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STRUCTURAL PLURALISM AND THE RIGHT TO KNOW

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ABSTRACT. In many nations, the structure of the public sector has changed dramatically. Public services are now delivered through a variety of governmental, quasi-governmental and private organizations. This transformation has undermined freedom of information laws, which usually establish a right to information held by governmental bodies alone. Many controversies have arisen over the withholding of government-held information relating to contracts with private providers, but this is only one aspect of a larger problem. We must also decide whether to recognize a right to information held within contracting organizations, or institutions that have no contractual or financial relationship with government at all. There is no consensus on how these questions should be answered, or on the criteria that should be used to resolve them. The aim of this paper is to develop a framework for deciding when a right to information should be recognized. Arguments about the right to information should be resolved by reference to its role in protecting the fundamental interests of citizens, and not by reference to the history or structural characteristics of the institution holding the contested information.

INTRODUCTION

The recent wave of public sector restructuring has been typified by a willingness to experiment with new forms of organization as instruments for the delivery of public services. Large, multi-function government departments have been broken into many special purpose agencies that have a quasi-contractual relationship with political executives. Commercial functions within government have been transferred to government-owned corporations, which have later been privatised in some instances. Other activities have been given to private for-profit or non-profit contractors, or specially built hybrid organizations that consider themselves to be "public" in some circumstances but "private" in others. In a few cases, governments have relinquished all responsibility for production of services, opting instead to create markets populated by private producers who have no structural or contractual links to government at all.¹ The philosophy that undergirds this restructuring is pragmatic and open to experimentation. It has been characterized by Anthony Giddens as a doctrine of "structural pluralism" (Giddens 2000: 55).

The diffusion of this new doctrine has provoked fears about the erosion of popular control over the instruments by which public policy is formulated and executed. Critics worry that political executives will be less willing to assume responsibility for maladministration by independent agencies or contractors, and that the displacement of the "public service ethos" by commercial values will breed indifference to fairness and probity. Others fear that private entities will escape constitutional safeguards and other statutory or common law rules of good administration, or that the governance structures of new agencies will give powerful client groups too much influence over the content of public policy.

Related to these complaints is a worry about the erosion of freedom of information (FOI) laws, which give citizens a qualified right of access to information held by public institutions. FOI laws diffused rapidly throughout the advanced democracies over the last thirty years, and their organizing principle -- the promotion of transparency in policymaking and operations -- became entrenched as one of the main precepts of good administration.² However, the effectiveness of many FOI laws has been undermined as a consequence of restructuring. These laws have traditionally applied to government departments or other agencies that are tightly linked to these departments. As authority has shifted to quasi-governmental or private organizations, the ambit of the law has shrunk. Many public functions now are undertaken by entities that do not conform to standards of transparency imposed on core government ministries. There is little consensus on how best to address this problem. Existing laws vary widely in their treatment of the various components of a fragmented public sector. This variation in responses may be evidence of a deeper confusion about how best to think about the proper scope of FOI requirements.

The aim of this paper is to provide a framework for resolving questions about the recognition of information rights. It argues that information rights should generally be recognized where organizational opacity can be shown to have an adverse effect on the fundamental interests of citizens. In fact, it can be shown that this logic undergirds many existing information rights, which are established to protect basic rights to physical and economic security, privacy, and political enfranchisement. Transparency requirements could also be established to allow citizens to fulfil correlative duties associated with the recognition of certain basic interests as fundamental rights. This approach to information rights is, like the doctrine of structural pluralism itself, pragmatic and open to experimentation. It rejects the

classical liberal insistence on differential treatment of the public and private spheres, recognizes that harm to fundamental interests could as easily arise from either sector, and establishes information rights where these seem likely to avert such harm.

DIVERSITY OF RESPONSES

Freedoms of information laws vary widely in their treatment of the new structures that emerged out after the breakup of the old public sector. This variation of legislative responses shows that the challenge confronting policymakers is not primarily one of policy design. If policymakers have the inclination to broaden the ambit of FOI laws, it is clearly feasible to do so. Instead, the diversity of responses is a symptom of the inability to resolve a more basic question: in what circumstances is it desirable to expand legal recognition of a right to know?

The confusion that has distinguished legislative reactions to the new structural pluralism is remarkable when compared to the consensus that dominates the treatment of core governmental institutions. These include ministries or departments that are directly accountable to Cabinet members, funded through appropriations, and regulated by a range of other general management laws.³ These are typically regarded as institutions that have a substantial role in policymaking or "steering" functions.⁴ These core institutions are almost always included in FOI laws, although there may be broad restrictions on access to certain kinds of sensitive information. Citizens are typically given a right to make complaints about non-compliance to an independent referee or court.

Government-owned corporations. Beyond the core public sector, consensus quickly breaks down. For example, there is wide variation in the treatment of government-owned corporations. The Canadian government excluded its major corporations when it adopted its

Access to Information Act in 1982, and resisted later proposals by legislators⁵ and the federal Information Commissioner (Canada Information Commissioner 1994) to broaden the law by including all federal corporations. At the other extreme is the United States, which included all government-controlled corporations within its 1974 Freedom of Information Act (Adler 1997: 190). New Zealand also included state-owned enterprises under its Official Information Act 1982, a decision reaffirmed in subsequent reviews of the law (Law Reform Commission of New Zealand 1997: 13-16). Many jurisdictions follow a middle path.⁶ A recent review of the Australian Freedom of Information Act observed that there was "no general rule or policy" regarding the application of FOI requirements to Australia's government business enterprises, with some entirely included, others included in part, and others excluded from the law (Australian Law Reform Commission 1995: s. 16.7).

Quasi-governmental organizations. There is comparable uncertainty in the treatment of quasi-governmental organizations – institutions that may perform important public functions but whose governance structure locates them in a “grey zone” between the private sector and core government departments (Greve 1999: 93). Many American laws are restrictive in their treatment of quasi-governmental organizations. Courts have determined that such organizations will only be subject to the federal Freedom of Information Act if there is “substantial federal control” over their day-to-day operations.⁷ Close structural similarity to organizations that are unambiguously subject to the law is used as evidence of control.⁸ Indeed, a recent decision insists that the law is not intended to encompass “quasi-public or quasi-governmental entities” at all.⁹ Courts have adopted the same approach while interpreting many state FOI laws.¹⁰

On the other hand, several jurisdictions are less conservative. Their FOI laws typically allow one structural attribute – rather than a combination of attributes or other evidence of

substantial governmental control – to determine whether an organization is subject to FOI requirements. Kentucky law, for example, subsumes any organization that derives at least one-quarter of its budget from state or local funds.¹¹ Missouri law affects any organization that exercises a statutory power to confer favourable tax treatment.¹² Quebec law includes any body whose capital stock is publicly owned,¹³ while Manitoba includes any body whose board is appointed by Cabinet.¹⁴ Australian laws include any bodies established by statute or regulation "for a public purpose" -- a requirement that is broadly construed.¹⁵

Other laws make no attempt to define characteristics that would cause an organization to be subject to FOI requirements. They rely, instead, on schedules that name organizations that will be affected by the law. These laws provide governments broad discretion in deciding whether quasi-governmental organizations should be included. For example, New Zealand drafted its schedule liberally, including bodies that the Canadian government elected to exclude from its schedule.¹⁶ In fact, the Canadian government has been criticized for refusing to list many new quasi-governmental organizations established as a part of its recent restructuring of national public services (Roberts 2000).

Contractors. Beyond this penumbra of quasi-governmental organizations is an expanding range of privately owned businesses that are connected to government through contracts to provide goods or services. Information about contractor performance may be held by the contracting agency, or by the contractor itself. Governments typically treat these two pools of information differently, and are generally more liberal in allowing access to information held by contracting agencies. In either case, there is still substantial variation in policy on disclosure.

All FOI laws acknowledge that governments may sometimes refuse access to confidential information that is provided to public agencies by businesses, including information that is provided during the negotiation or performance of contracts. But laws vary substantially in their definition of circumstances in which denial of access is justified.¹⁷ Some – including Canada’s federal law, and many of its provincial laws – compel governments to deny access to confidential commercial information even when there is no evidence that harm would be caused to contractors by the disclosure of that information. Other laws are less restrictive, denying access only when there is evidence that contractors would be harmed by disclosure.¹⁸

Even in these cases, however, a sub-class of confidential commercial information known as "trade secrets" is typically withheld regardless of harm¹⁹ -- but there is substantial variation in the definition of this term (Adler 1997: 81-82; Administrative Review Council 1997: sec. 5.76; McNairn and Woodbury 2000: sec. 4(1)(c)). Some laws allow this restriction on access to be overridden if there is a broader public interest that would be served by disclosure. Others permit such an override only if there is a threat to specified public interests, such as public health or safety; yet others contain no public interest override at all.²⁰

This statutory confusion is aggravated by the variation in governmental practices in negotiating contracts. Public agencies may choose to impose terms in tendering processes and contracts that oblige contractors to disclose information, or they may use FOI law as a shield against disclosure. The government of Western Australia recently boasted that it had achieved a “world first” by publishing a private prison contract with Corrections Corporation of Australia on the Internet (Ministry of Justice of Western Australia 1999). More typical is the behaviour of the Australian state of Victoria, which resisted disclosure of its prison contracts until overruled by the courts (Frieberg 1999). It was standard practice for the Victorian government to include

confidentiality clauses in its contracts, confounding later attempts to obtain contract information through FOI law (Freiberg 1997).²¹

There is also broad variation in the treatment of information held by contractors themselves. Older FOI laws generally exclude contractor records unless the contractor's relationship with the contracting agency is so close that the records are effectively under government custody and control²² or are, in the words of the U.S. Freedom of Information Act, "agency records."²³ In some of these jurisdictions, governments have been encouraged to negotiate terms that would establish a right of access to contractor-held information (Australian Law Reform Commission 1995: para. 15.13; Information and Privacy Commission of Ontario 1997). However, this approach has important limitations. Only the contracting agency, as a party to the contract, has a remedy for non-compliance, and there may little incentive for the agency to enforce the contract (Administrative Review Council 1997: para. 5.47; Frieberg 1999: 144-145).

Other laws take a more expansive view of contractor obligations. One method of encompassing contractor-held information, adopted in New Zealand and Irish law, is to deem contractor records to be held by contracting agency, and thus subject to the right of access.²⁴ A second method treats contractors as though they were themselves public bodies, with an independent responsibility for complying with FOI requirements. The laws of two American states – Florida and Rhode Island – extend to any "business entity acting on behalf of any public agency."²⁵ However, these laws have been strictly construed: Florida courts have insisted that contractors should have "some additional entanglement with government" that would justify a right of access (Carlson 1993).²⁶ Missouri includes contractors if the primary purpose of the organization is to enter into contracts with government.²⁷

In 1999, the state of Western Australia also expanded the definition of public bodies subject to FOI law to include all contractors and subcontractors.²⁸ Contractors who “carry out functions on behalf of a department” were subject to the administrative codes that until recently regulate access to information in the United Kingdom and Scotland.²⁹ Scotland intends to continue this approach in its new FOI law (Scottish Executive 1999: para. 2.4). However, the new UK law takes a more cautious approach. Rather than imposing a general requirement, the law gives government the discretion to include contractors who perform government functions.³⁰ Otherwise, government officials are merely enjoined to avoid the use of excessively restrictive confidentiality clauses while drafting contracts.³¹ However, there is one major exception to this policy: all persons or organizations who provide medical services that are paid for by the National Health Service are made subject to the new law.³²

The private sector. Citizens are least likely to have a right of access to information held by organizations that lack a structural or contractual connection to government. Indeed, we call this the *private* sector precisely because we are prepared to refuse demands for transparency except in unusual circumstances. However, jurisdictions vary substantially in their willingness to defer to this expectation of privacy. For example, many governments now recognize a citizen's right to access and correct personal information collected by private firms. This narrow piercing of corporate privacy is defended as a method of discouraging unfair treatment and unjustified intrusions in personal privacy, and is now permitted under data protection laws adopted throughout the European Union and in Canada. These laws typically establish a right of access to personal information held anywhere in the private sector. By contrast, the right of access to personal information is less firmly established in the United States. American laws

recognize more limited rights of access to specific kinds of personal data, such as credit information or educational records, held within the private sector.³³

Some nations have also recognized broader rights of access to information held by private organizations. South Africa's Promotion of Access to Information Act, adopted in 2000, implements a guarantee in its 1996 Constitution that citizens will have a right of access to information held by another person "that is required for the exercise or protection of any rights."³⁴ Unlike other access laws, the South African law requires citizens to identify the right that would be jeopardized by a denial of access to information held by private bodies.³⁵ However, courts seem likely to be liberal in defining the range of rights whose imperilment would warrant breaching corporate secrecy (Pimstone 1999: 10). Other laws might subject a few businesses to even broader transparency requirements. The British freedom of information law includes a discretion to include private organizations that "functions of a public nature," which would create a right of access that is not qualified by an obligation to specify a reason for requesting the information.³⁶ Similarly, a proposed Jamaican law would include businesses that perform critical public services or hold a monopoly position in the marketplace (Munroe 1999).

WEAKNESSES IN CONVENTIONAL ARGUMENTS

The broad variation in law suggests that the problem of setting transparency requirements in the grey zone of government is not primarily a technical one. If any government were to decide that certain classes of quasi-governmental or private organizations should be subject to access requirements, it would have little difficulty in finding a workable policy design already in use in another jurisdiction. The challenge confronting policymakers is philosophical rather than

technical. The fact that laws deviate so broadly probably reflects an underlying confusion about how the boundaries of access law should be drawn.

The same confusion is reflected in the policy debates that have arisen as restructuring has eroded access laws. Advocates of openness have typically relied on two main arguments to justify the preservation of access rights for new institutions in the grey zone. The first relies on provenance: because a privatised function was once subject to access requirements, these advocates argue, it should continue to be so.³⁷ This logic impelled policymakers in Britain to propose the inclusion of recently privatised utilities under the country's FOI law (United Kingdom 1997). Courts in some U.S. states have applied the same reasoning, showing greater willingness to extend FOI requirements to quasi-governmental entities or contractors if they undertake functions typically performed by government agencies (Keeling 1989: 212) (Robinson 1993: 793-97, 810-813). In the United States, this way of thinking about the ambit of FOI law is heavily influenced by dominant approach to constitutional review, which suggests that quasi-governmental agencies are more likely to be made subject to constitutional standards if they perform functions that are "traditionally the exclusive prerogative of government."³⁸ An argument based on provenance is most powerful when a sector is only partly privatised, with some governmental components that remain subject to FOI requirements and others that are not. There seems to be an inconsistency in allowing a new privately operated school or prison to operate with the benefit of secrecy when its older government-run analogue remains subject to openness rules (Barak-Erez 1995:1188-1189; Casarez 1995: 251).

The "provenance" approach is unsatisfying for several reasons. Above all, it is unprincipled: the approach provides no reason, other than the weight of history, for preserving transparency for privatised functions. Furthermore, it relies on a misreading of history. As

critics of the public function test have observed, there are few functions that have not been undertaken by private actors at some point in the past (Gilmour and Jensen 1998). This is true even of "core" functions such as corrections (Gentry 1986: 353; Wecht 1987: 815; Casarez 1995: 252), defence, or tax collection (Webber and Wildavsky 1986). It may be the recent period of state activism, which relied heavily on direct production of services by governmental actors, which is historically anomalous. Nor does the inconsistency in treatment of analogous public and private entities provide a compelling case for extending FOI rules. It could as easily serve as the foundation for an argument in favour of reducing transparency obligations for governmental entities, particularly when the two sectors are in competition for the right to provide services (Roberts 2000: 312).³⁹

The second method of defending transparency requirements in the grey zone relies on structural commonalities or control. Quasi-governmental agencies should be subject to access requirements, this argument says, if they share the share the organizational features of the conventional bureaucracy, or are directly regulated by the conventional bureaucracy through funding or appointments. As the previous section has shown, many FOI statutes rely on these criteria in determining the boundaries for access rights.⁴⁰ This approach is also unprincipled: it does not explain *why* the preservation of access rights might be important in a particular case. It relies, instead, on the premise that there are good (but unarticulated) reasons for promoting access for "core" governmental institutions, and that these reasons must also hold equally true for institutions in the grey zone that resemble the core institutions or are directly controlled by them. The approach says nothing about the question of whether transparency requirements should be imposed on organizations that are not structurally comparable to, or directly controlled by, core institutions.

Ambivalence about the wisdom of relying on structural formalisms is evident in the evolving British law on judicial review. The traditional position of British courts had been that administrative authorities could only be compelled to respect the standards of natural justice in their decision-making -- which include limited requirements to disclose information⁴¹ -- if those authorities exercised powers derived from statute. More recently, courts have expanded their jurisdiction to permit review of actions by private bodies, such as professional self-regulatory organizations, wielding significant powers that are not derived from legislation. The new approach, says Murray Hunt, seems to base decisions about the availability of judicial review "on the consequences of the exercise of the power and the nature of the interests affected by it, rather than the purely formal consideration of the source from which the power emanated" (Hunt 1997: 29). Hunt himself argues that the important factors for deciding the scope of judicial review

should include the nature of the interests affected by the body's decisions, the seriousness of the impact of those decisions on those interests, whether the affected interests have any real choice but to submit to the body's jurisdiction, and the nature of the context in which the body operates. Parliament's non-involvement . . . or whether the body is woven into a network of regulation with state underpinning, ought not to be relevant . . . The very existence of institutional power capable of affecting rights and interests should itself be sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the High Court (Hunt 1997: 33)⁴²

A comparable approach is taken in Britain's recent Human Rights Act, which gives individuals remedies for the violation of rights enumerated in the European Declaration of Human Rights.

The Act eschews structural formalities and therefore imposes obligations on private bodies performing public functions (Klug 2000: 48-49 and 167).⁴³

TRANSPARENCY AND FUNDAMENTAL INTERESTS

What is needed is a method of reasoning about the boundaries of access law that builds on explicit propositions about the good that could be produced by improved transparency. A better method of reasoning about access law would focus on the deleterious effects of opacity -- that is, on the harms that may be caused when access to information is denied. In particular, we can refer to harm to a citizen's fundamental interests. Obviously, this proposition remains imprecise, because the set of "fundamental interests" remains to be defined. Under this approach, advocates of transparency would be obliged, with reference to any particular organization, to satisfactorily answer at least two questions: first, whether there is a significant interest at risk of harm if transparency is not assured; and second, whether the risk of harm is substantial. These questions obviously differ significantly from traditional queries about the provenance or structure of the organization.

In some cases, the connection between access rights and the fundamental interests of citizens is obvious. For example, we recognize a fundamental right to security of the person, and by implication a right of access to information about potential threats to personal safety. This logic was recently adopted by a Canadian court, which ruled that police forces have a positive obligation to provide information about threats to safety that is rooted in the constitutionally recognized right to security of the person.⁴⁴ The European Court of Human Rights adopted similar reasoning in its 1998 *Guerra* decision. It concluded that the Italian government unjustifiably violated the "physical integrity" of the residents of Manfredonia by withholding

information about toxic emissions from a chemical factory in their community.⁴⁵ In a subsequent case the Court affirmed this position, ruling that British government agencies engaged in hazardous activities had a positive obligation to establish procedures allowing access to information by persons whose health might be affected by those activities.⁴⁶

The advanced democracies have imposed comparable disclosure requirements on non-government actors. For example, health professionals in private practice also have a duty to disclose information about a serious danger of violence by one person against another.⁴⁷ Commercial enterprises, like government agencies, have an obligation to provide communities with information about the release of toxic chemicals by their facilities.⁴⁸ Private employers have an obligation to provide their workers with information about hazardous materials used in the workplace, and manufacturers have an obligation to provide information to consumers about hazards posed by defective products (McLellan 1989; Tietenberg and Wheeler 1998). Individuals may also be permitted to disclose privately held confidential information if it would reveal a threat to health or safety.⁴⁹ The case for allowing access to information held by private providers of health services also rests on a concern for the physical integrity of citizens.⁵⁰

Policymakers have established disclosure requirements to protect other basic interests. Canada's Federal Court of Appeal has recently ruled that constitutional guarantees against unjustified invasions of personal privacy imply "a corollary right of access" to personal information collected by government, so that citizens can check its accuracy.⁵¹ The European Court of Human Rights has ruled that governments have a positive obligation to establish procedures allowing reasonable access to information contained in foster care files, arguing that individuals are entitled "to know and to understand their childhood and early development."⁵² In the United States, disclosure requirements have been imposed on many private schools. Students

and parents have a right of access to their own educational records, and in some cases a right to information about a broad range of operational matters, including an institution's fee policies, graduation rates, accreditation, and policing practices.⁵³ These policies are motivated by an appreciation of the critical importance of education to the development of human capacities.⁵⁴

Individuals also have a right to economic security that may imply the establishment of disclosure requirements. For example, access to information may be permitted to prevent the arbitrary denial of employment. In its 1987 *Leander* decision, the European Court of Human Rights ruled that a refusal of access to information used to deny a security classification, and thus to limit employment within government, could constitute a violation of fundamental rights.⁵⁵ Similarly, the Australian state of New South Wales gives individuals engaged in child-related employment a right of access to records pertaining to disciplinary hearings, regardless of whether the individual works in the public or private sector.⁵⁶ Many jurisdictions also require businesses to disclose information about plans for plant closings or mass layoffs (Portz 1995). The ability to obtain work and borrow money is also protected by obligations imposed on businesses to disclose information about the character or health of applicants for employment or credit.⁵⁷

It is sometimes argued that access provisions such as these are only specific applications of a general principle: that individuals should have a right of access to personal information held by public or private organizations, because individuals have a property right in this information and should consequently be entitled to control its use.⁵⁸ However, this is not the case. In many instances, these transparency obligations compel disclosure of information that is not "personal" at all. Consider, for example, Senator Edward Kennedy's recently proposed Patients' Bill of Rights. In addition to establishing a right of access to information about decisions to deny

treatment, the law would compel disclosure of much other information about internal procedures, handling of grievances, and physician qualifications and compensation.⁵⁹ Little of this is personal information. Nevertheless, it directly affects a fundamental personal interest, and should be disclosed for that reason.⁶⁰

It is also noteworthy that a concern for basic interests will result in the imposition of access requirements even on private organizations operating in competitive markets. In some instances, citizens can mitigate harms done by secrecy by ending their relationships with secretive institutions. Patients could find other healthcare providers; students, other educational institutions; workers, other employers. In the extreme, citizens could move to jurisdictions with less secretive governments. Albert Hirschman calls this the "exit option" (Hirschman 1970: 4). Policymakers are clearly attentive to the costs that may be associated with the exit option.⁶¹ In some instances they may also recognize that the exit option should not be relied upon, even if there are low costs to exit. For example, requiring citizens to mitigate certain harms by exiting a jurisdiction would be tantamount to repudiating the idea of citizenship itself.

Political participation rights. A right to information can also be established as a corollary of basic rights relating to political activity. The most familiar argument of this sort typically treats the right to information as an adjunct of the right to freedom of opinion and expression. This connection is made explicitly in the United Nations Covenant on Civil and Political Rights, which says that the right to freedom of expression "shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers."⁶² In fact, western nations put great emphasis on the "freedom to seek, receive and impart information" in the early years of the Cold War, as part of their attack on censorship within communist states (Donnelly 1998: 7). A 1948 UN conference on Freedom of Information ultimately produced a

convention recognizing a right of peoples "to be fully and reliably informed."⁶³ Some commentators began to describe "freedom of information" as a freestanding human right (Radcliffe 1953).⁶⁴

However, few governments were prepared to concede that this "right to information" implied a right of access to government records. The main aim of western governments had been to reduce government control of communication between non-governmental actors, rather than imposing a positive obligation on government to divulge its own information. An explicit recognition of such an obligation within the right to freedom of expression was proposed and rejected by governments during the drafting of the 1950 European Convention on Human Rights (Davis 1999: 1).⁶⁵ The European Court of Human Rights resisted later attempts to read a right of access to records into the convention's guarantee of freedom of expression, arguing that this guarantee

basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him . . . [but] cannot be construed as imposing on a State . . . positive obligations to collect and disseminate information of its own motion.⁶⁶

The notion that freedom of expression is purely a negative right -- which limits interference by government but does not impose affirmative obligations upon it -- has been contested.⁶⁷ To illustrate the fragility of the distinction, Holmes and Sunstein cite the 1992 decision of the U.S. Supreme Court in *Forsyth County v. the Nationalist Movement* (Holmes and Sunstein 1999: 111). In that case, the Court struck down a government policy that imposed fees for the use of public space that reflected administrative and policing costs relating to the proposed event.⁶⁸ Although it did not do so explicitly, the court essentially recognized an

affirmative obligation for government to maintain a public space and provide police protection so that citizens had a forum in to exercise their right to free expression.

In practice, there are many ways in which governments recognize an affirmative obligation to take steps so that the right to free expression can be realized. They enforce rules to prevent concentration of ownership in broadcast and print media, and require cable monopolies to provide community organizations with access to channels. They establish public broadcasting facilities to provide an outlet for voices neglected by commercial media, and provide financial support to smaller private media outlets⁶⁹ and for artistic expression. They maintain a system of intellectual property law that promotes expression by making it profitable. Reasonable people may disagree about the details of any one of these policies. But most would be surprised if the whole range of governmental interventions were set aside. It is accepted that realization of the right to free expression requires positive governmental action.⁷⁰ An obligation to provide access to information does not impose a burden greater than that already imposed by existing policies to promote free expression.⁷¹

The importance of access to information is clearer when the right to freedom of expression is considered more narrowly. Suppose that our concern is with expression on a specific subject: for example, about government's effectiveness in executing a policy. In some cases, government agencies may be informational monopolists: that is, they may have exclusive control over critical information required for intelligent discussion of the policy. If no right of access to information is recognized, the right to free expression is hollowed out. Citizens will have the right to say what they think, but what they think will not count for much, precisely because it is known to be grossly uninformed. A more sensible approach would be to treat

governmental monopolists just as we treat private media monopolists, by curbing their monopoly power so that we may promote free expression.

This argument is given added force if it is modified slightly. The right to freedom of expression is important because of the role it plays in the process of self-governance.⁷² In a decision that found a right of access to official information implied in the Indian Constitution's guarantee of freedom of expression, the Supreme Court of India explained:

Where a society has chosen to accept democracy as its creedal faith, it is elementary that its citizens ought to know what their government is doing. . . . No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy.⁷³

This is a common method of justifying a right of access to information. However, the logic suggests that the access right is better understood as a corollary of basic political participation rights, rather than the right to free expression alone. The Universal Declaration of Human Rights says that citizens are entitled to expect that "the will of the people shall be the basis of the authority of government."⁷⁴ The UN Covenant on Civil and Political Rights acknowledges a right of citizens to take part in public affairs and a the right to vote in "genuine periodic elections."⁷⁵ These rights impose substantial positive obligations upon government, such as the burden of organizing elections or maintaining legislatures.⁷⁶ However, these rights have little meaning if government's informational monopoly is not regulated. Otherwise, individuals are

invited to apply their rational capacities to the task of self-governance, but denied the raw material that this task requires.

As Stephen Sedley observes (Sedley 2000: 245), there is also need for consistency in our treatment of fundamental rights. As we noted earlier, it is already widely accepted that the protection of certain basic interests, such as personal safety or economic security, will demand recognition of a positive obligation to provide access to information. It would be peculiar if we were not prepared to apply the same logic in our treatment of other equally fundamental interests. Rules to assure access to information then become part of the institutional arrangements -- the "civic architecture" (Barber 1998: 37 and 67) -- that must be built and maintained by government so that individuals have the capacity to fulfill their political participation rights.

Although the case for recognizing this implied right of access might seem clearest with respect to core governmental institutions, there is no reason why it should be limited in this way. The execution of a policy may be delegated to a quasi-governmental or private organization, but the act of delegation itself is unalterably public. Proper consideration of the wisdom of this delegation may require access to information held by these quasi-governmental or private organizations. The idea that private entities can be regulated to protect political participation rights is not new: rules to constrain concentration of media ownership are built on the same principle. Indeed, the argument for extending this implied right of access is analogous to that used in defence of free speech rights in the so-called "company town" or "shopping mall" cases (Williamson and Friedman 1998). In the best-known of these cases, the United States Supreme Court ruled that the owners of a company town could not use trespass laws to ban pamphleteering, arguing that a company's property rights could not be allowed to dominate the

community interest in maintaining "free channels of communication."⁷⁷ Similarly, another limitation of private property rights -- a sort of informational trespassing -- might be tolerated if it proved essential to informed public discussion about the propriety of delegating responsibilities to private organizations.

Correlative duties. The preceding discussion has been built on the proposition that information rights are generally established as safeguards for generally accepted fundamental interests. To put the same point in different terms, an individual's right of access to information is often implied by our recognition of that individual's other basic human rights. However, this is not the only way in which information rights might arise.

The recognition that individuals within a community have certain basic rights creates correlative duties on other members of that community.⁷⁸ For example, our acceptance of the proposition that individuals should have a right to "life, liberty, and security of person"⁷⁹ imposes a corresponding obligation on other members of the community to avoid actions that unjustifiably infringe upon that right. The existence of these correlative duties is acknowledged in key human rights charters, which proscribe conduct by governments, groups or persons that are "aimed at the destruction of any of the rights and freedoms" enumerated in those documents.⁸⁰

These correlative duties bind citizens even when they rely on agents to work on their behalf. The task of providing critical public services that affect basic rights may be given to governmental organizations, but citizens cannot evade their own responsibility for ensuring that these agencies do their work properly. This implies the need to monitor these organizations, and the system of monitoring may include a right of access to information about their conduct. This would hold true even if the task of providing critical services were given to private or quasi-

private organizations. In any of these cases the correlative duties of citizens would imply an obligation to monitor the conduct of agencies, and a right of access to information could be justified as a mechanism for allowing citizens to fulfil this obligation.

Opposing considerations. A concern for fundamental interests will not always imply a need for disclosure of information. On the contrary, there are some instances in which these interests are better protected through non-disclosure. As a consequence, the right of access to information will never be unqualified. However, the task of setting limits on transparency is not qualitatively different than that of making the preliminary case for transparency: in both cases an appeal to fundamental interests is necessary.

For example, the disclosure of information might be restricted if it seemed likely to pose a threat to safety of an individual. A recent controversy in the Australian state of Victoria illustrates the potential conflict. A convicted triple murderer attempted to obtain the names of nurses at a local hospital, who he claimed could assist in establishing an alibi; the nurses protested that revelation of their identities might lead to a threat upon their lives (Hedge, Gale et al. 1999). Observers differed in their views about the magnitude of the risk posed to the nurses, and consequently about the propriety of withholding information, but none denied the existence of two fundamental and conflicting interests.⁸¹ A similarly stark conflict was evidence in a recent Canadian case, in which a person charged with sexual assault attempted to gain access to the therapeutic records of his accuser. Crafting an appropriate rule on disclosure of the records required a balancing of two fundamental but conflicting interests: the right to a fair trial on one hand, and the right to privacy on the other.⁸² Other considerations typically invoked to justify opacity -- national security, candour in internal governmental deliberations, commercial confidentiality -- can also be connected to the fundamental interests of citizens. It this

connection alone that gives these considerations weight in the calculation of appropriate transparency rules.

A concern for fundamental interests will also influence the design of procedures used to make decisions about disclosure of information. At a minimum, there is an obligation to respect the requirement of "second-order publicity" (Thompson 1999): that is, the policy that is used in making decisions about disclosure should itself be accessible, even if the information that is the subject of contention remains secret. Furthermore, we should question policies that neglect some critical interests or fail to establish fair procedures for balancing these interests. This was the basis of the European Court of Human Rights' 1989 *Gaskin* decision. In a dispute over access to adoption records, the Court criticised British government policy for its disproportionate regard for confidentiality of sources, and its failure to establish a fair procedure for reconciling competing claims regarding the release of adoption records.⁸³ A comparable complaint could be made against FOI laws that prohibit access to broad categories of information without regard to the actual harm that would be caused by the disclosure of information within that category.

AN ILLUSTRATION: PRISON PRIVATIZATION

The usefulness of this approach can be illustrated by considering a specific application of the doctrine of structural pluralism: privately operated prisons. Prison privatisation was largely unknown twenty years ago but has now spread through the United States and Commonwealth. Everywhere, it has bred complaints about erosion of transparency, which are given added weight by stories of disorder or mistreatment within private facilities (Greene 2000).

Critics most frequently complain about their inability to obtain copies of agreements between government agencies and private contractors,⁸⁴ but this is one part of a much larger

problem. Under current FOI laws, governments may rely on commercial confidentiality exemptions to deny access to other documents provided by contractors, such as operating manuals or incident reports (Gow and Williamson 1998; Curran 1999: 145). Documents in the exclusive possession of contractors are even more likely to remain hidden, unless government agencies have taken the unusual step of insisting on a right of access within the contract. In some parts of the United States, an even more unusual situation has arisen. New "speculative prisons" house inmates from neighbouring jurisdictions, and have no contractual relationship with governments of their home jurisdiction at all (Collins 1999). As a consequence, there are no contractual records that might be accessible under the law of the home jurisdiction, and no opportunity for the government of the home jurisdiction to impose access requirements through the terms of a contract. In several states controversies have arisen as a result of riots or escapes from poorly managed speculative prisons (California Senate Committee on Public Safety 1999: 5).

Three arguments can be made for piercing the "corporate wall" (Testa 1999) that surrounds private prisons, all based on an appeal to the fundamental interests of citizens. The first is premised on the right to personal security that is shared by all members of the community surrounding a privately operated correctional facility. The escape of high-risk prisoners would obviously jeopardize the safety of the prison's neighbours; in this respect, the prison is comparable to the chemical factory that was at the centre of controversy in the European Court of Human Rights' *Guerra* decision. The right to personal security implies a right to information about the operations of the facility. This might include information about the number and risk-classification of inmates; the number and qualifications of staff; and the prison's emergency response procedures. Safety considerations might warrant an even broader access rights. A

study of problems at the controversial Northeast Ohio Correctional Center observed that risks of disorder and escape are tightly linked to the prison's disciplinary procedures and the availability of work and educational opportunities, and consequentially the public might have a right to know about these subjects as well (Clark 1998). Similarly, the public might have a right to know about activities within the prison that are likely to aggravate the risk of recidivism when a prisoner is released into the community.⁸⁵

A second argument for access to information is premised on the political participation rights of citizens in the surrounding community. Corrections policy is a subject of profound importance, involving basic questions about the meaning of justice, the legitimate use of force, and promotion of public safety. At the same time, it is not an area that is typified by clear and stable societal preferences (Gentry 1986: 360 and 364). On the contrary, popular debate is characterized by profound disagreements on these basic questions, and massive uncertainties about the likely impact of policy choices. Individuals and communities resolve these questions through public deliberation -- the process of "civic discovery," as Robert Reich calls it (Reich 1988).⁸⁶ But public deliberation will not yield good results unless citizens have a good understanding of how correctional facilities actually work, and can observe the effect of their policy choices. An insistence on strict corporate secrecy effectively hobbles the process of civic discovery and denies each citizen his or her right to participate in the government of the community.

A final case for transparency is built upon the correlative duties of citizens. Correctional policy involves a collective decision that the fundamental rights of fellow citizens should be severely restricted. There may be good reasons for imprisonment, but it cannot be denied that the effect is profound: inmates become "involuntary wards of the state" (Wecht 1987: 830-831;

Freiberg 1997: 127-128; Curran 1999: 136). Prisoners have no "exit option," and their capacity to engage in political protests against excessive harms is curtailed. A collective decision to restrict the rights of fellow citizens so profoundly gives an important correlative duty. Citizens have an obligation to ensure that the restriction of fundamental rights does not become excessive.

Although the task of implementing corrections policy can be delegated to government departments or contractors, the task of fulfilling this correlative obligation cannot. This is particularly true when departments or contractors are known to have mixed incentives in their execution of policy. Contractors, for example, may attempt to reduce operating costs by using more brutal disciplinary procedures or stinting on essential services (Gentry 1986: 355-356; Wecht 1987: 829-830; Casarez 1995: 258; Hancock 1999: 44). Government departments will try to draft contracts that minimize this sort of misbehaviour, but contracts cannot anticipate all possible forms of malfeasance. Furthermore, governments may not be effective monitors of contract compliance. They may lack the resources needed for effective oversight and the political will to enforce the terms of the contract. This may be particularly true when the act of privatisation was itself controversial, and government has an interest in suppressing evidence of failure.⁸⁷ The danger that contractors and contracting agencies will misbehave is greatest when the misbehaviour is protected by official or commercial secrecy.⁸⁸ An effective remedy may be the establishment of strong transparency rules that allow broad access to information about operations within the privately run facility as well as the monitoring work of the contracting agency.

Of course, there are also arguments against disclosure that can also be justified by an appeal to fundamental interests. Excessive transparency might compromise security institutional security (and hence public safety) or the privacy of inmates and employees. Too much openness

might also erode the private provider's incentive to develop more effective techniques for achieving the aims of corrections policy. Nevertheless, this brief canvass suggests that a concern for fundamental interests would lead us to adopt more rigorous information rights than are currently provided in many jurisdictions now experimenting with prison privatisation. Furthermore, the method of arguing in favour of increased openness -- or, indeed, against it -- does not depend on issues of provenance or structure. There is no need to determine whether correctional services are "traditionally" a governmental function, or whether the funding and governance arrangements for a prison operator make it appear governmental to outside observer. The central issue is whether information rights must be recognized to avert the harm to fundamental interests that would otherwise be caused by organizational opacity.

CONCLUSION

Concerns about the "democratic deficit" caused by recent restructuring are significant but not unprecedented. Western democracies experienced a comparable crisis in the middle decades of the last century. The growth of governmental responsibilities, particularly in response to the Great Depression, entailed an expansion in the number, size and influence of administrative agencies. Many of these agencies exercised discretion given to them through statutes, or applied regulations made under authority of law but without close review by legislatures. Power seemed to shift from legislators to administrators, and this provoked complaints that presaged those now made against the restructured public sector. Administrators, it was said, exercised extraordinary influence -- but they did so secretly, and often capriciously. The bureaucracy, Britain's Lord Hewart complained, had established a "new despotism" (Hewart 1929). Administrative agencies, said U.S. Supreme Court Justice Robert Jackson, had combined to form a strange

"fourth branch" of government, which deranged traditional ideas about the division and control of political power (Rosenbloom 2000).

Throughout the post-war years, the western democracies constructed a new regime to regulate and legitimise bureaucratic power. New laws compelled administrative agencies to adopt more open procedures for rulemaking, and established mechanisms by which citizens could appeal adverse decisions. Courts became more liberal in providing citizens with judicial remedies for administrative malfeasance.⁸⁹ The construction of this new regime required an amendment of the long-held belief that the control of administrative behaviour should be the sole responsibility of political executives and legislators.⁹⁰ Citizens acquired a new set of rights that could be asserted directly against the new fourth branch of government. One of these was the right of access to information held by departments and agencies. In fact, the precursor of the current U.S. Freedom of Information Act was a provision of the 1946 Administrative Procedure Act, the keystone of the new regime for control of federal administrative agencies (Cross 1953: 223-228).

The last quarter of the twentieth century has witnessed a second and equally profound shift in the structure of political power. In this second period, authority has flowed out of the now-familiar bureaucracy, and into a new array of quasi-governmental and private bodies. The relocation of authority has provoked another doctrinal crisis: the old system of administrative controls, built to suit a world in which power was centred within government departments and agencies, no longer seems to fit contemporary realities. Fears about the misuse of power -- a second "new despotism" -- may be aggravated because of a second post-war trend. Western democracies have gradually broadened their definition of basic rights -- that is, those citizen interests that deserve protection against arbitrary action (Klug 2000: 71-74, 98-111, 127-134). In

short, our understanding of what counts as an abuse of power is expanding, at a moment when power itself is slipping out of the restraints imposed by the post-war regulatory regime.

The erosion of FOI law is part of this larger doctrinal crisis. Like the new approach to governance itself, an appropriate response to the weakening of FOI law must be typified by pragmatism and openness to experimentation. The critical question in determining information rights is not whether an organization "looks governmental," or performs a function that was once assigned to a government agency. Rather, the important questions are whether an organization could cause unjustifiable harm to fundamental interests, and whether transparency requirements might avoid such harm. These questions will provoke a more complicated, but ultimately more constructive discussion about the ambit of FOI laws.

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NOTES

¹ These private producers may be regulated by government agencies, but they are not created, owned or controlled by government, or producing services under contract to government. A voucher-based system of private education is an example (OECD 1999).

² The European Ombudsman has established a right of access to information in this way: (European Ombudsman 1996).

³ Including laws that regulate the treatment of public servants, the management of money, procurement, and administrative procedures.

⁴ The distinction between "steering" and "rowing" functions is made by: (Osborne and Gaebler 1992).

⁵ See the recommendations of the parliamentary committee that reviewed the law (Standing Committee on Justice and Solicitor General 1987). There have also been recent private members' bills that would expand the law to include government-owned corporations. (Bills C-206, C-418 and C-448, 36th Parl., 2d Sess.)

⁶ On Australian state laws, see: (Queensland Parliament 2000: 23). On Canadian provincial laws, see: (McNairn and Woodbury 2000: s. 2.8)

⁷ *Forsham v. Harris* 445 U.S. 169, 180 (1980). The critical question under federal law is whether an organization should be considered an "agency" for the purpose of the law.

⁸ *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

⁹ *Irwin Memorial, etc. v. American National Red Cross*, 640 F.2d 1051 (9th Cir. 1981). This view explicitly reverses the view expressed in *Rocap* that 1974 amendments to the FOI Act were intended to encompass quasi-governmental entities.

¹⁰ Such as the Hawaii FOI law, which comprises all state "agencies"; the Maryland law, which includes any "unit or instrumentality of state government"; and the Delaware law, which comprises all "public bodies."

¹¹ Open Records Act, K.R.S. 61.870(1)(h). For a comparable approach, see Tennessee Code 10.7.503(d)(1).

¹² In addition to organizations that directly receive government appropriations. Open Records Act, M.R.S. 610.010(4)(f)(b).

¹³ Act respecting access to documents held by public bodies, R.S.Q., c. A-2.1, s. 4.

¹⁴ Freedom of Information Act, C.C.S.M., c. F175, s. 1.

¹⁵ See the definitions of "agencies" or "authorities" in Commonwealth and state FOI laws. Incorporated companies and associations are typically excluded. In a recent decision, the Queensland Information Commissioner observed that the "public purpose" restriction "imposes a requirement that a purpose be one for the benefit of members of the community generally, or a substantial segment of them": Decision 95022, August 4, 1995.

¹⁶ For example, the New Zealand law includes local airport authorities and national agricultural marketing boards. Proposed legislation will also include the New Zealand Blood Service. By contrast, the Canadian government consciously excluded its recently-created airport authorities, as well as the Canadian Wheat Board and the new Canadian Blood Services.

¹⁷ For a discussion of variation among Canadian laws, see: (McNairn and Woodbury 2000: sec. 3.1.b and 4.1). On variation among Australian laws, see: (Australian Law Reform Commission 1995; Industry Commission 1996: 92-95; Administrative Review Council 1997: Ch. 5; Finn 1998).

¹⁸ A harm test has been read into the language of the U.S. Freedom of Information Act. See (Adler 1997: 84-87).

¹⁹ Although there are exceptions. Compare the Freedom of Information Act of the Australian state of Victoria (s.34(2)) with the Freedom of Information and Protection of Privacy Act of the Canadian province of British Columbia (s. 21(1)).

²⁰ In Canada, for example: the laws of British Columbia, Alberta and Manitoba contain broad public interest overrides; the federal law contains a qualified public interest override; and the laws of New Brunswick and Newfoundland contain no at all.

²¹ A similar practice is observed in Canada by: (Roberts 2000: 314). The Australian Auditor General has also complained about the abuse of confidentiality clauses: (Barrett 1999). See also: (Australasian Council of Auditors-General 1997: section 2).

²² For example, see Ontario's Freedom of Information and Protection of Privacy Act, section 10(1).

²³ Courts have interpreted this provision of the U.S. Freedom of Information Act strictly: (Casarez 1995: 268-284; Feiser 1999: 33-36, 43-54).

²⁴ Official Information Act, section 2(5)(New Zealand); Freedom of Information Act 1997, section 6(9) (Ireland). For a discussion of weaknesses in the Irish provision, see: (McDonagh 2000). For a criticism of the New Zealand provision, see (Administrative Review Council 1997: para. 5.37-38). Australia's Administrative Review Council proposes a similar provision for the Australian FOI law: (Administrative Review Council 1997: para. 5.43). For an

endorsement of the Council's proposal, see: (Australia. Senate Committee on Finance and Public Administration 1998: Chapter 4). The Australian government plans to adopt a limited version of this provision, to allow access to personal information held by contractors: (Joint Committee of Public Accounts and Audit 2000: para. 2.17)

²⁵ Rhode Island General Law 38-2-2(1); Florida Statutes §119.011(2).

²⁶ See also: (Robinson 1993; Casarez 1995: 298-299). The open records laws of other states (such as Arkansas, Kentucky and Texas) include organizations that are "supported by public funds." It has been suggested that such language might be construed to include private contractors (Bunker and Davis 1998). However, courts appear to read this language narrowly. The Texas statute has been interpreted to exclude businesses providing goods or services under contract (Keeling 1989: 223-225). Iowa's open records law takes yet another approach: it says government bodies "shall not prevent the examination or copying of a public record by contracting with a non-governmental body to perform any of its duties or functions." Iowa Code Chapter 22, Section 2.2. It, too, is read narrowly by the courts. In a 1989 decision, the Iowa Supreme Court suggested that the law refers only to cases in which governments have transferred a statutory function, with the intention of avoiding disclosure requirements (Supreme Court of Iowa 1989).

²⁷ Open Records Act, M.R.S. 610.010(4)(f)(a).

²⁸ Freedom of Information Act 1992, Schedule 2, Glossary. The amendment was made by Act No. 47 of 1999, section 15.

²⁹ Code of Practice on Access to Government Information (UK), section 6; Code of Practice on Access to Scottish Executive Information, section 6.

³⁰ Freedom of Information Act section 5(1)(b).

³¹ Draft Code of Practice, sections 24-28.

³² Freedom of Information Act, Schedule 1, sections 44 and 45.

³³ The right to access and correct personal information is one of several principles about the handling of personal information that have become widely accepted in the last quarter-century (Gellman 1998: 196-197). See also the 1980 OECD *Guidelines Governing the Protection of Privacy*, Principle 7; and 1995 European Union *Directive on Data Protection*, Article 12. Colin Bennett argues that there is evidence of convergence in national policies regarding the protection of personal information, but concedes that the United States remains an anomaly: (Bennett 1998). American laws establishing a right of access to particular classes of information include the Fair Credit Reporting Act, the Family Educational Rights and Privacy Act, and the Cable Communications Policy Act (Gellman 1998: 202). Many current proposals

for a new "patient's bill of rights" would establish a comparable right of access to personal health information. For a recent defence of the right to personal privacy, see: (Rosen 2000).

³⁴ Constitution of the Republic of South Africa Act, Act 108 of 1996, section 32(1)(b); Promotion of Access to Information Act, Act No. 2 of 2000, Part 3.

³⁵ Promotion of Access to Information Act, 53(2)(d).

³⁶ Freedom of Information Bill, section 5(1)(a). The law gives the government discretion to include such businesses.

³⁷ For example, the British government proposed in 1997 that its new FOI law should include all "privatized utilities" (United Kingdom 1997). The privatized utilities complained that this unfairly favoured competitors who had never been owned by government.

³⁸ (Feiser 1999: 60). Feiser and other commentators argue for an explicit adoption of the test used for constitutional review -- known as the "public function" test -- to resolve questions about the scope of FOI law: See also (Bunker and Davis 1998). For a criticism of the public function test's emphasis on "traditionally" governmental functions, see: "(Barak-Erez 1995).

³⁹ Privatized utilities used this argument to reverse the British government's proposal to include them under a new FOI law. See the utilities' submissions in response to the government's 1997 white paper. Recently privatized Ontario utilities have made the same argument: (Mittelstaedt 2001).

⁴⁰ The same approach is taken in more general discussions about boundaries "quasi-government." For an illustration, see: (Greve, Flinders et al. 1999: 139-140).

⁴¹ Rules of natural justice are intended to protect individuals who are the subject of adverse decisions by such authorities. The rules may require authorities to give notice of an intention to consider an adverse decision; disclosure of the case to be made against an individual; and access to the proceeding in which the decision will be made.

⁴² See also: (Oliver 1987).

⁴³ For arguments in favour of an extension of human rights obligations to the private sector, see: (Clapham 1993; Clapham 1995).

⁴⁴ Ontario Court (General Division), *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto et al.*, Court File No. 87-CQ-21670, Judgement July 3, 1998.

⁴⁵ European Court of Human Rights, *Guerra v. Italy*, Case no. 116/1996/735/932, Judgement February 19, 1998.

⁴⁶ European Court of Human Rights, *Case of McGinley and Egan v. United Kingdom*, Case no. 10/1997/794/995-996 (June 9, 1998). The Court upheld this right even though the apparent risk to citizens was significantly weaker than in *Guerra*. It concluded that the government had not violated its obligations.

⁴⁷ For example, see this influential American case: Supreme Court of California, *Tarasoff v. Regents of the University of California*, Case No. S.F. 23042, Judgement July 1, 1976. The case considered the "duty to warn" of psychotherapists.

⁴⁸ The growing popularity of pollutant release registers is discussed in (Czech Ministry of the Environment 2000).

⁴⁹ Several jurisdictions recognize a public interest defence in actions for breach of confidence. In the United Kingdom, such disclosures are also protected by the Public Interest Disclosure Act 1998.

⁵⁰ See the United Kingdom's Access to Health Records Act 1990. Comparable rules would be established under many of the current American proposals to adopt a "patients' bill of rights."

⁵¹ Federal Court of Appeal, *Ruby v. Solicitor General*, Case no. A-52-98 (Judgement June 8, 2000). Paragraphs 165 and 169.

⁵² European Court of Human Rights, *Gaskin v. United Kingdom*, Case no. 2/1988/146/200, Judgement July 7, 1989.

⁵³ Access to educational records is provided for in the Family Educational Rights and Privacy Act 20 USC § 1232g; other disclosure requirements are created by the Students' Right to Know Act, 20 USC 1092.

⁵⁴ See the United Nations Declaration of Human Rights, Art. 26.2, and the United Nations Covenant on Economic, Social and Cultural Rights, Art. 13.1.

⁵⁵ European Court of Human Rights, *Leander v. Sweden*, Case no. 10/1985/96/144, Judgement March 26, 1987. The Court determined that the violation was justified in the circumstances.

⁵⁶ Commission for Children and Young People Act of 1998, section 43.

⁵⁷ In the United States, the relevant law is the Fair Credit Reporting Act, 15 USC 1681; in Britain, the Consumer Credit Act 1974 and the Access to Medical Reports Act 1988.

⁵⁸ "Everyone is the rightful owner of their personal information, no matter where it is held, and this right is inalienable" (House of Commons Standing Committee on Human Rights 1997). See also (Litman Forthcoming: 5).

⁵⁹ Proposed Patients' Bill of Rights Act, S. 3057, 106th Cong., 2d Sess., section 121.

⁶⁰ The same argument could be made with respect to the disclosure requirements under the U.S. Family Educational Rights and Privacy Act.

⁶¹ Concern about the lack of an "exit option" also influences recent UK cases on judicial review: (Oliver 1987: 555)

⁶² United Nations International Covenant on Civil and Political Rights (1966), Article 19.2. Comparable language is found in the United Nations Universal Declaration of Human Rights (1948), Article 19.

⁶³ United Nations Convention on the International Right of Correction (1952), Preamble.

⁶⁴ For a comparable approach to "freedom of information" by an American author, see: (Brucker 1949).

⁶⁵ Article 10.1 of the European Convention on Human Rights refers to the "right to receive and impart information," while Article 19 of the Universal Declaration of Human Rights refers to the right to "*seek*, receive and impart information." The distinction is thought to weaken the case for recognizing a right of access to government information within Article 10.1 of the European Convention: (Jacobs and White 1996: 223).

⁶⁶ European Court of Human Rights, *Guerra v. Italy*, Case no. 116/1996/735/932, Judgement February 19, 1998. For a discussion of the Court's position in this and earlier cases, see: (Sedley 2000).

⁶⁷ The Supreme Court of Canada recently observed that "The distinctions between 'freedoms' and 'rights', and between positive and negative entitlements, are not always clearly made, nor are they always helpful. . . [A] situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of . . . ensuring public access to certain kinds of information." *Delisle v. Attorney General of Canada*, File No. 25926, Judgement October 7, 1999.

⁶⁸ Supreme Court of the United States, *Forsyth County v. The Nationalist Movement*, Case No. 91-538, (June 19, 1992): <http://supct.law.cornell.edu/supct/html/91-538.ZO.html>.

⁶⁹ Through preferential tax treatment, direct grants, governmental advertising, or preferential postage rates.

⁷⁰ For an argument that U.S. constitutional law creates a constitutional obligation for state action, see: (Fiss 1996).

⁷¹ This is certainly true from the point of view of financial costs. Critics may argue that there is an intangible cost, consisting of a weakened capacity for vigorous state action. However, the same might be said of other policies that permit the expression of dissent.

⁷² In a recent decision, Britain's Lord Steyn observes that "freedom of speech is the lifeblood of a democracy." See (Sedley 2000: 240).

⁷³ *S.P. Gupta vs. Union of India* (1981), quoted in (Amir-Ul Islam 1999). See also: (Martin and Feldman 1998, Chapter 8). Other relevant cases are: *State of U.P. v Raj Narain* (1975); *Gandhi v Union of India* (1978); *Bombay Environmental Group and others v Pune Cantonment Board* (1982); *Secretary, Ministry of Information and Broadcasting vs Cricket Association of Bengal* (1995).

⁷⁴ Article 21.3.

⁷⁵ Article 25.

⁷⁶ For example, the Canadian government spent over \$180 million on the 1997 general election, or about eleven dollars per elector. This excludes ongoing costs associated with its election commission and payments made to political parties.

⁷⁷ United States Supreme Court, *Marsh v. State of Alabama*, 326 U.S. 501 (1946). For comparable reasoning in a Canadian case, see the argument of Justice Bora Laskin in the Canadian Supreme Court's decision in *Harrison v. Carswell*, [1976] 2 SCR 200.

⁷⁸ For discussion of correlative duties, see: (Raz 1984; Raz 1986: 183-186).

⁷⁹ Universal Declaration of Human Rights, Article 3.

⁸⁰ Universal Declaration of Human Rights, Article 30; European Convention on Human Rights, Article 17; American Convention on Human Rights, Article 29.

⁸¹ The Liberal government amended Victoria's FOI law to restrict future disclosures of comparable information, but this was reversed by a Labor government later that year. Part IIIA of the Victoria Freedom of Information Act.

⁸² Supreme Court of Canada, *R. v. Mills*, [1999] 3 S.C.R. 668

⁸³ European Court of Human Rights, *Gaskin v. United Kingdom*, Case no. 2/1988/146/200, Judgement July 7, 1989.

⁸⁴ Complaints about the inability to obtain prison contracts in Australia were noted earlier in this paper.

⁸⁵ Neighbours of the facility would have a particular interest in the prospect of recidivism if inmates tended to settle in the surrounding area (Collins 1999: 16).

⁸⁶ See also: (Mansbridge 1992; Stern and Fineberg 1996).

⁸⁷ For general discussions of problems in government monitoring, see: (Gentry 1986: 355-360) Casarez, 1995 #34: 294-295](Finn 1998, 127; Collins 1999; Frieberg 1999: 132). Specific illustrations of monitoring failures are provided by (Moyle 1994; Clark 1998; Fitzgerald 2000).

⁸⁸ Indeed, Gentry characterizes this as a "hidden delivery" problem (Gentry 1986: 356-357). It might be better characterized as a principal-agent problem with serious divergences in incentives and information asymmetries.

⁸⁹ Judicial control was expanded in two ways: by liberalizing rules of standing, which determined who could ask for judicial remedies; and by lowering the threshold for judicial intervention in cases of administrative misconduct.

⁹⁰ In the British context, see: (Hunt 1997: 22).