[650]

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[644] *M du Fau de Lamothe/maire de Bordeaux, 2 août 1990* 7th Report of CADA at 38.
[645] *CE Sect., 29 juillet 1994, Chambre des notaires du département du Cher* Leb. 1994 at 396.
[646] B du Marais, "La notion de tiers ayant droit à communication d'un document nominatif - Conclusions sur Conseil d'État, Section, 29 juillet 1994, *Chambre des notaires du département du Cher*" (1995) 11 *RFD am* 740 at 742.
[647] Daël, above note 509 at 975.
[648] *Commission centrale des marchés publics, 2 avril 1992* 7th Report of CADA at 41.
[649] J Cosson, above note 640 at 24.
[650] Ibid. at 25.

Some bodies do not exercise a public function. The minister for the interior was asked to provide access to financial reports relating to the Fondation franco-japonaise Sasakawa. The foundation argued (and this was not contested) that it was not responsible for the management of any public function. CADA agreed and refused access to the documents. The fact that the minister for the interior held the documents in his role as supervisor of public foundations was not sufficient to confer administrative character on the documents.[651] Nor is it enough that a private body such as a private cancer research council collaborates in public activities. It must be actually managing a public service for its documents to be accessible.[652]

[651] *Léger, 1 décembre 1994* 8th Report of CADA at 86.
[652] *TA Paris, 2 mai 1984, Gillot,* Gaz. Pal. 1984 at 2.

c) Access to documents provided by third parties

Some documents held by the administration are provided to it by private individuals or bodies. Are these documents by their nature and subject administrative? Does the answer definitely determine their accessibility under the FOI law? CADA was the first to consider these questions. Following the administrative principle that a dossier must be viewed as a whole,[653] it allowed access to documents where there was a strong link between the private documents and the decision taken. For example a dossier relating to a building permit includes plans and information provided by the proprietor which are intimately linked to the decision to grant the permit and which are needed to fully understand the decision.[654] However, where documents sent in to the administration by a private individual have not been used by the administration in its work, they do not take on an administrative character.[655] This approach is consistent with the democratic objectives of the FOI law because it promotes understanding of administrative decisions. Some authors were concerned that the administration could avoid the operation of the law by getting a private organisation to prepare reports, so that they would no longer "emanate" from the administration.[656] Using the notion of the unity of a dossier meant that any such reports became administrative documents as soon as they were used in the decision making process.[657]

CADA's approach was followed by the Conseil d'État in its decision of *Durand.*[658] Durand sought access to documents which were part of the dossier relating to his request to be recognised as an architect. He had provided the administration with many of the documents contained in the dossier. Those documents were not by their nature or subject administrative.[659] Yet, the Conseil d'État held that they were an integral and integrated part of an administrative dossier and access to them should be provided.[660]

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[653] The French term is "unité du dossier".
[654] CADA (1981), above note 422 at 52.
[655] Ibid. at 52.
[656] Chabanol cited in J-Y Vincent, above note 410 at paras [84-5].
[657] CADA, above note 586 at 29-30.
[658] *CE, 3 juin 1987, Ministre de l'urbansime du logement et des transports c/ Durand* Leb.. 1987 at 190.
[659] X Prétot, "CE, 3 juin 1987, *Ministre de l'Urbanisme, du Logement et des Transports*C. *M. Durand* et observations" (1987) *AJDA* 682 .
[660] *CE, 3 juin 1987, Ministre de l'urbansime du logement et des transports c/ Durand* Leb.. 1987 at 190.

This approach was refined in the Conseil d'État's decision in the matter of *Hudin.*[661] Hudin had sought access under the Information Privacy law to his computerised records which were held by a private insurance company. During a CNIL investigation of his request the investigator took copies of the files held by the insurance company, which were annexed to the report made to CNIL. Hudin then sought access to the files of CNIL in an attempt to get copies of the documents originating from the insurance company. The commissaire du gouvernement, Fratacci said that the insurance company could in no sense be considered to be in charge of a public function and nor were the documents administrative in nature. To consider the copies of its files as administrative would make the CNIL investigator into a sort of latter day Midas who turned into "administrative" anything he touched. The crucial issue was how the administration came to be in possession of the documents. In *Hudin* the administration only held copies of the documents, the originals staying with the insurance company. More importantly, the documents were created by a private body exclusively for its use and with no intention of providing them to the administration. In that sense, the matter was quite a different one to *Durand.*[662] The Conseil d'État agreed. It would seem that this decision expands the definition of what is an administrative document, setting up a test which considers the purpose for which the document was created. An administrative document includes a document which emanates from a private individual, provided that the document was created with a view to being used by the administration. If a document is created for that purpose it remains an administrative document even if it is not ultimately used to make an administrative decision. [663]

Following the decision in *Hudin*, CADA clarified its approach to access to documents created by private individuals or organisations.[664] Now its view is that simply transferring a document to the administration, does not automatically make the document an administrative one. The key factor is whether the document was created for use by the administration or for some other purpose. For example, the inspecteurs du travail[665] have the right to receive copies of the internal regulations of a company yet these documents are not administrative ones. By contrast, the annual reports provided by mutual societies to the

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[661] *CE Sect., 8 octobre 1993, Hudin* Leb. 1993 at 262.
[662] Fratacci, above note 598.
[663] Touvet and Stahl, above note 518 at 684.
[664] CADA, above note 502 at 18.
[665] Workplace inspectors.

minister for social affairs pursuant to the Social Security Code are prepared to satisfy the requirements of that Code. Accordingly, they are administrative documents.[666]

The definition of what is an administrative document is not very clear. CADA has certainly been involved in creating exceptions where the legislature had not created any. But in doing so, it adopted tests which were simple and in keeping with the spirit of the law.[667] The same could not be said for the early decisions of the Conseil d'État. However, it now seems that the Conseil d'État has retreated from some of its harsher decisions and the jurisprudence, although complex is starting to consolidate.

C.Documents for which there is no right of access

There are some documents to which access is denied. These documents fall into three categories: documents which are not considered to be administrative documents, nominative documents and documents falling within the exceptions outlined in article 6.

1. Documents which are not administrative documents

The above discussion considered the definition of "document administratif" in the context of the French FOI law. There are a further two categories of documents which although created in an administrative setting are not themselves administrative documents.

a) Judicial documents

Under the doctrine of separation of powers, a judicial document is not administrative and it is therefore not accessible under the FOI law. This approach is likely to be confirmed by the Rights of Citizens Bill which provides that the judgements given by the Conseil d'État, the administrative courts, the Cour des Comptes and the chambres régionales des comptes are not administrative documents.[668] All judgements, ordonnances or decisions are judicial

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[666] CADA, above note 502 at 18.
[667] J-Y Vincent, above note 410 at para 100.
[668] Proposed amendment to article 1 of the French FOI law by article 8 of the Rights of Citizens Bill.

documents, even if handed down by the administrative courts.[669] So too are documents which are created for the purpose of arriving at a judicial decision. Included are decisions of the prosecutor, the dossiers d'instructions,[670] records of interview and experts' reports.[671] Legal aid applications are also exempted.[672] That is not to say that all documents held by a court are not accessible. Documents which relate to the administrative functions or activities of a court do come within the scope of the law. So too do reports prepared for non-judicial purposes even where used by the court in its investigation.[673]

The line between administrative and judicial can be a difficult one. CADA's decision in *Bertin-Mourot*[674] involved a request to the Cour des Comptes for documents relating to the management of a television company. Their accessibility depended on whether they related to the Court's administrative or judicial activities. The Court has the task of controlling the accounting and management practices of certain defined enterprises and organisations as well as its judicial duties. CADA found that the documents were produced for the Court's supervisory duties and did not contain any form of judgement. They were therefore administrative and accessible.

b) Legal documents

There are two types of legal documents which concern administrative acts but which are not administrative documents. They are the certificates of births, deaths and marriages[675] and documents executed by notaries. The Conseil d'État held that the former were created as an adjunct to a legal process and were governed by private law despite the fact that a public officer (the mayor) is responsible for their creation.[676] The Conseil d'État may have been persuaded by the fact that there was an established legal regime for accessing these documents.[677] Curiously, where the mayor establishes a list of the births deaths and

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[669] *CE, 27 juillet 1984, Association SOS Défense* Leb. 1984 at 284; *Association SOS Défense* (Conseil d'État, 27 February 1987, unreported).
[670] Court files containing all the evidence for a case.
[671] CADA, above note 502 at 15.
[672] *de Quincy* (CADA, 1 April 1993, unreported).
[673] *CE, 20 mars 1992, David* Leb... 1992 at 127.
[674] *Bertin-Mourot, 1 juin 1981* 5th Report of CADA at 183.
[675] The French term is "actes d'état civil".
[676] *CE, 9 février 1983, Bertin* Leb. 1983 at 53; J-Y Vincent, above note 410 at para 101.
[677] Lasserre and Delarue, above note 510 at 403.

marriages within the municipality, this document is accessible under the French FOI law, provided that the identity and the addresses of the people concerned are deleted.[678]

Notaries have a monopoly on the drafting of certain legal documents and carrying out certain processes. Some legal documents, once drafted and signed by a notary are regarded as being authentic and enforceable in much the same way as a judgement. At other times, notaries act as an auxiliary of the court and draw up documents, such as those settling property disputes in the case of divorce or succession, which will be sanctioned by the court at a later date. The other part of the work of a notary is to carry out court ordered sales of property, for example to settle a judgement or resolve a problem of succession.[679] Thus, while a notary carries out many public functions, it is as part of the court process and the Conseil d'État considers that the documents should not be regarded as administrative ones.[680]

2. Nominative documents

The French FOI law originally provided for access to non-nominative documents only.[681] An amendment was introduced in 1979 to include article *6bis* which allows a person to access their own nominative information,[682] but not the nominative information of another. Article *6bis* does not provide a definition of nominative. CADA considered that most administrative documents will include some identifying information even if it is only a name. So if "nominative" were interpreted to mean documents containing any sort of identifying information many documents would be exempt from access, considerably narrowing the scope of the law. Taking the objective of transparency as a starting point and relying on the travaux préparatoires, CADA considered a nominative document to be one which included

> an assessment or value judgement relating to a natural person who is identified by name or who is otherwise easily identifiable or which contains a description of a

[678] CADA, above note 502 at 17.
[679] Dadomo and Farran, above note 444 at 127-128.
[680] *CE, 9 février 1983, Bertin* Leb. 1983 at 53;Lasserre and Delarue, above note 510 at 403.
[681] Article 1.
[682] CADA, above note 502 at 46-47.

person's behaviour which if the behaviour were known could lead to that person being prejudiced.[683]

The decision of the Conseil d'État in *Mme Degorge Boëtte*[684] implicitly confirmed this approach.[685] There, the applicant sought access to an administrative contract which contained the name of the contracting party. The Conseil d'État held that as the contract contained only a name (and not for example an address or date of birth) the document was not "nominative". Other decisions of the Conseil d'État have allowed access to the mail register of a minister[686] or the list of municipal government officers.[687] The Rights of Citizens Bill replaces the term nominative with "non-accessible".[688] In doing so it specifically provides that non-accessible documents include those which fit the definition used by CADA and cited above.[689]

CADA considered that the following documents did not contain nominative information: a list of students enrolled in certain classes; an order to close down a restaurant; noise level readings from historical buildings and the contracts of all public servants holding a particular post for the past seven years, although in this last case, their address and date of birth was deleted. By contrast, some documents do contain a value judgement of the person mentioned in it. CADA has refused access to the school file of a student; the comments of a selection committee set up by the administration; prison files; a fatal accident report which comments on the actions of an identifiable person and the responses of inhabitants to a questionnaire sent out by the municipal government.[690]

Criticising another person can mean that the critic wishes to remain anonymous. This scenario formed the basis of the Conseil d'État's decision in *Touzan*.[691] Touzan held a high level position in the public service for 10 years. In 1973 his contract was not renewed. He sought access to the ministerial dossier which related to this decision. Annexed to a report

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[683] ...une appréciation ou un jugement de valeur sur une personne physique nommément dignée ou facilement identifiable, ou incluant la description du comportement d'une personne dès lors qu'il s'avère que, d'une manière ou d'une autre, la divulgation de ce comportement pourrait lui porter prejudice. CADA (1981), above note 422 at 50.

[684] *CE Sect., 30 mars 1990, Mme Degorge Boëtte* Leb.. 1990 at 85.

[685] X Prétot, "CE, 30 mars 1990, Mme Degorge Boëtte - Observations" (1990) *AJDA* 553 .

[686] *CE, 27 avril 1987, Caballero* Leb. 1987 at 739.

[687] *CE., 10 avril 1991, Commune de Louviers c/ M. Mabire-Bex* Leb.. 1991 at 948.

[688] The French term is "non-communicable" and it is proposed to include it in amended article 1 of the French FOI law.

[689] Proposed amendment to article 6 of the French FOI law by article 8 of the Rights of Citizens Bill. The definition was cited at note 683 with the translation in the accompanying text.

[690] CADA, above note 502 at 47-50.

[691] *CE, 10 juillet, Touzan* Leb., 296.

were interviews with politicians, public servants and people from the agricultural sector which contained highly unfavourable comments about Touzan's personality and work performance.[692] The documents were certainly nominative, in that they contained an unfavourable assessment of Touzan, but this did not prevent Touzan himself from accessing them. Yet, the commissaire du gouvernement was clearly uncomfortable about releasing the interviews, particularly as the inspector had interviewed people without telling them that their comments could be made public and or giving them an opportunity to check the transcript. The commissaire du gouvernement considered that just as exam papers were nominative regardless of whether the mark was written on the paper, the opinions expressed by identifiable people were also nominative. The annexes were therefore doubly nominative, once in respect of the author of the comments and once for the subject of the comments. Touzan could therefore only access the document once all references to his critics had been deleted. In reaching his conclusion, which was followed by the Conseil d'État, the commissaire du gouvernement recognised that it was unfair if the victim did not know the identity of his accusers, but that this was necessary for the administration to obtain similar information in the future.[693] This guarantee of anonymity was intended to protect one off providers of information to the administration. It has since been extended to parents writing letters to principal about conduct of a teacher in class.[694] However, it does not apply to public servants carrying out their functions and in the *Touzan* case, the names of the two investigators were released.[695]

Only the person the subject of nominative documents is entitled to access them. While a person is alive, CADA will only allow that person, a third party with written authorisation or a third party legally entitled to control the affairs of the person to access nominative files. A parent can therefore access information about a child who is a minor, but not once the child is of age. However, once a third party is recognised as standing in the shoes of the person concerned, then access can not be denied even if the document contains private, commercial or medical information.[696] Where a person has died, the terms of article 6*bis*

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[692] H Toutée, "La communication des documents nominatifs - Conclusions sur Conseil d'État, Section, 10 juillet 1992, *Ministre de l'Agriculture c/M. Touzan*" (1994) 10 *RFD am* 328 at 331.
[693] Ibid. at 332-334.
[694] *Ministre de l'Education nationale c/Ponthus* (Conseil d'État, 14 October 1992, unreported).
[695] Touvet and Stahl, above note 518 at 686.
[696] CADA, above note 502 at 51-52.

are interpreted strictly to protect the privacy of that person.[697] An heir might legitimately request access where she or he wishes to enforce one of the rights, such as a defamatory action, which can be inherited or enforced posthumously.[698] In *Chambre des notaires du département du Cher*[699] a daughter sought access to the dossier of her deceased father who had been refused an honorary membership of the notarial chambers. The Conseil d'État held that as there was no legal right which could be enforced posthumously, and as the father had not sought access to the dossier in his lifetime, the daughter was not sufficiently "concerned" by the dossier to be entitled to access. The Conseil d'État seems to have been particularly concerned by the possibility of family disputes arising out of access to nominative documents after death.[700]

3. The exceptions found in article 6

Article 6 sets out eight exceptions to the right of access to documents. It provides that: The agencies mentioned in article 2 can refuse to allow consultation of or access to an administrative document if it would threaten:

- the secrets relating to the deliberations of the government and those high ranking officials who exercise executive power;
- the secrets relating to national defence or external affairs;
- the national currency or national credit, state security or public security;
- the conduct of legal proceedings or any preliminary actions, except where authorised;
- the secrets relating to private life, personal and medical dossiers;
- commercial and industrial secrets;
- investigations by the responsible department of breaches of the taxation or customs law;
- secrets protected by legislation.

In applying the above provisions, the relevant minister is to determine, after consultation with CADA, a list of the administrative documents which can not be communicated to the public by reason of their nature or object.

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[697] Although the Rights of Citizens Bill proposes repealing article 6*bis*, article 6 is amended to include the same rights of access to nominative information and the repeal should have no effect on access to nominative information by third parties.
[698] B du Marais, above note 646 at 742-746.
[699] *CE Sect., 29 juillet 1994, Chambre des notaires du département du Cher* Leb. 1994 at 396.

As exceptions to the general rule granting access, the provisions found in article 6 should be interpreted restrictively,[701] although this has not always been the case.[702] The Rights of Citizens Bill proposes amending the way in which the exceptions are structured but does not make any substantive changes. The last line of article 6 is also important. Between 1981 and 1986, most ministers published lists of the documents which they considered to be inaccessible because one or more of the exceptions in article 6 applied. These lists are not binding and can still be overturned by a decision of the Conseil d'État.[703]

a) A brief outline of the exceptions

Following is a brief discussion of most of the exceptions found in article 6. Only items 1 and 7 are not discussed here. Items 1 and 7 of article 6 of the French FOI law are akin to ss.36 and 43 of the FOIA, as they exempt documents relating to government deliberations and business affairs. They will therefore be discussed in more detail below.

(1) The secrets relating to national defence or external affairs

Although a claim for exemption on the basis of a threat to national defence has been fairly rare[704] the exception has also been interpreted reasonably broadly by CADA. As a starting point, CADA relies on the secrecy classification given to documents as proof of their status as defence secrets.[705] CADA has prevented communication of a report into the safety of the nuclear waste depot at La Hague, Normandy on the basis that the figures in the report could be used to determine France's nuclear capacity.[706] It has also refused access to the list of underground caves which could serve as shelter for the civilian population in times of conflict.[707] The administration takes advantage of this broad yet vague concept. For example, a university professor asked for the official registers of incoming and outgoing mail in a minister's office in an effort to track down documents on behalf of an

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[700] Touvet and Stahl, above note 518 at 686.
[701] J-Y Vincent, above note 410 at para 175.
[702] D Lochak, "Secret, sécurité et liberté" in Centre universitaire de recherches administratives et politiques de Picardie (ed), *Information et transparence administrative* (1988) at 53.
[703] *CE, 16 juin 1988, Association Greenpeace* Leb. 1988 at 243.
[704] CADA, above note 502 at 101.
[705] Ibid. at 102.
[706] *Lalonde, 4 mars 1981* 5th Report of CADA at 181.

environmental group. He was told that to release even the number and title of files could threaten defence secrets.[708] Defence secrets are an exception to the right of access to nominative files established by article *6bis*. Accordingly, a person (or their relatives) can be refused access to their own file if it contains defence secrets.[709] The second part of item 1 concerns external affairs documents. Most of the documents falling within this exception relate to international negotiations or analyse a situation in a foreign country. They need not be directly related to France's diplomatic relations in order to fall within the exception.[710] The Conseil d'État has therefore refused access to documents describing the action taken by France to discover the fate of political prisoners in Guinea, because the inquiries were made using diplomatic channels and at a high level.[711]

(2) The national currency or national credit, state security or public security

CADA has adopted a narrow interpretation of this exception. It refused to accept the argument that such an exception exempted all documents emanating from the Treasury or the Banque de France.[712] It has therefore allowed access to a currency exchange agreement between the Banque de France and another bank.[713] Simply because a document is produced by security services does not make its release a threat to state or public security. For this reason, CADA has allowed people access to the file held about them by the police or the renseignements généraux.[714] The Conseil d'État has adopted a more restrictive approach[715] and considered that all of the files belonging to the renseignements généraux were exempt because of public security concerns.[716] However, CADA has denied access to a dossier which related to the transferral of a prisoner,[717] letters on an individual's hospital file from people claiming that he was dangerous[718] and a telegram from the minister for the

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[707] *Commission permanente d'étude et de protection des eaux souterraines et des cavernes de Franche-Comté* (CADA, 4 July 1985, unreported).
[708] Denis-Lempereur, above note 572 at 57.
[709] *Girard* (CADA, 8 March 1984, unreported); *Langlois* (CADA, 9 May 1985, unreported).
[710] CADA, above note 502 .
[711] *CE, 8 juin 1988, Association des familles framçaise des prisonniers politiques* Leb. 1988 at 232 .
[712] CADA (1981), above note 422 at 76; CADA, above note 502 at 105.
[713] *Ministre de l'Économie et des Finances* (CADA, 10 December 1981, unreported).
[714] The renseignements généraux is in charge of security and surveillance within France. CADA, above note 586 at 35.
[715] D Lochak, "Secret, sécurité et liberté" in Centre universitaire de recherches administratives et politiques de Picardie (ed), *Information et transparence administrative* (1988) 51 at 54-55.
[716] *CE, 27 avril 1988, Mme Loschak* Leb. 1988 at 173.
[717] *L* (CADA, 16 August 1994, unreported).
[718] *X* (CADA, 15 June 1989, unreported).

Interior relating to threats to Algerians.[719] In reaching its decision in these cases, CADA takes into account any threat posed by release of the documents to people who provide information or assist the public service.[720]

(3) The conduct of legal proceedings or any preliminary actions, except where authorised

Simply because legal proceedings are under way or might be started is not enough to refuse access to documents. Release must threaten the proceedings themselves by encroaching upon the matters at issue, disadvantaging a party or delaying the proceedings.[721] Thus, a report prepared by the Commission des opérations du bourse can be released even though it was subsequently transferred to a court to form part of its investigation.[722] In practice however the Conseil d'État has refused access to a document simply because it was linked to legal proceedings.[723] The release of documents can be authorised by the person who started the proceedings or who might defend or intervene in the proceedings.[724] The difference between documents excluded under article 6 and judicial documents (discussed above) is that the latter are not considered to be administrative documents and are not included within the scope of the law, while the former are administrative yet exempt.

(4) The secrets relating to private life, personal and medical dossiers

Apart from a name, most other personal details such as date of birth, age, marital status, family details, address, telephone numbers, social security number, profession or employment information are excluded under this heading.[725] Where possible, CADA asks the administration to simply delete the offending piece of information. There are situations where the entire document is likely to identify a person, such as cadastral information

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[719] *Lochak* (CADA, 6 July 1995, unreported).
[720] CADA, above note 502 at 109.
[721] J-Y Vincent, above note 410 at para 156.
[722] *CE, 20 mars 1992, David* Leb... 1992 at 127.
[723] *CE, 31 juillet 1992, Mme Vatin* Leb. 1992 at 208.
[724] J-Y Vincent, above note 410 at para 155.
[725] J-Y Vincent, above note 410 at para 158; CADA, above note 502 at 113.

about a person's property,[726] or a dossier for "farmers in difficulties",[727] in which case CADA will refuse access. Public servants are also entitled to have their private life protected, but this protection does not extend to information about their official functions, such as their administrative address, their level or their remuneration.[728] Medical files are not generally accessible, except to the person who is the subject of the file or in certain circumstances, their relatives. Article 6*bis* prevents direct access to medical files and requires that the details be relayed to the applicant via a doctor.

(5) Investigations by the responsible department of breaches of the taxation or customs law

An investigation into breaches of tax or customs law need not end in criminal proceedings for it to be covered by the exemption set out in article 6. It allowed for the exemption of a ministerial circular relating to circumstances which might indicate fraudulent activities and defining the methods used for discovering breaches of the law.[729] CADA originally considered that a report on a taxpayer, following investigation for fraud was exempt under article 6. The Conseil d'État disagreed and found that such a document was accessible under article 6*bis*.[730]

(6) Secrets protected by legislation

This last clause of article 6 is something of a cover all clause. The true scope of the provision is unknown, as there is no comprehensive analysis of all the sources of secrecy in French law.[731] Only the fact that the secret must be established by a law and not a regulation provides some limits.[732] CADA considers that the professional secrecy obligations of the medical profession (including nurses, midwives and psychiatrists) fall within the scope of this exception.[733] Other examples of secrets exempted by this provision

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[726] *Pailhes* (CADA, 2 February 1995, unreported).
[727] *Préfet du Pas-de-Calais* (CADA, 30 April 1992, unreported).
[728] CADA, above note 502 at 115.
[729] J-Y Vincent, above note 410 at para 167.
[730] *CE, Sect., 1 décembre 1989, Blance et SARL* Leb., at 244 and 246.
[731] J-Y Vincent, above note 410 at para 169; J Laveissière, above note 423 at 187.
[732] J Laveissière, above note 423 at 189.
[733] CADA, above note 502 at 128-129.

are: secrets relating to the organisation and collection of statistics;[734] secrets relating to the natural parents of a ward of the State;[735] complaints made by an employee about his employer to an inspecteur de travaille (a workplace inspector)[736] and some of the professional secrecy obligations imposed on taxation officers.[737]

b) The deliberations of government and those high ranking officials who exercise executive power

Item 1 of article 6 exempts access to documents which might threaten the deliberations of government and those high ranking officials who exercise executive power. Of all the restrictions to access found in the French FOI law, it has been said that this exception is the most problematic.[738] The documents that it seeks to exclude are likely to significantly affect the daily lives of the public. Yet, in its 1995 report on transparency, the Conseil d'État concluded that there was a general interest in protecting the discussions, confrontations, disagreements, negotiations, consultations and compromises which precede government decisions. To force these discussions to take place in the open would only encourage covert confidentiality.[739] Defining the limits of the exception is not easy as the phrases used in article 6 have no equivalent in French administrative law, leaving CADA and the Conseil d'État to decide on the scope of the exception.[740]

(1) The concepts of "the government", "high ranking officials who exercise executive power" and "deliberation"

The most important decision and one that illustrates the difficulties faced is that of *Mlle Pokorny*.[741] Mlle Pokorny sought access to a report prepared for the Prime Minister on the subject of "rémunérations annexes". These are premiums or allowances which are paid to public sector officers in circumstances of the utmost discretion and which complement,

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[734] J-Y Vincent, above note 410 at para 169.
[735] CADA, above note 507 at 39; CADA, above note 512 at 57.
[736] CADA, above note 507 at 43-44.
[737] *CE, 1 juin 1990, Ministre du budget c/Bouxom* Leb. 1990 at 141.
[738] J Laveissière, "A propos d'un rapport trop explosif: L'accès aux documents administratifs et la protection du <<secret des délibérations du gouvernement ...>>" (1988b) *La Semaine Juridique, Éd G I* 3347 at para 1.
[739] Conseil d'État, above note 431 at 68.
[740] J Laveissière, above note 738at para 1.
[741] *CE, 2 décembre 1987, Mlle Pokorny* Leb... 1987 at 392.

often very handsomely, the standard salary. The payments are not regulated and any attempt to shed light on them is seen an intolerable threat to the legitimate advantages of a public servant.[742] In October 1983 the Prime Minister asked Alain Blanchard to investigate the subject and provide a report. The report was given to the Prime Minister in July 1984, with the intention that it be made public. However by this time the political situation had changed and the Blanchard report was put under lock and key, with access limited to about 10 people.[743]

Not surprisingly the Secretary for State refused Mlle Pokorny access to the report. His decision was upheld by CADA, the Tribunal Administratif and the Conseil d'État. All considered that the report was requested by the Prime Minister with a view to defining government policy on the payments and that to release it would threaten the secrecy of government deliberations. The decision has been criticised because it takes an expansive interpretation of an exemption rather than the traditional narrow approach.[744] More importantly it represents a missed opportunity. Here was a report that covered a topic of long standing public concern, in an area which was a classic example of administrative opacity and where the public was truly interested in obtaining access. A chance to put into practice the democratic principles of the French FOI law and to demonstrate the benefit of accessing administrative documents was lost.[745]

(a) To which bodies does the exception apply?

The term government is fairly well defined in French constitutional law. The exception certainly applies to the activities of the Prime Minister and ministers acting either alone or as part of a collegiate decision making body such as the Conseil des ministres, interministerial councils and committees.[746] CADA considers that the exemption does not apply to the Commission des Opérations de Bourse[747] or the Commission de la

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[742] J Laveissière, above note 738 at para 1.
[743] Ibid.
[744] M Azibert and M d Boisdeffre, "Chronique générale de jursiprudence administrative française" (1988) *AJDA* 147 at 150.
[745] Ibid. at 150.
[746] CADA, above note 502 at 74-5; J Laveissière, above note 738 at para 4; J-Y Vincent, above note 410 at para 140.
[747] The closest Australian equivalent would be the ASC.

concurrence[748] as they are both independent administrative authorities and not collegiate government decision making bodies.[749]

However, the second phrase, "des autorités responsables du pouvoir executif"[750] is much less precise and the travaux préparatoires show that it was intended to ensure that the decisions of municipal government bodies were not excluded by article 6.[751] The phrase is a broad one which includes members of a ministerial cabinet, ministerial advisers or collaborators and high level officers within agencies. In its 1997 Guide CADA noted that it was generally persuaded to exempt decisions made by a public servant who had the authority to act on the minister's behalf.[752] Meetings of these officers which contribute to the conception or the implementation of political policies are also covered.[753] Despite the fact that they are not part of the central administration, CADA views Prefects as direct collaborators of the Minister for the Interior and policy documents passing between a Prefect and the Minister would be exempt.[754] The exemption may even extend to policy documents prepared for the Prefecture itself.[755] The report from the renseignements généraux[756] on activities of the socialist party within a department,[757] and the opinion of a Commissaire de la République[758]on an applicant for a national honour,[759] were both covered by this exemption. CADA considers that the documents emanating from the interministerial committee on town planning as well as defence councils and committees can all claim exemption for their documents under this clause.[760] In adopting such a wide stance, CADA has effectively created the potential for a zone of secrecy at the highest levels of French government, an outcome which is utterly contrary to the goal of transparency.[761]

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[748] This Commission regulates market competition.
[749] *Dumons* (CADA, 29 September 1983, unreported); *société Chanel* (CADA, 29 March 1989, unreported); *David, 31 août 1989* 6th Report of CADA at 39.
[750] This phrase translates as "high ranking officials who exercise executive power".
[751] CADA, above note 502 at 74; J Laveissière, above note 738 at para 3.
[752] CADA, above note 502 at 76.
[753] CADA (1981), above note 422 at 59; J Laveissière, above note 738 at para 5.
[754] *Commune de Lès-Villettes* (CADA, September 1985, unreported); Lochak, above note 715 at 59.
[755] J Laveissière, above note 738 at para 8.
[756] The service responsible for information and security within France.
[757] *Commissaire de la République du Territoire de Belfort* (CADA, 29 January 1987, unreported).
[758] This is the new name for a person carrying out similar functions to Préfet or Prefect, given after the reforms to decentralise France beginning in 1982. R Chapus, above note 617 at 211 – 212.
[759] *Benhamou* (CADA, 17 September 1987, unreported).
[760] CADA, above note 502 at 75.
[761] Lochak, above note 715 at 58.

(b) What documents reflect the deliberation of these bodies?

In using the term "deliberation" the French FOI law already set up difficulties. Laveissière pointed out that it is usually parliament who deliberates, while administrative authorities decide.[762] The exemption in article 6 is not limited to the reports or minutes of government deliberations, but extends to the notes, reports and dossiers used by ministers in making their decisions.[763] CADA has suggested that the contents of the document must either be used by the government or a high level authority in making a policy decision or in the exercise of a sovereign discretion. [764] If the document merely contains an interpretation of a law or is part of an administrative process then it can not be exempted under this clause.[765] The difficulty with this test lies in distinguishing between the reports, studies and dossiers which have the goal of allowing public decision makers to choose the appropriate policy measures and which do not.[766]

Examples of policy deliberations abound. In *Mlle Pokorny*, the Blanchard report was prepared solely for use by the Prime Minister in preparing his decision.[767] CADA has excluded from access the minutes of a meeting where government representatives discussed the upgrading of a national road,[768] the monthly survey into the attitudes of the French population carried out for the Prime Minister[769] and the discussions, notes and minutes which prepared the way for the decree on the sale of syringes.[770] In the last case, the reports of the working group on the subject were accessible. Not all surveys are exempt. A survey carried out at the request of the Minister for Education into private schools did not threaten any government secrets and so was accessible.[771] An agreement between two Ministers relating to the payment for stamping letters emanating from the Tribunaux Administratifs did not touch on policy issues either and was not exempted.[772] It is possible to provide restricted access to these documents, deleting those portions which related to the secrets of executive government.[773]

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[762] J Laveissière, above note 738 at para 3.
[763] *CE, 2 décembre 1987, Mlle Pokorny* Leb... 1987 at 392.
[764] CADA, above note 502 at 78-79.
[765] CADA (1981), above note 422 at 58.
[766] J Laveissière, above note 738 at para 12.
[767] *CE, 2 décembre 1987, Mlle Pokorny* Leb. 1987 at 392.
[768] *Escaro* (CADA, 10 April 1989, unreported).
[769] *Devillers, 16 avril 1984* 4th Report of CADA at 412.
[770] *Leman, 21 juillet 1994* 8th Report of CADA at 107.
[771] *Golab, 9 mai 1984* 4th Report of CADA at 414.
[772] *CE, 21 juillet 1989, Association SOS Defense et M. Bertin* Leb. 1989 at 687.
[773] *TA Rennes, 27 octobre 1988, Syndicat CGT du carénage de Lorient*, Gaz. Pal 1990 1, somm, 21.

Where deliberations relate to the exercise of State discretionary power, access is also excluded under this item. CADA has consistently concluded that a decision by the government to grant French citizenship is an exercise of State sovereignty and therefore the dossier is exempt from access. A similar conclusion was reached in respect of a decision to award a national honour. There are circumstances when such decisions are not discretionary, but follow a standard administrative procedure. For example a foreigner married to a French person is entitled to French nationality as of right and their naturalisation dossier is accessible.[774]

(2) The similarities between this exception and the concept of preparatory documents

By definition, policy documents prepare the way for policy decisions. They are therefore a particular kind of prepatory document. As was discussed above, access to preparatory documents is not denied, it is simply deferred. This raises the issue of whether article 6 precludes access to deliberative documents, or whether the general rule of allowing deferred access to preparatory documents prevails. The question has been considered by various authors. Both the exception for deliberative documents and the deferral of access for preparatory documents have the aim of providing a sphere of tranquillity and freedom from the public gaze for the administrative decision making process.[775] The Conseil d'État even considered that the notion of the secrecy of government deliberation is a modest extension of the principle of preparatory documents which was already found in general administrative law.[776]

Denis-Lempereur argued that as "deliberation" means examining questions in a group before taking a decision, it would be appropriate for deliberative documents to be released once the decision was taken.[777] Similarly Azibert and de Boisdeffre considered that the Blanchard report could have been published after the Prime Minister had had the opportunity to consider its contents, in the same way as many other administrative reports

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[774] CADA, above note 502 at 78.
[775] J Laveissière, above note 738 at paras 12 and 13.
[776] Conseil d'État, above note 431 at 68.
[777] Denis-Lempereur, above note 572 at 58.

are subsequently published.[778] The reasons for maintaining the secrecy of the deliberations of executive government diminish once the decision is taken, so that access to the deliberations of executive government becomes simply a question of timing.[779] Common sense would suggest it is appropriate to allow access to reports, pilot studies and the like once a decision has been taken. The same rule should apply to documents concerned with the deliberations of government.[780] Such an approach is attractive in that it would provide a consistent jurisprudential approach and allow deferred communication of documents which are currently exempt under article 6.

The difficulty is that there is nothing in the French FOI law which allows such an interpretation of article 6. Article 6 appears to exclude access to all high level deliberative documents until such time as the administration considers that they can be released or until they are generally accessible under the law governing the national archives.[781] In its decision in *David*,[782] CADA seemed to suggest that a report from the Commissaire de la Republique to the Minister for the Interior on redrawing the electoral boundaries could be released after the decision had been taken.[783] However a close reading of the decision reveals that CADA excluded access to the report but considered that once a decision had been taken the documents relating to the administrative implementation of that decision could be accessed. This is the approach that CADA continues to cite in its 1997 Guide.[784] Only those documents which are preparatory can be accessed after a decision is taken. Those which relate to the secret deliberations of government are accessible after 60 years pursuant to the law relating to access to archives.

c) Commercial and industrial secrets

Item 7 of article 6 provides an exemption for commercial and industrial secrets. However, prior to the FOI law, neither legislation nor jurisprudence used the notion of commercial or industrial secrets.[785] CADA was therefore obliged to formulate its own guidelines.

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[778] Azibert and de Boisdeffre, above note 744 at 150.
[779] J Laveissière, above note 738 at para 14.
[780] Ibid. at para 15.
[781] Ibid. at para 15.
[782] *David, 7 octobre 1985* 4th Report of CADA at 429.
[783] J Laveissière, above note 738 at para 14.
[784] CADA, above note 502 at 78 –79.

(1) The definition of commercial and industrial secrets

CADA's second report included an analysis of the general principles surrounding access to business documents. Secrecy within the business sector involves an interesting dichotomy. Openness and freedom are supposed to be the hallmarks of a free market economy and there is pressure from shareholders and State institutions for more information to be released about the activities of companies.[786] Yet business jealously guards its secrets from both consumers and competitors.[787] Business secrecy also reflects a genuine need and allows business to reflect on and develop projects in a competitive environment.[788] It provides a space in which to exploit any competitive edge without fear of imitation by competitors.

The French State guarantees both openness and secrecy, with the creation of the Commission des Opérations de Bourse, the law against cartels as well as laws relating to privacy, the protection of trade secrets and secrets learned as an employee.[789] The solutions are subtle and involve the balancing of prejudice to both sides. To reconcile the competing interests in accessing business documents under the FOI law, CADA chose to deny access to documents containing manufacturing secrets, economic or financial secrets or secrets relating to commercial strategies.[790] It was a solution which the Conseil d'État in its 1995 report considered a suitable one, although at different points it insufficiently protected business and was an obstacle to accessing sufficient information.[791]

(a) Manufacturing secrets

The secrets protected under this heading include secrets already protected by the law of patents and trade secrets, as well as the more general obligations of employee secrecy.[792] CADA exempts any documents which might betray the "savoir-faire" of the business, be

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[785] Conseil d'État, above note 431 at 103.
[786] CADA, above note 586 at 53.
[787] C Spanou, above note 413 at 147; see for example the resistance by company directors to the proposed bill requiring them to disclose their salary described in *Libération* 23 July 1999 at 19.
[788] CADA, above note 586 at 58.
[789] C Spanou, above note 413 at 147; CADA, above note 586 at 53-57; Conseil d'État, above note 431 at 102.
[790] CADA, above note 586 at 37-39; CADA, above note 502 at 139.
[791] Conseil d'État, above note 431 at 105.
[792] CADA, above note 502 at 139.

that its research or manufacturing techniques or other information which might enhance the efficiency of a third party.[793] One of CADA's more controversial decisions in this domain involved refusing access to a report on the security of the uranium storage facility at La Hague, because it could reveal industrial or commercial secrets.[794] Access to the daily records of effluent discharge were refused on the basis that an analysis of the elements contained in the discharge might reveal secrets about the manufacturing techniques used by the factory.[795] CADA used the same principle in a number of cases but considers that such an approach is only justified where there is a concrete link between the manufacturing process and the analyses sought.[796] Other, less controversial documents to which CADA has refused access include the reports of inspectors which describe the installations in a factory[797] or a report on the way in which private aquaculture businesses were managed.[798]

As with other exceptions, CADA has tried to provide partial communication where possible. Access was sought to the files relating to the authorisation for the bottling of natural mineral waters. CADA refused access to the map showing the source, the plant (planned or undertaken) for bottling water, installations used to treat the water and description of material used but otherwise allowed access to the dossier.[799] It has also allowed access to a dossier relating to an insulin injector because the dossier did not contain financial or technical information and did not threaten the manufacturing process of the company involved.[800]

(b) Economic and financial secrets

Under this heading, CADA aims to protect information on the general financial health of a business such as its takings, credit or level of activity. On this basis, CADA has refused access to the business records of a pharmacy, the production levels of local industries, the files of farmers in difficulty, the list of producers affected by disease, the consumption of flour or electricity by bakers, the declarations of milk production as well as some parts of

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[793] Conseil d'État, above note 431 at 104.
[794] *Lalonde, 4 mars 1981* 5th Report of CADA at 181.
[795] *Clément* (CADA, 29 November 1984, unreported).
[796] CADA, above note 502 at 140.
[797] *Boyer* (CADA, 20 May 1981, unreported).
[798] *Wackernie* (CADA, 24 May 1995, unreported).
[799] *Chef de l'inspection générale des affaires sociales* (CADA, 25 February 1993, unreported).
[800] *Chevrier* (CADA, 5 March 1993, unreported).

the annual reports for dentists working in a dental clinic.[801] Access was sought to the declarations given to the town council of the grape harvest of wine producers. CADA considered that these were not accessible because they contained industrial or commercial secrets.[802] By contrast, CADA has allowed access to the success rates of students attending different driving schools within a department and the amount of professional tax paid by each of the businesses in a particular locality.[803]

Documents relating to government aid to business are of interest to the public but also contain nominative information or business secrets. Given the variety of circumstance in which aid is given, CADA found it hard to provide a hard and fast rule on access. In general, it considered that information relating to the identity of the beneficiary, the amount of money paid and the number of employees concerned is not nominative because it does not contain a value judgement. Having said that, it may still contain industrial or commercial secrets. Access will be granted to documents relating to non-discretionary assistance, such as aid given for businesses participating in regional improvement, for business development in a priority area, for employing handicapped persons or grants for training. The level of these grants is fixed by regulation. Documents relating to discretionary aid are generally not accessible. Discretionary grants, such as an extension of the time limit for the payment of loans are likely to be given to businesses in difficulty. So too are subsidies given to prevent businesses laying off workers in regions where there is high unemployment, as these subsidies are fixed by reference to the likely effect of reducing the workforce and the cost to the business of maintaining its levels of employment. To release this information would subject the finances of these businesses to public scrutiny and could threaten their credit rating.[804]

(c) Secrets relating to commercial strategies

This heading relates principally to documents created in the context of public supply contracts. It would seem that initially, CADA interpreted the provision fairly strictly and

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[801] CADA, above note 502 at 141.
[802] *Maire du Wuenheim, 4 avril 1992* 7th Report of CADA at 58.
[803] CADA, above note 502 at 142.
[804] *Ministre de l'Intérieur, 27 janvier 1981* 5th Report of CADA at 180; *Commissaire de la République du département d'Indre et Loire, 26 avril 1985* 4th Report of CADA at 423.

refused disclosure of tenders for public supply contracts.[805] Subcontractors were only entitled to access the documents which concerned them.[806] This secrecy was regrettable as it did nothing to prevent the scandals that can arise out of public contracts with private bodies.[807] It seems that CADA has undergone a change of heart and now allows access to much of the information provided in tenders for a public supply contract. The price submitted by the successful tenderer and the global prices put forward by those companies who were unsuccessful in their tender are accessible, but the prices submitted for each individual part of the tender are not.[808] In 1993, CADA allowed a journalist access to documents relating to a supply contract which had been granted to the same enterprise for nine years in a row.[809] CADA also decided that as the cleaning, repair and security contracts for lifts in public buildings had been put to public tender they were therefore accessible.[810]

The heading still protects a considerable number of documents which could be of considerable public interest. Where a private body submits documents to an agency with a view to obtaining an authorisation or subsidy, those documents are protected by article 6.[811] CADA has thus denied access to town planning dossiers,[812] the decisions of the committee which considers acquisitions in the banking field[813] and to a request for a subsidy, which revealed the strategy of both the company involved and the industry in general.[814] On a similar note, access was sought to any agreement or letters relating to the creation of Eurodisneyland in France, which included letters from the French President. Without even examining the contents of the documents, CADA held that the communication of the letters would reveal the commercial strategies of the Walt Disney Company and the other companies involved in the project. They were therefore covered by commercial and business secrecy and not accessible.[815] A further step towards

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[805] *Weissenberger* (CADA, 11 July 1987, unreported).
[806] CADA (1988), above note 422 at 81.
[807] Denis-Lempereur, above note 572 at 59; for example the indictment of Jean Tiberi, President of OPHLM accused of participating in the taking of bribes from construction companies in exchange for being awarded public tenders for building low cost housing in Paris as described in *Libération* 22 July 1999 at 12; *Libération* 29 June 1999 at 1.
[808] *Commission centrale des marchés publics, 2 avril 1992* 7th Report of CADA at 41.
[809] *Président du conseil régional du Nord-Pas-de-Calais, 7 janvier 1993* 8th report of CADA at 100.
[810] *Directeur général de l'Office public d'habitation de la ville de Paris* (CADA, 3 September 1992, unreported).
[811] CADA, above note 502 at 144.
[812] *Oudin* (CADA, 29 October 1992, unreported).
[813] *Fillipi* (CADA, 23 March 1989, unreported).
[814] *Morin de la Mare* (CADA, 16 June 1988, unreported).
[815] *Conseil délégué interministériel <<Eurodisneyland>>, 17 septembre 1987* 5th Report of CADA at 101.

expanding the scope of the exception was recently taken by the Conseil d'État. It refused access to contracts between the Pompidou Centre and art vendors relating to the purchase of works of art on the basis that they would reveal commercial or industrial secrets.[816] Such an extension appears unjustified, as it is difficult to see why the disclosure of these contracts would threaten the acquisitions process or why a public art gallery needs to be competitive.[817]

(d) What is a "secret"?

Not all secrets are the same or have the same value. Common sense suggests that while "who ate the last piece of cake", and the PIN number to the family bank account are both secrets, they need to be guarded with quite different levels of vigilance. In this context, the meaning of the term "secret" is important because it limits the scope of the exception. Although an agency may choose to keep secret anything which is commercial or industrial, it could not argue that all commercial or industrial information is of the same importance. Some pieces of information may not even qualify for the term "secret". Yet, it seems that the question of what is meant by the term "secret" in this exception has not been specifically considered.

CADA certainly gives some meaning to the term "secret". For example, it allows access to the list of businesses that submitted tenders and the ultimate tender price but not the finer detail of the tender of each company.[818] Clearly not everything associated with industry or commerce is exempt. Generally, CADA determines whether releasing the documents may harm the business involved. For example the test for determining whether a document threatens manufacturing secrets is that the documents requested "must not contain information which is likely to or capable of disclosing the know-how of a business".[819] Those of CADA's decisions that consider whether a document contains commercial or

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[816] *CE, 17 février 1997, Centre national d'art et de culture Georges Pompidou c/M. Forest* Quotidien Juridique No 97, 4 décembre 1997.
[817] G Pellissier, "Note sur *CE, 17 février 1997, Centre national d'art et de culture Georges Pompidou c/M. Forest*" (1997) *Quotidien Juridique* 319.
[818] CADA, above note 502 at 142.
[819] "ne comportent pas des informations susceptibles de dévoiler le savoir-faire de l'entreprise" CADA, above note 502 at 139.

industrial secrets consider that documents or parts of documents are excluded to the extent that they *might* reveal industrial secrets.[820]

In its second report, CADA said that determining whether secrets were protected under this exemption involved a balancing of the prejudice that could be done to the business or administration by releasing the information as against the prejudice to the public in not being able to access the information.[821] In practice, the public interest in having the information seems to be rarely if ever expressly considered. Although article 6 does not specifically call for consideration of the public benefit, this alone is no reason not to do so. The jurisprudence relating to preparatory and incomplete documents indicates that both CADA and the Conseil d'État are prepared to fill in any perceived gaps in the law. It would be consistent with the principle of narrowly interpreting exceptions if CADA used a more rigorous definition of "secret". Transparency would be improved if there was some consideration of whether the harm arising from the release of secrets was counterbalanced by the benefit to the public in accessing the information.[822]

(2) Can the administration refuse to reveal its secrets?

The principle object of this exception is to exempt from access those documents which emanate from private bodies but which end up in the hands of the administration. Yet, there are also times when an agency wishes to protect its own secrets. This concern is heightened in a French context because French agencies can behave in a "private" manner in some contexts.[823] If a document is an administrative document and relates to a public purpose then it is prima facie accessible. However, there seems no doubt that article 6 does allow the administration to protect its own industrial or commercial secrets. The administration can even refuse to allow another public body, such as another government department or a town council to access information protected by the commercial or industrial secrecy exemption.[824]

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[820] Although I have translated the word as "might" CADA used the word "susceptible". *Maire d'Ustou/maire d'Aulus-les-Bains, 10 janvier 1991* 7th Report of CADA at 57; *Lalonde, 4 mars 1981* 5th Report of CADA at 181; (*Clément*, CADA, 29 November 1984, unreported); CADA, above note 502 at 141.
[821] CADA, above note 586 at 58.
[822] Denis-Lempereur, above note 572 at 59.
[823] See discussion and references at note 616.

In *Hudin*, CNIL tried to claim that the reports which were sought by the applicant were its commercial secrets.[825] The SNCF has asked CADA to exempt its commercial secrets on a several occasions. Access was sought to two tables of algorithms which allowed the national railway company to say that its fares had increased by an average of 2.8%. CADA considered that these did not contain any commercial secrets and released the document.[826] By contrast it upheld the SNCF's claim in relation to an important (and unfinished) project called SOCRATE.[827] It has allowed the SNCF to deny access to the security arrangements aboard its trains.[828] The OPHLM which is a public establishment with a commercial character sought an exemption for the minutes of the meeting of its council of administration. CADA held that there was nothing secret in the papers and they could therefore be released.[829] Similarly, Kellogs sought access to an audio visual document produced by a private company at the request of the administration and shown at the meeting of the national council of food. The agency concerned was the owner of the document and claimed exemption under article 6. CADA held that the document did not contain any exempt material and that Kellogs had the right to obtain a copy.[830]

D. The practicalities of accessing documents

Any discussion of the effectiveness of a FOI regime must include a consideration of the practice of accessing documents under that law. This Part will cover the procedure used to obtain documents in France and the process of obtaining review of agency decisions. It will also provide a detailed examination of the two major review bodies: CADA and the Conseil d'État.

1. Procedure

This section will trace the process of applying for documents, beginning with the initial application to the agency and then review by CADA and the administrative courts.

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[824] LR, "Secret des affaires et transparence administrative: une alliance antinomique" (1996) 62 *Les Petites Affiches* 15 at 15-16.
[825] H Maisl, "Note sur Conseil d'État Sect., 8 octobre 1993, Affaire Hudin" (1994) 1 *Droit de l'informatique et des télécoms* 26 at 27; S Fratacci, above note 598 at 880.
[826] *Sivardière* (CADA, 9 March 1992, unreported).
[827] *Beauval* (CADA, 21 January 1993, unreported).
[828] *Ministre de l'Équipment* (CADA, 3 April 1997, unreported).
[829] *OPHLM de la ville de Paris* (Conseil d'État, 30 June 1995, unreported)
[830] *Directeur général de la concurrence, 7 janvier 1993* 8th Report of CADA at 99.

a) Asking the administration

Article 4 of the FOI law provides that access to administrative documents can be exercised either by free consultation of the document at the offices of the administration or by requesting a photocopy. A request need not take any particular form and can be made by letter, in person and even verbally.[831] Although this approach seems simple, there are a number of complications which can make it much more difficult.

The applicant must have a fairly clear idea of the document that she or he is seeking and describe it in a precise manner. The administration is not obliged to consider a request which is too vague.[832] This can be hard as few administrations have complied with their obligations to publish a bulletin of the types of documents that they hold.[833] The applicant must work out which agency holds the document and submit a request to it. Generally the request should go to the administrative body which holds the documents, even if it is not the author of those documents.[834] Sometimes, the national administration (such as Prefects or Ministers) oversees the activities of collectivités territoriales[835] or private bodies carrying out a public function. Where documents are held by the national administration in its supervisory capacity, these documents are not accessible by that administration, and the request has to be transferred to the author of the documents.[836] A national agency who receives a wrongly addressed request for a document is obliged to forward it to the appropriate body. No such obligation exists for requests which are incorrectly addressed to municipal bodies.[837]

Once an applicant has successfully tracked down the document of interest, he or she may either view the document at the agency or ask for a photocopy. The administration is obliged to arrange its opening hours so as to allow reasonable access to documents. What is reasonable depends on the size and resources of the administration. It would be sufficient for a small commune[838] to be open half a day a week, particularly if it will open

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[831] CADA, above note 512 at 23.
[832] CADA, above note 502 at 153.
[833] Denis-Lempereur, above note 572 at 56; CADA, above note 502 at 154.
[834] CADA, above note 512 at 17.
[835] Municipal bodies.
[836] CADA, above note 512 at 18-19.
[837] CADA, above note 502 at 155.
[838] The equivalent of a municipality, some of whom may have as few as 60 inhabitants

on request.[839] Alternatively, the applicant may ask for a photocopy. The charge for this service can not exceed the real cost of the photocopy and CADA has been strict in its decisions in this area. The cost of photocopying within any national administration was set by an arrêté on 29 May 1980 at 1FF (about 25c) per page and has not increased since.[840] CADA has provided decisions to the effect that in a reasonable size town 3FF or 4FF per page was beyond the real cost of providing the copies and was excessive.[841] So too was an attempt by a commune to charge 10FF per page.[842] CADA has also held that where the administration does not have an accounting structure that enables it to bill for photocopies (for example, where there is no cash register available) the copies should be given for free.[843] A study conducted in the city of Lyon suggests that the trend is towards providing free copies where the cost is too small to warrant the paperwork involved in payment.[844]

The administration can refuse to provide a photocopy for one of two reasons. The first is where the document is too fragile to be copied.[845] This exemption was designed to preserve archival documents and both CADA and the Conseil d'État have closely examined claims that documents will be damaged.[846] In addition, the administration need only provide copies where it has the means to do so and Dennis-Lempereur suggests that some parts of the administration have claimed that an old photocopier does not allow them to fulfil their obligations.[847] CADA is of the view that in such a case, the documents should be sent out to be photocopied, with the bill paid for by the applicant.[848]

CADA has commented on numerous occasions that few administrations have set up a service for dealing with requests for documents. There are rarely specific photocopying facilities, easy ways of collecting payments or personnel specifically trained in the obligations of the law.[849] As requests increase, the problems caused by this lack of facilities will be exacerbated. When combined with poor record keeping practices, and the

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[839] CADA, above note 512 at 25.
[840] Arrêté de ministre du Budget du 29 mai 1980 (JO 3 juin 1980).
[841] *Maire de Fontainebleau* 8th report of CADA at 86.
[842] *Syndicat intercommunal pour l'assainissement de la region de Villeneuve-St-Georges* (unreported, Conseil d'État, 12 June 1996). By way of comparison, photocopying at the University of Montesquieu in Bordeaux in 1999 varied between 0.25FF and 0.50FF per page.
[843] CADA, above note 502 at 153.
[844] CADA, above note 512 at 111.
[845] Article 4 of the French FOI law.
[846] CADA, above note 502 at 156.
[847] Denis-Lempereur, above note 572 at 56.
[848] CADA, above note 512 at 26.
[849] CADA (1988), above note 422 at 19; CADA, above note 507 at 10; CADA, above note 495 at 17.

suspicion and opposition of public officers, accessing administrative documents can be a lengthy and frustrating process.[850]

b) Seeking CADA's assistance

If the administration refuses to provide the applicant with the documents requested it must notify the applicant in writing and provide reasons.[851] A failure to respond to the request within one month is taken as an implicit refusal of the request.[852] Either form of refusal allows the applicant to seek CADA's assistance. CADA tries to avoid formalism in the applications process and the application can be made by letter or fax provided that it contains a copy of original request. If there are problems with the application, CADA advises the person in writing or it may telephone to discuss the request. This process involves about 2000 letters per year and some 30 phone calls per day.[853] The application is not an appeal because CADA simply provides an opinion[854] and its opinion is not binding upon the administration.[855]

An applicant must seek CADA's opinion before appealing to the administrative courts. It is a mandatory pre-appeal step without which the administrative court can not hear the case.[856] The Rights of Citizens Bill confirms that CADA's opinion must be sought before appealing.[857] This rule represents a transformation of the nature of appeals in French administrative law.[858] It aims to enhance and enforce CADA's role as a conciliator, with a view to avoiding litigation,[859] and has generally been effective in this regard.[860] The rule is interpreted strictly by the Conseil d'État and as a mandatory procedure it can considerably

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[850] CADA, above note 502 at 159; CADA, above note 512 at 113-114.
[851] CADA, above note 502 at 163.
[852] Article 2, Décret No 88-465 du 28 avril 1988 relatif à la procédure d'accès aux documents administratifs.
[853] CADA, above note 502 at 164.
[854] The French term is "un avis".
[855] *CE, 27 avril 1983, Zanone*, Dr. adm. 1983 No 224; *CE, 21 novembre 1986, Mme Marabuto*, Dr. adm. 1987, No 1.
[856] *CE Sect., 19 février 1982, Mme Commaret* Leb. 1982 at 78 now codified by Article 2, Décret No 88-465 du 28 avril 1988 relatif à la procédure d'accès aux documents administratifs.
[857] To be included in amended article 5 of the French FOI law.
[858] J-F Brisson, *Les Recours Administratifs en Droit Public Français: Contribution à l'Étude du Contentieux Administratif Non Juridictionnel*. Edited by G Vedel. Bibliothèque de Droit Public (1996) at 200.
[859] J-P Costa, above note 484 at 185.
[860] B Pacteau, above note 506 at 474; J-P Costa, above note 484 at 185; J-F Brisson, above note 858 at 204.

prolong the process of obtaining access to documents.[861] Where an applicant has successfully obtained access to a file or document following CADA's intervention, but considers that there are documents missing from the file or too much of the document has been deleted, the applicant may not appeal but must return to the administration and ask for the missing documents (or parts thereof). If refused, she or he must seek CADA's assistance again.[862] The same rule applies if after CADA's intervention the administration refuses to provide photocopies of the documents.[863] The reasoning behind this approach is that it is the second decision of the administration, the one given after CADA's intervention, which is the appealable decision and not the decision of CADA itself.[864] The alternative regimes of access to documents have provided a way around this mandatory procedure, but this loophole is likely to be closed by the Rights of Citizens Bill.[865]

Although there is nothing in the FOI law itself which sets time limits on seeking CADA's assistance, the Conseil d'État considered that as a mandatory part of the litigation process it should fit within the norms of administrative litigation.[866] After receiving notification of the refusal or after one month of silence an applicant has two months within which to apply to CADA. CADA is obliged to provide its opinion within one month, although the validity of the opinion is not affected if this limit is exceeded.[867] The decree of 28 April 1988 provides that if within two months of the applicant's request to CADA the administration has not provided the documents, the applicant may appeal to the administrative courts.[868]

These strict time limits can be easily missed by an applicant who is not familiar with the process, and have been criticised as being excessively formalistic.[869] CADA has suggested that an applicant who is out of time should return to the administration, ask for the document again and bring a second application within time if access is refused.[870]

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[861] J-F Brisson, above note 858 at 202; J Laveissière, "Le <<droit à l'information>> à l'épreuve du contentieux, a propos de l'accès aux documents administratifs" (1987) 40e Cahier, Chronique *Receuil Dalloz Sirey* 275 at para 182.
[862] J-Y Vincent, above note 410 at paras 184-5; CADA, above note 502 at 163-.164; J Laveissière, above note 861 at 279.
[863] *CE, 23 octobre 1985, Leccia*, D. 1986, IR, 141.
[864] *CE., Sect., 19 février 1982, Mme Commaret* Leb. 1982 at 78; J Laveissière, above note 861 at 280; J-Y Vincent, above note 410 at para 196; J-F Brisson, above note 858 at 200.
[865] It would seem that under the Rights of Citizens Bill, the alternative access regimes will be brought under CADA's jurisdiction and therefore CADA's intervention will become mandatory for them as well.
[866] J Laveissière, above note 861 at 280.
[867] *Association SOS Défense* (Conseil d'État, 9 March 1983, unreported).
[868] Article 2 .
[869] CADA (1988), above note 422 at 21.
[870] Ibid. at 20.

Laveissière considers that this approach is unsustainable. Although an applicant can ask for the document and seek CADA's assistance again, the administrative courts can not hear an appeal from a decision which merely confirms an earlier decision which had not been appealed within time.[871] CADA itself is free to provide an opinion outside of these time limits as its decision is not appealable. Recognising the difficulties that can confront an applicant who is not aware of the process, CADA will provide its opinion on the legality of a refusal of access up to six months or a year after the administration's refusal. In doing so, it advises the applicant that she or he is out of time to appeal the decision of the administration.[872] The exercise is not futile as the good relations between the administration and CADA could persuade the administration to follow CADA's advice and provide the documents in any event.

CADA must move swiftly to provide its opinion within one month. After receiving the application for review, CADA asks the administration to provide it with the documents the subject of the request as well as any comments. The administration suffers no penalty if it fails to provide the documents and CADA has sometimes been delayed for up to a year and a half waiting for the administration's response.[873] Each matter is allocated to one of CADA's rapporteurs who provides a report for the Commission's next meeting. CADA meets twice a month and considers an average of 170 matters on each occasion. Only the difficult matters are debated before the Commission.[874] The President can invite a representative of the relevant administration to be present at this session, but this is rare. Generally, the informal contact set up by the rapporteur prior to the Commission's hearings means that the view of the administration is already known.[875] An applicant is never present, but can obtain an extract of the report prepared on the case.[876] After reaching its decision, CADA provides its opinion, either upholding or refusing the applicant's request (in whole or in part). At times it states that the request is outside the jurisdiction of the law or is vexatious, or a request for advice rather than documents. Not uncommonly, the administration has provided the applicant with the documents before the Commission

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[871] This is known as a décision confirmative, J Laveissière, above note 861 at 280; J-H Stahl, "Recours pour exès de pouvoir (Conditions de recevabilité)" *Répertoire de Contentieux Administratif* (1997) at para 189.
[872] CADA, above note 502 at 165.
[873] Denis-Lempereur, above note 572 at 60.
[874] CADA, above note 502 at 171; J-Y Vincent, above note 410 at paras 190-191.
[875] CADA, above note 502 at 171.
[876] J-Y Vincent, above note 410 at para 191.

makes its decision.[877] The opinion is provided to the administration and the applicant. The applicant then has to wait and hope that the administration complies with CADA's advice.

c) Appealing to the administrative courts

After CADA has provided its decision, the applicant waits for the administration to provide its response. If the response is an express refusal, an applicant has two months in which to bring an appeal. If there is no response, then the decree of 28 April 1988 provides that the time limit does not run until a refusal is express.[878] An applicant may still move to bring an appeal at any time after two months of silence from the administration.[879] Article 8 of the French FOI law provides that the administrative judge has six months in which to hand down a decision, although this rule is more frequently broken than upheld.[880] The appeal is to an administrative court regardless of whether the refusal originates with a public body or a private body in charge of a public function.[881] The appeals process follows the usual procedures of the administrative jurisdiction, so that the initial appeal is to the Tribunal Administratif, with subsequent appeals to the Cour Administrative d'Appel and the Conseil d'État. Where refusal emanates from some national bodies (for example independent administrative authorities) the Conseil d'État is the court of first instance.[882]

Generally a judge can not look at documents that are not also available to both parties, although such an approach was unsustainable in appeals concerning access to documents.[883] Following the first decision in the matter of *Huberschwiller*[884] a court can now ask to see the documents in dispute (provided that they are not the subject of a law relating to secrecy) without showing them to the applicant. The decision of an administrative court either upholds the administration's decision or quashes it. In theory, there is no power to order an administration to communicate documents to an applicant

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[877] CADA, above note 502 at 171-172.
[878] Article 2.
[879] CADA, above note 502 at 175.
[880] CADA, above note 507 at 13.
[881] J-Y Vincent, above note 410 at para 203 and the cases cited therein.
[882] CADA, above note 502 at 176.
[883] F Llorens and P Soler-Couteaux, "Contentieux Administratif - Accès aux documents administratifs" (1989) 39e Cahier *Receuil Dalloz Sirey* 375 at 375-376.
[884] *CE, 23 décembre 1988, Huberschwiller c/ Banque de France* Leb. 1988 at 464.

although this has not stopped some Tribunaux Administratifs from doing so in long or complex cases.[885]

2. The Commission d'Accès aux Documents Administratifs

All aspects of the FOI law, whether practical or jurisprudential, have been influenced by the actions of CADA. This section will consider the structure, role and effectiveness of this important body.

a) An independent administrative authority

Although traditionally it has been courts which upheld the freedoms of the French, part of the move towards decentralisation in France involved the setting up of independent bodies to oversee the activities of the administration and other powerful organisations.[886] These "autorités administratives indépendantes"[887] operate outside of the administrative hierarchy and have their own independent powers of decision, although the decisions they make are still under the control of the administrative judge.[888] CADA is generally considered to be one of these authorities, although it does not meet all of the criteria.[889]

CADA is composed of 10 members each appointed for a renewable term of 3 years. Its President is a Conseiller d'État. The Cours des Comptes and the Cours de Cassation both provide a member, appointed by the Prime Minister on the advice of the head of those courts. The Prime Minister also nominates his or her own representative. A deputy of the Assemblée Nationale and a Senator are appointed by the members of those institutions. One member is a representative of municipal government, being a member of either the conseil municipal or the conseil général appointed by a joint decision of the heads of the Sénat and the Assemblée Nationale. The last three members are a university professor, the Director General of Archives and the Director of "la Documentation française".[890] The

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[885] Introduced by law no 95-125, 8 February 1995.
[886] R Chapus, above note 617 at 200; G Braibant, above note 485 at 708.
[887] This translates as independent administrative authorities.
[888] R Chapus, above note 617 at 200, 347-348
[889] J-P Costa, above note 484 at 184; J-F Brisson, above note 858 at 197.
[890] Décret No 78-1136 of 6 décembre 1978 relatif à la Commission d'Accès aux Documents Administratifs. La Documentation française is the national publisher.

independence of CADA is generally seen to be enhanced by the different backgrounds and high calibre of the members of the Commission as well as their different modes of appointment. Importantly all members of the Commission take their role and their independence very seriously.[891]

Although CADA would seem to act independently, its status as independent administrative authority is sometimes disputed. Unlike CNIL, the legislature did not specifically designate CADA as an independent administrative authority in its enabling legislation. The FOI law reserves only one article for CADA and the membership, appointment and functioning of the Commission are established by a decree of the Conseil d'État. In addition, CADA does not have its own budget (unlike CNIL) and comes within the portfolio of the Prime Minister. Although appointed from different areas, the majority of the members are appointed by the executive. Finally, CADA lacks the power to make binding decisions. Despite the lack of formal guarantees of independence, Brisson still considered it to be an independent administrative authority.[892] The Commission operates outside of the administrative hierarchy and receives neither orders nor instructions. It is under the indirect control of the administrative judge. In practice, the Commission behaves like an independent administrative authority, with its members willing to adopt new and consistent jurisprudence on the French FOI law. As such, CADA provides important assistance for applicants who try to exercise their rights in an area where previously there were no checks on the behaviour of the administration.[893]

b) Powers and responsibilities

CADA's functions, set out in article 5 of the FOI law are to provide opinions on applications by people who have been refused access to documents, to provide advice to public authorities on any question arising from the FOI law, to propose changes to the law or regulations governing access to documents and to provide an annual public report (which is in fact published biannually) on its activities. Its principle activity is providing

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[891] G Braibant, above note 485 at 708; J-P Costa, above note 484 at 184; Conseil d'État, above note 431 at 44.
[892] J-F Brisson, above note 858 at 197.
[893] Ibid. at 197-198.

opinions and advice, with 3,500 decisions provided in 1995.[894] CADA is also responsible for checking the manner in which the administration has deleted those parts of a document which are secret[895] and supervising the exemptions claimed by the administration.[896] As the opinions given by CADA are not binding on the administration and can not be appealed before the administrative courts, technically speaking, CADA is not under the control of those courts. This gives it a certain freedom. However, it is not in a position to ignore the rulings handed down by the administrative courts for fear of raising false hopes amongst applicants and threatening its good standing with the administration.[897]

In its educative role, CADA is both mediator and information centre.[898] A lot of the refusals from the administration originally arose out of ignorance of the content of the law, and the rapporteurs had to both explain and persuade the administration to comply with its obligation to provide a broad right of access.[899] CADA now has a large informal network of contacts within the administration and informal exchanges will often precede written exchanges.[900] This informal network encourages the administration to feel comfortable about consulting CADA for advice on difficult requests. About 500 of these requests were received in 1996.[901] CADA's intervention often helps to resolve the stand off between an applicant and the administration, giving time for dialogue and allowing CADA to pressure the administration to comply with its obligations.[902] If CADA has given an opinion on the legality of a refusal, it asks the administration to advise it within a month whether its opinion was followed. This allows CADA to conclude that its advice is followed between 85% and 90% of the time.[903] CADA is also concerned about the lack of public awareness about the Commission and the right of access to documents and has undertaken at least one extensive public awareness campaign.[904]

As can be seen from the preceding discussion, a large part of CADA's role, at least in the first 10 years after the introduction of the law was to develop a consistent jurisprudence

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[894] J-P Costa, above note 484 at 184. 1995 is the most recent figures available as CADA did not publish a report in 1997, publishing instead a third edition of its Guide.
[895] J-Y Vincent, above note 410 at para [177].
[896] Denis-Lempereur, above note 572 at 60.
[897] CADA, above note 502 at 174.
[898] CADA, above note 489 at 13.
[899] CADA (1988), above note 422 at 18.
[900] CADA, above note 502 at 168.
[901] Ibid. at 167-169.
[902] J-F Brisson, above note 858 at 196.
[903] CADA, above note 495 at 16; CADA, above note 507 at 10; CADA, above note 502 at 169.
[904] CADA, above note 495 at 6.

which filled in any gaps left by the legislature. CADA is of the view that it adopts a liberal and flexible approach to the French FOI law,[905] a view which is largely borne out by an analysis of the jurisprudence. It has tried to adopt practical and realistic solutions to the problems posed by the law.[906] It has developed a jurisprudence on filtering out repeated or excessive requests[907] and recommended that the administration have only one month instead of two to respond to a request.[908]

CADA is responsible for a number of excellent publications which provide comprehensive information on access to documents and the role of the Commission. The most important of these is its biannual report. A ninth report (due in 1997) was not published and was instead replaced by a third edition of CADA's Guide to Accessing Documents.[909] The tenth report is expected late in 1999.[910] Each report provides a summary of CADA's activities during the year, any changes to the jurisprudence and its suggestions for improvement. There is always a comprehensive analysis of the decisions given by CADA in the previous two years. The first four reports used a table to describe each decision, noting the date, the relevant authority, the documents requested and the advice of CADA. This approach became very lengthy and subsequent reports provide a collation of the decisions into tables, graphs and commentary. The 8th report (published in 1995) included tables or graphs illustrating: the increasing number of requests forwarded to CADA; whether applicants were groups or individuals; the number of requests submitted to different administrations; the number of requests made in each geographical area; the subject matter of the requests (for example agriculture, defence, environment, education, elections, public supply); CADA's response to the request; the reason for refusal (where relevant) and the types of documents requested. This comprehensive information provides a good understanding of who is using the law and for what purpose.

The reports also provide a good coverage of the jurisprudence of the French FOI law. The first two reports contained a detailed discussion of the law, written in a clear style and covering who had a right of access, the administrations from which documents could be

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[905] CADA (1981), above note 422 at 11-2; J-P Costa, above note 484 at 185.
[906] CADA, above note 586 at 30; CADA, above note 586 at 7; CADA (1981), above note 422 at 11. One example is CADA's decision to change its stance on dividing documents into those relating to private and public activities once it realised the practical difficulties involved in applying such a distinction.
[907] J Laveissière, above note 861 at 281.
[908] Commission d'Accès aux Documents Administratifs, *L'accès aux documents administratifs* (Report No. 7, 1993) at 22.
[909] CADA, above note 502 . The contents of these guides are discussed below.

requested, which documents were accessible and the procedure to be followed. The intention was that the reports should increase knowledge and use of the FOI law.[911] Later reports focused on particular topics such as access to municipal documents, documents held by social service organisations, environmental or town planning documents and questions of procedure. CADA has also published a Guide to Accessing Documents, with the first edition appearing in 1990 and the latest edition in 1997. Again it is written in a clear and comprehensible style, covering all aspects of the law and although it contains references to decisions of the Conseil d'État and CADA, these do not make the text legalistic.

All these activities are carried out on a budget so lean "it would earn the praise of Thatcherites", to quote the current President of CADA.[912] At the time he wrote, the President was hoping for a budget increase to allow the computerisation of the Commission.[913] CADA has eight full time staff, with the members of the Commission, its rapporteur general and seven rapporteurs all working part-time.[914] The lack of resources has in the past been criticised as hampering the activities of the Commission.[915]

c) Effectiveness

Secrecy was a fundamental part of the French administration so CADA faced a difficult task in trying to bring about the acceptance and implementation of access to documents. Initially, the administration's attitude was one of ignorance, extreme caution or even hostility and ill will.[916] The record keeping practices of the administration were not able to deal with the requests for documents and work practices did not take account of the need to release as much of a document as possible.[917] The administration was slow to set up

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[910] Telephone conversation with staff of CADA, 2 July 1999.
[911] CADA (1981), above note 422 at 13.
[912] J-P Costa, above note 484 at 186.
[913] Ibid.
[914] Ibid.
[915] Denis-Lempereur, above note 572 at 60.
[916] CADA, above note 586 at 9; J Laveissère, "Reflections sur la Pratique Administrative" in Centre universitaire de recherches administratives et politques de Picardie (ed), *Information et transparence administratives* (1988) 163 at 166.
[917] For example, the pages in dossiers were not numbered so that once disassembled they were difficult to put back together and nominative parts of reports were not kept separate from the remainder of the report. CADA, above note 586 at 9.

reception desks, train staff or allocate specific staff to deal with requests.[918] Under pressure from CADA, most big administrations have now taken some if not all of these steps, putting up signs about their opening hours and regularly publishing their technical reports.[919]

Awareness of the FOI law is growing, so that while in 1979-80 CADA provided 431 opinions[920] in 1995 it provided 3,500.[921] Initially most users of the law were seeking access to their own files. CADA questioned whether this reflected a lack of concern about questions of general interest, or whether it was simply that few could spare effort and money trying to obtain documents that brought them no immediate benefit.[922] Environmental groups and unions that had welcomed the law tried to use it, but soon fell back on their old methods of using contacts inside the administration because they were quicker, simpler and more reliable.[923] Even after the introduction of the FOI law, the administration was often comfortable with giving out a large amount of information verbally, but baulked at providing photocopies of documents.[924] This may be changing. By 1985, 30% of requests to CADA came from organisations[925] although this level has remained constant since.[926] In 1993 Greenpeace asked every Prefecture for documents relating to the importation of rubbish and a large union sought a list of the municipal employees of 93 communes.[927] As such, the law is still seen as a useful way of verifying the accountability and veracity of ministers, particularly in their dealings with big business.[928]

Notable by their absence from the list of applicants are the media and businesses.[929] Although the cases discussed by CADA do include some requests from journalists[930] it is rare to find a newspaper article which refers either to CADA, or documents obtained under

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[918] CADA, above note 495 at 17.
[919] CADA, above note 489 at 15.
[920] CADA, above note 512 at 70.
[921] J-P Costa, above note 484 at 185.
[922] CADA, above note 507 at 7.
[923] Denis-Lempereur, above note 572 at 60; C Spanou, above note 413 at 157-158.
[924] F Rangeon, "L'accès à l'information administrative" in Centre universitaire de recherches administratives et politiques de Picardie (ed), *Information et transparence administrative* (1988) 79 at 96-97.
[925] CADA, above note 507 at 6.
[926] CADA, above note 512 at 71.
[927] Ibid.
[928] C Spanou, above note 413 at 160.
[929] J Laveissère, above note 916 at 163.
[930] For example *Président du conseil régional du Nord-Pas-de-Calais, 7 janvier 1993* 8th report of CADA at 100; CADA, above note 495 at 11.

the French FOI law.[931] French newspapers continue to expose administrative and political scandals, but the fact that they do not use the French FOI law to obtain their information suggests informal avenues are more effective. Reports prepared for ministers, for example, are regularly leaked to the press to ensure that their contents are made public.[932] An article published in the October 1999 issue of a consumer choice magazine, *Que Choisir*, demonstrates the problems faced by journalists wishing to use the law. The article focused on the failure of educational institutions to fix fire safety problems after they had received a notice from the safety commission. In early 1999, the journalist asked each Prefecture to provide him with a copy of all the notices issued in 1998. Almost all the Prefectures refused to provide the documents. The journalist then went to CADA who provided its opinion on 18 February 1999 saying that the documents fell within the scope of the law and were accessible. After receiving CADA's recommendation, 43 Prefectures provided the documents, but a further 57 did not. Of those, 18 did not provide the information and 39 simply did not respond.[933]

While there is no doubt that CADA and the FOI law need to be more widely known,[934] the public is losing its fear of the administration.[935] Partial credit for this change must go to the whole program of "transparency" described earlier. In addition, access to CADA is free and relatively quick and its opinion alone can persuade the administration to modify its approach.[936] Those accessing documents are more determined about exercising their rights. This new bravery can be termed abusive, for example when applicants regularly seek documents as the town hall is closing its doors,[937] or put in frequent requests for the same or similar documents. Nonetheless, abusive requests are very often subject to constant

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[931] This is my experience after 8 months living in France, confirmed by discussions with colleagues. During this time, I found two articles which referred to CADA and the French FOI law. The first appeared was the *Que Choisir* article discussed in this paragraph. The journalist who wrote the article also appeared on the midday edition of the news to discuss his experience. The second was a full page article in the daily paper *Libération* in which a journalist described the attempts of two friends who were opposition members of the conseil régionale (which exercises considerable power within a département) who tried to obtain receipts for a series of very expensive meals paid for out of public funds as part of an attempt to attract a new business to the local area: *Libération* 13 October 1999 at 9. This does not purport to be a comprehensive study, but can be contrasted the regular references to FOI in Australian newspapers.

[932] Comment by journalist from the radio station France-Inter on 14 September 1999, discussing the fact that the report of the Dekeuwer-Défossez commission on family law reform was leaked to the newspaper *la Croix* on the morning of 14 September 1999, when it was due to be given to the Garde des Sceaux at midday and not made publicly available until 17 September 1999. See also report by B. Grosjean in *Liberation*, 15 September 1999 at 2.

[933] A de Blauwe, above note 933 at 15.

[934] J-P Costa, above note 484 at 183.

[935] CADA, above note 489 at 14; CADA, above note 512 at 115.

[936] Ibid. at 14.

[937] CADA, above note 512 at 115.

rejections which could also be seen as an abusive action by the administration. In addition, agencies often fail to respond to requests within a month, resulting in an implicit refusal of access. This allows them to avoid the obligation to give reasons.[938]

CADA continues to hope that the law will be used for "peaceful purposes" rather than to harass the administration or as a precursor to litigation.[939] However, as Spanou pointed out the right to request documents is one weapon in what is often a war of attrition between the administration and members of the public and how or when it is used depends to a large extent on the relative power of the two parties.[940] Small organisations or individuals do not have access to inside contacts and use the law both to gain information and harass agencies into paying attention to their cause. In this sense, the autonomy of the law helps to make the administration accountable and transparent regardless of whether documents are ultimately obtained.[941]

Although CADA lacks the power to make binding decisions, the consensus is that it is still an effective mechanism for enforcing rights of access. Part of this can be attributed to its real independence from the administration and the calibre of the Commissioners.[942] Because it is obliged to persuade rather than force the administration to comply, it takes part in regular and fruitful dialogue, searching for practical solutions while aiming to change the attitude of the administration towards transparency.[943] The trust built up between the administration and CADA results in it having a moral authority which is respected and which would not have been the same if it were able to force compliance. It has been suggested that this is preferable to a binding power of decision.[944] The administration is obliged to take responsibility for its actions and CADA is under almost no pressure from members of the executive.[945] Effective access regimes rely on agencies being welcoming, helpful and maintaining a good records system and this is certainly more easily achieved by persuasion than force.[946] Nonetheless, where an agency does not co-operate with CADA, for example by refusing to provide the documents the subject of the request or by claiming that the documents no longer exists, CADA has little option but to

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[938] CADA, above note 489 at 15.
[939] CADA, above note 507 at 5.
[940] C Spanou, above note 413 at 159-160.
[941] Ibid. at 163.
[942] J-F Brisson, above note 858 at 198.
[943] Ibid. at 198; CADA (1988), above note 422 at 13.
[944] J-P Costa, above note 484 at 185.
[945] Ibid. at 185.

accept the actions of the administration, or perhaps report its attitude in the biannual report.[947]

3. The Conseil d'État

Although the Tribunaux Administratifs and the Cours Administratives d'Appels have provided more decisions on the FOI law than the Conseil d'État, its role as the final court of appeal means that ultimately its stance is of more importance and for this reason it will be the focus of this section. The FOI law is fairly brief, leaving many of the practicalities of access to CADA and ultimately the Conseil d'État. Commentators seem to be torn between criticising the restrained and formalistic way in which the Conseil d'État has interpreted the law,[948] and approving the solutions it reaches as being balanced in difficult circumstances.[949]

There is no doubt that the Conseil d'État initially appeared quite uncomfortable with the broad rights accorded by the French FOI law. It created a number of difficult areas of jurisprudence, by distinguishing between the public and private functions of an agency, and refusing access to preparatory documents. These distinctions were created where none existed in the legislation, leading one commentator to remark that although the legislation was not easy to interpret, the Conseil d'État had not made its own task any easier.[950] The practicalities of access were made even more difficult when the Conseil d'État insisted that an application must be made to CADA for every document which is later to be the subject of an appeal.[951]

In its fourth report, CADA suggested that the reason for the Conseil d'État's prudent approach was that as the highest appeal court it only saw the most difficult or the most vexatious cases, which gave it a distorted view of the users of the system. For this reason, it set out to limit the scope of the law rather than expand it. Of the 35 cases considered by

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[946] J-F Brisson, above note 858 at 199.
[947] Ibid. at 199; Denis-Lempereur, above note 572 at 60.
[948] Honorat and Baptiste, above note 508 at 606; J Laveissère, above note 916 at 164.
[949] M Pouchard, "Conclusions sur Conseil d'État, 20 juillet 1990, *Ville de Melun et Assocation "Melun Culture Loisirs" C. M. Vivien*" (1990) *AJDA* 820 at 821; B Pacteau, above note 506 at 475.
[950] Honorat and Baptiste, above note 508at 604.
[951] J Laveissière, above note 861 at 279.

the Conseil d'État until 1985, it granted access in only two of them.[952] It may also be that the Conseil d'État's close links with the administration make it more supportive of the tradition of secrecy and conscious of the inconvenience that a right of access to documents presents for the administration. Both of these reasons would make it inclined to limit the effects of the French FOI law.

E. Other perspectives

There are a number of changes to the environment in which the French FOI law operates which in turn impact on the French public's ability to access administrative documents. The first is the increasing role of the European Community in governing the lives of French citizens, which makes access to European documents of considerable interest. The second is the extent to which the laws of the European Community could affect the French FOI law and the right of access to French documents. Finally, there is a discussion of the changes to the FOI law proposed in the Rights of Citizens Bill.

1. Access to documents held by the European Community

Increasingly French citizens find that the decisions which affect their lives are made by the European Community and not by their national government. For a French person to understand and participate in these decisions, access to European documents is vital. Although transparency has been discussed in a European context since the early days of the European Community,[953] it was not until the signing of the Treaty of Amsterdam on 2 October 1997 that a right of access was included in a treaty. At present, rights of access to European documents are regulated by a Code of Conduct, which the Commission, Council and Parliament have incorporated into their internal regulations. Under , article 191a of the Treaty of Amsterdam (which has become article 255 of the Treaty of European Union) there will be a right of access to institution documents. The treaty sets a deadline of 1 May 2001 for article 255 to be implemented.

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[952] CADA, above note 507 at 13-14.
[953] P Twomey, "Note on Case T-194/94 *Carvel and Guardian Newspapers Ltd v EU Council*" (1996) 33 *CML Rev* 821 at 831.

This section of the thesis will discuss in turn the right of access as it currently exists and the rights of access contained in article 255 of the Treaty Amsterdam. The complex nature of European law makes it difficult to properly consider the background to a European right of access to documents here and a fuller discussion is included in Appendix B.

a) Accessing documents under the Code of Conduct

Prior to October 1999 and the implementation of the Treaty of Amsterdam, there was no obligation on the European institutions (the European Council, Commission and Parliament) to provide the public with access to their documents. Under public pressure, the European Commission and Council drafted a Code of Conduct Concerning Public Access to Commission and Council documents ("the Code of Conduct").[954] It has been argued that the purpose of the Code of Conduct is two fold. It improves the transparency of the Community's decision making process and increases public confidence in Community administration.[955] This Code of Conduct has been incorporated into the internal rules of the European Council, Commission and Parliament.[956] The legal basis for adopting the rules is that it forms part of the organisation of the institutions' internal affairs and is in the interests of good administration.[957] Although the obligation to provide access to documents was voluntarily assumed by the European institutions, it conferred rights on third parties which the institutions are now obliged to respect.[958]

The internal rules of each institution provide for a general right of access to documents provided they were created by the institution and are still in its possession. Documents provided to the institution by a third party do not fall within the scope of the rules. There

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[954] This Code was adopted on 6 December 1993 and can be found as an annex to the European Council's decision 93/731/EC, OJ 1993 L 340. U Oberg, "Recent Developments in Public Access to Documents held By European Community Institutions" (1998) 17 *Uni Tas LR* 1 at 3.
[955] Applicant's arguments in *Case T-105/95 WWF UK v Commission* ECR II - 313 at 338.
[956] Council Decision of 20 December 1993 (93/731/EC), OJ 1993 L 340 at 43; Commission Decision of 8 February 1994 (94/90/ECSC), OJ 1994 L 46 at 58; European Parliament Decision of 10 July 1997 (97/632/EC), OJ 1997 L 263 at 27. A "decision" represents the exercise of European regulatory powers. The term "decision" is the correct English term. The way in which the Code is incorporated into these rules is discussed in more detail in Appendix B.
[957] *Case C-58/94, Netherlands v Council* [1996] ECR I-2169.
[958] *Case T-124/96 Interporc Im-und Export GmbH* ECR II 233 at 247; *Case T-105/95 WWF UK v Commission* ECR II - 313 at 343.

are exceptions to this general right of access. Access shall not be granted where disclosure could undermine the protection of:

1. a public interest (such as public security, international relations, monetary stability, court proceedings, inspections and investigation);
2. the individual and of privacy;
3. commercial and industrial secrecy;
4. the Community's financial interests; or
5. confidentiality as requested by the natural or legal person who supplied any of the information contained in the document.[959]

In addition, access to a document may be refused if it is necessary to protect the confidentiality of the institution's proceedings.[960]

There have been a number of decisions of the European Court of First Instance ("CFI") which have considered the nature of the rights of access accorded by the European institutions. The CFI has held on a number of occasions that the rules of the bodies provide a broad right of access to documents and any exemptions must therefore be construed narrowly.[961] If an institutional decision maker has concluded that any of one of exceptions numbered 1 to 5 is satisfied, then it must not release the documents.[962] The decision maker may only reach such a decision if it has proof that disclosure could undermine one of the interests protected.[963] In contrast, the exception which protects the confidentiality of the institution's proceedings invests the body with a discretion to balance the public interest in the confidentiality with the public interest in releasing the documents.[964] Here the decision maker must genuinely balance the interests of the citizen and the institutions before exercising its discretion.[965] The different tests reflect the

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[959] These provisions are contained in article 4(1) of the Council Decision 93/731/EC, in the Code of Conduct annexed to Commission Decision 94/90/ECSC;and article 5(1) of Parliament Decision 97/632/EC.
[960] These provisions are contained in article 4(2) of the Council Decision 93/731/EC, in the Code of Conduct annexed to Commission Decision 94/90/ECSC;and article 5(2) of Parliament Decision 97/632/EC.
[961] *Case T-174/95, Svenska Journalistförbundet v Council* ECR II-2293 at 2323; *Case T 194/94, Carvel and Guardian Newspapers Ltd v Council* [1995] II-2767 at 2789; *Case T-105/95 WWF UK v Commission* ECR II - 313 at 343; *Case T-124/96 Interporc Im-und Export GmbH* ECR II 233 at 247; *Case T-83/96 van der Wal v Commission* ECR II -545 at 563
[962] *Case T 194/94, Carvel and Guardian Newspapers Ltd v Council* [1995] II-2767 at 2788; *Case T-105/95 WWF UK v Commission* ECR II - 313 at 343; *Case T-124/96 Interporc Im-und Export GmbH* ECR II 233 at 248; *Case T-83/96 van der Wal v Commission* ECR II -545 at 563.
[963] *Case T 194/94, Carvel and Guardian Newspapers Ltd v Council* [1995] II-2767 at 2788; *Case T-105/95 WWF UK v Commission* ECR II - 313 at 344.
[964] *Case T 194/94, Carvel and Guardian Newspapers Ltd v Council* [1995] II-2767 at 2788-2789; *Case T-105/95 WWF UK v Commission* ECR II - 313 at 344; *Case T-124/96 Interporc Im-und Export GmbH* ECR II 233 at 248; *Case T-83/96 van der Wal v Commission* ECR II -545 at 563.
[965] *Case T-174/95, Svenska Journalistförbundet v Council* ECR II-2293 at 2324.

different interests which the two categories of exception seek to protect. The first "obligatory" exception protects third party interests or those of the public at large. The second exception only concerns the interests of the institution concerned.[966] In applying either exception, the body must consider each document on a case by case basis. More than one exception can be invoked simultaneously.[967] Although there is an obligation to give reasons for its decision, a body need not provide reasons for each document. It must however set out in a clear and unequivocal way how it came to apply the exceptions to each category of documents.[968]

Although the CFI can undertake merits review of European administrative decisions, where the decision concerns complex technical (or economic) matters the CFI generally restricts itself to considering whether the appropriate procedures were followed. So far, the decisions of the CFI in the area of access to documents have only considered procedural aspects of Community institutions' compliance with their rules.[969] There has been very little discussion by the CFI on the substantive meaning of the exemption provisions.[970]

The procedure for accessing documents is simple, but not particularly quick. An applicant may apply in writing and the document may be viewed for free or a copy obtained for a cost.[971] Applicants to the Commission or the Council are to be informed within one month of the outcome of their request, although Parliament has 45 days to respond.[972] If refused, they have the opportunity to submit an application for confirmation of this decision to the institution. The confirmatory decision must also be made within one month. If the confirmatory decision is also a refusal there are two options open to an applicant. A natural person may apply to the European Ombudsman, who will review the administration's decision (and can request copies of the documents involved) and mediate

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[966] *Case T-105/95 WWF UK v Commission* ECR II - 313 at 344.
[967] *Case T-174/95, Svenska Journalistförbundet v Council* ECR II-2293 at 2324; *Case T-105/95 WWF UK v Commission* ECR II - 313 at 344
[968] *Case T-105/95 WWF UK v Commission* ECR II - 313 at 345; *Case T-124/96 Interporc Im-und Export GmbH* ECR II 233 at 248.
[969] U Oberg, above note 954 at 8.
[970] Despite the paucity of discussion of the content of these exceptions, the Commission had already raised the "frankness and candour" argument before the CFI in an attempt to avoid providing documents relating to negotiations with Irish authorities concerning development in an Irish national park *Case T-105/95 WWF UK v Commission* ECR II - 313 at 339.
[971] Articles 2 and 3 of the Council Decision 93/731/EC; Code of Conduct annexed to Commission Decision 94/90/ECSC;and articles 2 and 3 of Parliament Decision 97/632/EC.
[972] Article 7 of the Council Decision 93/731/EC; Code of Conduct annexed to Commission Decision 94/90/ECSC;and article 3(3) of Parliament Decision 97/632/EC.

between the person and the administration. Alternatively the decision can be reviewed to the Court of Justice.[973]

b) Accessing documents under the Treaty of Amsterdam

On 2 October 1997, the Treaty of Amsterdam was signed. Included in it was Article 191a of the treaty (which will become article 255 of the Treaty on European Union), which provides that:

> Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

Paragraphs 2 and 3 provide that the general principles and limitations on access for reasons of public or private interest are to be determined by Council within 2 years and that each institution shall adopt its own Rules of Procedure. There is still no right of access to documents held by other European Community bodies. Article 255 specifies that it must be implemented two years after the Treaty of Amsterdam comes into force. The Treaty of Amsterdam came into force on 1 May 1999, which means that the provisions of article 255 should be implemented by 1 May 2001.

The Commission released a discussion paper on 23 April 1999 which provided some preliminary proposals for the right of access. A new Commission took office in mid-1999 and another proposal is being drafted with a view to putting it before the Commission in January 2000.[974] In the meanwhile, it is worth considering the previous discussion paper to try to get a sense of the direction the Commission might take. The April 1999 discussion paper suggested generally following the format of the Code of Conduct, but added some extra limitations. The first would exclude from the definition of document any working document which contributes to internal proceedings, such as "summary reports of meetings, briefing notes, departmental opinions, mission reports, notes containing an

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[973] Article 7 of the Council Decision 93/731/EC; Code of Conduct annexed to Commission Decision 94/90/ECSC;and article 3(4) of Parliament Decision 97/632/EC.

[974] E-mail to Ulf Oberg from Commission dated 18 November 1999 and forwarded to the author by Christoph Sobotta.

official's personal thoughts or opinions etc."[975] It suggested keeping the same exemptions as found in the Code but elaborating their contents so that the Community legal order would be protected as part of the public interest. In addition, there are specific exceptions provided for the sectors of justice and home affairs.[976] The protection of the institutions' confidentiality would remain discretionary, but the discussion paper acknowledged that the use of this exception would diminish as all internal documents would be exempted in any event. As a further safeguard, it suggested including an embargo to delay access to certain documents to prevent interference with the decision making process and to ensure that premature dissemination did not cause resentment or damage the Community's interests.[977] The sweeping nature of these proposed exemptions brought expressions of outrage from some interest groups who claim it seeks to deny access to documents in direct contravention to the spirit of the Treaty of Amsterdam.[978] It may be that the staff of the new Commission will take into account these criticisms when drafting the next discussion paper.

The decisions so far on access to documents in the hands of the Council and the Commission, as well as the restrictive approach adopted in the April 1999 discussion paper, suggest that they are a long way from embracing the idea of transparency. There are however signs of change. In early 1999 all the members of the Commission resigned, largely in response to increasing concern over the lack of accountability. It would seem that the public expects a higher standard of transparency within the European administration than within its own national systems.[979] The new Commission could be seen as a turning point for openness in Europe. The way in which the provisions of article 255 of the Treaty on European Union are implemented will prove a litmus test.

2. The effect of European laws on access to documents in France

European laws take paramount effect in France, so that a European law (in whatever form) will override an inconsistent national law. European directives which deal with access to documents at a national level require the member state to change its laws to fit the

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[975] European Commission, "Discussion Paper on Public Access to Commission Documents", Brussels (1999) at para III.2.2.
[976] Ibid. at para III.4.
[977] Ibid. at para III.4.
[978] Statewatch, Press Release, "EU plans undermine Citizens Right of Access to Documents", 26 April 1999.

directive. Traditionally, European norms have been more favourable to the citizen than existing national legislation. Yet, in the context of access to documents or information this may not be the case.[980] This part will consider the effect of European law on the French FOI law.

The first question is whether the Code of Conduct or article 255 of the Treaty on European Union will affect access to documents held by the French government. The only area where this overlap is likely to occur is where the French government holds European documents or has prepared documents for a European institution. At present, the Treaty of European Union and the rules of the European institutions only purport to govern access to documents held by them. Given that the rules relate only to community institutions they should not have any effect on the freedom of information laws in member states. The decision in *Case T-174/95, Svenska Journalistförbundet v Council*,[981] confirms that national and European access regimes operate independently of one another. There, an applicant sought the same documents from the Swedish government and the European Council. It obtained 18 out of 20 documents from Sweden, but only 4 of the same documents from Council.[982]

The only way for the Community to interfere with the French FOI law is for it to require a standard right of access to documents at a national level. This was done for environmental documents in directive No 90-313 of 7 June 1990.[983] This directive obliged the relevant authorities of member states to provide access to environmental information.[984] It allowed the member state to claim a number of exemptions, some of which were not available under the French FOI law. These included exempting: a) material supplied by a third party who was not under any obligation to provide it; b) disclosure where it would increase the likelihood that the environment to which it related would be damaged, and c) internal communications. Concerns were raised (although they do not appear to have been realised to date) that access to environmental documents could be refused on one of these grounds,

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[979] *Le Monde* 17 March 1999 at 20.
[980] R Letteron, "Le modèle français de transparence administrative à l'épreuve du droit communautaire" (1995) 11 *RFD am* 183 at 185.
[981] *Case T-174/95, Svenska Journalistförbundet v Council* ECR II-2293.
[982] Ibid.
[983] OJ C 1990 L 158/56.
[984] D Curtin and H Meijers, "The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?" (1995) 32 *CML Rev* 391 at 417; Conseil d'État, above note 505 at 85.

where there would not otherwise be a right of refusal under the French FOI law.[985] Curtin is of the view that the democratic foundations of the European community would in any event prevent community legislation from reducing the rights of access at a national level.[986]

A standard right of access to personal data was provided for by European directive No 95-46 of 24 October 1995.[987] This directive requires all member states to implement laws controlling the collection, processing and movement of personal data, whether held by public or private bodies. A person may obtain any of his or her own data being processed, a right of rectification or deletion where appropriate and information about people to whom the data has been provided. This right must be exercisable without excessive delay or expense,[988] although what is reasonable is left to the discretion of the member state.[989] However, the member state can restrict this right of access when necessary to protect national security, defence, investigation and prevention of criminal offences, any regulatory function, important economic or financial interests of the State or the protection of the subject of the data.[990] These restrictions are much broader than those found in the Information Privacy law, although France would not be obliged to adopt such broad restrictions. The member states had until 24 October 1998 to comply with the directive, but in May 1999, France was still at the stage of putting forward a bill which would allow it to comply with its obligations.[991]

3. The Rights of Citizens Bill

As noted above, on 13 May 1998 a bill[992] was put before the Assemblée Nationale which proposed a number of changes to the functioning of the administration. It has undergone a number of amendments in the Sénat and the Assemblée Nationale, with each house rejecting the amendments of the other. The Bill was referred to a Commission des lois on 13 October 1999, where members of both houses will sit in committee in an attempt to

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[985] R Letteron, above note 980 at 191.
[986] Curtin and Meijers, above note 984 at 431.
[987] OJ 1995 L 281, at 31-50.
[988] Article 12.
[989] R Letteron, above note 980 at 187.
[990] Article 13.
[991] Reply of Emile Zuccarelli, Minister for the Public Sector, Debats Parlimentaires du Sénat, Sénce du 10 mars 1999, No 20 S. (C.R.), *Journal Officiel* at 1384 at 1405.
[992] The French term is "projet de loi".

reach a compromise. Accordingly the Bill is highly unlikely to be passed before 2000. Most of the proposed changes to the French FOI law are uncontroversial and many simply codify the interpretations adopted by CADA and Conseil d'État. It is therefore unlikely that the Commission des lois will significantly change the nature of the amendments to the FOI law. In the following discussion (and throughout the thesis) reference to the Rights of Citizens Bill will be to the text referred to the Commission des lois on 14 October 1999.[993] The final amendments are likely to be very similar to those which are discussed here.

The Information Privacy law will be amended so that it no longer impedes third parties from accessing administrative documents under the FOI law.[994] This should put an end to the situation where an applicant's right of access varies considerably depending on whether the document is on a file or held on a computer.[995] Access to all administrative documents, regardless of their form, will be governed by the FOI law. This approach is reinforced by a new definition of "document" which includes documents which are on a computer but which can be obtained without any special form of processing.[996] While giving access to documents held on a computer, the law has not changed the fact that the administration is not obliged to create a document in order to satisfy a request.[997]

A number of amendments codify the existing procedure and jurisprudence. The expanded definition of documents includes a list of documents which are not considered to be administrative documents. Those documents are the acts of the parliament, the judgements from the Conseil d'État and the administrative courts, the judgements of the Cour des Comptes and the chambres régionales des comptes and requests for an investigation made to the mediator.[998] The right of access does not apply to incomplete documents or documents which precede an administrative decision, while the decision making process is under way.[999] There is no right of access to documents which have been made publicly available.[1000] Nor is the administration obliged to respond to abusive requests, in

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[993] Those parts of the Rights of Citizens Bill which amend the FOI law (and an English translation) are included in Appendix E.
[994] Proposed new article 29-1 of the law of 1 January 1978, inserted by article 6 of the law of 27 May 1999.
[995] Commission des Lois du Sénat, *Rapport sur le projet de loi relatif aux droits des citoyens dans leurs relations avec les administrations* (Report No. 248, 1999) at 27.
[996] The definition of document will form part of article 1 of the FOI law.
[997] Commission des Lois du Sénat, above note 995 at 31.
[998] Proposed new article 1 of the FOI law.
[999] Proposed new article 2 of the FOI law.
[1000] Proposed new article 2 of the FOI law.

particular those which are numerous, repetitive or systematic.[1001] Article 5 will confirm that it is obligatory to seek CADA's assistance before beginning an administrative appeal.

Provisions which break new ground are rare. There is a new exemption for documents which have been prepared by the administration for sale,[1002] such as the collection of weather information by Météo France.[1003] A document will now be obtainable by seeking a copy on a disk.[1004] Thirdly, the role of CADA is expanded[1005] so that it will also oversee access to archives and access applications made under separate laws, such as those governing collectivités territoriales,[1006] the town planning code[1007] and the electoral code.[1008] Applicants wishing to appeal a rejection under these laws will be obliged to seek CADA's intervention as a preliminary step.

The exceptions found in article 6 will be rearranged to make them easier to follow, although the substance has not been changed. The term "non-nominative" has been changed to "non-accessible". Article 6 will include two parts, the first of which lists the exceptions in much the same way as the current clause. The second part provides that some documents are only accessible by an interested person. This category includes documents which threaten the secrecy of private life, personal dossiers, and documents containing medical secrets or commercial or industrial secrets. There is no definition of who an "interested person" might be.[1009] Nominative documents also fall under this heading, although rather than use the term nominative, the proposed amendment adopts CADA's definition so that any document which contains either a) an assessment or value judgement relating to natural person who is identified by name or who is otherwise easily identifiable or b) a description of a person's behaviour which if the behaviour were known could lead to that person being prejudiced can only be communicated to an interested person. Article 6*bis* will be repealed.

The Rights of Citizens Bill puts forward a number of helpful amendments. Abolishing the distinction between administrative files held on a computer and paper documents

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[1001] Proposed new article 2 of the FOI law.
[1002] Proposed new article 2 of the FOI law.
[1003] Commission des Lois du Sénat, above note 995 at 33.
[1004] Proposed new article 4 of the French FOI law.
[1005] Proposed new article 5 of the French FOI law.
[1006] The equivalent of municipal governments.
[1007] Translated as "code de l'urbansime".
[1008] The code électoral.

effectively broadens the public's right of access to documents and puts an end to a frustrating and inconvenient distinction. Modernising the law by allowing access to computer files on disk is a timely recognition of the needs of contemporary citizens. Finally, expanding the role of CADA should provide for a more consistent approach to accessing administrative documents.

There have been some missed opportunities too. Little was done to harmonise the dual pathways of the French FOI law with the other laws providing specific access to documents.[1010] More controversial, there was no attempt made to resolve the problem faced by CADA in the event that the administration will not cooperate with its requests. Finally it should be recognised that Parliament has now set in stone the restrictive approaches taken by CADA and the Conseil d'État. In some senses codification does provide greater clarity, as there is no need to search the jurisprudence to be aware of all the exceptions. Nonetheless Parliament has partially resiled from the grand ideals of open government which it urged twenty years ago.

F. Conclusion

At the time of enacting the French FOI law, France was leading Europe in its approach to open government. To some extent, the broad rights of access it then provided have now been whittled away by the restrictive interpretations of CADA and the Conseil d'État. The FOI law is not the example of a truly liberal, citizen focused access regime that I thought I might find in France. Nonetheless, the French approach offers a number of very interesting and challenging ideas. It demonstrates that it is possible to allow direct access to documents held by private companies and that the exemption for internal working documents may be limited to those created at a high level of government. It shows that it is possible to allow deferred access to documents once a sensitive decision has been reached. Of much significance is the example of CADA which offers an approach to review of FOI matters combining conciliation, persuasion, expertise and respect.

A FOI law will always be about balancing the competing interests of the public. On one hand there is a strong public interest in accessing administrative documents, to assist open

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[1009] M-C Rouault, above note 422 at 9.
[1010] Ibid. at 8.

and accountable government. On the other hand there is also a public interest in allowing the administration to function efficiently, and in preserving the privacy of individuals and business. Rather than skirting around the edges of these complex issues, French courts and commentators have approached the subject head on and allowed it (legitimately in my view) to sway their interpretation of the FOI law.

CADA's interpretation of the term "nominative" is one example of this frank approach. If nominative were defined as any information that identifies an individual, the scope of the FOI law would be dramatically restricted. But it would also be unfair to allow all information about individuals to be released. At the point of balance, access to individual information is prevented only if derogatory or prejudicial or if it fell within the privacy exemption in article 6. A similar quandary concerned the right of access to documents created by third parties. Here CADA consciously balanced the risk that a person might be unaware that their private documents were in the hands of the administration and therefore accessible, with the public's right to critically assess administrative decision making. The balance which CADA struck was to consider whether the documents were voluntarily provided to the agency and if so for what purpose. A final example concerns the Conseil d'État's definition of "*administrative* document". Here, it had to balance the importance of accountability when spending public money with the need for business and government to have a confidential sphere in which to conduct their "private" activities. In all these cases, the need to find a balance was openly considered. In doing so, French review bodies and commentators confronted questions of what constitutes a public or a private activity, how much secrecy the administration requires and what weight should be given to a person's right to know. An observer of this balancing process has no illusions as to how difficult it can be.

Perhaps the most enlightening aspect of this comparative study was the growing realisation of the impact of political systems on the interpretation of FOI laws. The list of exemptions in the FOIA and the French FOI law are very similar. Although the French FOI law does not contain an exemption for all internal working documents, the Conseil d'État's decisions on preparatory documents produced a very similar result. It would appear that both French and Australian review bodies are equally uncomfortable disclosing information which may harm the functioning of government. In fact, CADA has openly acknowledged and respected the need for agencies to have a space away from public eyes

in which to carry out their work. Finally, the practical study of access in France confirms the Australian experience that bureaucracies raised on a diet of secrecy are very slow to change.

CHAPTER III REFLECTIONS ON THE AUSTRALIAN FOIA IN LIGHT OF THE FRENCH EXPERIENCE

The analysis of the FOIA that formed the first chapter of this thesis demonstrated that the FOIA is struggling to meet its objective of enhancing democratic government. Compounding this problem is the dramatic change to the nature of the public sector in Australia. Public administration is moving away from old values of rationality, citizenship and the public interest towards market mechanisms and commercial interests.[1011] In this changed environment there is an opportunity for FOI to play an important role in ensuring that the actions of government are accountable to the public.[1012]

The question is how to adapt the FOIA to meet these new challenges. This thesis offers a unique opportunity to draw on the experience gained by a study of the French FOI law. Exploring another legal regime, particularly one with a comparable political and economic system, should of itself challenge researchers to reconsider the values on which their own system is based. Here it was hoped that there would be specific aspects of the French system which could be adapted to make the Australian system more effective or better suited to the changes to administrative practice. This chapter will firstly consider the difficulties and benefits of undertaking comparative work in this context. It will then examine the ways in which the Australian FOIA might be amended to incorporate some of the aspects of the French law. Finally, there will be a more general discussion of how the FOIA might be adapted so that it enhances democracy in a commercialised public sector.

A. Comparing two legal regimes

This part will touch on both the difficulties and the benefits of a comparative study of FOI.

[1011] M Aronson, above note 260 at 43; H Schoombee, "Privatisation and Contracting Out - Where are we going?", Administrative Law under the Coalition Government, Canberra (1997) at 138.
[1012] H Schoombee, above note 1011 at 139; M Aronson, above note 260 at 58-63.

1. Benefits of comparative work in this context

There are a number of benefits to comparative work in this setting. The initial incentive for this study was a desire to improve the Australian FOIA. Although Australia and France have different legal traditions, both are complex capitalist societies with democratic governments. Their comparable political and economic systems increase the chances that a comparative study will yield practical results. Despite the fact that the Australian and French FOI laws are structured differently, both have very similar purposes and objectives. The scope of the right of access and the list of exceptions are strikingly alike. This raises the question of the extent to which the underlying political and economic structure influences the effectiveness of FOI.

The most obvious benefit of comparing two such systems is that there may be aspects of the French FOI law which can be directly transposed into the FOIA. If Australian observers search for inspiration only within the common law system they are less likely to find truly different ideas. It can also be tempting to reject new suggestions as "impractical" or "unfeasible" when there is no way of judging how they might work. A look at the French system not only opens up new possibilities but provides a demonstration of how things operate in practice. Concrete ideas are not the only benefits of comparative study. Just as learning a foreign language allows people to learn more about how their native language works, studying a different legal system enables us to better understand the character of our own system. Looking on the familiar system with new eyes can offer a fresh perspective and answers to troubling issues.

Beyond these practical reasons, there is value in studying a different legal regime for its own sake. Since Dicey unfavourably compared *droit administratif* to the English law controlling administrative action, common lawyers have seen the French approach as the antithesis of their own. Yet this study, focusing as it does on one particular aspect of French administrative law, indicates that in practice each of the two FOI laws operates in a very similar way. Again, this suggests that it is political, economic and social values, rather than the legal norms which drive FOI practice.

2. The difficulties of comparative work in this context

Despite these benefits direct comparisons between France and Australia can be misleading because of the different legal traditions. This part will summarise differences between French and Australian law which impact most heavily on the FOI law. Appendix A contains a more detailed description of the structure of the French administrative regime.

The most fundamental difference is the division of the French legal system into public and private jurisdictions. Although independent, the administrative courts are in fact part of the administration and its judges are not members of the judiciary.[1013] Administrative judges sit at the apex of the administrative system and are experts in administrative law and practice. Recruitment for the administrative courts is quite different from that of Australian courts. The members of the Conseil d'État are the cream of the administration, drawing on the best graduates from the École Nationale de l'Administration and distinguished members of the public administration. Many members are not lawyers.[1014] This selection process guarantees a highly intelligent membership with a profound understanding of administrative practice. Knowledge of the administration is updated by regular secondments. At any one time, one third of the members of the Conseil d'État are working as ministerial or Presidential advisers, as Prefects, ambassadors, as heads of corporatised administrative bodies such as Air France, or within private industry.[1015]

The structure of the Conseil d'État itself enhances the administrative expertise of its members. It is divided into six sections, four of which give advice to government on Bills and draft regulations and one of which considers questions of law reform. The sixth sits in judgement on matters of administrative litigation. Conseillers move between these sections and may work part-time in two different sections. This variety of work leads to a deep understanding of the administration at all levels. When the administration is brought before the court it knows that its actions will be judged by experts in the field of administration and accords those decisions appropriate respect.[1016]

[1013] Brown and Bell, above note 616 at 82.
[1014] Ibid. at 80, 83-84.
[1015] Ibid. at 60; web site of the Conseil d'État found at http://www.conseil-etat.fr/ce-data/index2.htm.
[1016] Brown and Bell, above note 616 at 77; J C S Burchett, "Administrative Law - The French Comparison" (1995) 69 *ALJ* 977 at 991.

The jurisdiction of the administrative courts has never been defined, but can be broadly described as extending to the review of those actions which concern a "public service". Loosely speaking a public service is the satisfaction of a public need by a public authority. Both "public need" and "public authority" have been interpreted widely. A public need can include almost any activity which benefits the public, whether it be catching stray dogs, providing a camping ground, a fireworks display or operating a ski lift. Further, a public authority need not provide the service itself. It is enough that it has some hand in regulating or authorising the provision of the public service by another.[1017] Often, a private organisation's ability to exercise public powers will bring its activities within the jurisdiction of the administrative courts.[1018] In this way, France has anticipated by over a century the recent division between policy makers and service providers in the Australian public sector.[1019]

As was discussed earlier, public services are quite often provided by private bodies, be they companies, associations or mutual societies. The impact of the concept of "public service" on the French FOI law can be seen in the discussion of the definition of "*administrative* document" in Chapter Two.[1020] As the boundary line between what are private and public activities in Australia becomes increasingly blurred, it is refreshing to see the very direct approach taken in French administrative law. The Conseil d'État does not pretend that the line is an easy one to draw, but has at least considered the meaning and importance of the distinction.

Even from this brief overview there are a number of striking differences between the administrative law regimes of Australia and France. Although many aspects of French law seem very attractive to an Australian administrative lawyer, it would be unhelpful to suggest a complete overthrow of the Australian system of law. This is firstly because the Australian system still has much to offer. More importantly though, such a suggestion is impractical and unrealistic. The details of the Australian legal system can be changed, but not the underlying structure.

[1017] Brown and Bell, above note 616 at 127.
[1018] Ibid. at 125-128.
[1019] For example, Aronson's discussion on the distinction between policy making and service delivery in M Aronson, above note 260 at 56-58.
[1020] Chapter 2 Part B(2) at page 109.

B. Themes for Change

There are undoubtedly a number of areas where the FOIA is not living up to its original objective of enhancing democracy and government accountability. Aspects of French FOI law and practice offer some inspirations for change. As outlined above, it is not feasible to simply adopt wholesale the French approach to accessing government documents. Nonetheless, there are areas of the Australian FOIA which could be improved by incorporating aspects of the French FOI law. The following discussion focuses on a number of themes where comparison is instructive.

1. Reviewing Denials of Access

Review of FOI decisions has a significant impact on the effectiveness of FOI as a whole. Many commentators consider the AAT to be too slow, too expensive, too adversarial and too conservative.[1021] Both the 1995 ALRC/ARC report and the 1998 ARC report suggested introducing a FOI Commissioner, whose role would include monitoring FOI performance, training agency staff and providing information, advice and assistance to agencies and applicants, but with no role in reviewing agency decisions.[1022] This would be left in the hands of the AAT.[1023] Although this would be an improvement on the current arrangement, I am not convinced that leaving review with the AAT is the best solution. In France, the role played by CADA has been crucial to the development and practice of the French FOI law. It is worth reflecting on CADA's structure, composition and approach when considering what changes could be made to review of decisions under the FOIA.

a) A better review body

CADA undertakes a wide range of activities, similar in some senses to the FOI Commissioners in WA and Queensland. It provides advice to applicants and adjudicates on refusals of access. This adjudication process involves consulting with the French

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[1021] ALRC/ARC, above note 3 at 172.
[1022] Ibid. at 62; ARC, above note 275 at 70.
[1023] ALRC/ARC, above note 3 at 172.

agency concerned and some mediation between the agency and applicant. The process still moves quickly to a conclusion on the appropriateness of the agency's decision. Agencies can also seek CADA's advice on applying the FOI law in general or specific cases. Advice can take the form of an official opinion, or simple consultation with a member of CADA's staff. These activities give CADA a good understanding of how the FOI law is applied within agencies, and the types of request being made to agencies. Agencies are thereby educated through a mix of mediation and persuasion, but the quick resolution of the complaint means that an applicant can proceed rapidly to appeal if she or he wishes to do so.[1024]

CADA's success is in large part attributable to its members and staff. As noted above, the members of CADA are drawn from the legislature, the administration, academia, the ordinary courts and the administrative courts. All are high ranking members of their profession. Some have had legal training, although many more have been trained in public administration. Their work with CADA is part-time only and so they maintain their knowledge of prevailing administrative policies and practices. The rapporteurs who prepare the cases work for CADA on a part-time basis only, mostly on secondment from junior positions in the Conseil d'État. As with the Conseil d'État, the decisions of CADA are respected by the administration because they come from an expert body. That a review body should be involved in and respected by the administration is not part of Australian (or common law) thinking. Instead lawyers and the law have deliberately stood back from the administration when reviewing its decisions.[1025]

The question is whether the CADA model could be adopted in Australia. It may be said that an Australian FOI review body composed of experts in public administration would result in a bias in favour of the administration. Lawyers are said to be free from this taint.[1026] The experience of CADA shows that an understanding of the administration does not necessarily lead to bias. Indeed even in Australia, experience suggests that administrators who become review officers may be harsher on their former colleagues than

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[1024] In France the process of appealing is not as quick as some would like, as agencies have up to two months in which to decide whether to follow CADA's advice and before an applicant can appeal. This considerably delays the appeal process, but there is no reason why this aspect of the French FOI law should be adopted in Australia.

[1025] H W MacLauchlan, "Law and the New Public Management" in M Taggart (ed), *The Province of Administrative Law* (1997) 118 at 120.

[1026] A Mason, "Reflections on the Development of Australian Administrative Law", The Kerr Vision of Australian Administrative Law - at the Twenty-Five Year Mark, Canberra (1996) at 125.

those without public administration experience. In an early AAT decision on access to documents provided by a foreign power, Dr Renouf, who was formerly Secretary of the Department of Foreign Affairs, was prepared to release the documents while his colleagues on the Tribunal were not. He dismissed the agency's submissions on the security classification of the documents saying that DEFA generally erred towards over-classification.[1027] The WA FOI Commissioner, Ms Bronwyn Keighley-Gerardy, formerly a high-ranking police officer, has whole heartedly embraced the objectives of the WA FOI Act and has criticised the FOI practices of the police service.[1028] It is submitted that most responsible people, when given a position of independence take their task seriously and act independently.[1029] In my view, a general suspicion of bias is unjustified and no reason not to have public administrators reviewing FOI decisions.

In Australia, review bodies of this type, be they Ombudsman or FOI Commissioners are generally single decision makers, assisted by staff. Review by a panel of decision makers is generally only found in tribunals or courts. The French approach has the advantage of allowing diverse experiences and opinions to bear on what can be complex review decisions. It may also enhance the reputation of the review body. The success of CADA's opinions is partly attributable to the French tradition of collegiate decision making. Despite the possibility of differing views within the Commission, CADA's opinions are always unanimous. Dissenting judgements from Commission members would make the system more complex and less user friendly. Although unanimous judgements are not without precedent in the common law world[1030] it would be highly unusual for an Australian Commission to be obliged to give unanimous decisions. A collegiate approach seems too complex to be implemented in an Australian setting at this stage. For this reason it is more pragmatic to advocate a single Commissioner to review FOI decisions.

There are problems with a Commissioner. Whenever a single person is responsible for an area, there is always a risk attached. While the person may be spectacularly good, she or he may also be spectacularly bad. Even if the person represents neither of these extremes,

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[1027] *Re Stolpe and Department of Foreign Affairs* (1985) 9 ALD 104 at 110.
[1028] Office of the WA FOI Commissioner, above note 395 at 8-10.
[1029] An equivalent in a legal setting is the appointment of judicial officers to the High Court. How many governments, thinking to make a conservative appointment have chosen a barrister or Solicitor General who had consistently appeared for government or big business interests, but found that on reaching the bench, that person adopts a truly independent and sometimes quite liberal approach to the legal questions that come before them.
[1030] I am thinking in particular of the decisions of the Privy Council until recent years.

he or she will always have limited knowledge and experience. For these reasons, allowing the FOI Commissioner to draw on the administrative expertise of others is very appealing. There are number of ways in which this is possible. One device is to permit the Commissioner to seek assistance from a panel of administrative experts, and one means to achieve this would be to include on the panel all members of Commonwealth tribunals. This would provide for a large range of people with expertise in almost every area of administrative practice, who already have some exposure to legislative interpretation, the process of administrative decision making and the importance of impartiality. It would also be cost effective, as the costs of advice could be absorbed by the tribunal concerned. If payment is made, the fees are likely to be considerably less than those paid to private consultants. The Commissioner would then call on some members of this panel to contribute to the FOI process in a variety of ways.

Where the Commissioner must review a decision on an area in which she or he has little knowledge (for example immigration), the Commissioner could delegate his or her decision making powers to an expert from the panel. Hopefully, this would produce the sort of critical assessment of the agency's arguments which was demonstrated by the comments of Dr Renouf, discussed earlier. In other cases, the Commissioner might not be aware of the practical background to a particular claim. In such a case, while the agency could assist, the Commissioner might also be briefed by a panel member on the critical issues involved. It may also be helpful for the FOI Commissioner to ask a panel member to sit in on an interview or a discussion of a particular case. In the informal setting of Commissioner controlled FOI review, an agency representative could be asked to explain the agency's claims and the expert could listen to, comment on or question the representative. Another use of the panel might be for a select number to meet either regularly or just occasionally to discuss the most difficult cases or recurring issues. For example, it may be that a number of claims raise the issue of the breadth of the deliberative process exemption. These cases, together with the broader issue of the scope of the exemption itself, could be considered and reflected on by people with practical experience. The Commissioner need not follow the advice received, but will at least have given the matter full consideration. The records of these discussions would be accessible under FOIA, to the extent that their subject matter does not fall within one of the exemptions.

The initial mediation process and the preparation of the Commissioner's file would still be undertaken by agency staff and it is envisaged that an expert would only be called in when a matter can not otherwise be resolved. For this scheme to work, the Commissioner would need to be a person who is prepared to take advice and admit her or his own limits. Unfortunately, there is no way of ensuring such a person is appointed to the position. At some point, one must simply resort to trust.

CADA is also vigilant in its monitoring of the FOI law. Roberts suggests that an important part of encouraging compliance with FOI laws is effective monitoring of agencies performance.[1031] CADA's statistics cover the number of individuals and private organisations who made applications during the year, which people used the FOI law frequently, the number of requests from each geographical area, the type of documents requested, the subject matter of the various requests and the extent to which agencies did not follow its advice.[1032] It is able to identify agencies which do not carry out their obligations or comply with CADA's recommendations. It is also able to identify classes of people (eg country people) who do not use the law and develop awareness programs for them. Statistics on FOI compliance are already collected in Australia, although the scope of the information collected should be expanded. With increasing computer technology, the analysis of statistics is becoming easier and once collected the task of evaluating compliance with FOI laws should be facilitated.

b) The structure of review

Lacking determinative power, CADA relies heavily on the respect it inspires in the French administration. It depends on persuasion and good will to encourage the administration to follow its advice. To reinforce CADA's capacity to prevent litigation, the Conseil d'État has held that an applicant must have applied to CADA before proceeding to judicial review. There are thus two aspects of the CADA model of FOI review which raise issues in an Australian context. The first is whether a FOI Commissioner would be more effective with or without binding powers of decision. This depends in part on whether an Australian Commissioner could inspire the same level of respect for its decisions. The

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[1031] A Roberts, above note 341 .
[1032] CADA, above note 512 at 69-79.

second question is whether appealing to the Commissioner should be an obligatory part of the appeals process.

It is probably best to address the second question first. In my view, it would not be beneficial to add another stage to the review process under the FOIA. In France, CADA works well as an obligatory pre-litigation step because its role is partly to prevent further litigation.[1033] It is the first level of appeal after the original decision maker. In Australia, an applicant already faces internal review before reaching the AAT. Under the present proposal for an ART, the applicant would then face two levels of ART review.

I would suggest giving applicants a choice between an appeal to the Commissioner and an appeal to the AAT (or ART). An appeal to the Commissioner would be informal, cheap and relatively quick. Following the procedures of the WA FOI Commissioner, there would be no obligation to provide a hearing. The Commissioner would be able to reject claims which were too wide. Any appeal from the decision of the Commissioner would be limited to review under the Administrative Decisions (Judicial Review) Act 1977. If applicants have to choose between AAT review and a Commissioner, it then seems appropriate that the decision of the Commissioner should be binding upon the agency.

If the Commissioner's decision is binding and reviewable then there would be an obligation to provide comprehensive reasons for decision. Where the Commissioner relies on the opinion of a panel member when making a decision, the reasons should refer to the weight given to the views of any panel member. The doctrine of official notice could perhaps be extended to allow the Commissioner and the panel of experts to work together to make an institutional decision. In addition, the Commissioner should be careful to ensure that the parties are given the opportunity to comment on the views expressed by the panel member, where appropriate. The Commissioner's caseload would make it more effective in its educative, advisory and monitoring roles because applicants would regularly bring before it an indication of the problems with FOI. The efficacy of the model would still depend to a large extent on the Commissioner's ability to inspire the respect of the administration.[1034]

[1033] J-P Costa, above note 484 at 185.

[1034] I note that the decisions of the AAT are not legally binding on the administration, except in relation to the particular decision under review. The decisions of review bodies are followed out of a strong tradition. Given this tradition, the Australian administration may be inclined to follow the decision of a FOI Commissioner in any event.

As noted earlier, an applicant would be entitled to choose whether she or he wishes to pursue review before the AAT (or ART) or before the Commissioner. First tier ART review is supposed to provide the flexible, informal, mediative review that is part of CADA's speciality. The disadvantage of ART review is that it would still be in a Tribunal setting. Unless the Tribunal is encouraged to telephone applicants and agencies to ask for more information, or to persuade them to compromise or back down, it is unlikely to be as effective as a Commissioner. Thus, regardless of whether it is the AAT or the ART conducting the review, Tribunal review will be of quite a different nature to Commissioner review. It will certainly be more expensive and quite probably more time consuming. However, should a party prefer a more formal approach, with the guarantee of a hearing and the possibility of legal representation, then this option is open to it. It would be important to ensure that a party does not seek review before the Commissioner and then return to have the same matter reviewed by the Tribunal. I would suggest that the President of the AAT be given discretion to refuse to consider a matter which has already been substantially considered by the Commissioner. A provision phrased in this way should avoid the possibility that an applicant who is unsuccessful before the Commissioner will request the same documents again and then seek review of the agency's decision before the Tribunal.

The suggestions put forward in this part are substantially different to the current practice. However, they draw on successful experiences in France, WA and Queensland. Given that review of FOI decisions is not highly regarded at present, a significant over haul is warranted.

2. FOI in a privatised public sector

In the twenty years since FOI legislation was enacted in France and Australia, the way in which public services are delivered has undergone significant change.[1035] Privatising and corporatising does not diminish the need for government accountability or participative democracy. It can however, make it harder to achieve because a third player (business) is introduced into the equation. As always, access to information is at the heart of bringing

[1035] Office of the WA FOI Commissioner, above note 388 at 5.

people and organisations to account for their actions. The discussion in Chapter One showed that the FOIA as it is presently drafted is insufficient to meet this task. Any contemporary analysis of the FOIA needs to consider how it might be adapted to fulfil its democratic role in this new environment. This section will consider a number of accountability obstacles arising out of the new approach to administration and consider some of the other possibilities for changing the FOIA to make it useful in the next century.

The definition of "agency" in the FOIA only includes bodies which are part of the State apparatus. As discussed above, private bodies are not obliged to comply with the FOIA, which means a loss of accountability where those private bodies provide public services or exercise public power. In the new administrative world, citizens are increasingly being type cast as consumers. As taxpayers they are in fact the purchasers of the services which they consume. Government can not simply avoid accountability for the way it spends public money by contracting out service provision. Where public funds are being spent, there are good accountability reasons for allowing citizens to have information about the type and quality of services being provided in return. Where there is government involvement in the way a body is run (even if it simply means that a body gains commercial credibility from being a part of government), then there are good democratic reasons for providing access to documents about government involvement.[1036]

Using private bodies to carry out public tasks is likely to increase, as the Attorney General acknowledged in the foreword to the 1997/98 FOI Annual Report.[1037] This is part of a more general move by both Liberal and Labour governments to bring commercial mechanisms into the public sector.[1038] This process includes using private contractors to provide services directly to the public, converting GBEs into companies incorporated under the Corporations Law or selling the shares in these corporatised companies to private shareholders.[1039] Aronson suggests that our legal system now operates as a "trichotomy" rather than the traditional public/private dichotomy. Just as economists use the term a "mixed economy", we should also see our administration as being a mixture of government

[1036] M Ricketson, above note 18 at 28.
[1037] Attorney General's Department, above note 322 at iii.
[1038] H Schoombee, above note 1011 at 135.
[1039] M Allars, above note 282at 45; M Aronson, above note 260 at 42.

and private players.[1040] The French legal system closely resembles this definition and has had a long history of operating in this way. An understanding of how FOI operates in a French setting is helpful to foresee new possibilities for Australia.

The ARC's report on contracting out considered that the competing objectives of FOI and privatisation should be balanced:

- rights of access are not affected simply because the administration contracted out the provision of some services;
- individual contractors should not be responsible for ensuring that the rights of access under the FOIA remain the same; and
- therefore documents in the possession of the contractor which relate directly to the performance of the contract should be deemed to be in the possession of the government.[1041]

In my view, this proposal is likely to lead to increased delay in accessing documents held by a contractor. The extra work involved in obtaining documents from contractors may also increase costs. Any review process is likely to be slower, more complex (as the reviewer will have to obtain access to the contractor's files) and more costly.

The practice of FOI in France suggests that it is possible for private companies to provide direct access to documents.[1042] As noted above, the French have a long history of regulating the public service activities of private sector contractors under administrative law. Contractors in France are aware that in providing services to government they will have to comply with administrative law obligations and can include any anticipated costs into their contract price. A timely response to FOI applications could even be made a term of the contract. The burden of FOI need not be a heavy one. In 1993 and 1994, only 3-5% of appeals to CADA concerned private organisations.[1043] Certainly, if the aim of contracting out is to provide cheaper public services, then it is only realistic that private companies bear the same incidental costs (such as FOI) as those borne by the public sector.

[1040] M Aronson, above note 260 at 52. This is particularly so in France, where public bodies can also have private activities which are governed by civil law and justiciable before the civil courts. See Brown and Bell, above note 616 at 137-9.
[1041] ARC, above note 275 at 53, 60.
[1042] See Chapter 2 Part B(2) and Chapter 3 Part A(1) above.
[1043] CADA, above note 512 at 71.

Allowing direct access to the documents of a private body will force Australian courts to consider questions about what are public and what are private activities. French FOI jurisprudence shows that drawing this line is far from straightforward. Yet, both the ALRC and the ARC seem prepared to accept that this approach would be possible in an Australian setting.[1044] In France, the rules which decide whether a body's activities are public or private have been developed by the courts, into a fairly complete yet complex set of case law.[1045] In Australia, it would be unwise to simply amend the FOIA to refer to an organisation's "public" activities. A better approach would be for legislation to provide a set of key indicators as a guide for judicial decisions. French jurisprudence considers: the control exercised by the administration over the body, the extent to which public money pays for the service and any "government" powers exercised by the body.[1046] These three criteria alone would bring within the scope of the FOIA: services provided by outside contractors (paid for by government), many GBEs and corporatised bodies (where they are subject to Ministerial control or have community service obligations) and providers of public utilities such as water, electricity, gas and phone (who are able to exercise a type of "government" power by denying access to these essential services).

Yet, even if the FOIA were to apply to private enterprises, this would not be sufficient to allow access to the necessary range of administrative documents. The exceptions provided for in s.43 would, as discussed above, exempt most of the documents needed to ensure that a contractor remains accountable to those who are ultimately paying for its services.[1047] The majority of the ARC considered the current exemption to be a fair balance between public and private interests, although the minority disagreed. Part of the justification for the breadth of this section is that unbeknownst to business, their documents may end up in the hands of government and on government files. Thus, documents may come within the scope of the FOIA, without the business being aware of or condoning access. Although the French FOI law has been interpreted so that it also provides a broad exception for business affairs documents, there is another aspect of the French jurisprudence which

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[1044] The ARC proposed deeming all documents in a contractor's possession that related to the performance of the contractual obligations to be in the possession of the government, ARC, above note 275 at 60. The joint ALRC/ARC report on the FOIA anticipated a similar distinction by proposing that GBEs would not be subject to the FOIA where their activities took place in a commercial setting, ALRC/ARC, above note 3 at 214.

[1045] French administrative law is the exception to the general rule that French law is codified. There has never been a true codification of administrative law. It is effectively judge made law, resembling in this way a common law system. Brown and Bell, above note 616 at 2.

[1046] *CE, 20 juillet 1990, Ville de Melun et Association <<Melun-Culture-Loisirs>> c/ Vivien et autres* Leb.. 1990 at 220 and discussion in Chapter 2 Part B(2)(B)(b).

could be helpful here. In determining whether a document falls within the scope of the law, the Conseil d'État considered whether the document was created for the purpose of providing it to the administration.[1048] Using this test eliminates the possibility of accidentally revealing business documents which were not intended for government files. The need for a broad business affairs exemption to protect against this risk would vanish.

There are two ways of incorporating such an approach into the FOIA. The first is to amend the definition of document in s.4 to include only those documents which were created for the purpose of providing them to the administration. While this most faithfully replicates the French approach, it would significantly alter the structure of the Australia FOIA. The alternative would be to include this test in s.43 alone. If there were a public interest test for s.43(1)(b) and s.43(1)(c)(ii),[1049] then the public interest should favour releasing documents deliberately provided by business to government. This is especially so if the business received a benefit (such as a licence, permit or subsidy) in return for providing the information. The justification for such a claim is that where government awards business a licence, contract or privilege there is an opportunity for agency capture and corruption.[1050] As Aronson pointed out, the "likely frequency must surely be significantly increased when one adds government secrecy to these risk factors."[1051]

Of course, a broad right of access is of little use if documents can then be withheld under exemptions. Many commentators have suggested that there should be an overriding public interest test for all exceptions. There seems no reason to object to an amendment of this sort. If the document is too sensitive or damaging to private interests to be released, it would not be in the public interest to release it. Introducing a test of this sort is not foolproof. The jurisprudence surrounding the release of internal working documents shows that even with a public interest test, the courts can narrowly interpret the public interest. A set of legislative guidelines as to what the public interest might or might not include would also be helpful.[1052]

[1047] See discussion in Chapter 1 Part B(2)(b).
[1048] See Chapter 2 Part B(2)(c).
[1049] As suggested by the minority of the Administrative Review Council in ARC, above note 275 at 73-75.
[1050] See discussion in Chapter 1 Part B(2)(b)(4).
[1051] M Aronson, above note 260 at 61.
[1052] This has been proposed as part of the alternative to the government's Freedom of Information Bill in the United Kingdom. Section 4(2) of the Bill presented to the House of Lords on 10 December 1998 provided that the public interest included the promotion of better informed discussion of public affairs, greater accountability and more effective public participation as well as the existence of any offence or failure to comply with a legal obligation, abuse of authority or neglect of official duty or danger to an individual or the

Considering the role of FOI in a privatised public sector, Snell suggested that FOI might be ripe for redundancy.[1053] In contrast, Aronson suggests that FOI will take on a "pivotal role" in the new privatised public sector, as a barrier against corruption, poor decision making by agencies and inadequate service provision by contractors.[1054] Contractors and corporatised bodies should be expected to provide cheaper, more efficient and transparent public services.

3. Evaluating the effectiveness of the FOIA

The fundamental question in Australia and France remains: does a right of access to administrative documents really improve transparency and enhance democracy? Analysing the effectiveness of the French FOI law leads to a rethinking of the criteria used to measure the success of FOI laws. Both Australian commentators and CADA measure the success of the law by reference to the number of applications made for non-personal files.[1055] In both jurisdictions, the focus on release of general interest documents reflects the democratic purpose of FOI and its emphasis on opening up government decision making to the light. Yet, in both France and Australia most applicants use the law to seek access to their own files. This raises two issues.

Firstly, it is interesting to note that the large number of requests for access to personal files (in both Australia and France) are implicitly dismissed as having no democratic value. Yet, the right to request one's own file is a crucial part of an accountable administration. It is often the administrative decisions made at a personal level, such as the refusal of a permit or a problem with payment of a social security cheque, which have the greatest effect on individual lives. The ability to check the accuracy of the information held on a personal file can explain a decision or resolve problems with the administration. The knowledge that such files are accessible also serves to improve administrative practices, so that public servants are more likely to note their reasons for reaching a decision and less

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public. The Freedom of Information Bill can be found at http://www.publications.parliament.uk/pa/ld199899/ldbills/010/1999010.htm.

[1053] R Snell, "Rethinking Administrative Law: A Redundancy Package for Freedom of Information?", Administrative Law and the Rule of Law: Still Part of the Same Package?, Canberra (1998).

[1054] M Aronson, above note 260 at 58-63.

likely to make derogatory comments.[1056] Accessing personal files is an excellent example of grass roots democracy at work. A right of access to documents is akin to having an effective ambulance service. Everyone hopes that there is never a need to use it, but it is reassuring to know that it exists.

The second issue is why there are not more requests for non-personal information. CADA questioned whether the public lacked curiosity or imagination about questions of general interest, or whether it was simply that few could spare effort and money trying to obtain documents that brought them no immediate benefit.[1057] My view is that advocates of FOI in both Australia and France overestimated the interest of the general public in government. Yet the public is still concerned about governmental behaviour and governmental decision making. And while the cost of access documents in either France or Australia can be intimidating, it is submitted that the crucial reason for the lack of public interest applications is time.[1058] Here, I am talking not about the timeliness of the FOI process, but the lack of time in people's lives to use a FOI law. An easy access regime alone will not ensure that people seek access to documents of general rather than personal relevance. Consider the most simple access regime imaginable. An e-mail sent to a central administrative clearinghouse results in documents from any government department being posted to the applicant within two weeks and the minimal costs charged to their credit card. This would not change the fact that most members of society would be too busy coordinating work, family and leisure to find time to read the documents that arrived in their letterbox. An issue must impact on an individual in a very direct way for it to take priority over these daily tasks.

This analysis makes it unrealistic to judge the success of a FOI law by the number of individuals seeking access to documents of general interest (as opposed to personal files). Yet, a lack of time does not necessarily translate to a lack of interest in the workings of government. Rather, the public relies heavily on the media, academics and public interest groups to carry out the work of accessing documents, sifting through them and

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[1055] CADA (1981), above note 422 at 9-10;Commission d'Accès aux Documents Administratifs, *L'accès aux documents administratifs* (Report No. 4, 1986) at 5-6; CADA (1988), above note 422 at 16; CADA, above note 908 at 27;R Snell, above note 45; P Bayne, above note 44at 107; M Ricketson, above note 18 at 27.
[1056] M Ricketson, "Ten Years of Freedom of Information: what has it meant?" (1994) *FoI Review* 58; *Re Conngan Aboriginal Corporation and Aboriginal and Torres Straight Islander Commission* (Administrative Appeals Tribunal, Deputy President Barnett, 30 September 1998, unreported) at para 29.
[1057] CADA, above note 507 at 7.
[1058] R Snell, above note 328 at 82.

summarising the interesting or worrying aspects of administrative practices.[1059] It is these groups that will be responsible for promoting the democratic objectives of the FOIA. The extent to which the FOIA is used by the media, public interest groups and academics is a better test of the efficacy of the law, than simply looking at the number of non-personal files requested.

French environmental groups and unions that welcomed the FOI law and tried to use it soon fell back on their old methods of using contacts inside the administration because they were quicker, simpler and more reliable.[1060] Even after the introduction of the French FOI law, the administration was often comfortable with giving out a large amount of information orally, but baulked at providing photocopies of documents.[1061] By 1985, the number of organisations using the law was 30%[1062] but this level has remained constant since.[1063] The decisions of CADA and the Conseil d'État show that some environmental groups such as Greenpeace and urban lobby groups such as Alurely make regular use of the French FOI law.[1064]

Greenpeace and the Wilderness Society have also taken advantage of the FOIA in Australia, but a search of the Austlii database suggests that they have each appealed only one decision.[1065] The Australian environment portfolio[1066] received 55 FOI requests in 1997/98 and determined 40 of them. Of these requests, 22 were granted in full, 14 were granted in part and 4 were refused in full. It notified charges of $37,651 but collected only $2,365.[1067] The bald statistics do not enable us to determine how many requests were for non-personal information, the type of requests refused or the nature of the material deleted.

[1059] Ibid.
[1060] Denis-Lempereur, above note 572 at 60; C Spanou, above note 413 at 157-8.
[1061] F Rangeon, above note 924 at 96-97.
[1062] CADA, above note 507 at 6.
[1063] CADA, above note 512 at 71.
[1064] Ibid. at 71.
[1065] *Re Rogers Matheson Clark and Australian National Parks and Wildlife Service* (1991) 22 ALD 706; *Re Rae and Department Of Premier and Cabinet* (1986) 12 ALD 589. The Australian Conservation Foundation was involved in at least one appeal, which settled early on (author's conversation with P Bayne). However, it does not appear to have run a full appeal. The Austlii database (at http://www.austlii.edu.au/) lists complete text of all AAT, Federal Court and High Court decisions. A search for the terms Greenpeace, Wilderness Society or Australian Conservation Foundation combined with Freedom of Information or FOI revealed only the decisions cited.
[1066] Which according to the FOIA Annual Report is comprised of the Minister for the Environment, the Department of the Environment, the Australian Heritage Commission, the Bureau of Meteorology, the Great Barrier Reef Consultative Committee, the Great Barrier Reef Marine Park Authority, Parks Australia – Wildlife Australia and Supervising Scientist – Alligator Rivers. Attorney General's Department, above note 322 at 59.
[1067] Attorney General's Department, above note 322 Appendices A, B and D.

However, the overall record of the portfolio suggests that it is being at least moderately cooperative about FOI.

As discussed above, the French media have been very slow to use the French FOI law.[1068] French journalists have used the law for their own research[1069] and used information gained by opposition members.[1070] However, the way in which CADA and the law was discussed in the two stories concerned suggests that CADA was not well known amongst members of the public. The second example was both a success story for the French FOI law and highlighted the possibilities for corruption when business and politics mix.[1071] A company[1072], which was 90% publicly funded and headed by members of the regional government[1073] tried to encourage the building of a new car factory in the local area. Good food and wine were part of the negotiation process. A regional auditor's report[1074] noted that during a three year period, the company paid for 568 meals for a total of 241,614FF ($61,952). Two meals in particular stood out because they cost 994FF ($254) and 1,811FF ($464) per head.[1075] Two opposition members sought access to a copy of the bills for these meals and after considerable difficulty and CADA's intervention were successful. They then discovered that the meals were held at the restaurant of another member of the municipal government, who would later be voting on the construction of the car factory. The story was not front page news[1076], and the journalist writing it did not seem too shocked by the story he told. Nonetheless he hoped that people would be angry enough to react, because he argued that there was a need to break the silence and tacit acceptance of such actions.

Generally though, French journalists rely on leaks and informal contacts to obtain their information. This is partly because high level government decisions are exempt under article 6, and documents which prepare the way for any government decisions are exempt

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[1068] J Laveissère, above note 916 at 163. See also comments at note 931.
[1069] As in A de Blauwe, above note 933 ; *Président du conseil régional du Nord-Pas-de-Calais, 7 janvier 1993* 8th report of CADA at 100; CADA, above note 495 at 11.
[1070] *Libération* 13 October 1999 at 9.
[1071] Ibid.
[1072] Known in French as a société d'économie mixte.
[1073] The Conseil Régionale.
[1074] The report of the Cour régionale des comptes, which is the regional equivalent of the Cour des comptes discussed above.
[1075] The second, more expensive meal was provided for 20 people, bringing the evening's total to 36,320FF ($9,312). As the journalist pointed out the same sum would pay 18 people their monthly unemployment benefit.
[1076] It was on page 9.

until after the decision has been made. In this way most of the interesting documents are not available until after the issue is no longer news. Australian journalists have made better use of the various FOI laws available to them. A survey by Nigel Waters reveals that journalists from *The Sydney Morning Herald* made about 35 requests for information over 18 months and used FOI requests from politicians a further 13 times. In all, FOI was mentioned on over 100 occasions during this period and resulted in a number of significant stories being run.[1077] A similar analysis of the use of FOI by reporters from *The Age* and *The Australian Financial Review* over six months showed a reduced level of FOI use by journalists themselves, but a total of 89 references to FOI in *The Age* and 16 in *The Australian Financial Review*.[1078]

Like their French counterparts, Australian journalists have been frustrated by the overuse of exemptions in the FOIA as well as the lack of a universal public interest test which might help to restore the balance in favour of disclosure.[1079] Not surprisingly, media use of the FOIA can also be hampered by obstructive bureaucracies and FOI officers. The problems often lie with the officer's superiors and may even stem from interference by ministerial advisers.[1080] In addition, the restrictions on information about individuals which are now included in the Privacy Act 1988 can make officials even more reluctant to provide sensitive information under FOI.[1081] Cost is another issue. Application fees themselves are unlikely to deter media applications, but high fees and the cost of review of an adverse decision does. Waters suggests that cost alone is not the real problem. It is the possibility that, despite the hefty bill there may be no newsworthy material in the document that deters significant FOI applications.[1082] Admittedly some of these problems could have been provoked by media abuse of FOI laws, such as the fishing expedition conducted by Bill Birnbauer in the mid-1980s where he obtained 4000 files from the State Electricity Commission.[1083] He at least looked through these files himself to find the

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[1077] N Waters, above note 328 at 11. The stories related to the waterfront dispute and the extent of Federal government involvement with the stevedoring company Patricks, the High Court Chief Justice's letter of complaint to the Deputy Prime Minister about lack of support, travel allowances paid to Federal MPs, the salary levels of senior executives of the Sydney Olympics committee, overseas study tours by politicians and police staffing levels in rural areas of NSW.

[1078] The Age journalists made 5 requests, while there were none from AFR. The Age also used information gained by opposition MPs on 56 occasions and the AFR on 7 N Waters, above note 328 at 13.

[1079] R Coulthart, above note 328 at 45-46; M Ricketson, above note 18 ; N Waters (1999), above note 328 at 20-21.

[1080] N Waters (1999), above note 328 at 17, 23; R Coulthart, above note 328 at 46.

[1081] R Coulthart, above note 328 at 45.

[1082] N Waters (1999), above note 328 at 22.

[1083] Ibid. at 17.

information he was seeking (rather than requesting photocopies). However, the time taken to collect such a large number of files must have left the SEC unsympathetic to FOI. Despite their complaints, few journalists or news organisations campaign for FOI reform or participate in processes such as the ALRC and ARC discussion papers.[1084]

A number of the practical problems that affect journalists' use of the FOIA, arise out of the media environment itself. Jack Waterford criticises the implementation of FOI as being ill adapted to the needs of journalists, but also criticises journalists for not making themselves sufficiently aware of how FOI works and how to use it effectively.[1085] Few newspapers provide staff with training on making FOI requests, so that journalists have to rely on the experience of others to help them in making an application. Some newspapers have designated one person to collect resources on FOI, but the system remains fairly informal and subject to staff availability.[1086] Journalists felt inadequate in the face of agency exemption claims, but specialised legal help was not available. Waters suggests an external support centre to be shared by all journalists regardless of their employer. Such a centre could also take much of the literature, currently written by lawyers for lawyers and turn it into material useable by journalists in their everyday practice.[1087]

It seems that efficiency targets are starting to affect the newsroom too. Editors are now reluctant to let reporters carry out in depth investigations, particularly over a longer period of time. It is in this type of investigation that FOI is likely to prove most useful.[1088] There is tension too between the objectives of open government found in the FOIA and the media's desire or economic need for a "scoop". Ironically, publication of a large number of administrative documents can actually defeat openness. This is because it denies journalists the commercial advantage attached to an exclusive story and reduces the likelihood of a thorough examination of the inconsistencies in documents. It may also deter journalists from pursuing a similar request in the future.[1089] As discussed above, the public are highly unlikely to read the documents themselves and they are therefore effectively excluded from finding out about the content of the documents.

[1084] R Snell, above note 328 at 83; N Waters (1999), above note 328 at 32
[1085] J Waterford above note 340; R Snell, above note 328 at 83.
[1086] N Waters (1999), above note 328 at 18.
[1087] Ibid. at 32.
[1088] Ibid. at 30.
[1089] R Coulthart, above note 328 at 44; N Waters (1999), above note 328 at 24.

Should the FOIA be refocussed to allow opposition politicians, the media, public interest groups and academics to use it more quickly and effectively? One frequent suggestion is to waive (or significantly reduce) FOI charges for media and lobby groups.[1090] The idea is tempting, but there are a few inherent problems. Firstly, any form of general waiver would have to allow some kind of exemption for fishing expeditions to ensure that administrative time was not overly burdened with unjustifiably large FOI claims. The second problem with this approach is that according special rights of access to certain groups detracts from the broad democratic goals of the Act. In some senses this analysis is too simplistic, because (as was noted earlier) it is the specialist groups which are most likely to further the democratic objectives of the FOIA. Ultimately allowing special rights of access to certain groups may enhance democracy in a broader sense, because the public as a whole will be better informed. It should be remembered too that this approach would not deny access to ordinary FOI users, who would have the same rights as they do now. The major difficulty lies in defining who qualifies as the "media" or a "lobby group" and to take advantage of the reduced fees. The term encompasses extremist groups as well as the more familiar lobby groups, and the possibility that government may define who qualifies as a "legitimate" body takes us quickly into dangerous waters.

Rather than refocussing the FOIA, public interest groups should learn to make better use of the provisions already available in the FOIA. Section 30A of the FOIA already provides that fees can be waived or reduced where the agency considers that the "giving of access is in the general public interest or in the interest of a substantial section of the public".[1091] If the public interest groups regularly sought a waiver of fees under this section, they may find that it had substantially the same outcome as a general waiver for public interest groups. The administration is still called on to decide whether a request is in the public interest, but this is less problematic than deciding what constitutes a legitimate lobby group. Coulthard wrote of the investigative possibilities open to the media if they could obtain data on disk. In the USA journalists had used this technique to uncover a serious fraud perpetrated by the nation's largest health insurer.[1092] Yet the definition of document in s.4 FOIA includes "any article on which information has been stored or recorded, either mechanically or electronically". If more requests were made for electronic data, then it

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[1090] M Ricketson, above note 18 at 29; L Dalton, above note 319 at 850; R Coulthart, above note 328 at 46; R Snell, above note 328 at 83.
[1091] s.30A (1)(b)(iii) FOIA.
[1092] R Coulthart, above note 328 at 45.

may gradually accustom agencies to releasing matter of this sort. Similarly public interest groups could make better use of s.21 FOIA which allows for an agency to defer access to a document where release would be contrary to the public interest until the public interest in non-disclosure had passed. It can be hoped that an FOI Commissioner (following the model proposed above or the ARC model) would facilitate use of the FOIA by special interest groups.

Effective use of FOI allows the media to set the news agenda rather than simply reacting to media releases.[1093] Even where FOI applications are unsuccessful, regular use by media organisations makes governments aware "that the media are serious about holding them accountable".[1094] Where requests are unsuccessful, they too can be reported, in an effort to embarrass the government into greater openness. Snell argued that the media has an obligation under our system of democracy to use the FOIA to closely scrutinise the activities of government.[1095] Where the press does not use the law, this contributes to the public's lack of awareness of their right of access to documents.[1096] Press articles beginning with "according to documents obtained under FOI" are an excellent advertisement for both the right of access and the benefits it can bring to an applicant. Given the lack of information provided by government on FOI, the media are often the only source of information about FOI.[1097] The article in *Que Choisir*, discussed above, provided a positive example. It advised readers that they could verify the safety of the schools in their area by seeking access to documents in the same way as the journalist writing the article.[1098] Waters' research shows that the interests of the media and public interest groups in Australia are closely related. More and more, the media relies on opposition politicians or public interest groups to do the FOI legwork for them.[1099] Realistically, it is the use of the FOIA by these groups that is going to be the best chance for accomplishing the democratic objectives it was designed to achieve.

[1093] N Waters (1999), above note 328 at 9.
[1094] Comment of Linda Morris reported in N Waters (1999), above note 328 at 24.
[1095] R Snell, above note 328 at 82.
[1096] Ibid. at 82.
[1097] Ibid. at 82. For example, entering the term "FOI" into the Federal government's entry point web page does not bring up any search results. This is despite the fact that this page is supposed to provide "easy access to all Commonwealth authorised information and services". The page can be found at www.fed.gov.au.
[1098] A de Blauwe, above note 933 at 20.
[1099] N Waters (1999), above note 328 at 11 and 13.

4. Changing the underlying political culture

The fact that France and Australia have reached similar FOI outcomes from quite different starting points suggests that it is the structure of their political systems rather than the structure of the legislation which perpetuates a culture of secrecy. The question is how to change this foundation. An important part of an effective FOI culture is a supportive bureaucracy. One of the advantages of a FOI Commissioner who does not have binding powers of decision is that she or he is obliged to build good relations with the bureaucracy and persuade it to accept the value of FOI. Even where the Commissioner's decision is binding (as has been proposed here), there is still an opportunity to build a relationship of trust between the administration and the Commissioner's office.[1100] A Commissioner should help to build a FOI culture, but it will take some time.[1101] A quicker approach might be to take advantage of the general upheaval in public administration to implement some more radical proposals.

Individual FOI officers are obviously affected by the demands of their superiors and at present seem to be discouraged from supporting open government.[1102] Until officers are encouraged to release documents, most will remain overly cautious. Many high level public servants no longer have security of tenure, but are on 5 year contracts, with renewal contingent on performance. Generally, this "corporate approach" is considered to be detrimental to FOI. Yet a performance based system could be turned to the advantage of FOI users. One of the performance criteria of high level officers should be ensuring FOI compliance. Statistical measures make it possible for FOI compliance to be ascertained which can then be used to determine the person's performance.[1103]

Just as FOI lawyers are concerned about the loss of government accountability measures, public servants are probably concerned that their ability to provide good advice and service

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[1100] This might sound overly optimistic, but while working in Agriculture Western Australia, I observed the ease with which the FOI Officer contacted the Commissioner's Office for assistance and the respect he accorded to their advice.

[1101] See the troubles faced by the journalist in A de Blauwe, above note 933 and the opposition members of the council in *Libération* 13 October 1999 at 9 where prior to the intervention of CADA they were met with blank refusals of access from the relevant agencies and even after CADA's favourable opinion did not receive all the documents they requested. The WA FOI Commissioner who undertakes a similar role still complains of the lack of co-operation by some agencies, 6 years after the WA Act was introduced, Office of the WA FOI Commissioner, above note 388 at 4.

[1102] N Waters (1999), above note 328 at 17-18.

[1103] A Roberts, above note 341 .

to government is being hampered by the privatisation program. This common concern over outsourcing and privatisation may provide an opportunity to build bridges between these two groups. Whereas in the past government decision making could have been influenced by balanced advice from the public sector, public servants could now contribute to a balanced and accountable decision making process by encouraging the use of the FOIA. In addition, as the public sector becomes more competitive, there may be a greater need for more professionalised services in the public sector. Lawyers should consider specialist training in public administration and public administrators may need to undertake some legal training. Lawyers who work for government may even find that they are responsible for ensuring that the public law values of accountability, openness and the public interest are maintained in a new privatised environment.[1104]

Most of these changes will require some form of political will to implement them. This is where the challenge lies. Governments are composed of human beings and few (if any) like to have their mistakes discovered, let alone publicised. The privatisation of government only compounds this problem as business is also jealous of its secrets. While FOI is not necessarily about revealing government error, most requests take place where people are unhappy with a decision (at a personal or general level) and are looking for a reason to attack it.

There are no easy answers to the question of political will. It seems that the implementation or improvement of FOI and other accountability measures are most likely to take place when there has been a dramatic change in government or when the balance of power lies with independents.[1105] The FOIA was put forward by successive Labour and Liberal governments but only implemented after Labour's return to power in 1981.[1106] The Tasmanian FOI Act was pushed through by Greens MP Bob Brown.[1107] The recent Victorian election is an excellent example of how backlash against the incumbent government can put FOI at the top of the political agenda.[1108] Vocal public concern over the loss of accountability measures can force the hand of government. Again a recent

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[1104] H MacLauchlan, above note 1025 at 133.
[1105] N Waters (1999), above note 328 at 31.
[1106] See discussion in Part A of Chapter 1.
[1107] R Snell (1994), above note 18 at 36.
[1108] The speech by the Governor Sir James Gobbo at the opening of the Victorian parliament on 3 November 1999 pronounced that the new minority Labour government would pursue program that would "sow the seeds of lasting and permanent democratic reform" and that the first bills to be introduced in the following

example is also one of the most striking. One of the first acts of the new Victorian Labour cabinet was to attend a specially prepared university course on good governance that covered issues such as accountability and due process. Public servants from a range of agencies attended a similar course on the role of government in encouraging ethical approaches in the public and private sectors.[1109] Only public interest in FOI will create political will for improvement. Ironically public interest generally only comes with public awareness of the problems. It is time the debate on FOI moved beyond the academic arena and into the media and public interest organisations who should lobby the public and create a catalyst for change.

C.Conclusion

It is time to rethink the way in which the FOIA works. Despite its differences, it is clear that the French FOI law has a great deal to offer Australia. At a practical level, there is an example of an alternative review process, based on mediation, respect and quick decision making. French law offers a concrete model of how private bodies might be brought within the jurisdiction of the FOIA. The very absence of a media use of FOI in France, highlighted the importance of its role in Australia. Against this background, I have offered a number of suggestions for change. The first is a new review process which allows an applicant to chose between the current system and a new FOI Commissioner, assisted by a panel of experts. Secondly, it is suggested that the FOIA should be expanded to include direct access to documents of private bodies where they relate to the provision of a public service. The third suggestion considers that there is value in personal information requests, but that critics should look to the use of FOIA by media and lobby groups if they really want to evaluate effectiveness. Finally, I consider that it is time for a new approach to FOI officers and the public sector. Rather than viewing them as the enemy, FOI advocates should seek the common ground in a concerted push for increased accountability. All of these examples represent significant changes from the current approach to FOI, which is to be expected when they are influenced by a very different system. In my view, the increasing importance of FOI in a changed public sector environment warrants such a different approach.

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week would restore the powers of the auditor-general and strengthen the Freedom of Information Act: *The Age* 4 November 1999 at 1.

[1109] *The Age Education* 3 November 1999 at 1. The Course was run by Dr Graeme Hodge of the Monash Mt Eliza Business School.

CONCLUSION

The FOIA was enacted with the lofty aims of increasing public understanding of administrative practices and improving public participation in government decision making. The ultimate goal was to provide a better, more accountable, more democratic government. In a different hemisphere but at a similar point in time, the French legislature was enacting the French FOI law with aspirations of transforming a secretive bureaucracy into one which was transparent and responsive to the public.

Unfortunately, the FOIA does not seem to be achieving these goals and dissatisfaction has been building steadily over the past decade. During that time, the public sector environment in which it operates has changed rapidly. Policy decisions are largely separated from the provision of services. Services are often contracted out. Against this background the High Court has become increasingly insistent on the right of the public to participate in government and the important role that information plays in effective participation.

The changes to the public sector do not diminish the significance of FOI, as information maintains a pivotal role in ensuring that government remains accountable for the decisions it takes and the way in which it spends public money. The exceptions relating to internal working documents and commercial information provide excellent case studies of the effectiveness of FOI. The detailed consideration of these two areas revealed that the manner in which the exceptions were interpreted detracted from accountable government. Review of decisions made under the FOIA was also examined and found to fall short of the objective of being quick, cheap and supportive of open government.

In a search for fresh ideas about FOI, it seemed appropriate to look outside of the common law world. A comparative study of the French legal system offered a number of advantages. Firstly, there is very little work published in English on the French FOI law. Accordingly, there was a considerable resource which was largely inaccessible to the (English speaking) common lawyer. France's economic and political structures are

comparable to those of Australia, making it feasible to draw parallels between the two systems. In addition, France has enjoyed a long history of democracy, one which appeared to put citizenship at the heart of the political system. Although this is a rather simplistic assessment of the French Revolution, it nonetheless forms a markedly different setting to the Westminster tradition inherited by Australia. This different history alone offered possibilities of new approaches to transparency and accessibility of documents.

The French FOI law has some striking differences in structure. Much of the focus of the law is on the concept of an administrative document. In determining the scope of this concept the French administrative courts have faced the difficult task of determining the types of activities which should be subject to public accountability measures. Although the approach adopted by the Conseil d'État was too narrow in my view, it is interesting to see a "judicial" body which does not back away from these sensitive and important issues. French interpretation seems to openly acknowledge an instinctive approach to what *should* be released, which is consistent with the view that justice (rather than legal technicalities) is of primary importance.

Despite its longer history of public involvement in government, overall the French FOI law and practice is less open than the Commonwealth FOIA. The exemptions are generally construed more broadly. It is not uncommon to exempt documents because they fall within a certain class or category. For example, any documents preceding a high level policy decision are exempt, as are documents which are given a security classification. Although I admire the work done by CADA and the respect it has inspired, the two newspaper articles which referred to the French FOI law show that some French agencies utterly refuse to comply with the FOI law, until challenged before CADA. The fact that CADA does not have binding powers, means that an applicant must appeal a decision to the administrative courts to obtain an enforceable right of access.

Apart from these practical insights into an alternative FOI regime, there is inherent value in undertaking a detailed study of an aspect of French administrative law. Administrative law in a French context has fascinated public lawyers ever since Dicey first unfavourably compared *droit administratif* to the English approach. In doing so, he helped to create an assumption that the French system was inherently different from the common law system, and one which would inevitably lead to a different result. The micro study conducted here

shows that despite the contrasting legal systems, and the different structure of the FOI laws, the practical outcome was very similar. Both legislatures were concerned to protect the same categories of documents. French courts have similar reservations about releasing sensitive government information as Australian review bodies. Bureaucrats are often reluctant to change the habits of secrecy, because it offers them very little benefit and exposes them to the risk that their decisions will be challenged. There is no doubt that the structure of the two legal systems offers some alternative approaches, but at a practical level there are few differences.

This is not to suggest that Australia has nothing to learn from the French FOI law. Although French law can not be adopted wholesale in an Australian setting, there are still a number of interesting ideas which merit consideration. The final chapter of the thesis considered a number of areas in which the FOIA could be changed for the better, by adopting aspects of the French approach. Review of FOI decisions is an area of considerable concern. Informal, conciliatory and cheap review has already been suggested by Australian commentators. What is different about the French system is the way in which it uses administrative experts to improve the quality of decisions and to make the review process one that is highly respected. The FOIA could also be improved if the FOI Commissioner were to closely monitor agencies' performance, and offer assistance to agencies trying to improve their FOI practice. France has a long history of dividing up service providers from policy makers. It treats private bodies who carry out public functions as subject to public law rules in relation to those functions. Australia is currently facing the challenge of maintaining accountability in the face of privatisation and corporatisation. The French approach confirms that it is possible to make private bodies publicly accountable.

The final two suggestions for change did not involve adopting aspects of the French FOI law. Rather, the challenge of working through a foreign system of FOI prompted me to reconsider the assumptions that we make about our own system. The first of those assumptions was that the success of the FOIA should be judged according to the number of applications for non-personal information. In my view, this approach is wrong. Applications for personal files are a vital part of government accountability and should be recognised as such. Secondly, I think it is unrealistic to expect ordinary citizens to access government documents. Rather, citizens will inevitably rely on the media, public interest

groups and academics to make FOI applications and it is the ease with which these groups can use the FOIA which should be used to measure its success. There is also a need to build new bridges with public servants. They should be encouraged to view FOI as a partial substitute for the moderating influence over government previously fulfilled by unbiased public service advice.

Although the FOIA is struggling to bring about government accountability, it should not be abandoned. The need for information about government is increasing, not decreasing. There is certainly a need for the Act to be modified to meet new challenges, but it may be that the public sentiment towards the need for FOI is changing too. Compared to their French counterparts, the average Australian is very aware of FOI. Australians are perhaps more attached to the idea of accountability than they are given credit for. To construe the recent Labour election victory in Victoria as an uprising to defend the FOI Act is overstating the matter. But generally speaking, Australians now believe that government must be subject to accountability measures. When those measures are threatened, they react strongly. It is this latent political will which must be harnessed to move the FOIA forward in to the next century.

APPENDIX A NOTES ON THE FRENCH SYSTEM OF ADMINISTRATIVE LAW

A. The civil and administrative jurisdictions

The division of the French system of justice into administrative and private law regimes has its origins in the principle of the separation of executive, judicial and legislative powers propounded by Montesquieu.[1110] Although this does not necessarily require a dual system, for political reasons the revolutionaries decreed that judges should not be allowed to interfere in the activities of the State.[1111] This left it up to the State to judge its own affairs, while the civil courts continued to judge all other matters. Gradually, a system of administrative courts developed. In 1799 the Conseil d'État, which had existed as the adviser of the King under the Ancien Regime was reconstituted by Napoleon, firstly as a consultative body and then with a growing power to review administrative action. The Conseillers remain members of the administration and are not judges[1112] but from 24 May 1872 onwards, the Conseil d'État was officially independent from the head of State and the administration.[1113]

Only administrative courts can quash or rectify decisions taken pursuant to prerogative or executive powers as well as matters which concern certain areas of law such as individual freedoms or private property.[1114] Where the matter could fall into either the administrative or private law jurisdiction, the legislator may make a choice.[1115] The private law courts deal with all other matters, including criminal and family law. The main private law courts form a four level hierarchy, although there are other courts which deal with special issues,

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[1110] J Vincent et al, *La justice et ses institutions* (3 ed, 1991) at 57

[1111] Law of 16 and 24 August 1790, article 13 and decree of 16 Fructidor an III

[1112] Dadomo and Farran, above note 444 at 46-47; R Chapus, above note 617 at 667-668. In theory, administrative judges can be removed from office, unlike civil judges who benefit from the principle of irremovability. In practice however, administrative judges benefit from the same security of tenure as their civil colleagues.

[1113] R Chapus, above note 617 at 669; J Vincent et al, above note 1110 at 60-61.

[1114] Decision no 86-224, "Conseil de la Concurrence" given on 23 January 1987; J Vincent et al, above note 1110 at 62. Prerogative powers in a French context are different to their Australian meaning, and is closer in meaning to "government type powers". The term includes the ability to levy fees or charges, impose fines or to make decisions which are appealable in the administrative courts.

[1115] J Vincent et al, above note 1110 at 63.

such as employment matters. Final appeals from any private law court are heard by the Cour de cassation, which only considers questions of law.

This division of jurisdiction can make it difficult for litigants, who have to choose which court in which to bring their case. If the litigant makes the wrong decision, the court can decline to hear the suit. Rather than having both jurisdictions decline to hear a matter, it can be referred to the Tribunal des conflits, which is responsible for deciding the appropriate jurisdiction.[1116] The Tribunal des conflits is composed of equal numbers of members from the Conseil d'État and the Cour de cassation. The President is the Attorney-General who rarely attends but has the casting vote in the event that the other eight members are unable to reach a decision.[1117]

B.The Administrative Courts

The French administrative courts now form a three level hierarchy, with the Conseil d'État overseeing five Cours Administratives d'Appel and the 35 Tribunaux Administratifs. These lower courts were created in 1987 and 1953 respectively to help deal with the backlog of cases. The court of first instance is the local Tribunal Administratif with the Cour Administrative d'Appel hearing appeals. A form of leave to appeal is necessary to reach the Conseil d'État. The Conseil d'État has a residual jurisdiction for hearing matters at first instance but it now sits almost exclusively on appeals and considers only questions of law. There are no court costs payable for any of the administrative courts nor is it necessary to be represented by a lawyer before the Tribunal Administratif. There are also a number of more specialised administrative courts, which give rise to a right of appeal to the Conseil d'État.[1118] The Conseil d'État does not content itself with checking the work of the lower courts by way of an appeals process. Its members also visit the other courts to check on procedure, bring support and ascertain new trends in the disputes appearing before them.[1119]

The Conseil d'État is divided into six sections, four of which cover the areas of finances, internal affairs, social affairs and public works. A reports and research section was set up

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[1116] Ibid. at 169 –172.
[1117] This only occurs rarely. J Vincent et al, above note 1110 at 167-168.
[1118] J Vincent et al, above note 1110 at 342-343.

to provide an annual report, study topical legal issues and provide proposals for reform. These administrative sections undertake government advisory work including a thorough check of any government bill before it goes before parliament and as well as the legality of government decrees. The sixth section is the "contentieux" or litigation section. It is divided into 10 subsections.[1120] The simplest cases are tried by one subsection, but most are heard by two sitting together. Complex cases are heard by the section du contentieux, which is formed by the President of the section du contentieux, the three Vice-Presidents, 10 Presidents of the subsection, two members of the administrative sections and the rapporteur. Where judgement has been given by section du contentieux, it is denoted in the title of the case as "*CE, Sect.,...*" Exceptional cases are heard by all six subsections, known as the Assemblée du Contentieux. The Assemblée comprises 12 members and is presided over by the Vice-President of the Conseil d'État. The remaining members are: the President and three Vice-Presidents of the section du contentieux, the president and rapporteur of the reporting subsection and the five presidents of the administrative sections. A judgement of the Assemblée is denoted in the title of the case as "*CE, Ass. ...*"

All the administrative courts follow a similar procedure. A matter is allocated to a rapporteur who provides a formal summary of the facts and law. In the Tribunal Administratif, the rapporteur ensures that all the necessary information is available and can seek expert evidence, make site visits and generally inquire into the facts. In the Conseil d'État and the Cours Administrative d'Appel a commissaire du gouvernement is appointed who reads the dossier and then formulates his or her conclusions outlining an appropriate decision in the matter. The judges in a matter are the rapporteur, the President of the subsection and one other, although as the case becomes more difficult 7 judges or the whole subsection may also sit. There is a public hearing where the rapporteur reads out his notes of the parties' submissions and where the parties may comment but generally do not. The commissaire du gouvernement also reads out his or her conclusions. The judges then retire to make their decision, which often follows the recommendations of the commissaire du gouvernement. The decision is very short (often only a few paragraphs) and is given in the name of the French people. It refers to the subsections that were sitting, but not to the names of the judges themselves. There is no appeal within each level of the court hierarchy. A decision by one subsection is as much a decision of the Conseil d'État as one given by the section contentieux. The Conseil d'État has no officers which enforce

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[1119] Brown and Bell, above note 616 at 50-58.

its judgements, although the section des rapports et études now has some role in criticising those administrations who continue to follow a decision which has been overturned by the Conseil d'État.[1121]

The success of the Conseil d'État and the administrative court system relies on the esteem in which its members are held by the French administration. Most of the members of the administrative courts are drawn from the École Nationale de l'Administration (ENA) which is subject to very rigorous entry requirements (generally undertaken after obtaining university qualifications). There students are given a thorough legal and practical training in public administration over two years of study. The remaining 25% are distinguished members of the administration itself. New recruits are given personal supervision by a senior member of the Conseil d'État. This provides a mixture of young intellect and mature experience, with a strong esprit de corps. In all, the Conseil d'État has 297 members, of whom up to 80 may at any time be on secondment to other positions or judicial tasks, working as ministerial aides or within industry. The Conseil d'État, and to a lesser extent the other administrative courts are seen very much as part of the administration and are admired and respected. Their training, and regular secondments means that they have a practical understanding of the way the administration functions so that their decisions are seen more as solutions and less as interference from a distant judge.[1122]

C.Sources of French Administrative Law

French administrative law draws on substantially the same sources as Australian administrative law. At the highest level of the hierarchy is the Constitution, followed by duly ratified international treaties or agreements (including European law). European law is enforceable as a national law.[1123] Constitutional and administrative jurisprudence also has an important role in the application of the law.[1124] The writings of commentators play a role similar to that found in the Anglo-Saxon context. Their reflections on past

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[1120] The French term is "sous-sections".
[1121] Brown and Bell, above note 616 at 90-120.
[1122] Ibid. 616 at 59-60 and 77-110; J Burchett, above note 1016 at 991.
[1123] R Chapus, above note 617 at 28.
[1124] Ibid. at 128-129.

judgements, analysis of the current state of the law and suggestions for future directions can be very influential on courts.

Legislation is generally referred to by the date on which it was promulgated by the President. The French FOI law is therefore referred to as the la loi du 17 juillet 1978 or the law of 17 July 1978. Where legislation is unclear its meaning is interpreted by a judge. Although a judge will try to conform to the letter of the law, the paramount concern is one of justice, and with this ultimate goal in mind, the judge may limit or expand the scope of the law, soften its harsh edges or rein in its liberalism.[1125] Administrative law differs from other areas of French law in that it has never been truly codified[1126] and no law has ever determined the fundamental notions and principles which are to be its foundation. This task has therefore fallen to the administrative judge, whose role becomes much closer to that of a judge in the Anglo-Saxon system.[1127] The judgements of a higher court are not binding on the lower courts as such and there is no system of precedent. However, where the Conseil d'État has formulated a very clear jurisprudence on a subject, a lesser court who fails to follow does so knowing that its decision is likely to be overturned on appeal. Nonetheless, administrative tribunals often have sufficient flexibility to adopt a regional approach to some areas of law.[1128]

The judgements of the Conseil d'État are particularly short, often no more than a few paragraphs. They relate the complaint of the applicant, perhaps a restatement of the most critical facts, the decision and the orders for disposal of the matter. To understand the decision itself, it is necessary to read the conclusions of the commissaire du gouvernement, whose role is to recount the facts of the matter, the jurisprudence to date, the practical difficulties which may result from following a particular jurisprudential path and finally, her or his suggestion for how to resolve the matter. Some, but not all of these conclusions are published in the law journals.

[1125] Ibid. at 77.
[1126] There is a Code of Administrative law, but this is more of a collation of the existing laws than the creation of a consistent and principled code.
[1127] R Chapus, above note 617 at 78.
[1128] For example, the Tribunal Administratif of Bordeaux has favoured viticulture over urban expansion in some of its decisions in the town planning context.

APPENDIX B BACKGROUND TO THE RIGHT OF ACCESS TO EUROPEAN DOCUMENTS

It has been argued that a right of access to documents is a fundamental principle of European community law.[1129] The basis for the argument is twofold. Firstly, as most member states have now adopted a right of access to documents such a right should be seen as a general principle of Community law. Secondly, article 10 of the European Convention on Human Rights provides for a right to free expression. Free speech has been interpreted as being an essential part of a tolerant and open society, whose citizens have a right to be properly informed. In addition, Article 3 of the First Protocol to the Convention obliges the contracting parties to hold free elections, to ensure the free expression of the people in their choice of legislature. For a person to freely express their will, it has been argued, they need to be informed about the choices they are making.[1130] These arguments were put before the Full Court of the European Court of Justice in *Netherlands v Council.*[1131] The Advocate General supported a finding of a fundamental right to information but the court did not seem to reach any firm conclusion on the point.[1132]

In the absence of a clear right to documents in European law, there have also been moves towards incorporating such a right into a treaty. In 1984, 1986 and 1994 the European parliament adopted resolutions calling for greater openness in government. However, the most significant catalyst for change was the rejection of the Treaty of Maastricht by the citizens of Denmark and France. This was seen as a sign of the mistrust of a secretive Europe and "highlighted the fact that public enthusiasm for the grand European Project could no longer be assumed".[1133] The meetings of the European council in Birmingham

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[1129] Curtin and Meijers, above note 984 at 430-431; U Oberg, above note 954 at 3-8; *Case C-58/94, Netherlands v Council* [1996] ECR I-2169.
[1130] Curtin and Meijers, above note 984 at 399-400.
[1131] *Case C-58/94, Netherlands v Council* [1996] ECR I-2169.
[1132] U Oberg, above note 954 at 6; F Lafay, "L'accès aux documents du Conseil de l'Union: contribution à une problématique de la transparence en droit communautaire" (1997) 33 *RTD eur* 37 at 49; P Twomey, above note 953 at 841.
[1133] P Twomey, above note 953 at 831. See also Curtin and Meijers, above note 984 at 420; J Söderman, "The Role and Impact of the European Ombudsman in Access to Documentation and the Transparency of Decision-making", EIPA Seminar on Transparency and Openness, Maastricht (18-19 September 1997) at 2.

and Edinburgh reiterated the need for a right of access to documents. After considerable pressure (in particular from the Netherlands) the European Council and Commission adopted a joint Code of Conduct concerning Public Access to Council and Commission documents, ostensibly confirming their support of transparency as part of the process of bringing Europe closer to its citizens.[1134]

For this Code to be enforceable, it had to be implemented by the relevant institutions. Only the Community legislature can adopt general rules on a right of access to European documents. The institutions were therefore restricted to incorporating the Code into their Rules of Procedure, as an internal organisational measure adopted in the interests of good administration.[1135] The European Council implemented the Code by its Decision of 20 December 1993[1136] and the European Commission by its Decision of 8 February 1994.[1137] The European Parliament adopted a similar Decision on 10 July 1997.[1138] The substance of the decisions is the same.[1139] They set out a broad right of access to the documents of the institution, available on written request. The document can then be viewed for free or a copy obtained for a cost.

The Council and the Commission have been fairly timid in the implementation of their decisions, although the Commission says that in 1998 90% of requests for access were granted.[1140] On appeal to the CFI, both the Council[1141] and the Commission[1142] argued that their Decisions were not binding but were simply policy statements of how they intended to act. These arguments were rejected by the Court, which found that both Decisions conferred rights on third parties.[1143] Both bodies have made sweeping rejection of access applications. One example is the landmark case of *Carvel and the Guardian v Council.*[1144] There the applicant, who was the European Affairs Editor of *The Guardian* sought a variety of documents including the minutes of certain meetings of the Council of

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[1134] This Code was adopted on 6 December 1993 and can be found as an annex to the European Council's decision 93/731/EC, OJ 1993 L 340. U Oberg, above note 954 at 3.
[1135] U Oberg, above note 954 at 5.
[1136] Decision No 93/731, OJ 1993 L 340 at 43.
[1137] Decision No 94/90, OJ 1994 L 46 at 58.
[1138] Decision No 69/637/EC, OJ 1997 L263 at 27.
[1139] A "decision" of a European body is the equivalent of a regulation. Although it can be confusing for an Australian reader who is accustomed to a decision which emanates from a court, decision is nonetheless the correct English translation.
[1140] European Commission, above note 975 at para II.3.
[1141] *Case T 194/94, Carvel and Guardian Newspapers Ltd v Council* [1995] II-2767 at 2784.
[1142] *Case T-105/95 WWF UK v Commission* ECR II - 313 at 336.
[1143] Ibid. at 343; *Case T 194/94, Carvel and Guardian Newspapers Ltd v Council* [1995] II-2767 at 2788.
[1144] *Case T 194/94, Carvel and Guardian Newspapers Ltd v Council* [1995] II-2767.

Ministers for Justice, Social Affairs and Agriculture. The Social Affairs Council provided the applicant with copies of the documents sought. The Justice and Agriculture Councils denied access to most documents on the basis that the documents were developed for use in a Council decision. The release of the documents by the Social Affairs Council was dismissed as an administrative error.[1145] In trying to substantiate its claims before the CFI, the Council argued that because the members are encouraged to reach a consensus, members may have to back down from previously held positions. Accordingly, its processes would be jeopardised if they did not remain confidential.[1146] The CFI rejected the Council's submission and held that it had not balanced the public interest in disclosure against the interests of the Council in maintaining confidentiality.[1147]

The restrictive approach adopted by the European Council can also be illustrated by the decision in *Svenska Journalistförbundet v Council.*[1148] There a Swedish journalists group sought access to the same set of documents from both the Swedish government and the Council. The documents related to the setting up of the Europol. The applicant successfully obtained 18 out of 20 documents from Sweden, but could only get access to 4 of the same documents from Council. In its refusal, the Council did not specify which exemptions related to which documents.[1149] At the time it claimed that more detailed reasons could not be given for fear of disclosing the contents of the documents. Yet at a later court hearing, it provided a summary of both the documents and exemption claims.[1150] Although the two examples chosen here both relate to applications to the Council, the approach of the Commission has not been any more liberal.[1151] As the Parliament only adopted a right of access in July 1997, it is difficult to ascertain its attitude to releasing documents.

The final aspect of accessing European documents is the role of the Ombudsman. His office was set up as another way to achieve transparency following the rejection of the Treaty of Maastricht. He has considered a number of applications relating to refusals to grant access, and his approach has strongly favoured openness. He rejected the argument put by the Council that a "repeat application" included circumstances where one person

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[1145] P Twomey, above note 953 at 833-835.
[1146] *Case T 194/94, Carvel and Guardian Newspapers Ltd v Council* [1995] II-2767 at 2785-2786.
[1147] Ibid. at 2791.
[1148] *Case T-174/95, Svenska Journalistförbundet v Council* ECR II-2293.
[1149] Ibid. at 2327.
[1150] Ibid. at 2327.

had made several applications for different documents. This interpretation had been used by the Council to reject applications from journalists, who had used the right of access to documents on several occasions.[1152] In addition, the Ombudsman has undertaken an "own initiative" inquiry into the rules governing access in the Community. After considering the jurisprudence arising out of the *Netherlands v Council* case he concluded that as part of good administration all community bodies were obliged to have in place rules which allowed access to documents. The content of the rules was to be determined by the bodies themselves. In 1996 he investigated the rights of access to documents held by 14 community bodies. Most did not have any rules allowing for access in place and he requested that they draft a clear set of rules within 3 months. He hoped that the process of adopting the rules would encourage greater openness, provide a target for scrutiny and debate and allow the public to know their rights and to exercise them.[1153]

[1151] *Case T-105/95 WWF UK v Commission* ECR II - 313.
[1152] *Complaint 634/97/PD against the Council of Ministers* (European Ombudsman, Strasbourg, 21 December, unreported).
[1153] J Söderman, above note 1133 .

APPENDIX C THE FRENCH FOI LAW: EXTRACTS AND TRANSLATIONS

Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal

Titre Ier

De la liberté d'accès aux documents administratifs

Article 1er

Le droit de toute personne à l'information est précisé et garanti par le présent titre en ce qui concerne la liberté d'accès aux documents administratifs de caractère non nominatif. Sont considérés comme documents administratifs au sens du présent titre tous dossiers, rapports, études, comptes rendus, procès-verbaux, statistiques, directives, instructions, circulaires, notes et réponses ministérielles qui comportent une interprétation du droit positif ou une description des procédures administratives, avis, à l'exception des avis du Conseil d'Etat et des tribunaux administratifs, prévisions et décisions revêtant la forme d'écrits, d'enregistrements sonores ou visuels, de traitements automatisés d'informations non nominatives.

Article 2

Sous réserve des dispositions de l'article 6 les documents administratifs sont de plein droit communicables aux personnes qui en font la demande, qu'ils émanent des administrations de l'Etat, des collectivités territoriales, des établissements publics ou des organismes, fussent-ils de droit privé, chargés de la gestion d'un service public.

Article 3

Sous réserve des dispositions de la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés, concernant les informations nominatives figurant dans des fichiers, toute personne a le droit de connaître les informations contenues dans un document administratif dont les conclusions lui sont opposées. Sur sa demande, ses observations à l'égard desdites conclusions sont obligatoirement consignées en annexe au

document concerné. L'utilisation d'un document administratif au mépris des dispositions ci-dessus est interdite.

Article 4

L'accès aux documents administratifs s'exerce :

a) Par consultation gratuite sur place, sauf si la préservation du document ne le permet pas ou n'en permet pas la reproduction ;

b) Sous réserve que la reproduction ne nuise pas à la conservation du document, par délivrance de copies en un seul exemplaire, aux frais de la personne qui les sollicite, et sans que ces frais puissent excéder le coût réel des charges de fonctionnement créées par l'application du présent titre. Le service doit délivrer la copie sollicitée ou la notification de refus de communication prévue à l'article 7.

Article 5

Une commission dite "commission d'accès aux documents administratifs" est chargée de veiller au respect de la liberté d'accès aux documents administratifs dans les conditions prévues par le présent titre, notamment en émettant des avis lorsqu'elle est saisie par une personne qui rencontre des difficultés pour obtenir la communication d'un document administratif, en conseillant les autorités compétentes sur toute question relative à l'application du présent titre, et en proposant toutes modifications utiles des textes législatifs ou réglementaires relatifs à la communication de documents administratifs. La commission établit un rapport annuel qui est rendu public. Un décret en Conseil d'Etat détermine la composition et le fonctionnement de la commission prévue au présent article.

Article 6

Les administrations mentionnées à l'article 2 peuvent refuser de laisser consulter ou de communiquer un document administratif dont la consultation ou la communication porterait atteinte :

- au secret des délibérations du Gouvernement et des autorités responsables relevant du pouvoir exécutif ;
- au secret de la défense nationale, de la politique extérieure ;
- à la monnaie et au crédit public, à la sûreté de l'Etat et à la sécurité publique ;
- au déroulement des procédures engagées devant les juridictions ou d'opérations préliminaires à de telles procédures, sauf autorisation donnée par l'autorité compétente ;

- au secret de la vie privée, des dossiers personnels et médicaux ;
- au secret en matière commerciale et industrielle ;
- à la recherche, par les services compétents, des infractions fiscales et douanières ;
ou, de façon générale, aux secrets protégés par la loi.
Pour l'application des dispositions ci-dessus, les listes des documents administratifs qui ne peuvent être communiqués au public en raison de leur nature ou de leur objet sont fixées par arrêtés ministériels pris après avis de la commission d'accès aux documents administratifs.

Article 6 bis
Les personnes qui le demandent ont droit à la communication, par les administrations mentionnées à l'article 2, des documents de caractère nominatif les concernant, sans que des motifs tirés du secret de la vie privée, du secret médical ou du secret en matière commerciale et industrielle, portant exclusivement sur des faits qui leur sont personnels, puissent leur être opposés. Toutefois, les informations à caractère médical ne peuvent être communiquées à l'intéressé que par l'intermédiaire d'un médecin qu'il désigne à cet effet.

Article 7
Lorsqu'il est saisi d'un recours contentieux contre un refus de communication d'un document administratif, le juge administratif doit statuer dans le délai de six mois à compter de l'enregistrement de la requête.

Article 8
Sauf disposition prévoyant une décision implicite de rejet ou un accord tacite, toute décision individuelle prise au nom de l'Etat, d'une collectivité territoriale, d'un établissement public ou d'un organisme, fût-il de droit privé, chargé de la gestion d'un service public, n'est opposable à la personne qui en fait l'objet que si cette décision lui a été préalablement notifiée.

...

Article 10
Les documents administratifs sont communiqués sous réserve des droits de propriété littéraire et artistique. L'exercice du droit à la communication institué par le présent titre

exclut, pour ses bénéficiaires ou pour les tiers, la possibilité de reproduire, de diffuser ou d'utiliser à des fins commerciales les documents communiqués.

....

Law n° 78-753 of 17 July 1978 providing for various measures for the improvement of the relations between the administration and the public and diverse provisions of an administrative, social and fiscal nature.

First Part

The freedom to access to administrative documents

Article 1

The right of every person to information is outlined in and guaranteed by this part, in so far as it concerns the freedom to access administrative documents which are not nominative in character. The following are considered to be administrative documents for the purposes of this part: all dossiers, reports, studies, minutes, statements, statistics, directives, instructions, circulars, ministerial notes and replies which involve an interpretation of the law or a description of administrative procedures, opinions, except for the opinions of the Conseil d'État or the Tribunaux Administratifs, forecasts and decisions whether recorded in writing, visually, or in a sound recording and computerised data which is non-nominative.

Article 2

Subject to the provisions of article 6 administrative document are fully accessible to anyone who makes a request, provided they emanate from the administrations of the State, municipal governments, public establishments or organisations, including private organisations, which are responsible for the management of a public service.

Article 3

Subject to the provisions of the law n° 78-17 of 6 January 1978 relating to computerisation, files and freedoms concerning nominative information included on files, every person has the right to know about an adverse finding which is contained in an administrative

document. At his request, his own remarks on the adverse finding must be placed in an annex to the relevant document. The use of an administrative document without complying with the conditions of this article is forbidden.

Article 4

Access to administrative documents can be obtained:

a) By free consultation at the office of the agency, except where the preservation of the document does not permit it or does not permit a reproduction;

b) Provided that reproduction does not damage the document, by delivery of one copy.

The fees will be charged to the person who made the request, but must not exceed the real cost incurred by the agency. The agency must deliver either the requested copy or notice of a refusal of access as provided for in article 7.

Article 5

A commission called "commission for access to administrative documents" is responsible for overseeing the respect of the freedom of access to administrative documents according to the conditions set out in this part, notably by providing an opinion when an application is made to it by a person who has encountered difficulties in obtaining access to an administrative document, by advising the relevant agencies on any request relating to the application of this part and by proposing useful reforms of legislation or regulations relating to access to administrative documents. The commission shall provide an annual report which shall be made public. A decree of the Conseil d'État shall determine the composition and procedures of the commission.

Article 6

The agencies mentioned in article 2 can refuse to allow consultation of or access to an administrative document if it would threaten:

- the secrets relating to the deliberations of the government and those high ranking officials who exercise executive power;
- the secrets relating to national defence or external affairs;
- the national currency or national credit, state security or public security;
- the conduct of legal proceedings or any preliminary actions, except where authorised;

- the secrets relating to private life, personal and medical dossiers;
- commercial and industrial secrets;
- investigations by the responsible department of breaches of the taxation or customs law;
- secrets protected by legislation.

In applying the above provisions, the relevant minister is to determine, after consultation with CADA, a list of the administrative documents which can not be communicated to the public by reason of their nature or object.

Article 6 bis

Any person who requests it has the right to obtain access from the agencies mentioned in article 2 to documents of a nominative character which concern himself, and a claim cannot be made that the document contains secrets relating to private life, medical secrets or commercial or industrial secrets where those secrets relate entirely to his personal affairs. Nonetheless, information relating to medical matters can only be communicated to the person through a doctor nominated by the person for that purpose.

Article 7

An administrative judge must hand down his decision on an appeal relating to the refusal to provide access to an administrative document within 6 months of the filing of the appeal.

Article 8

Except where provision is made for an implied rejection or an agreed understanding, any decisions taken in the name of the Sate, a municipal government, a public establishment or an private organisation responsible for the management of a public service must be notified to the person who made the request before such a decision can take effect.

Article 10

Administrative documents are accessible subject to copyright. The exercise of a right of access under this part excludes, third parties from reproducing, distributing or using the documents for any commercial purposes.

APPENDIX D THE INFORMATION PRIVACY LAW: EXTRACTS AND TRANSLATIONS

Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés

Article 1er

L'informatique doit être au service de chaque citoyen. Son développement doit s'opérer dans le cadre de la coopération internationale. Elle ne doit porter atteinte ni à l'identité humaine, ni aux droits de l'homme, ni à la vie privée, ni aux libertés individuelles ou publiques.

...

Article 4

Sont réputées nominatives au sens de la présente loi les informations qui permettent, sous quelque forme que ce soit, directement ou non, l'identification des personnes physiques auxquelles elles s'appliquent, que le traitement soit effectué par une personne physique ou par une personne morale.

Article 5

Est dénommé traitement automatisé d'informations nominatives au sens de la présente loi tout ensemble d'opérations réalisées par des moyens automatiques, relatif à la collecte, l'enregistrement, l'élaboration, la modification, la conservation et la destruction d'informations nominatives ainsi que tout ensemble d'opérations de même nature se rapportant à l'exploitation de fichiers ou bases de données et notamment les interconnexions ou rapprochements, consultations ou communications d'informations nominatives.

...

Article 14

La Commission nationale de l'informatique et des libertés veille à ce que les traitements automatisés, publics ou privés, d'informations nominatives, soient effectués conformément aux dispositions de la présente loi .

Article 15

Hormis les cas où ils doivent être autorisés par la loi, les traitements automatisés d'informations nominatives opérés pour le compte de l'Etat, d'un établissement public ou d'une collectivité territoriale, ou d'une personne morale de droit privé gérant un service public, sont décidés par un acte réglementaire pris après avis motivé de la Commission nationale de l'informatique et des libertés .

Si l'avis de la commission est défavorable, il ne peut être passé outre que par un décret pris sur avis conforme du Conseil d'Etat ou, s'agissant d'une collectivité territoriale, en vertu d'une décision de son organe délibérant approuvée par décret pris sur avis conforme du Conseil d'Etat. Si, au terme d'un délai de deux mois renouvelable une seule fois sur décision du président, l'avis de la commission n'est pas notifié, il est réputé favorable.

Article 16

Les traitements automatisés d'informations nominatives effectués pour le compte de personnes autres que celles qui sont soumises aux dispositions de l'article 15 doivent, préalablement à leur mise en oeuvre, faire l'objet d'une déclaration, auprès de la Commission nationale de l'informatique et des libertés. Cette déclaration comporte l'engagement que le traitement satisfait aux exigences de la loi. Dès qu'il a reçu le récépissé délivré sans délai par la commission, le demandeur peut mettre en oeuvre le traitement. Il n'est exonéré d'aucune de ses responsabilités.

Law n° 78-17 of 6 January 1978 relating to computerisation, files and freedoms

Article 1

Information technology must be the servant of every citizen. Its development must operate within the framework of international co-operation. It must not threaten either human identity, human rights, private life or individual or public freedom.

...

Article 4

Nominative in the context of the present law means information which allows, in whatever form, whether directly or otherwise, the identification of a natural person who is the

subject of the information and this definition applies regardless of whether the data was processed by a natural or legal person.

Article 5

Data processing of nominative information in the context of this law means any action undertaken by automatic means, relating to the collection, saving, development, modification, storage or destruction of nominative information as well any action of the same nature which relates to the use of files or data bases and in particular the linking or compiling, the consultation or communication of nominative information.

...

Article 14

The National commission for computerisation and freedoms is responsible for ensuring that that data processing, whether public or private, of nominative information, is carried out in compliance with the provisions of this law.

Article 15

Except for those cases which must be authorised by the law, data process of nominative information carried out for the State, a public establishment or a municipal government or for a private body managing a public service shall be governed by a regulatory decision, made after having sought the opinion of the National commission for computerisation and freedoms.

If the opinion of the commission is unfavourable it can not be bypassed except by a decree which conforms with the opinion of the Conseil d'État or, in relation to a municipal body, by virtue of a decision of its deliberative body, approved by a decree which conforms to the opinion of the Conseil d'État. If after two months the commission does not provide an opinion, its opinion is presumed to be favourable. This time limit of two months can be renewed for a further two months, by the President of the commission, on one occasion only.

Article 16

Data processing of nominative information carried out for persons other than those listed in article 15 must, prior to its commencement, be the subject of a declaration to the National commission for computerisation and freedoms. This declaration includes the undertaking

that the processing satisfies the requirements of the law. Once it has received the acknowledgment from the commission, which shall be provided without delay, the requestor can begin the treatment. It is not however exonerated from any of its responsibilities.

APPENDIX E THE RIGHTS OF CITIZENS BILL: EXTRACTS AND TRANSLATIONS

Article 8 of the Rights of Citizens Bill amends the French FOI law. Following is article 8 of the Rights of Citizens Bill, at the time that it was sent to the Commission des lois (14 October 1999).

PROJET DE LOI

relatif aux droits des citoyens dans leur relations avec les administrations.

...

Article 8

Le titre Ier de la loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal est ainsi modifié :

1° Au premier alinéa de l'article 1er, les mots : «de caractère non nominatif» sont supprimés;

2° Le deuxième alinéa de l'article 1er est remplacé par deux alinéas ainsi rédigés :

«Sont considérés comme documents administratifs, au sens du présent titre, tous dossiers, rapports, études, comptes rendus, procès-verbaux, statistiques, directives, instructions, circulaires, notes et réponses ministérielles qui comportent une interprétation du droit positif ou une description des procédures administratives, avis, prévisions et décisions, qui émanent de l'Etat, des collectivités territoriales, des établissements publics ou des organismes de droit public ou privé chargés d'une mission de service public. Ces documents peuvent revêtir la forme d'écrits, d'enregistrements sonores ou visuels, de documents existant sur support informatique ou pouvant être obtenus sans un traitement automatisé spécial.prévisions

«Ne sont pas considérés comme documents administratifs, au sens du présent titre, les avis du Conseil d'Etat et des juridictions administratives, les documents de la Cour des comptes mentionnés à l'article L. 140-9 du code des juridictions financières et les documents des chambres régionales des comptes mentionnés à l'article L. 241-6 du même code et les documents d'instruction des réclamations adressées au médiateur de la République.»;

3° L'article 2 est ainsi rédigé :

«Art. 2. – Sous réserve des dispositions de l'article 6, les documents administratifs sont de plein droit communicables aux personnes qui en font la demande.

«Le droit à communication ne s'applique qu'à des documents achevés. Il ne concerne pas les documents préparatoires à une décision administrative tant qu'elle est en cours d'élaboration. Il ne s'exerce plus lorsque les documents font l'objet d'une diffusion publique. Il ne s'applique pas aux documents réalisés par une autorité administrative dans le cadre d'un contrat de prestation de service exécuté pour le compte d'une ou de plusieurs personnes déterminées.

«L'administration sollicitée n'est pas tenue de donner suite aux demandes abusives, en particulier par leur nombre, leur caractère répétitif ou systématique.»;

4° L'article 4 est ainsi rédigé :

«Art. 4. – L'accès aux documents administratifs s'exerce :

«a) Par consultation gratuite sur place, sauf si la préservation du document ne le permet pas,

«b) Sous réserve que la reproduction ne nuise pas à la conservation du document, par la délivrance d'une copie facilement intelligible sur un support identique à celui utilisé par l'administration ou sur papier, au choix du demandeur dans la limite des possibilités

techniques de l'administration et aux frais de ce dernier, sans que ces frais puissent excéder le coût de cette reproduction, dans des conditions prévues par décret.»;

5° Les deux premiers alinéas de l'article 5 sont remplacés par trois alinéas ainsi rédigés :

«Une commission dite "Commission d'accès aux documents administratifs" est chargée de veiller au respect de la liberté d'accès aux documents administratifs et aux archives publiques, dans les conditions prévues par le présent titre et par le titre II de la loi n° 79-18 du 3 janvier 1979 sur les archives. Elle émet des avis lorsqu'elle est saisie par une personne qui rencontre des difficultés pour obtenir la communication d'un document administratif ou pour consulter des documents d'archives publiques, à l'exception des documents mentionnés au 3° de l'article 3 de la loi n° 79-18 du 3 janvier 1979 précitée. La saisine de la commission pour avis est un préalable obligatoire à l'exercice d'un recours contentieux.

«Elle conseille les autorités compétentes sur toute question relative à l'application du présent titre et des dispositions susmentionnées de la loi n°79-18 du 3 janvier 1979 précitée. Elle peut proposer, à la demande de l'autorité compétente ou à son initiative, toutes modifications de ces textes et toutes mesures de nature à faciliter l'exercice du droit d'accès aux documents administratifs et aux archives publiques et à renforcer la transparence administrative.

«La commission établit un rapport annuel qui est rendu public.»;

6° Après l'article 5, il est inséré un article 5-1 ainsi rédigé :

«Art. 5-1. – La Commission d'accès aux documents administratifs est également compétente pour examiner, dans les conditions prévues aux articles 2 et 5, les questions relatives à l'accès aux documents administratifs mentionnés aux dispositions suivantes :

«– l'article L. 2121-26 du code général des collectivités territoriales,

«– l'article L. 28 du code électoral,

«– le b de l'article L. 104 du livre des procédures fiscales,

«– l'article 5 de la loi du 1er juillet 1901 relative au contrat d'association et l'article 2 du décret du 16 août 1901,

«– l'article 79 du code civil local d'Alsace-Moselle,

«– les articles L. 213-13 et L. 332-29 du code de l'urbanisme.»;

7° L'article 6 est ainsi rédigé :

«Art. 6. – I. – Ne sont pas communicables les documents administratifs dont la consultation ou la communication porterait atteinte :

«– au secret des délibérations du Gouvernement et des autorités responsables relevant du pouvoir exécutif,

«– au secret de la défense nationale,

«– à la conduite de la politique extérieure de la France,

«– à la sûreté de l'Etat, à la sécurité publique ou à la sécurité des personnes,

«– à la monnaie et au crédit public,

«– au déroulement des procédures engagées devant les juridictions ou d'opérations préliminaires à de telles procédures, sauf autorisation donnée par l'autorité compétente,

«– à la recherche, par les services compétents, des infractions fiscales et douanières;

«– ou, de façon générale, aux secrets protégés par la loi.

«II. – Ne sont communicables qu'à l'intéressé les documents administratifs :

«– dont la communication porterait atteinte au secret de la vie privée et des dossiers personnels, au secret médical et au secret en matière commerciale et industrielle,

«– portant une appréciation ou un jugement de valeur sur une personne physique, nommément désignée ou facilement identifiable,

«– faisant apparaître le comportement d'une personne, dès lors que la divulgation de ce comportement pourrait lui porter préjudice.

«Les informations à caractère médical ne peuvent être communiquées à l'intéressé que par l'intermédiaire d'un médecin qu'il désigne à cet effet.»;

8° L'article 6 bis est abrogé;

BILL

relating to the rights of citizens in their relations with the administration.

Article 8

The first part of law n° 78-753 of 17 July 1978 providing for various measures for the improvement of the relations between the administration and the public and diverse provisions of an administrative, social and fiscal nature is hereby amended:

1. In the first line of article 1, the words "of a nominative character" are repealed.

2. The second line of article 1 is replaced by the following two lines:

"The following are considered to be administrative documents for the purposes of this part: all dossiers, reports, studies, minutes, statements, statistics, directives, instructions, circulars, ministerial notes and replies which involve an interpretation of the law or a description of administrative procedures, opinions, estimates and decisions which emanate from the State, municipal governments, public establishments, or organisations, whether public or private which are responsible for a public service. These documents can take the following forms in writing, a visual or sound recording, documents saved on computer which can be obtained without using any special form of data processing."

The following are not considered to be administrative documents for the purposes of this part, opinions of the Conseil d'État and the administrative courts, the documents of the Cour des comptes included in article L.140-9 of the code of financial jurisdictions and the documents of the chambres régionales des comptes included in article L.241-6 of the same code and the complaint files forwarded to the mediateur."

3. Article 2 is amended as follows:

"Article 2 – Subject to the provisions of article 6, administrative documents are fully accessible by any person who requests access.

The right of access does not apply while documents are incomplete. It does not apply to documents which prepare an administrative decision which is in the process of being developed. It no longer applies once documents have been made publicly available. It does not apply to documents which have been created by an administrative authority in the context of a service contract carried out for the benefit of one or more persons.

The agency is not obliged to consider abusive requests, whether they are abusive by reason of their quantity, or because of their repetitive or systematic character."

4. Article 4 is amended as follows:

"Article 4 – Access to administrative documents can be obtained:
a) For free, by consultation at the offices of the agency, except if the preservation of the document does not allow it,
b) Provided that copying does not affect the document, by providing a readily understandable copy, either in the form used by the agency or on paper. The choice of form is for the applicant to make, within the limits of the technical capabilities of the agency. The cost is to be charged to the applicant, although the cost may not exceed the real cost of providing the copy and is subject to any conditions set out by decree.

5. The two last lines of article 5 are replaced by the following 3 lines:

A commission called "the Commission for Access to Administrative Documents" is responsible for overseeing the respect of the right of access to administrative documents and to public archives, according to the provisions of this part and part II of law n° 79-18 of 3 January 1979 on archives. It must provide an opinion when an application is made to it by a person who has encountered difficulties in obtaining access to an administrative document or in consulting a public archive, with the exception of documents mentioned in 3° of article 3 of law n° 79-18 of 3 January 1979. It can propose, either at the request of a relevant authority or at its own initiative, any amendments to these laws and any measures

which improve the right of access to administrative documents or public archives and reinforce openness on the part of the administration.

The commission shall prepare an annual report which shall be made public.

6. After article 5 shall be inserted article 5-1 which reads:

Article 5-1 The jurisdiction of the Commission for Access to Administrative Documents extends to examining, within the terms of articles 2 and 5 the questions relating to access to administrative documents provided for in the following clauses:
– article L. 2121-26 of the general code relating to municipal government,
– article L. 28 of the electoral code,
– sub-article b of article L. 104 of the book of fiscal procedures,
– article 5 of the law of 1 July 1901 relating to the contract of an association and article 2 of the decree of 16 August 1901,
– article 79 of the civil code of Alsace-Moselle,
– articles L. 213-13 et L. 332-29 of the town planning code.

7. Article 6 is amended as follows:

Article 6 – I Access to administrative documents is denied where release would threaten:
- the secrets relating to the deliberations of the government and those high ranking officials who exercise executive power,
- the secrets relating to national defence,
- external affairs,
- state security, public security, or the personal security of any person,
- the currency or national credit
- the conduct of legal proceedings or any preliminary actions, except where authorised;
- investigations by the responsible department of breaches of the taxation or customs law;
- secrets protected by legislation.

II Administrative documents are only accessible by the person interested in them:

- where access would threaten the secrets of private life, personal dossiers, medical secrets and commercial and industrial secrets,
- where they contain an assessment or value judgement relating to a natural person who is identified by name or who is otherwise easily identifiable,
- where they contain a description of a person's behaviour which if the behaviour were known could lead to that person being prejudiced.

Information of a medical character can only be released to the interested person using a medical practitioner (nominated by that person) as an intermediary.

8. Article 6bis is repealed.

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