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Erratum note

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Open Government in the United States and Canada: Public and Press Access to Information

by Evan B. Smith*

I. INTRODUCTION

With the proclamation of Canada’s Access to Information Act¹ in 1983 and the adoption of provincial freedom of information acts in at least four provinces,² Canada has joined the United States in recognizing a right of the press and public to examine records of government agencies. In addition, statutes in all fifty states³ and nine of the ten Canadian provinces,⁴ as well as a U.S. federal statute,⁵ recognize a right to attend meetings of government bodies.⁶ Courts in both nations have also recognized a right to attend trials.⁷ But statutes and court decisions in both nations include exceptions to the right of access to government information. These exceptions are based on interests of confidentiality for government officials and of citizen privacy. This article will compare the laws gov-

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The author wishes to thank Professor Melvyn Durchslag of the Case Western Reserve University School of Law for reading the article and offering helpful suggestions.

² The four provinces are Nova Scotia (which adopted the first act in 1977), New Brunswick (1978), Newfoundland (1981), and Quebec (1982). See infra notes 89-92.
⁴ A search of the statutes in effect in 1983 showed that all provinces but Prince Edward Island had requirements that meetings of local governments be open. See infra note 201.
erning press and public access to government bodies, institutions and records in the United States and Canada.

This interest of the press and the public in access to government information, commonly referred to as "freedom of information" or the "right to know," includes several specific interests: (1) access to government records and documents; (2) attendance at meetings of public bodies; (3) attendance at court proceedings; (4) access to public institutions such as prisons and an opportunity for the press to interview certain people, such as inmates; and (5) an opportunity to use cameras and recording devices during public proceedings, especially court proceedings.

The subject of access to nongovernment places, proceedings and documents is outside the scope of this paper.

The argument for openness of public records, proceedings and places is based on the need in a representative democracy to keep the electorate informed. A statement by James Madison is frequently cited for this proposition: "A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 8

One Canadian writer has suggested that this idea is stronger in the United States than in Canada because Americans view representative democracy as an inferior substitute for direct democracy, while Canadians and others with parliamentary systems on the British model are more likely to defer to the judgment of their representatives because their democratic institutions were added onto an aristocratic institution—the British monarchy. 9 In the United States the idea that a citizen has a right to know what his government is doing is reinforced by the Declaration of Independence statement that "power derives from the consent of the governed" and from clauses in the constitutions of most of the states that the powers of government rest ultimately in the people. 10 This idea of government accountability to citizens has not been the rule in Canada, where courts have deferred to the power of government bodies at all levels, as an Ontario court demonstrated in a 1928 case when Judge Meddleton stated: "A municipal council is not a servant of the people; it is supreme in all matters within its jurisdiction." 11 Additional differences come from the structure of the two governments, with the U.S. system of checks and balances suggesting a need for access to information. 12

10 E.g., Ariz. Const. art. II, § 2; Mich. Const. art. 1, § 1; Ohio Const. art. I, § 2; Or. Const. art. I, § 1; Wash. Const. art. I, § 1.
and the Canadian system of parliamentary supremacy suggesting nonaccess.\(^\text{13}\)

Representatives of the press have generally been the most vigorous proponents of an access right. The press has argued that it needs to have access to government to keep the citizenry informed and to keep a check on government institutions.\(^\text{14}\) In the United States, the press has been a major mover in the drive for access statutes,\(^\text{15}\) in seeking enforcement of those laws,\(^\text{16}\) in efforts to keep courtrooms open\(^\text{17}\) and in urging the admission of cameras to the courtroom.\(^\text{18}\)

In Canada, the press has been a prime mover in challenging courtroom closures\(^\text{19}\) and in working for freedom of information legislation.\(^\text{20}\) The Canadian press has done little, however, to enforce open meetings legislation.\(^\text{21}\) Prior to the adoption of the Charter and the Access Act, the press in Canada was generally unable to establish standing to challenge government secrecy because it was required to show a special interest above that of the general public.\(^\text{22}\) Section 24(1) of the Charter has been the basis for press standing to challenge closed courtrooms\(^\text{23}\) and may be useful to challenge closed meetings: “anyone whose rights and

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\(^{13}\) See infra discussion in Section III(A) of arguments that access legislation in Canada is counter to Canadian traditions.

\(^{14}\) See E. Emery, The Press and America 66 (3d ed. 1972). Countervailing considerations include national security, protection of the privacy of both government employees and private citizens, protection of trade secrets and private commercial information, a need for confidentiality in police investigations, encouragement of frank discussion among public officials, and prevention of undue disclosure of government plans on such subjects as land sales, labor negotiations and litigation. These considerations are manifested in exceptions to various freedom of information and open records statutes discussed in Section III, infra.


\(^{16}\) Sigma Delta Chi, supra note 6, at 25-42 (noting enforcement actions by the press in the form of either court actions or requests for opinions from attorneys general in 22 states).


\(^{18}\) Twenty-eight news organizations petitioned the Judicial Conference of the United States in 1983 to allow cameras in federal courtrooms. See Federal Courts Remain Closed to Still and Television Cameras, in Sigma Delta Chi, supra note 6, at 23.

\(^{19}\) See, e.g., Re Section 12 of the Juvenile Delinquents Act, 38 Ont. 2d 748 (1982).


\(^{21}\) A search of open meetings cases in Canada and conversations in the fall of 1983 with two teachers of media law in Canada (Willfred Kesterton, professor of journalism at Carleton University in Ottawa, and Robert Martin, professor of law at Western Ontario University in London, Ontario) revealed no recent cases in which news organizations sued for access to government meetings. One of the few reported actions by a news organization occurred more than 20 years ago when a Toronto radio station lost a challenge to a ban on recording devices at a school board meeting. Radio CHUM-1050 Ltd. v. Board of Education for Toronto, 44 D.L.R.2d 671 (C.A. 1964).


\(^{23}\) See generally Re Section 12, 38 Ont. 2d. 748 (1982).
freedoms, as guaranteed by this charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. 324

In both the United States and Canada, the legal vehicles for access are found in both statutory and constitutional law. 25 This article will review these vehicles and the cases which have refined and construed them. The constitutional questions will be considered first.

II. CONSTITUTIONAL RIGHTS OF ACCESS

In both the United States and Canada, constitutional arguments for a right of access may be based either on freedom of speech and the press, or on a right related to a particular institution of government, such as a right to public trial. In the free speech/press category, the question is whether such guarantees cover only protection against censorship, 26 or also include affirmative rights to gather news.

Freedom of speech and the press in the United States is based on the first amendment to the U.S. Constitution: “Congress shall make no law . . . abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances,” and on comparable clauses in state constitutions. 27

24 CANADIAN CHARTER OF RIGHTS AND FREEDOMS [hereinafter cited as CHARTER].

25 Sometimes reference is also made to a common law right of access. Both American and Canadian courts have recognized a common law right of access to court records. Nixon v. Warner Communications, 435 U.S. 589 (1978); Attorney General of Nova Scotia v. MacIntyre, 132 D.L.R.3d 385 (1982). See F. SIEBERT, THE RIGHTS AND PRIVILEGES OF THE PRESS 37 (1934) for the argument for a common law right to see police records. There seems to be no recognized common law right of access to other government proceedings. A Canadian commentator cites the 1908 English case of Alderman and Burgesses of Tenby Corp. v. Mason, [1908] 1 Ch. 457, as authority for the absence of a common law right of access to meetings. See I. MacF. ROGERS, THE LAW OF CANADIAN MUNICIPAL CORPORATIONS 235 (2nd ed. 1971). In Tenby, the court held that a town council whose meetings were regularly open to reporters from three of the town’s newspapers could bar a substitute reporter whom council members considered incompetent.


There was no guarantee of free speech and the press under the British North America Act (BNA Act). There was no guarantee of free speech and the press under the British North America Act (BNA Act).28 One Canadian commentator says that "[p]rior to the enactment of the Canadian Bill of Rights it could not be said with certainty that freedom of expression was recognized in Canada except as a possible 'class of subjects' primarily within the legislative competence of Parliament."29 Traditionally, free speech/press claims in Canada have been based on arguments that abridgement of the right was not among the powers allotted to the provinces under section ninety-two of the BNA Act.30 Canada’s most famous free press case, Re Alberta Legislation,31 forbade prior restraint as beyond the powers of the the provincial government under section ninety-two of the BNA Act. Left open was whether Parliament could restrain press freedom under its power to make laws for the "good government" of Canada. Still, the Canadian government reported at a 1948 United Nations Conference on the Universal Declaration of Human Rights: "Freedom of Information in Canada is inherent in the Canadian Constitution, but it is not specifically enacted."32 Nearly thirty years later, one writer said that "[n]otwithstanding such assurances, the citizen's access to government records remains subject to the whims of the government of the day."33

This "whim," however, was recently eliminated. The 1982 Charter of Rights and Freedoms34 guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media."35 Prior to the adoption of the Charter, the 1960 statutory Bill of Rights36 included guarantees of "freedom of speech"37 and "freedom of the press"38 against encroachment by the federal government. Some provinces had statutes with similar guarantees.39

Freedom of the press in both nations generally has been held to be a prohibition on censorship, what Blackstone called "previous restraint."40 It has also been argued that freedom of speech and press also includes a right of access to government information. This is based on the proposition that if the purpose of the freedoms of speech and press is to have an informed democracy, the purpose cannot be fulfilled unless the press, the primary medium of information about government, has access to infor-

28 British North American Act, 1867, 30 & 31 Vict., ch. 3 [hereinafter cited as BNA Act].
30 Section 91 of the BNA Act lists powers of Parliament; Section 92 lists powers of the provincial legislatures, with residual powers belonging to Parliament under section 91.
32 Rankin, supra note 22, at 1.
33 Id.
34 CHARTER, supra note 24.
35 Id. § 2(b).
37 Id. § 1(d).
38 Id. § 1(f).
40 4 W. BLACKSTONE, COMMENTARIES 151 (1759).
In the United States, the additional argument has been advanced that since freedom of speech and freedom of the press are listed as two different rights in the first amendment of the U.S. Constitution, and since freedom of the press certainly includes "speech," the press must have some additional rights beyond speech, such as an access right, or the press clause would be redundant. Most writers on both sides of the border, however, reject this textual argument, treating freedom of speech and the press as having the same boundaries. This "separate freedom of the press" argument is even harder to make under section 2(b) of the Charter of Rights and Freedoms, which protects "freedom of thought, belief, opinion and expression, including the press and other media of communication" (emphasis added). Including "press" as part of freedom of expression indicates that freedom of the press may not extend beyond simple expressive rights. Nonetheless, the mention in 2(b) of freedom of "opinion" has led one Canadian writer to suggest that the role of the press in opinion formation requires compulsory access to government information. The specific mention in 2(b) of "other media" has also been cited by at least one Canadian commentator as a strong argument for a right of the electronic media to use microphones, cameras and other recording devices in courtrooms.

A right of access to courts might also be based on a constitutional guarantee of a public trial. The question regarding this right is whether it is only held by a criminal defendant or other party to the court action, and therefore waivable by the party or parties, or whether the right is a general public right. Under the sixth amendment to the U.S. Constitution, a public trial is among the rights which "[i]n all criminal trials . . . an accused shall enjoy." Under section eleven of the Canadian Charter a public hearing is a right of "any person charged with an offense." Despite the language indicating that the right is for the criminal defendant, the argument has been made that the public also has an interest in seeing that judicial processes are carried out in the open.

The press in both nations has been successful in claiming a constitutional right of access to the courtroom. The United States Supreme Court, in Richmond Newspapers v. Virginia, based its decision that the press and public have a right to attend a criminal trial on the free speech

45 Beckton, supra note 29, at 116.
46 See Gannett, 443 U.S. at 438-39 (Blackmun, J., dissenting).
and press guarantees of the first amendment to the U.S. Constitution. A year earlier, however, in *Gannett v. DePasquale*, the Court had rejected by a five to four vote an argument that the press and public had a right to attend a criminal proceeding based on the sixth amendment guarantee that the accused shall enjoy the right to a speedy and *public* trial. Justice Potter Stewart's opinion for the Court said that the public trial right is personal to the accused.

Had the Court based the right of access on the public-trial guarantee of the sixth amendment, the right would be limited to attendance at court proceedings. Since the sixth amendment deals with criminal rights, the public trial right of access might have been limited to criminal proceedings or, perhaps, to criminal trials. Indeed, it was a pretrial hearing which the Court allowed to be closed in *Gannett*.

Since the Court in *Richmond Newspapers* based the right to attend judicial proceedings on the free speech and press rights of the first amendment, many observers have suggested that the right could be extended to other contexts. The Chief Justice himself observed in a footnote to his majority opinion that, although the *Richmond Newspapers* ruling dealt with a criminal trial, "both civil and criminal trials have been presumptively open." Furthermore, his statement that the freedoms granted by the first amendment had a "core purpose of assuring freedom of communication on matters relating to the functioning of government" would appear to justify access to other government institutions in addition to the courts. Justice John Paul Stevens, concurring in the decision, expressed a belief in a broader meaning of the decision: "[T]he Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." New York Times attorney James Goodale said that the decision should be applied to help reporters see "prisons, small-town meetings, the police blotter." Columnist Anthony Lewis wrote that the decision recognized that a purpose of the first amendment is to hold government accountable and that a constitutional right of access should apply whenever that interest outweighs other interests.

While *Richmond Newspapers* has been extended to forbid a blanket

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49 Included in the torrent of protest that followed *Gannett* were arguments that pretrial hearings in criminal cases, such as the one that was closed in *Gannett*, often are the only chance for the press and public to observe the conduct of a case because such a high percentage of cases end before trial. *See* Goodale, *Open Justice: The Threat of Gannett*, 1 COM. & L. 12 (1979).
50 448 U.S. 555, 580 n.17 (1980).
51 *Id.* at 575.
52 *Id.* at 583.
rule closing courtrooms during the testimony of juvenile victims of sex crimes\(^{55}\) and to require press access to jury selection proceedings,\(^{56}\) it has not been extended beyond the courtroom context. The U.S. Supreme Court had, in three cases during the decade before *Richmond Newspapers*, grappled with claims of a constitutional right of access to noncourt institutions such as prisons. The Court ruled that the first amendment did not include a right to interview designated prisoners in state or federal penitentiaries\(^{57}\) or a right to inspect prisons,\(^{58}\) beyond any rights given to the public. But, in the 1974 prison interview cases,\(^{59}\) four justices supported a constitutional right of access, including Justice Lewis Powell, who based his opinions on “the societal function of the First Amendment.”\(^{60}\)

In the 1978 prison inspection case, Justice Stewart, who concurred in the denial of a right of access beyond public tours, argued that the Court should nonetheless recognize the right of the television station which brought the suit to use its normal news gathering tools—cameras, microphones and other recording devices.\(^{61}\) One observer of the prisoner interview cases noted that the press was still left with some access through visiting hours or tours and speculated that the Court would not allow a total foreclosure of government activity from the press.\(^{62}\)

As the Court struggled with these access cases during the 1970s, two justices explained in speeches their views on whether an access right is included in freedom of the press. Justice William Brennan Jr. distinguished between the “speech” aspects of press freedom, which he said are absolutely protected, and what he called “functional” or news gathering aspects of press freedom, which he said should be weighed against other interests.\(^{63}\) Justice Stewart, who has argued for some recognition of the needs of the institutional press,\(^{64}\) has stated that on questions of government information, the Constitution is neutral: “It is neither a freedom of Information Act nor an Official Secrets Act.”\(^{65}\) A barrier to an extension of the right of access from the courtroom to other contexts, however, is that Chief Justice Burger’s opinion for the Court in *Richmond Newspa-

\(^{55}\) *Globe Newspapers*, 557 U.S. 596 (1982) (courts, however, could close proceedings based on findings in a particular case).


\(^{59}\) *Pell*, 417 U.S. 817 (1974) and *Saxbe*, 417 U.S. 843 (1974), were decided together and announced the same day.

\(^{60}\) *Saxbe*, 417 U.S. at 862 (Powell, J. dissenting).


\(^{63}\) Brennan, *supra* note 41, at 175-177.

\(^{64}\) *See Stewart, supra* note 42, at 631, 635; *see also Houchins*, 438 U.S. at 16-19 (Stewart, J., concurring).

\(^{65}\) Stewart, *supra* note 42, at 636.
pers placed great emphasis on the traditional openness of trials, a factor not likely to be available for an argument for access to prisons, schools or other government institutions.

Canadian courts have also recognized a constitutional right to attend trials. Soon after the Charter was proclaimed in the spring of 1982, the Ontario High Court in Re Section 12 of the Juvenile Delinquents Act decided that a blanket rule closing juvenile proceedings violated the free press rights of the complaining newspaper. A lower court had found the right of access based on the "public hearing" guarantee of section 11(d) of the Charter, but the High Court based its decision on the section 2(b). The court said that, with the advent of the Charter, Parliament no longer had the right to remove the rule of openness in a class of criminal cases, as it had done in section 12(1) of the Juvenile Delinquents Act. The Ontario court cited Richmond Newspapers for the proposition that courts are presumptively open and, like the U.S. Supreme Court, found historical justification for the proposition that access to courts is "the unwritten law of the land." Like the U.S. decision in Globe Newspapers that the Massachusetts statute violated the first amendment by requiring judges to close courtrooms during all testimony of juvenile victims of sex crimes, the Ontario court said that the provision of the Juvenile Delinquents Act requiring that courts be closed during juvenile proceedings violated section 2(b) of the Charter. However, an observer of the case suggested that the Young Offenders Act would be acceptable under the Charter because it lifts the broad legislative restriction on public proceedings and confers a discretion on the court in each case.

Like the American decisions, the decision in Re Constitutional Validity of Section 12 of the Juvenile Delinquents Act was based on a constitutional provision that includes freedom of the press. Again the free press basis for the decision would appear to leave the issue open to expansion to other contexts, such as council meetings or public records. An access right based on the "public hearing" guarantee of section 11(d), as declared by the lower court, would have been limited to the courtroom context. By choosing to stress the free press argument before the court, the plaintiff newspaper got a decision with implications for a broader right of access under the Charter.

66 Richmond Newspapers, 448 U.S. at 560-75.
67 38 Ont. 2d 748 (1982).
68 Id. at 752-53.
71 38 Ont. 2d at 752.
72 Id. at 753.
74 Beekton, supra note 29, at 115.
75 Id. at 114-15.
Through these decisions, Canadian and American courts have reached similar conclusions: the respective guarantees of freedom of the press in the two nations include a right to attend court proceedings. This right prohibits blanket rules closing off whole classes of court proceedings and allows closure only when based on findings in a particular case. In neither nation has there been extension of the access right beyond the courtroom context, although a right of access as part of a free expression, speech or press right seems hard to limit to the courtroom. In both nations, however, the justification for a right to attend court proceedings is at least partially based on the tradition of open trials. This suggests that courts may not readily accept an access argument involving institutions without such a tradition of openness.

Another factor which may make expansion of the right less likely is that, unlike the access-to-courts cases, in which an appellate court makes a ruling within its own sphere of government, a court ruling for a constitutional right of access in another context would force an access rule on a legislative or executive authority. This is particularly true in Canada, which has a tradition of parliamentary supremacy.

In the United States, the press or anyone else seeking access to the courtroom has an additional tool in the form of state constitutional provisions declaring that courts shall be open. These provisions, which are distinct from a criminal defendant's public trial rights, have been interpreted broadly in several states to allow access to all kinds of court proceedings. In addition, a provision in at least one state constitution declares the criminal public-trial right without making it personal to the accused.

Another state constitutional access tool exists in at least five state constitutions which guarantee that at least some sessions of the state legislature be open. But the prime tools for access to meetings and documents outside the courtroom context are statutes, the subjects of the next section.

### III. Statutory Rights of Access

While the recognition, or lack of recognition, of constitutional rights of access in the two nations is similar, differences in the statutory grant of this right are greater. Statutory provisions are in two main forms: those guaranteeing access to documents and other records, and those guaran-

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76 Richmond Newspapers, 448 U.S. at 560-75; Re Section 12, 38 Ont. 2d at 752.
teering access to public meetings. Canada has trailed the United States in adopting legislation regarding access to both public records and public meetings. Where laws regarding public meetings exist in Canada, they lack the comprehensive nature of their American counterparts.

In addition, some American states have statutes guaranteeing to the press the right to interview selected state prison inmates in confidential settings, and at least one has a statute guaranteeing that courts be open. Forty-three states have statutes or court rules allowing electronic news gathering equipment in courtrooms on either a permanent or experimental basis. This article, however, will examine only the two principal kinds of access laws.

A. Access to Government Records

When the United States adopted the Freedom of Information Act in 1966, it became the third democratic nation to have such legislation. The act gave its name to the freedom of information movement. That movement, which began with concern over the growth of government during the 1930s and 1940s, has led to the adoption of freedom of information or public records laws in all 50 states. In recent years, Canada has joined the movement, with the adoption of the federal Access to Information Act and provincial acts in Nova Scotia, New Brunswick, Newfoundland and Quebec. Ontario and Manitoba have proposed similar legislation.

It should not be surprising that such legislation in Canada came

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81 H. Nelson & D. Teeter, supra note 15, at 397 n.13 (citing 7 Press Censorship Newsletter 61 (1975)).
87 In 1983, Mississippi became the 50th state to adopt Freedom of Information legislation. See Sigma Delta Chi, supra note 6, at 41.
93 McCamus, supra note 20, at 54.
twenty years later than it did in the United States. John D. McCamus has noted the factors that have worked against adoption of access legislation in Canada:

[I]n sharp contrast to the divisions inherent in the American separation of powers model, the Canadian system of government places effective control over both the executive and legislative branches of government in the hands of the Prime Minister and Cabinet. If the enactment of freedom of information legislation in the United States is to be explained in part by the existence of tension between executive and legislative branches of government, such tension normally is absent in the Canadian context. Moreover, at the federal level, and in some of the provinces, at least one or another of the major political parties has dominated electoral politics for much of our recent history. . . . Thus, whatever motivation there might otherwise be for a party in power to enact public access laws in the expectation that they might be of considerable use once the party again finds itself in opposition, also is typically absent.94

Particularly troublesome to many in Canada is the provision in access legislation for appeal to courts in disputed cases. McCamus notes that when provincial access legislation was debated in New Brunswick in 1977, the provincial government called review by the courts "at odds with the Parliamentary system,"95 and that a federal green paper that same year declared disclosure requirements inconsistent with the notion of accountability of government ministers to the legislature.96 McCamus counters these arguments by saying that, in a system which emphasizes party discipline, access legislation is needed to restore accountability. Both the federal act and the provincial act in New Brunswick were finally written to include judicial review, but subsequent legislation in Quebec has interposed, before the judicial hearing, a review by a Commission on Access to Information. Similar proposed legislation in Ontario includes review by a Fair Practices Tribunal prior to review by the court.97 McCamus credits American influence and pressure from opposition parties, business, labor groups, the Canadian Bar Association, the Canadian Civil Liberties Association, associations of academics, public interest groups and the press in the adoption in 1982 of a statute based on the American model.98

What finally emerged as Canada's federal Access Act is similar to the U.S. Freedom of Information Act. Both declare a broad right of public access to records of many kinds,99 both include lists of exemp-

94 Id. at 51.
95 Id. at 54 (citing NEW BRUNSWICK LEGISLATIVE ASSEMBLY, FREEDOM OF INFORMATION: OUTLINE OF POLICY PERTAINING TO A LEGISLATED RIGHT OF ACCESS BY THE PUBLIC TO GOVERNMENT DOCUMENTS 32 (June, 1977)).
96 McCamus, supra note 20, at 52-53.
97 Id. at 54.
98 Id. at 52.

https://scholarlycommons.law.case.edu/cuslj/vol9/iss/6 12
ACCESS TO INFORMATION

The U.S. Freedom of Information Act (FOIA) applies to federal executive and administrative agencies, including all parts of the executive branch of government and any independent regulatory agencies. However, it does not apply to Congress. One reason for this is its history as part of the Administrative Procedures Act. Another is that it was inspired by concern over executive secrecy. In addition, there are constitutional concerns that it might interfere with the right of members of Congress not to be held accountable outside Congress for what they say in "speech and debate," and that it would present separation of powers difficulties if the Attorney General were required to defend Congress or any of its members in a disclosure action.

The act includes nine enumerated exceptions:

1. properly classified national defense and foreign policy matters;
2. personnel rules and practices internal to any agency;
3. material properly exempted by statutes other than the Privacy Act;
4. privileged or confidential trade secrets and commercial or financial information;
5. memoranda and letters which would not be available to an outside party in litigation;
6. personnel, medical, and other similar files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy";
7. law enforcement investigatory records for protection of pending cases, personal privacy, confidential sources, investigatory techniques and safety of personnel;
8. reports of agencies regulating and supervising financial institutions; and
9. geological and geophysical information.

A 1974 amendment to the Act added sanctions: assessment of court costs.

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105 5 U.S.C. § 551-59. The Freedom of Information Act is § 552, the Privacy Act is § 552(a) and the Government in the Sunshine Act is § 552(b).
106 Relyea, supra note 85, at 20-21.
108 Relyea & Riley, supra note 86, at 21-22.
fees against agencies losing challenges to nondisclosure\textsuperscript{111} and personal sanctions against bureaucrats for noncompliance,\textsuperscript{112} though "[e]xperts say they know of no federal official who has been punished."\textsuperscript{113}

This lack of punishment for noncomplying bureaucrats is one criticism of the administration of the Act made by the press, scholars, and others.\textsuperscript{114} Other complaints include long delays in disclosure,\textsuperscript{115} excessive fees,\textsuperscript{116} refusal to waive fees "in the public interest" as the act requires,\textsuperscript{117} unexplained denials and deletions,\textsuperscript{118} shuttling documents among various offices and agencies,\textsuperscript{119} giving limited information in exchange for an agreement not to appeal,\textsuperscript{120} and denying requests because of minor errors in the wording of the requests.\textsuperscript{121} In addition, freedom of information advocates claim that government agencies deliberately fail to fill positions established for compliance.\textsuperscript{122} National Broadcasting Company reporter Carl Stern says that at one time the Drug Enforcement Administration had filled only twenty-one of forty authorized FOIA positions and that the administrator admitted that if the positions were filled, "[w]e would have to release too much information."\textsuperscript{123}

Complaints that the act is too complicated for new or occasional users have inspired many "how to" manuals for journalists.\textsuperscript{124} Government officials, however, complain of the difficulty of compliance, and the Reagan administration has made attempts to expand the defense and foreign policy exemption.\textsuperscript{125} Indeed, the ease of access to information under the act largely depends on the attitude of the current government. Weinberg cites memoranda from two Attorneys General to illustrate this point. Griffin Bell, Attorney General during the early part of the Carter administration, wrote in 1977:

\begin{quote}
The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents fall within the exemptions in the act.\textsuperscript{126}
\end{quote}

\begin{footnotes}
\item 113 Weinberg, \textit{Trashing the FOIA}, 23 COLUM. JOURNALISM REV. 21, 24 (1985).
\item 114 Id. at 22-28.
\item 115 Id. at 23-24.
\item 116 Id. at 21, 23.
\item 117 Id. at 21, 23, 25.
\item 118 Id. at 25.
\item 119 Id.
\item 120 Id. at 26-27.
\item 121 Id. at 28.
\item 122 Id. at 24.
\item 123 Id.
\item 124 \textit{E.g.}, \textit{How to Use the FOIA}, in SIGMA DELTA CHI, supra note 6 at 52.
\item 125 See, Relyea supra note 85, at 27-29; Weinberg, supra note 113, at 25.
\end{footnotes}
President Reagan's Attorney General, William French Smith, wrote a superceding memo in 1981 that said the Justice Department would "defend all suits challenging an agency's decision to deny a request submitted under the FOIA unless it is determined that the agency's denial lacks a substantial legal basis."\(^\text{127}\)

Canada's new act attempts to deal with complaints of both government officials and access seekers, particularly through the provision establishing an independent Information Commissioner empowered to review and investigate decisions on access requests (including a power to examine requested records) and to recommend disclosure.\(^\text{128}\)

In other respects, the Canadian Act is a weaker access tool than its American counterpart, particularly because it provides for more exceptions than the U.S. act. The Canadian act, which covers federal executive and administrative agencies,\(^\text{129}\) includes exceptions analogous to most of those in the U.S. act: international relations and defense,\(^\text{130}\) memoranda giving advice or recommendations,\(^\text{131}\) material exempted by other statutes,\(^\text{132}\) trade and commercial information,\(^\text{133}\) material which would compromise a solicitor-client privilege,\(^\text{134}\) personal information,\(^\text{135}\) and law enforcement information.\(^\text{136}\) Some of these exceptions are broader than those in the U.S. Act. The personal information exemption, for example, exempts all information covered by Canada's Privacy Act,\(^\text{137}\) the law enforcement exception grants the government broad power to expand coverage,\(^\text{138}\) and parties affected by commercial or personal information sought under the act have a right to prevent disclosure. The act also exempts material related to intergovernmental relations,\(^\text{139}\) an exemption that means that material relating to U.S.-Canada relations that might be available under the U.S. Freedom of Information Act will not be available under the Canadian Access to Information Act. The international relations/defense exemption is, however, more restricted than its U.S. counterpart because exempted material must meet criteria independent of its classification status.\(^\text{140}\)

The Access Act also includes exceptions that are peculiarly Canadian, such as an exemption for material relating to federal-provincial re-

\(^{128}\) Access Act § 30-37.
\(^{129}\) Id. § 5.
\(^{130}\) Id. § 15.
\(^{131}\) Id. § 21.
\(^{132}\) Id. § 24.
\(^{133}\) Id. § 20.
\(^{134}\) Id. § 23.
\(^{135}\) Id. § 19.
\(^{136}\) Id. § 16.
\(^{137}\) Id. § 19.
\(^{138}\) Id. § 16.
\(^{139}\) Id. § 13.
lations, a sensitive subject given recent federal-provincial differences such as the separatist movement in Quebec. This exception seems to permit the exemption of vast amounts of information from disclosure requirements.

In addition to the exemptions, some areas of government are completely left out of the access scheme, meaning that large amounts of material are not even subject to the severance of exempted from non-exempted material or to review by the Information Commissioner or the courts. The most significant of these areas is cabinet records, including "memoranda the purpose of which is to present proposals or recommendations to the cabinet."

Nonetheless, for the material not exempted the Canadian act has a potential for providing more consistent and reliable access. The feature with the most promise is the office of the Information Commissioner, whose function is to monitor compliance, independent of any agency with an interest in nondisclosure. In addition, Canada seems to be simplifying the process of requesting information by making available copies of an Access to Information Request Form, which outlines steps involved in making a request, including an invitation to ask departmental officials for assistance.

The Canadian scheme includes a provision for an appeal to the Federal Court of Canada, which has power to order compliance, sometimes in summary proceedings. Either the requesting party or the Information Commissioner may initiate an action for disclosure of records. Third parties with an interest in the material requested have a right to notice and participation, or may initiate an action to stop disclosure. The court has a right to examine the records in question. The burden is on the government institution to prove a justification for nondisclosure. The court is restricted from acting on subjects excluded from the act such as cabinet records and is limited to examining only whether the agency had "reasonable grounds" for denial in five important areas: federal-provincial relations, international relations and

141 Access Act § 14.
142 See McCamus, supra note 20, at 56.
143 Access Act §§ 68-69.
144 Id. § 69.
145 See id. §§ 54-66.
146 See Access to Information Request Form, Gov't of Canada Form No. TBC 350-57 (83/2) (1983).
147 Access Act §§ 41-53.
148 Id. §§ 49-51.
149 Id. § 45.
150 Id. §§ 41-42.
151 Id. §§ 43-44.
152 Id. § 46.
153 Id. § 42.
154 Id. § 69.
defense, law enforcement, penal institutions and material affecting the financial interests of Canada. The act encourages compliance of government officials by providing for liability for obstruction, but not for good-faith disclosure.

At the state and provincial level, Canadian action is still far behind the United States. In the United States, all 50 states have some form of open records statute, generally applying throughout state and local government to "any public writing," all records "required by law to be kept," or all "public records and other matters in the office of any officer." The state statutes vary greatly in the number and kind of exceptions.

In Canada, only four of the ten provinces have access statutes about the fraction of U.S. states that had such statutes almost thirty years ago. Among the provinces without such legislation is the populous province of Ontario, where concern over ministerial responsibility has held up proposed legislation. Nova Scotia passed Canada's first access legislation in 1977. This act was highly criticized for being limited in scope and not including enforcement. It would have been strengthened by a bill that was proposed in 1981 but not yet enacted. New Brunswick passed a comprehensive act in 1978, as did Newfoundland in 1981 and Quebec in 1982.

B. Access to Meetings of Government Bodies

While recent legislation has moved Canada closer to the United States regarding access to records, open meetings legislation is still an area of great difference. Comprehensive open meetings or "sunshine" laws are common in the United States but nonexistent in Canada.

155 Id. § 50.
156 Id. § 67.
157 Id. § 74.
158 See supra notes 3-7 and accompanying text; see, e.g., CAL. GOV'T CODE §§ 6250-6255 (West 1985); COLO. REV. STAT. §§ 24-72-201 to 202 (1973); FLA. STAT. ANN. §§ 119.01-12 (1982).
159 ALA. CODE § 36-12-40 to 41 (1975).
160 OHIO REV. CODE ANN. §§ 149.43, 149.43.1 (Baldwin 1982).
161 ARIZ. REV. STAT. ANN. §§ 39-121.
162 See SIGMA DELTA CHI, supra note 6.
163 See supra notes 89-92.
164 See Dent, How to Analyze your state's laws, in SIGMA DELTA CHI, supra note 6, at 1.
165 See Babcock, Freedom of Information in Ontario: To Be or Not To Be? in CANADA'S NEW ACCESS LAWS, supra note 89, at 119, 124-41.
167 See McCamus, supra note 20, at 53-54.
although openness requirements have been established for various individual Canadian entities.

Access to meetings of federal bodies in the United States is provided by the Government in the Sunshine Act, 172 which applies to about fifty federal boards and commissions, 173 defined as "collegial bod[ies] composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency." 174 The Act requires open deliberations anytime a number of members of the body sufficient to make a quorum is present "where such deliberations determine or result in the joint conduct or disposition of official agency business." 175 The Act allows a body to close any part of a meeting relating to 10 subject matter exceptions covering subjects similar to those exempted by the FOIA: 176

1. classified national defense or foreign policy matters;
2. internal agency personnel matters;
3. matters expressly required by law to be held confidential;
4. confidential commercial or financial information or trade secrets;
5. accusations of criminal activity or censure against a person;
6. clearly unwarranted invasions of personal privacy;
7. law enforcement and criminal investigatory information;
8. bank examiners records;
9. matters which if disclosed would generate financial speculation or which would frustrate agency action not yet announced; and
10. matters involving the agency's issuance of a subpoena or the agency's participation in litigation or arbitration.

The Sunshine Act is more limited than most state open meetings laws, the federal FOIA 177 and the Privacy Act, 178 because it covers relatively few agencies and has few sanctions for lack of compliance. Enforcement of the Sunshine Act is prospective only. The primary remedy available to the press or other observers of federal agencies is an injunction to force a pending meeting to open, to order an agency not to close future meetings or to require that a transcript of closed meetings be furnished. 179 Courts have no power to declare actions void or to penalize individual members of boards or commissions. 180 However, just as under

175 Id. § 552b(a)(2) (1982).
176 Id. 552b(c) (compare with id. § 552(b)(1)-(9)).
177 Id. § 552 (1982). See generally supra Section III(A).
179 Id. § 552a(1).
180 Id. § 552b(b)(2).
the Freedom of Information Act, courts may assess costs against an offending agency.\textsuperscript{181}

In Canada, no general federal legislation on this subject exists, although acts which establish various boards and commissions include requirements that meetings be open, but give the boards and commissions broad discretion in deciding when to meet in private.\textsuperscript{182}

The same kinds of distinctions between American and Canadian open meetings laws can be found in comparing state and provincial statutes. All fifty states and the District of Columbia have open meetings laws.\textsuperscript{183} These laws tend to be comprehensive, applying to all but a few state and local agencies. The state legislature is a notable exception in about half of the states.\textsuperscript{184} Freedom of Information advocates often point to this omission as a weakness in state laws,\textsuperscript{185} but separation of powers issues make court enforcement difficult, and the size and prominence of state legislature make informal pressures for openness from opposition parties and the press more likely for this body than for many others. Still, this exclusion seems to indicate that the legislatures hold other bodies to higher standards than they do themselves.\textsuperscript{186} In addition, state laws generally do not apply to judicial and quasi-judicial bodies\textsuperscript{187} and to meetings among executive officers.\textsuperscript{188} The statutes all apply to final decisions, but an increasing number of states—forty-two by a recent count\textsuperscript{189}—require that deliberations also be open.\textsuperscript{190} State statutes usually include a few specific subject matter exceptions. Common exceptions include personnel actions, buying and selling land, labor negotiations, discussion of pending litigation and discussion of security arrangements.\textsuperscript{191}

\textsuperscript{181} Id. § 552b(i).
\textsuperscript{183} See P. KEEFE, supra note 3, at 7; see, e.g., ARK. STAT. ANN. § 12-2805 (1979); CAL. GOV'T CODE §§ 11120-11131 (West 1985); OHIO REV. CODE ANN. § 121.22 (Baldwin 1982); OKLA. STAT. ANN. tit. 25, §§ 8-301 to 8-314 (West 1984); R.I. GEN. LAWS § 42-46-3 (1984); VA. CODE § 2.1-343 (1979); WASH. REV. CODE ANN. ch. 42.30 (1972).
\textsuperscript{184} See J. ADAMS, supra note 6, at 14; see, e.g., PA. CONS. STAT. ANN. tit. 65, § 261 (1984); VA. CODE tit. 2.1, § 341(a) (1984); WASH. REV. CODE ANN. § 42.30.020(1)(a) (1972).
\textsuperscript{185} See generally J. ADAMS, supra note 6, at 3-9, 14-15 (applicability to the state legislature is one of 11 factors which contribute to a "score" by which the author ranked open meetings laws).
\textsuperscript{186} Id., at 8 (suggests that including state legislatures in the scope of the statutes would "codify what is probably customary behavior anyway").
\textsuperscript{188} See, e.g., OHIO REV. CODE ANN. § 121.22(B)(1) (Baldwin 1984).
\textsuperscript{189} Fact File, supra note 6.
\textsuperscript{190} e.g., OHIO REV. CODE ANN. § 121.22(A) (Baldwin 1984).
\textsuperscript{191} E.g., OHIO REV. CODE ANN. § 121.22(G); R.I. GEN. LAWS § 42-46-5 (1984). But note that some states list many very specific exceptions; the 25 listed in CAL. GOV'T CODE § 11126 (West Supp. 1984) being the largest number.
In addition to stating specific openness requirements and specific exceptions, the statutes of thirty-seven of the fifty states declare a general policy of openness, usually with the instruction that the laws are to be liberally construed.192 These policy statements can be used to apply the openness requirement where the statute does not specifically require it. For example, the law in Arkansas does not specifically include committees in its open meetings requirement.193 The Arkansas Supreme Court has extended the requirement to committees,194 with the following comment:

It appears to us somewhat incongruous that a parent body cannot go into executive session . . . but its component parts [the committees] which actually investigate the complaints, and act on those complaints by making recommendations to the board, are at liberty to bar the public from their deliberations. Surely, a part [of a board] is not possessed of a greater prerogative than the whole.195

The inclusion of bodies such as committees and commissions that are either components of, or subservient to, other bodies is an issue that is often left vague by state statutes, as in the Arkansas statute. Although precise considerations vary from state to state, factors important in determining whether committee or commission meetings are required to be open include the degree to which the committee or commission determines the final decision and whether a committee includes a majority of the members of the parent body.196

In forty-seven of the fifty states, some kind of remedial action is possible if the law is violated,197 including invalidation of action taken at illegally closed meetings.198 Criminal sanctions against individual officers are possible in twenty-one states199 although these sanctions present difficulties in enforcement.200


194 Arkansas Gazette Co. v. Pickens, 258 Ark. 69, 522 S.W.2d 350 (1975).

195 Id. at 76, 522 S.W.2d 350 at 354.


197 See Fact File, supra note 6.


200 A prosecutor in Texas is reported to have dropped charges against five city officials in June of 1983, saying it would be impossible to prove the necessary intent to convict the officials on misdemeanor charges. Sigma Delta Chi, supra note 6, at 31. In Oklahoma, however, a 1981 decision said there was no need to prove intent for a misdemeanor open meetings violation by a public official. Hillery v. State, 630 P.2d 791 (Okla. Crim. App. 1981).
In Canada, a requirement that meetings be open can be found in the statutes of nearly all the provinces, but none of the provinces has a comprehensive U.S.-style law and none has a declaration of a general policy of openness. Instead, open meetings requirements are found in acts of municipalities, school boards, and acts establishing other government bodies. A search of Ontario statutes reveals openness requirements in at least six places, with slightly different requirements for different kinds of organizations.

The openness requirements are often easily bypassed. In several provinces, regular meetings must be open, but special meetings may be closed "as in the opinion of the council, the public interest requires." Other provisions allow bodies to convene as committees-of-the-whole for in camera deliberations. Generally, a declaration of the reason for the private session is required, as is a report on the subjects covered in the session. None of the Canadian laws has lists of enumerated exceptions. Lists of enumerated exceptions in the American states constitute a statutory determination of when closure is in the public interest, but in Canada this determination may often be made by the affected government body on an ad hoc basis. In addition, the Canadian statutes contain no sanctions beyond voiding actions taken at closed meetings, and nothing seems to prevent a public body from repassing voided legislation.

In general, Canadian courts have deferred to the judgments of councils and boards who decide to close their meetings. However, at least one court construed a provincial statute in a way that established a general policy of openness. In a 1975 case, the Manitoba Court of Queen's Bench construed the discretionary right of a council to meet in camera to operate only when the council had a proper purpose. Although the right of the council to meet in camera is not qualified in the statute,


203 Municipal Act, 1970 Man. Stat. ch. 100, § 114. But see 1978 SASK. REV. STAT. ch. R-26, § 57; id. ch. U-10, § 51(4) ("The council of a municipality shall hold its regular and special meetings openly and no person shall be excluded except for improper conduct . . . .")

204 E.g., Ontario Municipal Affairs Act, 1980 ONT. REV. STAT. ch. 302, § 53.


the court said it could be exercised only to protect confidentiality or to deal with sensitive matters, not to hide the existence of a proposed action from the press and public.209 The court construed the statute to have the kind of general policy of openness found in the U.S. statutes. The court allowed a motion to quash a bylaw passed by a municipal council. The council had met in committee-of-the-whole to consider “certain aspects of a matter before the council,” then returned to open session and introduced and passed a proposal before property owners affected by the law had had a chance to hear about it.210

The most frequent plaintiffs in the few open meetings suits in Canadian courts have been property owners whose land has been expropriated or re-zoned.211 Court actions brought by the press are rare.212 This is probably due in part to escape clauses and the lack of sanctions in the Canadian laws. Another probable reason is that the press has been unable to claim standing to sue. Canada has traditionally required a special interest in the subject; that is, the party must be directly affected by a government action in order to challenge it in court.213

The Canadian Supreme Court, prior to the Charter, liberalized the standing requirements to allow standing to a party that could show that it has a genuine interest as a citizen and that there is no other reasonable, effective remedy.214 In addition, section 24(1) of the Charter allows standing to “[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied.” This provision was used to establish a right of access to courts under the Charter.215 Although section 24(1) doesn’t apply to enforcing statutes, it could affect standing under statutes by analogy.

But even with standing to enforce openness requirements, the press faces the government’s discretion to meet in private, as provided by the statutes. Despite these loopholes, the openness requirements appear to create a policy of openness through which the press could argue that the free press provision of section 2(b) includes a right of access to meetings, just as the traditional openness of courts prompted the court in Re Section 12 to find a right of access to courts in section 2(b).

But a surer way to provide access to government bodies in Canada would be for Parliament and provincial legislatures to pass comprehen-

209 Re Buhler and Stanley, 69 D.L.R.3d at 607.
210 Id. at 608.
211 See, e.g., Howatson, 37 D.L.R.3d 584; Cedar Crescent Dev., 63 D.L.R.3d 719; Re Buhler and Stanley, 69 D.L.R.3d 602.
212 One of the few is a 1964 case in which a Toronto radio station lost a challenge to a ban on recording devices at school board meetings. Radio CHUM 1050, Ltd. v. Board of Education for Toronto 44 D.L.R.2d 671 (C.A. 1964).
215 Re Section 12, 38 Ont. 2d 748.
sive open meetings statutes. The lack of such statutes leaves Canada's open government scheme incomplete. Just as the legislatures have determined when records of government institutions should and should not be available, the legislative bodies should make the same determination on access to meetings of local law making bodies and federal or provincial rule making agencies. This would not be an infringement on parliamentary supremacy, but rather a more specific parliamentary decision as to how bodies that are creations of Parliament or the provincial legislature should conduct themselves. It is likely that Canadian traditions would lead to an exception for Parliament or the provincial legislatures, but, as noted earlier, there are other means for providing a check on such bodies, which are very much in the public eye.

IV. CONCLUSIONS

Overall, rights of access to government proceedings and records are well established in the United States. Constitutional interpretation provides access to court proceedings, and statutes provide access to public records and public meetings.

Canadian traditions of parliamentary supremacy have worked against establishing such rights in Canada, but recent developments have made the access rights of the press and public more like those in the United States. The two key factors have been the adoption of the Canadian Charter of Rights and Freedoms and the adoption of access-to-information statutes by the Canadian Parliament and four provinces.

The Charter has led to a declaration that the press has a constitutional right of access to court proceedings and has given the press a stronger basis to establish standing to bring suit. The first decisions based on the Charter indicate that Canadian courts are following the lead of U.S. courts in finding a constitutional right of access, at least to courts. The potential exists in both systems to extend the constitutional right of access from the courtroom context to other contexts. The breakthrough for a constitutional right of the press to attend meetings of public bodies, to visit prisons, or to take cameras into courtrooms could come in either of the two nations. If it does, the decisions in either country could provide a guide for the courts of the other.

Canadians, as newcomers in the area of access legislation, have borrowed much from the United States, but in the federal Access to Information Act, Canadians have created exceptions that are much broader than those in U.S. statutes. Canadians are likely to find that exempting from the system all material leading to advice to cabinet ministers\(^\text{216}\) deserves the name the "Mack Truck Exception" coined by a member of the Canadian parliament.\(^\text{217}\) The federal-provincial relations exception\(^\text{218}\) may also be big enough to drive the proverbial Mack Truck through.

\(^{216}\) Access Act § 69.

\(^{217}\) Butler, Public Access: Problems of Implementing the Access Act of 1982, in CANADA'S NEW
Canadians may find that, to make their legislation really useful, they will need to move toward the greater scope of the American Freedom of Information Act. On the other hand, Americans would do well to emulate some of the features of the Canadian law that are designed to make the act easier to use, particularly the designation of an information commissioner to monitor compliance and the distribution of request forms to help potential users.

That the Canadian federal statute is more limited in scope than the U.S. Freedom of Information Act may, however, mean that its early use will be reassuring those who have feared that such legislation would harm Canada's governmental traditions. The limitations in the federal legislation will make its use less shocking to the Canadian system than would the use of broader legislation. This may blunt the opposition to such legislation on the provincial level. At the same time, the features of the act that make it easier to use may increase popular support for provincial legislation which, as noted above, lags far behind legislation in U.S. states.

For access to meetings of public bodies, Canada has not provided the kinds of rights found in American federal and state law. But establishment of open meetings laws in Canada would be a logical outgrowth of the commitment to access evidenced by the access laws and the open courts decisions. Such legislation would, of course, signal a break with the tradition of parliamentary supremacy. But Canada needs such legislation to make its access scheme complete and, as it has in other areas, Canada could learn from the U.S. experience with access laws.


218 Access Act, § 14.