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ACCESS TO INFORMATION LEGISLATION IN CANADA AND FOUR OTHER COUNTRIES

Kristen Douglas
Alysia Davies
Law and Government Division

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PARLIAMENTARY INFORMATION AND RESEARCH SERVICE
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INTRODUCTION

The first law creating a right to government information was enacted in Sweden in 1949, though the basic principle of access to official information had been recognized there in 1766. Finland adopted an access law in 1951. The influential United States Freedom of Information Act was passed in 1966. A number of European countries enacted access to information legislation in the 1970s. Countries with Westminster systems of government soon followed, with Australia, Canada and New Zealand all enacting freedom of information (FOI) legislation in the early 1980s. Well over 50 countries now have access to information laws in place.

Canada's *Access to Information Act* (ATIA), in force since 1983, gives Canadians a broad legal right to information recorded in any form and controlled by federal government institutions. Individuals may apply for access to certain information, and, unless the requested information falls within certain specific and limited exceptions, the Act will require its release within specified time limits. The exemptions are set out in the Act, and they generally relate to individual privacy, commercial confidentiality, national security or other confidences necessary for policy-making. Cabinet confidences are excluded from the operation of the Act.

In 1983, the passage of the ATIA placed Canada in the forefront of what was then an emerging legislative field; but in the two succeeding decades, advances in some other countries have not been matched in this country. This paper briefly considers the freedom of information statutes in place in four other jurisdictions: the United Kingdom, Ireland, Australia and New Zealand. These countries were selected for comparison because they were identified in then-Justice Minister Irwin Cotler's April 2005 document entitled *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*[1] as being those which might be most

(1) Justice Canada, *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, April 2005, http://www.justice.gc.ca/eng/dept-min/pub/ati-aai/index.html.

appropriately considered in preparing for reform of the ATIA. These countries' access to information schemes are useful for the purpose of comparison with Canada's because all four countries have Westminster-style parliamentary systems, and their access regimes have been developed at varying points during the ATIA's 23-year history.

FREEDOM OF INFORMATION LEGISLATION IN FOUR COUNTRIES

A. United Kingdom

Freedom of information legislation came into effect for the United Kingdom and Scotland for the first time on 1 January 2005: the *Freedom of Information Act 2000*(2) (the U.K. FOIA) applies to U.K. government departments and public authorities in England, Wales and Northern Ireland. The Act had been passed four years previously; its effective date was subject to a delay to give authorities time to prepare for its implementation. In addition to departments and public authorities, the legislation also applies to the House of Commons, the House of Lords and to the Welsh and Northern Ireland assemblies. The *Freedom of Information (Scotland) Act 2002* provides similar, though not identical, rights to information held by the Scottish Executive, Scottish public authorities and the Scottish Parliament.

Two other related statutes came into effect at the same time: *The Environmental Information Regulations 2004*(3) (EIRs), enacted in compliance with a European Union Directive, which provide a separate right of access to environmental information held by U.K. public authorities and some private bodies, including utilities and contractors providing environmental services on behalf of authorities; and the amended *Data Protection Act 1998*,(4) which entitles individuals to see many kinds of personal information about themselves that is held by public or private bodies. The right to information held by private bodies was not affected by the amendments. The U.K. Information Commissioner enforces information rights across the whole of the United Kingdom, including Scotland.

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(2) United Kingdom, *Freedom of Information Act 2000*, http://www.uk-legislation.hmso.gov.uk/acts/acts2000/20000036.htm.

(3) United Kingdom, Statutory Instrument 2004 No. 3391, *The Environmental Information Regulations 2004*, http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_statutory_instrument_2004.pdf.

(4) United Kingdom, *Data Protection Act 1998*, 1998 c. 29, http://www.opsi.gov.uk/acts/acts1998/19980029.htm.

The Information Commissioner's Office[5] is the independent public body set up to promote access to official information and to protect personal information in the United Kingdom by enforcing the *Data Protection Act*, the U.K. FOIA, the *Privacy and Electronic Communications Regulations* and the EIRs. The office provides guidance to, and takes complaints from, organizations and individuals. Reporting directly to Parliament, the Commissioner's powers include the ability to order compliance and to prosecute for breaches of the various information statutes. The Commissioner also approves the publication schemes that must be maintained by public authorities under the U.K. FOIA.

The U.K. FOIA provides a general right of access to information held by some 100,000 public authorities, which include those listed in Schedule 1 to the Act, defined by an Order,[6] or included in the definition of "publicly owned company."[7] Under the legislation, anyone can request information from a public authority and have it disclosed to him or her, subject to clearly defined exemptions.[8] Some exemptions, referred to as "qualified," are subject to a public interest test, including the exemptions for:

- information intended for publication;
- information that must be exempted to safeguard national security;
- information likely to prejudice defence, international relations or criminal investigations, law enforcement, audits or proceedings;
- information obtained in confidence from another government or an international organization;
- information likely to prejudice relations between governments or administrations within the United Kingdom, or the economic interests of the United Kingdom;

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(5) United Kingdom, Office of the Information Commissioner, http://www.ico.gov.uk/.

(6) Section 5 of the Act allows the Secretary of State, by order, to designate as a public authority for the purposes of this Act any person who is neither listed in Schedule 1, nor eligible for listing, but who appears to the Secretary of State to exercise functions of a public nature or to exercise such functions under contract to a public authority.

(7) Section 6 defines "publicly owned company" as one that is it is wholly owned by the Crown or a public authority listed in Schedule 1, other than a government department or any authority that "is listed only in relation to particular information."

(8) For example, personal data about the requester and environmental information are exempt from release under the U.K. FOIA as they are the subject of rights of access under other statutes.

- information likely to prejudice collective responsibility, inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation, or prejudice the effective conduct of public affairs;(9)

- information relating to honours and relations with the Royal Family;

- information likely to endanger an individual's health and safety;

- most personal data; and

- trade secrets, information likely to prejudice commercial interests, and "legal professional privilege"(10) information.

In cases where these types of exempted materials are requested, the public authority concerned will be required to disclose the information unless it can demonstrate that the public interest in withholding the information outweighs the public interest in disclosing it.

Some of the exemptions make reference to information being exempt from disclosure if prejudice would result from the confirmation or denial of the existence of the information or its disclosure. In such a case, a public authority could not withhold information relating to the economy unless its disclosure would be likely to prejudice the economic interests of the United Kingdom or the financial interests of an administration in the United Kingdom. Such provisions are not blanket exemptions that would justify the withholding of whole categories of information. Where no prejudice is likely to occur, the information will be disclosed subject to withholding any elements where prejudice is likely to arise.

Absolute exemptions to the disclosure requirement under the U.K. FOIA, to which the public interest override is not applied, include:

- materials that are already accessible;

- information relating to or supplied by specified security and intelligence services and organizations, and certain other specified bodies with security functions;(11)

- information contained only in court documents;

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(9) The public interest test does not apply to this exemption in the case of requests made to the House of Commons or the House of Lords.

(10) United Kingdom, *Freedom of Information Act 2000*, section 42.

(11) The exemption can be established by a ministerial certificate, which the Information Commissioner cannot overturn. However, the Information Tribunal established under the U.K. FOIA can set aside the certificate if it finds that the information does not relate to, and has not been supplied by, such a body.

- materials that must be exempted "for the purpose of avoiding an infringement of the privileges of either House of Parliament" or that would interfere in the deliberations of Parliament, the responsibility of ministers, or the conduct of public affairs;[12] and

- information the disclosure of which would constitute a breach of confidence or an infringement of a statute.

The grounds for refusing to release information under the EIRs are more limited. There are fewer exemptions and most are subject to a public interest test. The authority may not refuse a costly, repeated or vexatious request. However, it can refuse to disclose information if the request is "too general" or "manifestly unreasonable." Also, the EIRs state that a public authority must apply a presumption in favour of disclosure, and the exemptions must also be interpreted "in a restrictive way."

Unlike the EIRs, the U.K. FOIA permits public authorities to refuse to comply with requests where the cost of providing the information will exceed the set cost limit, or where the request is frivolous, vexatious or substantially repeats a recent request.

The Information Commissioner can receive and investigate complaints from requesters when information is not disclosed by a public authority. Decisions of the Information Commissioner under the U.K. FOIA or the EIRs can be challenged by the applicant or by the public authority to the Information Tribunal, free of charge, and then to the courts on a point of law. The Act gives Cabinet ministers the ability to override the Commissioner's decision that a department or other public authority must disclose exempt information in the public interest.[13]

Until the end of 2008, the U.K. FOIA also requires every public authority (including the House of Commons and the House of Lords) to adopt and maintain a publication scheme setting out:

- the classes of information that it publishes or intends to publish;

- the manner in which it intends to publish the information; and

- whether there will be a charge for the information.

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(12) This exemption can be established by a certificate signed by the Speaker of the Commons or the Clerk of the Parliaments, which the Information Commissioner cannot overturn.

(13) Section 53 of the FOIA permits an "accountable person," which as defined includes Cabinet ministers for most public authorities, to provide the Commissioner with a certificate signed by that person stating that he or she has, on reasonable grounds, formed the opinion that there was no failure to release documents as required by the Act. A copy of such a certificate must be tabled in the appropriate Parliament or Assembly.

The public authority is required to have regard to the public interest in creating the publication scheme, and the scheme must be approved by the Information Commissioner. However, as of 31 December 2008, all of these schemes expire. The Information Commissioner has approved their replacement by a model scheme for all public authorities, to be adopted 1 January 2009.(14) The model scheme was developed by the Information Commissioner through a wide-ranging consultation with various public bodies. Any public authority that has not adopted the new model scheme by the effective date will be in breach of the U.K. FOIA.

The U.K. FOIA contains no general government duty to maintain records, but the importance of proper records management is emphasized in the *Lord Chancellor's Code of Practice on the Management of Records*, promulgated as required under the Act.(15) The Code provides that:

> Any freedom of information legislation is only as good as the quality of the records to which it provides access. Such rights are of little use if reliable records are not created in the first place, if they cannot be found when needed or if the arrangements for their eventual archiving or destruction are inadequate. Consequently, all public authorities are strongly encouraged to pay heed to the guidance in the Code.(16)

The Information Commissioner has conducted annual surveys of FOIA access providers across the United Kingdom since the Act's inception. The most recent of these surveys, *Freedom of Information: Three Years On*, found that the attitudes towards freedom of information within government were generally positive, and most believed it had contributed to greater openness and improvements in records management. However, there was also considerable agreement that the U.K. FOIA had led to high costs for government and put a strain on staff resources.(17)

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(14) Section 20 of the U.K. FOIA permits the substitution of this type of general model, provided it is approved by the Information Commissioner.

(15) Section 46 requires the Lord Chancellor to issue a code of practice providing guidance to relevant authorities as to the practice they should follow in connection with the keeping, management and destruction of records.

(16) United Kingdom, Department of Constitutional Affairs, *Lord Chancellor's Code of Practice on the Management of Records: Issued under Section 46 of the Freedom of Information Act 2000*, November 2002, http://www.justice.gov.uk/docs/foi-code-46.pdf.

(17) Information Commissioner's Office / Continental Research, *Freedom of Information: Three Years On* (Market Research Report), London, U.K., December 2007–January 2008, pp. 6–8.

B. Ireland

The Irish *Freedom of Information Act 1997*[18] (the Irish FOIA) allows members of the public to obtain access to official information to the greatest extent possible consistent with the public interest and the right to privacy. It also creates rights enabling individuals to have personal information in a record amended where it is incomplete, incorrect or misleading; and to obtain reasons for decisions affecting the person.[19] There are also requirements that public bodies publish information about themselves, the information they hold, and the internal rules and guidelines they use in decision making.

The Irish FOIA is administered by the Department of Finance and enforced by the Office of the Information Commissioner. The Act provides for the establishment of an independent Office of the Information Commissioner to review most decisions made by public bodies under the Act, and also permits the Irish Ombudsman to be appointed Commissioner.[20]

The most recent amendments to the Irish FOIA, the *Freedom of Information (Amendment) Act 2003*, came into force on 11 April 2003.[21] The declared purpose of the 2003 amendments was to ensure the Irish FOIA's efficient operation; they extended additional protection to certain sensitive government records, and clarified certain technical procedures. However, these amendments created considerable controversy, and the government was accused of trying to scale back the scope of the Irish FOIA. The amendments included a provision severely curtaining access to government documents predating the introduction of access legislation, and introduced wider protection for ministerial communications and advice to government, along with a new fee system for requests.[22]

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(18) Ireland, *Freedom of Information Act 1997*, Number 13 of 1997, http://www.gov.ie/bills28/acts/1997/ a1397.pdf.

(19) Australia's legislation contains a similar provision, but in the other jurisdictions considered in this paper, this type of application is governed by other legislation. For example, in Canada the relevant legislation is the *Privacy Act*, http://laws.justice.gc.ca/en/P-21/206690.html.

(20) The current Information Commissioner, Emily O'Reilly, is also Ombudsman, having been appointed to both offices on 1 June 2003.

(21) The legislative history and final text of the *Freedom of Information (Amendment) Act 2003* are available online at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2003/1103/default.htm. A compilation of the 1997 and 2003 Acts is available at http://www.foi.gov.ie/legislation/amalgamated-acts.pdf/. A useful guide to the legislation is available at http://www.foi.gov.ie/foi.nsf/Guide?OpenFrameSet.

(22) Ireland, Office of the Information Commissioner [Information Commissioner of Ireland], *Freedom of Information: The First Decade*, Dublin, Ireland, May 2008, pp. 13–16 http://www.oic.gov.ie/en/Publications/SpecialReports/10thAnniversaryPublication-FreedomofInformationTheFirstDecade/.

The First Schedule to the Irish FOIA sets out the departments of state and other officials, defined as "public bodies" for the purposes of the legislation, that are subject to investigation by the Commissioner. Included are: government departments; various public offices and commissions; publicly funded groups or organizations; companies of which a majority of the shares are held by a minister of the government; and other bodies, organizations or groups whose members are appointed by the government or a minister of the government, or that perform statutorily mandated public functions.(23)

Ireland's Information Commissioner(24) reviews decisions of government agencies and can make binding decisions requiring the release of documents. He or she also promotes openness in government by encouraging the voluntary publication of information above and beyond the minimum requirements of the Irish FOIA. The Commissioner has significant investigative and enforcement powers, including powers to search, to issue summons and to compel the release of information. Hindering the Commissioner in the performance of his or her duties is an offence under the legislation.(25) He or she regularly reviews the operation and effectiveness of the Act, and publishes commentaries and annual reports.

The Irish legislation sets out a series of exemptions to the right of access to records held by public bodies; these exemptions protect information relating to key areas of government activity, third-party interests, and court and parliamentary matters. Many of the Act's exemptions are subject to an injury test, requiring that consideration be given to whether disclosure would have an adverse effect on a specific interest before material can be withheld. Other exemptions contain a general public interest test, requiring that consideration be given to whether the public interest in disclosure of a particular record is better served and outweighs the potential harm or injury arising from such disclosure.

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(23) A full list of all public bodies covered is available on the website of the Department of Finance, FOI Central Policy Unit, at "List of Public Bodies and Contacts": http://www.foi.gov.ie/bodies-covered-by-foi.

(24) Ireland, Office of the Information Commissioner, http://www.oic.gov.ie/en/AboutUs/.

(25) Hindering the Information Commissioner in the performance of his or her duties or functions is also an offence under the ATIA in Canada.

Some records may be exempt because they fall into a particular class, such as a record covered by legal professional privilege, certain records related to the decision-making processes of a government department,(26) or records related to security and international relations. The exemption in the latter two categories is a mandatory one, while other exemptions are discretionary. The mandatory exemption covering government records does not apply:

- where 10 or more years have elapsed since the government decision to which the record relates was made; or
- where the information constitutes factual material and the decision to which it relates has been published.(27)

Some classes of records are exempt from scrutiny by the Information Commissioner. For example, an exceptionally serious or sensitive matter in the area of law enforcement, security or international relations may be designated as exempt by means of a ministerial certificate; matters covered by such certificates may not be disclosed under the Act. The certificates may not be reviewed by the Information Commissioner, but are instead subject to review by the Taoiseach (the Prime Minister) and other members of the government, or on a point of law by the courts.(28)

Under the Irish FOIA, heads of public bodies may refuse to release documents containing matters relating to deliberative processes of departments, unless the head is of the opinion that the public interest would be better served by the document's release. However, a Secretary General of a department has the power to certify a record as "relating to a deliberative process in a Department of State" and to revoke such a certificate when he or she is satisfied that the deliberative process has concluded. Such a certificate establishes conclusively that the record is exempt, meaning that it cannot be released, and there can be no review of that decision under the Act.

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(26) This exemption covers government records, records prepared for a member of the government for the purpose of a government meeting, and records very closely related to such meetings, including a record consisting of a communication between two or more members of the government concerning a matter that at the time of record's creation was before, or was expected to come before, government. "Government" is defined for the purpose of section 19 as including a committee consisting of members of the government, the Attorney General or ministers of state, and a committee of officials certified by the Secretary General to the government as having been established in direct support of government deliberations. See *Short Guide to FOI Acts*, http://www.foi.gov.ie/foi.nsf/Guide?OpenFrameSet.

(27) "Factual information" is defined in the Irish FOIA as "including information of a statistical, econometric or empirical nature together with any analysis thereof."

(28) Ireland, *Freedom of Information Act 1997*, as amended, sections 25 and 42.

Although the Irish Parliament (the Oireachtas) is bound by the Irish FOIA, the Act also includes mandatory exemptions protecting:

- opinion and advice relating to the proceedings of the Oireachtas;
- records that would be exempt from production in court on grounds of either contempt or legal professional privilege;
- the private papers of elected representatives of the European Parliament or of Local or Regional Authorities or Health Boards; and
- records relating to the appointment, or proposed appointment, or business or proceedings of tribunals and inquiries as defined in the section.

Decisions about certain classes of records are not subject to an injury test, as they fall outside the scope of the legislation. These exclusions consist of: records held by the courts; records relating to a review by the Information Commissioner, or the Comptroller and Auditor General, or an Ombudsman; records relating to the President or to a proposal of a political party; records relating to the confidential papers of a member of either House of the Oireachtas; or records relating to information provided in confidence to a public body in relation to the enforcement of criminal law.

Exemptions subject to a public interest test, requiring refusal where the disclosure of the existence or non-existence of the record would be contrary to the public interest, include:

- government records more than 10 years after their creation;
- materials relating to the deliberative processes of a public body or that would prejudice the operations of or effectiveness of tests, examinations, or audits conducted by or on behalf of a public body;
- records the release of which could prejudice criminal proceedings, law enforcement, the security of an institution or public safety;
- information given to a public body in confidence, or the release of which would breach a confidence;
- trade secrets and information of financial, commercial, scientific or technical value;
- personal information about an individual, including someone who is deceased;

- information relating to research or that could reasonably be expected to prejudice the well-being of a cultural, heritage or natural resource or a species, or the habitat of a species, of flora or fauna;

- information the release of which could have an adverse impact on the national economy or result in financial loss or the undue disturbance of the ordinary course of business generally.

Third-party information given to public bodies which is of a personal, commercially sensitive or confidential nature may be disclosed if it is in the public interest, or, in the case of personal information, where the release of the information would benefit the individual. In order to release these types of information, specified consultation processes must be followed; or, if they cannot be followed, the consent of the Information Commissioner must be obtained.

The Irish FOIA provides (under section 32) for refusal of access to certain records whose disclosure is prohibited by other statutes.(29) The operation of the enactments that allow the non-disclosure of a record that might be the subject of an FOI request is currently under review by a parliamentary committee, the Joint Committee on Finance and the Public Service. Each minister of the government has provided a report to the Joint Committee on the enactments under his or her department's authority that contain provisions authorizing, or requiring, the non-disclosure of particular records. In December 2005 the Information Commissioner reported to the Joint Committee on her findings in relation to those statutory non-disclosure provisions.(30)

In her report to the Joint Committee, the Commissioner commented on the exclusion of many public bodies from the operation of the Irish FOIA, noting that on 21 October 2005 the Minister for Finance had announced his intention to extend the Irish FOIA to a further 109 public bodies. Expressing concern that certain significant public bodies continue to be excluded from the Act, the Commissioner argued that for the Irish FOIA to have the greatest possible impact in promoting transparency and accountability in the public sector, it should apply to public bodies generally. The Commissioner indicated that the number of non-

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(29) The mandatory refusal effect of section 32 is nullified if the enactment in question is included in the Third Schedule to the FOI Act (Enactments Excluded from Application of Section 32).

(30) Information Commissioner of Ireland, *Report of the Information Commissioner to the Joint Committee on Finance and the Public Service for the purpose of Review of Non-Disclosure Provisions in accordance with The Freedom of Information Act 1997 [section 32]*, December 2005, http://www.oic.gov.ie/en/Publications/SpecialReports/ReportstotheJointCommitteeoftheHousesoftheOireachtasSection32/221205ReporttoJointOireachteasCommitteeonFinanceandthePublicService/.

disclosure items in other statutes was growing, and she recommended the creation of a new Non-Disclosure Act that would accommodate in one statute all the non-disclosure provisions currently found in individual enactments.

In September 2006, the Joint Committee released its report, in which it agreed with the Commissioner that 34 existing exemptions from the Irish FOIA under various Acts should be eliminated, while another 40 should be preserved. The Commissioner and the Joint Committee disagreed on another 36 exemptions, which related to areas such as abuse in educational institutions, industrial design and competition, genetically modified organisms, refugees, and medical practitioners, among others.(31) Despite the introduction of three private members' bills, one in 2006 and two in 2008, in an attempt to eliminate both the disputed and non-disputed exemptions, no changes have been made to the legislation so far.(32)

In a 2004 appearance before the Joint Committee on Finance and the Public Service, the Commissioner reported that her most pressing concern was the continued decline in usage of the Irish FOIA. This decline, she noted, was reflected both in the number of requests made to public bodies and in the number of applications to her office, which had decreased by 32% since the previous year. In the Commissioner's view, this drop was directly attributable to the introduction of fees for non-personal requests.(33) The new fees, along with other legislative amendments that she argued had weakened the FOI regime, had particularly reduced the use of the Act by members of the media.

According to the Commissioner, the Joint Committee agreed with her submissions to some extent and wrote to the Minister of Finance suggesting legislation to change the fee structure for appeals to the Commissioner.(34)

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(31) Houses of the Oireachtas, *Review under Section 32(2) of certain provisions under the Freedom of Information Act 1997 (as amended in the Freedom of Information (Amendment) Act 2003,* Joint Committee on Finance and the Public Service, 7th Report, September 2006.

(32) The *Freedom of Information (Amendment) Bill 2006*, *Freedom of Information (Amendment) Bill 2008*, and *Freedom of Information (Amendment) (No. 2) Bill 2008*, respectively. All of these bills proposed the elimination of the controversial 2003 fee structure as well.

(33) The Commissioner pointed out that it costs €150 to appeal to the Office of the Information Commissioner. This cost, she argued, was seriously out of line with European and other jurisdictions. With regard to Canada, she noted that only in Ontario are requesters charged a fee for appealing to the Commissioner, but that there, the cost is about one-tenth of what is charged in Ireland.

(34) Information Commissioner of Ireland (2005), p. 16.

In May 2008, the Information Commissioner released a report looking back at the first 10 years of the Irish FOIA's operation. In it, she noted the various controversies that have continued since the 2003 amendments, along with several other issues, and called for a full review of the legislation over a six-month period by a group headed by an independent chairman.(35) She also suggested that FOI fees should be reduced in the interim to "restore public confidence in the current FOI arrangements."(36)

In the meantime, the Commissioner's role has been expanded to grant her oversight in relation to the new *European Communities (Access to Information on the Environment) Regulations*, known as the *AIE Regulations*. These appear to be similar to the ones in the United Kingdom, and were created in response to the same Directive 2003/4/EC of the European Parliament and Council mandating public access to environmental information.(37)

The *AIE Regulations* came into effect in May 2007 and require that information relating to the environment held by a public authority must, with certain exceptions, be made available to any person upon request.(38) The exceptions include information that would have an adverse effect on international relations, defence, public security, the course of justice, commercial or industrial confidentiality that protects a legitimate economic interest, or intellectual property rights. They also include information requests that are "manifestly unreasonable" in volume or range, formulated in too general a manner, concern unfinished documents or those still being completed, or that concern internal communications of public authorities not related to the public interest.(39) However, all disclosure decisions must be made with regard to balancing the public interest, and certain categories of information, such as those concerning emissions, must be released regardless of the other restrictions.(40)

The *AIE Regulations* operate "in parallel" with the Irish FOIA and are not part of it, but the post of Commissioner for Environmental Information has been initially granted to the Information Commissioner under the *AIE Regulations*, so she has oversight with respect to both

(35) Information Commissioner of Ireland (2008), pp. 44.

(36) Ibid., p. 44.

(37) Department of the Environment, Heritage and Local Government of Ireland, "Access to Information on the Environment," http://www.environ.ie/en/Environment/AccesstoInformationontheEnvironment/#.

(38) Ibid.

(39) *European Communities (Access to Information on the Environment) Regulations*, S.I. 133 of 2007, s. 9.

(40) Ibid., s. 10.

schemes.[41] The *AIE Regulations* are administered by the Irish Department of the Environment, Heritage and Local Government.[42]

C. Australia

Freedom of Information legislation exists in Australia at the Commonwealth, as well as the state and Australian Capital Territory, levels.[43] The object of the Commonwealth *Freedom of Information Act 1982*[44] (the Australian FOIA) is to extend the right of every person to access information in the possession of the Commonwealth government, subject to exemptions that recognize the need to protect sensitive personal and commercial information and some government records. The Act applies to the documents held by the majority of Australian government agencies. It also applies to documents held by ministers that relate to the affairs of Australian government agencies.

The Australian FOIA also allows a person to apply to an agency or a minister for a correction of incomplete, incorrect, out-of-date or misleading personal information about them contained in government records.

An agency must make decisions on requests for documents within 30 days, but this deadline may be extended if consultations are required. An applicant must pay an application fee and processing charges, but both may be reduced or waived on grounds including hardship or the public interest. The Act provides three types of recourse for unsatisfied applicants – a right to: seek internal review by an agency; seek an independent review of the decision by the Administrative Appeals Tribunal (the AAT); or complain to the Commonwealth Ombudsman. The Ombudsman, along with several other roles, has the power to investigate agency actions under the Australian FOIA, including decisions, delays, and refusal or failure to act. Applications can be made to the Federal Court for judicial review of decisions of the AAT.

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(41) Ibid., s. 12.

(42) Department of the Environment, Heritage and Local Government of Ireland.

(43) All Australian jurisdictions, except for the Northern Territory, have enacted FOI legislation. Each jurisdiction modelled its legislation on the Commonwealth Act, although a number have endeavoured to make improvements to the federal provisions. See Abigail Rath, "Freedom of Information and Open Government," Background Paper 3/2000, Parliament of New South Wales, http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/B5E59EF1F98B3D58CA256ECF000B00C3.

(44) Australia, *Freedom of Information Act 1982*, Act Number 3 of 1982, as amended, http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/02ABF6B365F7B572CA25702600010FF2?OpenDocument.

The Australian legislation applies to agencies, including Commonwealth government departments and "prescribed authorities,"[45] and to the courts, but in the latter case, only in respect of documents of an administrative nature. Some bodies are expressly exempt from the application of the Act, either completely or in respect of certain types of documents, by virtue of their inclusion in a division of Schedule 2 to the Act. Most of the exemptions set out in Schedule 2 reflect concerns for the protection of security, intelligence and national defence interests, or commercial interests. The Auditor General is exempt from the application of the Act by virtue of being included in a particular division of Schedule 2.

Unless the document is exempt, any person can apply for and be given access to any document of a minister or an agency. The legislation exempts documents that are already publicly available or offered for sale. Requests for documents must be in writing and include payment of the prescribed fee, and the agency to whom the application is made must take reasonable steps to assist the person to make the request in the proper form. Requests for non-exempt documents may not be refused by agencies or ministers unless fulfilling them would substantially and unreasonably divert resources or interfere with ministers' functions.

Documents that could cause damage to relations between the Commonwealth and a State, or that would divulge information communicated in confidence by a State government, are exempt from disclosure. Where arrangements have been entered into between the Commonwealth and a State with regard to consultation under the Act, requests for such documents cannot be fulfilled without consultation taking place between the Commonwealth and State governments.

Cabinet documents are also exempt; under the Australian FOIA, these include: official records of Cabinet (including its committees); documents submitted to the Cabinet for its consideration, or documents created for the purpose of such submission; and documents which, if disclosed, would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published. A certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifies

(45) Defined as including "a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council" or declared by the regulations to be a prescribed authority for the purposes of the Act, and excluding an incorporated company or association; or certain other excluded bodies.

conclusively that such a document is exempt from the operation of the Act.[46] Once a Cabinet decision has been officially published, an exception to the Cabinet documents provision permits the release of purely factual material, unless its release would involve the disclosure of any deliberation or decision of Cabinet.

"Cabinet notebooks" are excluded from the definition of documents provided in the Act, and therefore are excluded from its operation. "Cabinet notebook" is defined under the Australian FOIA as a notebook or other like record that contains notes of discussions or deliberations taking place in a meeting of the Cabinet or of a committee of the Cabinet, being notes made in the course of those discussions or deliberations by, or under the authority of, the Secretary to the Cabinet.

If an application is made to the Administrative Appeals Tribunal for review of a decision to refuse to release a Cabinet document, the Australian FOIA permits the Tribunal to determine whether there exist reasonable grounds for a claim that the document is exempt. In order to assess a claim, the Tribunal may require the document to be produced for its inspection. If the Tribunal determines that reasonable grounds for the claim do not exist, the appropriate minister must either revoke or not revoke the certificate. Where the certificate is not revoked, the minister must give written reasons for the decision to the applicant and to the House.

Exemptions for documents relating to intergovernmental relations, commercial interests and personal information are similarly reviewable by the Tribunal. In such cases the legislation spells out that the onus is on the agency to justify its decision to refuse to release the document in question.

Part IV of the Australian FOIA provides many exemptions, of which the following are subject to a public interest override:

- documents affecting relations with the States;
- documents the disclosure of which would reveal opinion, advice or recommendations obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth (referred to as internal working documents);

(46) Ministerial certificates may be signed by ministers or the Secretary to the Department of the Prime Minister and Cabinet, certifying that he or she is "satisfied that a document is an exempt document" in relation to documents affecting national security, defence or international relations, documents affecting relations with other states, Cabinet documents and Executive Council documents. Such a certificate, so long as it remains in force, establishes conclusively that the document is exempt for the purposes of the Act.

- documents the disclosure of which would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency; or

- documents the disclosure of which would have a substantial adverse effect on the proper and efficient conduct of certain operations of an agency.

Other exemptions, for which no general public interest override is provided (although the wording suggests elements of an inherent injury or public interest test in some cases), include:

- documents the disclosure of which would, or could reasonably be expected to, cause damage to the security, defence or international relations of the Commonwealth, or would divulge any information or matter communicated in confidence by a foreign government or an international organization;

- documents relating to law enforcement and public safety;

- documents the disclosure of which is statutorily prohibited or would justify an action for breach of confidence;

- documents the disclosure of which would involve the unreasonable disclosure of personal information about any person (including a deceased person);

- documents of such a nature that they would be privileged from production in legal proceedings on the ground of legal professional privilege;

- documents relating to business affairs, such as trade secrets and commercially valuable information;

- documents relating to certain types of research by specified agencies, and certain documents relating to companies and securities legislation;

- documents the disclosure of which would be contrary to the public interest by reason of having a substantial adverse effect on the ability of the Government of the Commonwealth to manage the economy of Australia, or of causing an undue disturbance of the ordinary course of business in the community;

- documents the disclosure of which would constitute a contempt of court or a breach of parliamentary privilege; and

- electoral rolls and specified related documents.

In 1994, the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) began a review of the Australian FOIA. The principal purpose of the review was to determine whether the Act had achieved the purposes and objectives it was designed to achieve and, if it had not, to recommend changes to improve its effectiveness. The ALRC/ARC report, entitled *Open Government*, was tabled on 24 January 1996. The review found that, while the Australian FOIA has had a significant impact on the way that agencies make decisions and the way they record information, many agencies continued to foster a "culture of secrecy." While some agencies had adopted a constructive and helpful approach, others had taken an adversarial and legalistic approach to the Australian FOIA.(47)

The review found that one of the most serious problems with the FOI regime was the lack of a single, independent person or organization with responsibility for overseeing the administration of the Act. The focus of the review's recommendations was on clarifying the purpose of the Australian FOIA and improving the way in which the Act is administered. It recommended the creation of an FOI Commissioner whose role it would be to administer the Act, and to provide assistance to agencies and applicants. It advocated restricting the number of exemptions, and subjecting them to a public interest override. Also, it recommended that the fee structure and the objectives of the Act be altered to promote increased openness and more disclosure of documents.

In 1999, the Commonwealth Ombudsman reported on a self-initiated investigation into the administration of the Australian FOIA.(48) In particular, the report endorsed the need for an agency to be given responsibility and resources for the ongoing oversight of FOI administration. The report also highlighted the increasing problems being encountered by agencies in recordkeeping and offered support for aspects of the ALRC/ARC report.

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(47) Australian Law Reform Commission, *Freedom of Information (Open Government) Bill (2000): Submission to Senate Legal and Constitutional Legislation Committee*, 30 November 2000, http://www.alrc.gov.au/submissions/ALRCsubs/2000/1130.htm.

(48) Commonwealth Ombudsman, *"Needs to Know": Own Motion Investigation into the Administration of the Freedom of Information Act 1982 in Commonwealth Agencies*, June 1999, http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_1999_all_foi/$FILE/NeedstoKnow.pdf.

In the following year, the Freedom of Information Amendment (Open Government) Bill 2000, a private Member's bill, was referred to the Legal and Constitutional Legislation Committee of the Australian Senate for inquiry; the Committee reported in 2001, endorsing some aspects of the bill, but objecting to others.(49) The bill, which was intended to give effect to the recommendations of the 1996 ALRC/ARC report, would have reduced the classes of documents that are exempt. It would have removed from that list: documents to which secrecy provisions of enactments apply; documents relating to research documents affecting the national economy; certain documents arising out of companies and securities legislation; and electoral rolls and related documents. Other exemptions would have been limited, such as the exemption for Cabinet records, which would have applied for only 20 years after the creation of the document.

One of the bill's most significant aspects was the proposed creation of a new statutory position of FOI Commissioner, who would have been given general responsibility for overseeing and monitoring the administration of the Australian FOIA, for identifying and addressing problems, and for providing assistance and advice to the public on FOI issues. The Senate Committee accepted evidence that the administration of the Australian FOIA and compliance by Commonwealth agencies would be enhanced by the establishment of an FOI Commissioner or by conferring all those functions associated with oversight of FOI on a single office, possibly within the Ombudsman's office. The Committee found that centralization of those functions would enhance accountability as well as optimize the opportunity for public and agency education about FOI.

In June 2002, the Australian federal government introduced controversial proposed amendments to the Australian FOIA, designed to create an exemption from disclosing certain information under FOI to the Australian Broadcasting Authority, the Office of Film and Literature Classification and the Classification Boards.(50) The amendments were passed in 2003.

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(49) Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, Commonwealth of Australia, April 2001, http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/freedom/report/report.pdf.

(50) See for example, Electronic Frontiers Australia, *Amendments to FOI Act: Communications Legislation Amendment Bill (No. 1) 2002*, 19 September 2003, http://www.efa.org.au/FOI/clabill2002/.

Another attempt at reform began in September 2007, when the Australian Law Reform Commission was given terms of reference from the Australian government to review FOI laws and practices across the country, including the state and territorial laws, with a view to harmonization.(51)

However, following a November 2007 federal election which produced a new government, responsibility for the administration of the Australian FOIA was shifted from the Australian Attorney General's office directly to the Office of the Prime Minister and Cabinet. This was effected by an administrative order in December 2007.(52)

In July 2008, the Cabinet Secretary suspended the Commission's review and announced a reform process led by the government instead. A *Freedom of Information Miscellaneous Reforms Bill* was added to the government's list of proposed legislation for the 2008 spring sittings.(53) The proposed bill, expected to be introduced in 2009, will include provision for the appointment of an FOI Commissioner and the abolition of the power to issue "conclusive ministerial certificates" preventing disclosure of information where the government deems its release would not be in the public interest. Both of these proposed reforms have been recommended several times in earlier reviews of the law.(54)

The Commission has indicated its qualified approval of these developments, and the Cabinet Secretary has stated that the Commission will resume its review of the Australian FOIA at a later date, after the government's changes to it have been implemented.(55)

In the meantime, the Commission has completed a two-year review of Australia's privacy law regime, which already includes a separate Privacy Commissioner under the *Privacy Act 1988*. In August 2008, the Commission released a report with 295 recommendations, including a recommendation that the Australian FOIA be amended to provide greater clarity

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(51) Australian Law Reform Commission, "About the Inquiry," http://www.alrc.gov.au/inquiries/current/foi/about.html.

(52) Australian Government, Attorney-General's Department, "Freedom of information," http://www.ag.gov.au/www/agd/agd.nsf/Page/Freedom_of_Information.

(53) Australian Government, Department of the Prime Minister and Cabinet, "Legislation Proposed for Introduction in the 2008 Spring Sittings," http://www.aph.gov.au/bills/index.htm.

(54) Senator John Faulkner (Cabinet Secretary), "Freedom of Information Reform," Media Release 25/2008, 22 July 2008.

(55) Ibid.; Australian Law Reform Commission, "ALRC's FOI Inquiry deferred pending Government reforms," Media release, 22 July 2008.

about its interaction with the provisions of the *Privacy Act* governing the release of personal information, and that the process be simplified for gaining access to and correcting one's own personal information held by the government.(56)

The government has indicated that it will be providing its response to the Commission report in two stages, with the first response to be completed in 12 to 18 months.(57)

D. New Zealand

New Zealand's two Parliamentary Ombudsmen inquire into complaints raised against New Zealand central, regional and local government organizations or agencies.(58) They are independent review authorities and are accountable to Parliament, rather than to the government of the day. One of the two categories of complaints with which they deal relates to access to information: they review refusals by ministers of the Crown or government organizations at central, local or regional levels to release official information held by them. These complaints fall under either the *Official Information Act 1982* (OIA)(59) (for central government agencies) or the *Local Government Official Information and Meetings Act 1987* (for local and regional authorities).

The OIA is enforced by the Ombudsmen. Under the Act, an Ombudsman can investigate complaints about:

- a refusal to provide official information requested,
- a delay in responding to a request for information,
- an extension of time limits for a reply to a request,
- deletion of part of the information requested,
- any charge levied to provide the information,

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(56) Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, 30 May 2008 (Released to the public 11 August 2008), Section 15.

(57) Senator John Faulkner (Cabinet Secretary), "Speech to Launch the Australian Law Reform Commission's Report on Privacy," 11 August 2008.

(58) Office of the Ombudsmen of New Zealand, http://www.ombudsmen.govt.nz/.

(59) *Official Information Act 1982*, 1982 No. 156, as amended, available at the Statutes of New Zealand website: http://www.legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html?search=ts_act_official+information+act&sr=1.

- a release of information on conditions,
- a release of information in a manner other than that requested, or
- an inadequate statement of reasons for a decision or recommendation.

The purpose of an investigation under the official information legislation is to enable an Ombudsman to form an independent view as to whether or not the decision to withhold any information was made in accordance with the statute. Although the Ombudsman does not have order-making power, his or her recommendations are binding unless overturned. Where information has not been released and an Ombudsman thinks it should have been, the Ombudsman may recommend that it be released. Such a recommendation to a minister or a central government department or organization generally becomes binding on the 21st day after it has been made, unless there has been an Order in Council overruling it. There is no fee to a requester for any investigation by an Ombudsman.

Under the OIA, requests may be made by New Zealand citizens, residents and corporations, including those incorporated outside New Zealand but having a place of business in New Zealand, and by any person located in New Zealand. Departments and organizations covered by the Act are under a duty to provide reasonable assistance to requesters.

The Ombudsman's powers are set out in the *Ombudsmen Act 1975*. His or her investigatory powers allow an Ombudsman to obtain information from appropriate persons, to make such enquiries as he or she thinks fit, and to require any person to give information and to produce documents or papers or things in their possession. An Ombudsman may issue a summons to a person to appear and may examine that person under oath. An Ombudsman may also enter premises occupied by any organization to carry out an investigation.

As is the case in Canada, the New Zealand access to information legislation has been found by the courts to be of constitutional importance.(60) The purposes of the OIA are to enhance public participation in government, and to promote accountability and transparency in the public sector. The OIA applies to all ministers of the Crown, central government departments and organizations listed in Parts 1 and 2 of Schedule 1 to the *Ombudsmen Act 1975*, and to those organizations listed in Schedule 1 to the OIA.

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(60) In New Zealand, in *Commissioner of Police* v. *Ombudsman* 1 NZLR [1988] 385, the Court held that "the permeating importance of the Act is such that it is entitled to be ranked as a constitutional measure" (p. 391). In Canada, the Federal Court of Canada, relying on the Supreme Court of Canada in *Dagg* v. *Canada (Minister of Finance)*, 1997 2 SCR 403, has recognized the ATIA as having quasi-constitutional status: *Canada (Attorney-General)* v. *Canada (Information Commissioner)* 2004 FC 431 (T.D.).

Information is available under the OIA unless it is specifically exempted. The Act contains a general presumption in favour of disclosure,[(61)] but provides that good reason for a refusal to disclose exists where disclosure would:

- prejudice the security, defence or economy of New Zealand;
- prejudice the entrusting of information given in confidence at the government level between nations;
- endanger the safety of any person; or
- prejudice law enforcement or the right to a fair trial.[(62)]

Although these exemptions are not subject to a public interest override, there is an injury or public interest element inherent in each of them; and in every case, the justification for an agency's refusal to disclose would be weighed against the general presumption in favour of release.

A further series of exemptions subject to a public interest override[(63)] include information that must be withheld in order to:

- protect the privacy of natural persons;
- protect commercial or trade secrets;
- prevent a breach of confidence;
- protect the health and safety of individuals;
- prevent loss to the public;
- maintain constitutional conventions that protect ministerial responsibility or political neutrality, and the confidentiality of advice tendered by ministers of the Crown and officials;

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(61) "The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it."

(62) OIA, section 6.

(63) "[T]he withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available."

- maintain effective conduct of public affairs, through the "free and frank expression of opinions by or between or to Ministers of the Crown, or members of an organisation, or officers and employees of any Department or organisation"(64) in the course of their duty, and the protection of such people from improper pressure;

- maintain legal professional privilege;

- avoid jeopardizing commercial negotiations; and

- prevent the use of official information for improper gains or advantages.

The basic contents of the OIA have remained unchanged since its passage in 1982, and the legislation has not been subject to a major review since 1997. However, legislative changes that may have an effect on the OIA are in the works. The New Zealand Law Commission is in the midst of a multi-year, four-stage review of the country's *Privacy Act 1993* (PA). The Law Commission has completed two stages of the review, including an extensive report and set of recommendations on how information in New Zealand's public registers should be handled.

This report, entitled *Public Registers: Review of the Law of Privacy, Stage 2*, defines public registers as lists, registers or databases of information, to which the public has some specific statutory rights of access. The report acknowledges that they are "part of a freedom of information regime," but states that there is uncertainty as to whether the OIA applies to public registers, which are currently only explicitly regulated under the PA and the *Domestic Violence Act 1995*.(65)

Most of New Zealand's public registers have been created by individual statutes in the subject areas to which the registers pertain. The report's final recommendation is that the information in the public registers be regulated primarily under those statutes rather than the OIA,(66) although the principles used to govern access to them would be indirectly influenced by the OIA, and would include the free flow of information, transparency, privacy interests, accountability for fair handling of personal information and public safety and security.(67)

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(64) OIA, section 9(*g*).

(65) New Zealand Law Commission, *Public Registers: Review of the Law of Privacy, Stage 2*, NZLC R101, Wellington, New Zealand, January 2008, p. 6.

(66) Ibid., pp. 71–75.

(67) Ibid., p. 76, paragraph 5.25.

The report has been tabled in Parliament, but no government response appears to have been put forward yet. The government had already introduced a bill in Parliament in early 2007 to restrict general access to personal information in certain kinds of registers, but this bill also appears to expand some categories of personal information collected by the government. This bill, the *Births, Deaths, Marriages, and Relationships Registration Amendment Bill*, was passed and received Royal Assent in July 2008.(68)

Another earlier report by the Law Commission in 2006 did an extensive study of access to court records, for which there is currently no comprehensive regime in New Zealand. The report recommended that a new *Court Information Act* be introduced specifically to regulate access to these types of records. This Act would vest the power in the courts to control this access regime, and would amend the OIA to clarify that the OIA does not apply to any records of particular court cases that are held in case management databases administered by the Ministry of Justice.(69)

This earlier report, *Access to Court Records*, was tabled in Parliament, and the government issued a response in May 2007 referring its recommendations to the Select Justice and Electoral Committee of the Parliament for further study.(70) The fate of this study is unclear – New Zealand's 48th Parliament was dissolved for an election in September 2008.

COMPARATIVE ANALYSIS

A comparison of the access to information legislation in the United Kingdom, Ireland, Australia and New Zealand highlights some significant differences between the various regimes, along with some similarities. Also, some important differences between these four models and Canada's ATIA are revealed, suggesting several areas that might be examined when the ATIA is being considered for possible reform. For the purposes of this comparison, the aspects of each country's access to information regime that are most relevant to the Canadian one have been emphasized.

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(68) The bill amended the *Births, Deaths, and Marriages Registration Act 1995*, No. 16, which will become known as the *Births, Deaths, Marriages and Relationships Registration Act 1995* once the new amendments come into force.

(69) New Zealand Law Commission, *Access to Court Records*, NZLC R93, Wellington, New Zealand, June 2006, pp. 166–167.

(70) *Government Response to Law Commission Report on Access to Court Records*, Presented to the New Zealand House of Representatives, May 2007.

As is always the case, comparisons between legal and political systems present some difficulties, even when, as in this case, all five countries have Westminster-style parliamentary systems. In spite of the inherent difficulties, this paper draws some broad conclusions about the features underlying the relative strengths and weaknesses of the four international examples of access to information legislation, and makes comparisons with Canada's ATIA.

The United Kingdom, Ireland and Australia all provide for universal access to the freedom of information systems they create. In New Zealand, however, requests may be made only by a person who is currently in New Zealand, or by New Zealand citizens or residents wherever they are located. This is equivalent to the current situation under the ATIA in Canada.

Some of the statutes canvassed in this paper can be seen as sustaining an access to information system that favours a greater degree of openness, such as the most recently passed statute, the U.K. FOIA. The scope of the U.K. scheme is somewhat wider than the others; and contrary to the other Information Commissioners and Ombudsmen considered, the U.K. Commissioner has a specific legislative duty to actively promote the legislation. Other key advantages unique to the U.K. scheme include a complementary Code of Practice, linked to but not part of the legislation, which governs the obligations of government officials to keep records, and the presence of an independent Information Commissioner with order-making power and the ability to prosecute for offences under the access legislation.

In Canada, the extension of the ATIA to public bodies that are currently outside its purview, including Parliament, Officers of Parliament, and other organizations performing public functions or spending public money, has been the subject of debate.(71) Under the *Federal Accountability Act* passed in 2006, a number of organizations, as well as some Officers of Parliament, have been added to Canada's access regime. The Act also granted new mandatory class exemptions related to the Officers' functions which are not available to other entities already covered by ATIA.(72) All four of the statutes examined in this paper identify the bodies to which the legislation applies using lists set out in schedules to the legislation.(73) Because of

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(71) For a review of the last two decades of access to information reform proposals in Canada, see Kristen Douglas, *The Access to Information Act and Recent Proposals for Reform*, PRB 05-55E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 6 February 2006.

(72) *Federal Accountability Act*, S.C. 2006, c. 9.

(73) The Australian FOIA applies to departments, "prescribed authorities" and "eligible case managers." It defines "prescribed authorities" in its interpretation section, and then lists agencies which are exempt from the legislation in a Schedule to the Act.

differences in political systems, comparisons in this area can be particularly challenging. For instance, one reason that some of these statutes apply to such great numbers of organizations is that local authorities are included – something that would not be possible under Canadian federal legislation for constitutional reasons.

Unlike Canada, all the jurisdictions except New Zealand include their Parliaments under their freedom of information regimes. In each case there is protection for documents the release of which would infringe parliamentary privilege, or for the confidential papers of a parliamentarian. In the United Kingdom, there are absolute exemptions for materials that must be protected to avoid "an infringement of the privileges of either House of Parliament" or that would interfere in the deliberations of Parliament, the responsibility of ministers or the conduct of public affairs. In Ireland, a similar exemption covers opinion and advice relating to the proceedings of the Oireachtas (Parliament): the Irish FOIA excludes records given to a member of the government or a minister of state for use by him or her or for the purposes of proceedings in either House of the Oireachtas (including a committee of either House), including briefings provided in relation to oral and written Parliamentary Questions. In Australia, an absolute exemption prevents the release of documents the disclosure of which would constitute a breach of parliamentary privilege.

The various access statutes differ in terms of their application to the offices of agents that would be referred to in Canada as Officers of Parliament.(74) Some similar offices are mentioned in the other countries' access legislation, but are not always covered. For example, in the United Kingdom, the Information Commissioner and the National Audit Office are included; in New Zealand, the Parliamentary Commissioner for the Environment and the Privacy Commissioner are included; in Australia, the Auditor General is listed as an exempt agency; and in Ireland, records held by the Ombudsman and the Comptroller and Auditor General are excluded from the operation of the Irish FOIA.(75)

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(74) For example, the Information and Privacy Commissioners, the Auditor General, the Official Languages Commissioner and the Chief Electoral Officer, offices which are now included in Canada's access regime following the passage of the *Federal Accountability Act*.

(75) While the offices of such officers are included, such as the Comptroller and Auditor General, the Ombudsman, the Ombudsman for Children and the Pensions Ombudsman, records relating to their audits, inspections, investigations and examinations are excluded from the scope of the Act.

Although they are subject to access to information legislation in Ireland, records held by the courts are excluded from disclosure. In Australia, the courts are included as prescribed authorities under the legislation, but the Act applies to a document of the court only if the document relates to administrative matters. As noted earlier, in New Zealand the Law Commission has recommended a separate access scheme for documents held by the courts, but it has not yet been implemented.

An aspect of access to information legislation that can reduce its impact on the openness of government is a high number of exemptions restricting the right of access, especially if no public interest override applies. At the weaker end of the spectrum, in terms of the examples considered in this paper, the Australian legislation provides for the greatest number of exclusions and absolute exemptions. In this respect, the Australian legislation is similar to that currently in place under the ATIA in Canada. The Australian legislation does provide for a public interest override, which applies to a few of the exemptions, but most exemptions are not subject to such an override. In the United Kingdom, Ireland and New Zealand, more exemptions are subject to the public interest override than are not.

In determining the strength of an access to information regime, a crucial question, in the view of most observers, is the treatment of Cabinet documents. In Canada, under the ATIA, records containing Cabinet confidences are excluded from the operation of the Act for 20 years from the date of their making. Because such records are excluded, rather than exempted, neither the Information Commissioner nor the Federal Court of Canada may examine any withheld Cabinet documents to determine whether or not they are, in fact, Cabinet confidences. A similar situation exists in Ireland, where a Cabinet confidence identified in a ministerial certificate is not subject to release, and such a certificate is not reviewable by the Information Commissioner. In Australia, Cabinet documents that would reveal deliberations or decisions of Cabinet are exempt from release, meaning that exemption decisions may be reviewed by the Administrative Appeals Tribunal; but Cabinet notebooks are excluded by definition from the operation of the Act. (This may change with the broader access terms promised by the new Australian government.) In the United Kingdom and New Zealand, however, Cabinet documents are exempt, and the exemption is subject to a public interest override.

Some other aspects of access to information regimes, including factors beyond the strict letter of the law, seem to influence their effectiveness in particular countries. For example, the New Zealand freedom of information regime is seen as being strengthened by the role of the Office of the Ombudsmen in its enforcement. That office has a long and robust history in New Zealand.(76) A second example is the issue of fee increases, which in Ireland was considered by the Information Commissioner and other observers as causing a decline in requests and thus weakening the FOI regime.(77) The Irish Commissioner also cited the extensive and growing list of prohibitions in other statutes, which prevent release of documents under the Irish FOIA, as undermining the effectiveness of the legislation. The increasing number of such prohibitions has also been identified as a weakness of the Canadian ATIA.(78)

In Canada, some non-legislative features of the federal access to information regime, such as the internal departmental procedures described by Alasdair Roberts as constituting a "hidden law" on access to information that substantially restricts statutory rights for certain kinds of requesters, are cited as factors that reduce the degree of openness achieved.(79) Professor Roberts argues that while the ATIA mandates that all requesters be treated equally, journalists and opposition parliamentarians are, in practice, often treated differently.

All of the access regimes in Canada and the four countries discussed in this paper are becoming increasingly intertwined with companion privacy legislation, with a focus on access to personal information held by the government. Canada has a comparatively explicit set of rules governing this particular issue in the interacting provisions between ATIA and the *Privacy Act*,(80) but Canada's Act has not yet been updated to account for a number of technological changes that the other countries are either planning to incorporate or have already

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(76) Rt. Hon. Helen Clark, "Address to 22nd Australasian and Pacific Region Ombudsmen's Conference," Wellington, New Zealand, 10 February 2005, http://www.beehive.govt.nz/node/22164.

(77) Appeals are free in the United Kingdom and New Zealand, and fees may be reduced or waived in the public interest in Australia.

(78) Section 24 of the ATIA provides for a mandatory exemption for information the disclosure of which is restricted by a statutory provision listed in Schedule II of the Act.

(79) Alasdair S. Roberts, "Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada," *Public Administration*, Vol. 83, No. 1, Spring 2005, pp. 1–23, http://www.aroberts.us/documents/journal/roberts_PA_Spin_2005.pdf.

(80) *Privacy Act*, R.S. 1985, c. P-21.

incorporated into their legislation. The U.K.'s *Data Protection Act*(81) and its provisions concerning access to personal information appear to be the most comprehensive and up-to-date of all the countries, although the U.K. Act is quite complex.(82) Both the U.K. Act and the Irish *Data Protection Act*(83) are based on a European Union Directive(84) regarding the protection of personal information.(85)

CONCLUSION

A number of elements of the stronger international models considered here, especially the U.K. legislation, can be found among the suggestions for reform of the ATIA that have been proposed for consideration in recent years in Canada.(86) This fact suggests that the legislation and experiences of these countries may be usefully considered in developing an updated ATIA for Canada.

Some of the important themes of this comparative analysis have already been raised in discussions about how Canada's ATIA should be revised. Expanding the scope of the ATIA has been an ongoing preoccupation throughout this country's experience under the Act, with several reports recommending that Parliament and the Officers of Parliament be brought under the legislation. Where the inclusion of Parliament in the access regime was advocated, some reports proposed that MPs' and Senators' offices be excluded. In terms of Officers of Parliament, there has been disagreement about which of the Officers ought to be included, and the passage of the *Federal Accountability Act* only added some, not all, of these Officers to ATIA's coverage. Although the courts of some other jurisdictions have been included in their access legislation, at least in terms of administrative records, the Canadian reform proposals, for the most part, did not suggest the inclusion of the courts in the ATI regime.

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(81) *Data Protection Act 1998*, 1998, c. 29.

(82) The U.K.'s *Data Protection Act* applies to all private and public organizations in the United Kingdom, subjecting them to the same standards in the handling of personal information.

(83) *Data Protection Act*, No. 25/1988, as amended by the *Data Protection (Amendment) Act 2003*, No. 6 of 2003.

(84) *European Union Data Protection Directive*, 95/46/EC.

(85) The oversight in the U.K. and Irish Acts is different, however, in that the U.K. Information Commissioner has oversight over both privacy and freedom of information legislation, whereas Ireland has a separate Data Protection Commissioner to address privacy complaints.

(86) Douglas (2006).

Most of the stronger elements of the U.K. regime that have been highlighted in this paper were also put forward as part of the reform proposals released in 2005 by Canada's Information Commissioner, the Hon. John Reid, in his proposed *Open Government Act*.(87) Some of these features include the proposed inclusion of injury tests and public interest overrides for most exemptions, and the proposed new treatment of Cabinet confidences (as an exemption rather than as an exclusion). In some respects, however, the U.K. FOIA goes even further than the Commissioner's proposed legislation would: for example, the Commissioner's proposal would not give Canada's Information Commissioner the power to order documents released, or the power to prosecute for any offences. In fact, both the Information Commissioner and the Privacy Commissioner at the federal level have expressed what some have interpreted as a preference for continuing to act as ombudspersons rather than assuming additional powers.(88) A special advisor to the minister of Justice recommended in November 2005 that this matter be given more study,(89) but no extensive alterations to the Commissioners' roles have been made to date.

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(87) Information Commissioner of Canada, *Proposed Changes to the Access to Information Act*, September 2005, http://www.infocom.gc.ca/specialreports/pdf/Access_to_Information_Act_-_changes_Sept_28_2005E.pdf.

(88) Jennifer Stoddart, Privacy Commissioner of Canada, "Cherry Picking Among Apples and Oranges: Re-focusing Current Debate About the Merits of the Ombuds-Model Under PIPEDA," Speech, Toronto, 21 October 2005, http://www.privcom.gc.ca/information/pub/omb_051021_e.asp; John Reid, (former) Information Commissioner of Canada, "Opening Remarks to the Standing Committee on Access to Information, Privacy and Ethics," Ottawa, 25 October 2005, http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=116.

(89) The Honourable Gérard V. LaForest, *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues* (Report of the Special Advisor to the Minister of Justice), 15 November 2005, http://www.justice.gc.ca/eng/ip/index.html.