

**IN THE EUROPEAN COURT  
OF HUMAN RIGHTS**

**Applications Nos. 21825/93 & 23414/94**

**KENNETH McGINLEY AND E.E.**

**-and-**

**THE UNITED KINGDOM**

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**THIRD PARTY INTERVENTION OF LIBERTY  
(THE NATIONAL COUNCIL FOR CIVIL LIBERTIES) AND  
THE CAMPAIGN FOR FREEDOM OF INFORMATION**

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## **Introduction**

Liberty (the National Council for Civil Liberties) and the Campaign for Freedom of Information welcome the opportunity to submit written comments to the European Court of Human Rights in the case of *Kenneth McGinley and E.E. v the United Kingdom*, in accordance with the leave of the President of the Court granted by letter dated 25 April 1997, pursuant to Rule 37(2) of Court A.

Liberty is one of the leading independent human rights organisations in the United Kingdom. Since its formation in 1934 Liberty has contributed to the development of a wide range of human rights issues in this country through its litigation in the domestic and European courts, its Parliamentary lobbying and its campaigning. Liberty also publishes documents in response to Government and Law Commission consultation papers. Liberty's legal department has developed considerable experience in representing clients before the European Commission and Court of Human Rights. On a number of occasions leave has been granted to Liberty to submit written comments to the Court in respect of cases before it: *Brannigan and McBride v United Kingdom*, *McCann and Others v United Kingdom*, *Chahal v United Kingdom*, *Saunders v United Kingdom* and *Halford v United Kingdom*.

The Campaign for Freedom of Information is an independent UK organisation established in 1984 which seeks to improve the public's legal rights to official information. It monitors the operation of existing access rights in the UK, makes representations to government and advises individuals seeking to exercise their rights. It has promoted a number of private member's bills which have become law in the UK. These are: the Access to Personal Files Act 1987, the Access to Medical Reports Act 1988, the Environment and Safety Information Act 1988 and the Access to Health Records Act 1990.

In preparing this submission, Liberty and the Campaign for Freedom of Information have been assisted by Mr Tim Eicke, barrister, of Francis Taylor Building, Temple, London EC4Y 7BY

*July 1 1997*

## **Summary**

This submission, in accordance with the leave granted by the President, considers the following issues:

### **(1) The public records system in the United Kingdom (page 4)**

*This section includes an analysis of the public records legislative system and practice, including the retention and closure of records. Records may be withheld in order to protect national security, personal information and confidential information. Some entire classes of records are withheld under 'blanket' approvals. The existing arrangements, involving the Public Record Office and the Advisory Council on Public Records, do not provide sufficient independent scrutiny or oversight.*

### **(2) The legislation relating to access to medical records (page 14)**

*The limited statutory rights of access to health records are set out. It is submitted that the Court's judgment in the case of Gaskin (7 July 1989), should have led to improvements in the arrangements for access to medical records. However, the UK Government's proposals in response to the judgment did not extend to medical records and in any event have still not been implemented.*

### **(3) Comparative international human rights standards concerning access to information (page 21)**

*The final section comprises a comparative analysis of freedom of information legislation and jurisprudence in both international human rights law and domestic legal systems. The submission concludes by highlighting five fundamental principles relating to the right of access, notably that the refusal of access to information be subject to effective independent review.*

## I. ACCESS TO PUBLIC RECORDS IN THE UK

The Public Records Act of 1958 sets out a framework for the preservation of official records. This involves the selection of those which are considered worthy of preservation, and their transfer from government departments to the Public Record Office (PRO) where they are made available for public inspection after a prescribed period of time. Initially, the normal closure period was 50 years from the date on which the file ceased to be used by the department, but this was reduced to 30 years by the Public Records Act 1967.

Before permanent selection, records are reviewed twice, by departmental records officers under the guidance of the Public Record Office. The first review is carried out five years after the file is closed, and determines whether the file should be destroyed or whether it is likely to be needed again by the department or to merit preservation on historical or other grounds. Records not selected for preservation are destroyed. Preserved records are reviewed again 25 years after their closure. Those not destroyed at that point are later made available to the public at the Public Record Office either thirty years after their closure or, if their contents are considered too sensitive to disclose at that point, after a more extended period.

### **Grounds for withholding records**

The 1958 Act provides that public records may nevertheless be withheld from public access if -

- (a) they are retained by the department “for administrative purposes or...for any other special reason” under section 3(4)
- (b) they are closed for a longer period in accordance with section 5(1)
- (c) making them available might disclose information obtained from members of the public in circumstances which might constitute a breach of good faith<sup>1</sup>,
- (d) disclosure of the information contained in them is prohibited by statute<sup>2</sup>.

The Lord Chancellor has general responsibility for the operation of the Act<sup>3</sup> and his approval is required before records can be retained or closed.

No explicit criteria governing the circumstances under which records may be retained by departments or closed for more than the normal thirty year are specified in the legislation. Section 5(1) of the Act also envisages that particular records may be closed for periods of

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<sup>1</sup> Public Records Act 1958 (hereafter “PRA”) s 5(2)

<sup>2</sup> PRA s. 5(3)

<sup>3</sup> PRA s. 1(1)

*less* than thirty years; and section 5(4) provides that individuals who have obtained special authority may be permitted to inspect closed records (sometimes referred to as ‘privileged access’). But again the statute provides no indication of the circumstances in which these powers should be exercised. It places no obligation on the Lord Chancellor to give reasons for his decisions, and it makes no provision for the making of appeals against decisions to any independent body. In all these respects, the Public Records Act differs from a Freedom of Information Act (whose characteristics are described later in this submission).

Many records are withheld under so-called “blanket” approvals, given by the Lord Chancellor which permit departments to retain records within a number of broad classes without the need to seek specific approval for individual records. These blanket approvals currently apply to records created within specified periods, and are subject to review at periodic intervals.

Those blanket approvals in effect in 1993<sup>4</sup> have been described as follows:

Security and intelligence material

Civil and Home Defence material (under review)

Atomic Energy, pre-1956 defence-related material (under review)

Atomic Energy, post 1956 defence-related material

Personal records of civil servants, retained for administrative purposes.

Since that time, the two blanket approvals which were then under review, are now no longer in force.

Records not falling within these classes are assessed on a case by case basis. A set of criteria used for this purpose was described by the then Lord Chancellor in 1967, during the passage of the Public Records Act of that year<sup>5</sup> and is, so far as we have been able to determine, the first occasion on which such criteria were publicly described. Modifications to the criteria were made in 1970<sup>6</sup>, 1982<sup>7</sup> and 1993<sup>8</sup>.

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<sup>4</sup> ‘Open Government’, July 1993, HMSO, Cm 2290, para 9.23

<sup>5</sup> Introducing the Public Records Bill of 1967, the then Lord Chancellor stated that prolonged closure had been found to be necessary in relation to the following classes of records: “...first those containing information about individuals whose disclosure would cause distress or embarrassment to living persons or their immediate descendants (such as criminal or prison records, records of courts martial, records of suspected persons, and certain police records); secondly those containing information obtained under pledge of confidence, such as the census and various individual returns used in publishing statistical compilations; thirdly, certain papers relating to Irish affairs; fourthly, certain exceptionally sensitive papers which affect the security of the State. In addition certain papers, the ownership of which is shared with ‘old’ Commonwealth countries, cannot be released until all the Governments concerned have given their consent.” [House of Lords debates, 11 May 1967, col 1657-8]

<sup>6</sup> Advisory Council on Public Records (hereafter “ACPR”), 1970 Annual Report, HMSO, page 38.

<sup>7</sup> ‘Modern Public Records’, The Government response to the Report of the Wilson Committee, March 1982, Cmnd 8531, paragraph 27.

<sup>8</sup> Cm 2290

The criteria may be described under three headings: national security; personal information and confidential information. The following section (compiled from the sources described in footnotes 5-8) indicates the changes that have been made to the criteria under each of these headings during the period 1967 to the present:

### **National security**

- (a) “Exceptionally sensitive papers which affect the security of the State”  
*[from at least 1967 to 1970]*
- (b) “Exceptionally sensitive papers, the disclosure of which would be contrary to the public interest, whether on security or other grounds (including the need to safeguard the Revenue)” *[from 1970 to 1993]*
- (c) “Exceptionally sensitive records containing information, the disclosure of which would not be in the the public interest in that it would harm defence, international relations, national security (including the maintenance of law and order) or the economic interests of the UK and its dependent territories” and “it is possible to establish the actual damage that would be caused by release” *[from 1993 to present]*

### **Personal information**

- (a) “Documents containing information about individuals whose disclosure would cause distress or embarrassment to living persons or their immediate descendants” *[from at least 1967 to 1982]*
- (b) “Documents containing information about individuals whose disclosure would cause distress or danger to living persons or their immediate descendants” *[from 1982 to 1993]*
- (c) “Documents containing information about individuals the disclosure of which would cause either substantial distress, or endangerment from a third party, to persons affected by disclosure or their descendants”  
*[from 1993 to present]*

### **Confidential information**

- (a) “Documents containing information obtained under a pledge of confidence” *and* “Confidential commercial correspondence including material about British firms which have been operating continuously in foreign countries since the 1930s, of which disclosure now might have adverse repercussions on the current work of trade promotion”  
*[from at least 1967 to 1970]*
- (b) “Documents containing information supplied in confidence, the disclosure of which would or might constitute a breach of good faith”  
*[from 1970 to present.<sup>9</sup>]*

Some of these changes represented a narrowing of the criteria, reducing the grounds on which records could be withheld and presumably increasing the volume of records available to the public. For example, in 1982, the criterion for withholding personal records was

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<sup>9</sup> As currently formulated, this broadly describes the criterion laid down in section 5(2) of the Public Record Act 1958

changed from those whose disclosure would cause “distress or embarrassment” to the more limited ground of those causing “distress or danger”<sup>10</sup>. In 1993, the Open Government white paper introduced changes intended to promote greater openness and place “the emphasis firmly on release rather than retention”<sup>11</sup>. The white paper indicated that records would only be withheld if they contained information falling within any of the three specified criteria, and “it is possible to establish the actual damage that would be caused by release”<sup>12</sup>. In addition to these changes, the white paper introduced a policy of reviewing records which had already been closed for more than 30 years to see whether they could now be released. A substantial volume of previously closed records have since been made available.

On the other hand the 1970 changes had the opposite effect, widening the scope of the national security criterion and potentially bringing more records within its scope. The report for that year of the Advisory Council on Public Records<sup>13</sup>, noted that an examination of records which had been withheld for more than 30 years had revealed that the criteria described by the Lord Chancellor in 1967:

“did not in all cases describe accurately the circumstances in which it had been found necessary to withhold records for longer than 30 years, and that [it appeared that] the categories should be redefined”

The national security criterion was accordingly broadened, so that instead of applying merely to records “which affect the security of the State” it referred to records whose disclosure “would be contrary to the public interest, whether on security or other grounds (including the need to safeguard the Revenue)”. This suggested that rather than restricting the government’s discretion to withhold records, the criteria were merely descriptive of existing practice, and could be changed retrospectively if the practice changed or was found to have been inadequately described in the past.

The progressive widening of the definition of the national security criterion continued in 1993, when it was extended so as to specifically refer to the need to avoid harm to “defence, international relations, national security (including the maintenance of law and order) or the economic interests of the UK and its dependent territories”. This may reflect an awareness of the shortcomings of earlier definitions rather than an expansion of the range of records considered for extended closure. For example, harm to international relations was not specifically referred to in the criteria until 1993, although there is no doubt that it has always been one of the grounds on which records have been withheld.

This much delayed acknowledgement of the specific grounds on which records were actually withheld illustrates the lack of transparency which has often characterised the operation of the public records system. A major review of the operation of the Public Records Act, established by the Lord Chancellor and chaired by Sir Duncan Wilson, which

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<sup>10</sup> Cm 8531, para 27.

<sup>11</sup> Cm 2290, para 9.31

<sup>12</sup> Paragraph 9.12

<sup>13</sup> A body established under section 1(2) of the 1958 Act

reported in 1981 (the “Wilson Committee”) noted that it was:

“extremely difficult for the user to discover the extent and nature of the documents to which he is denied access”<sup>14</sup>.

Indeed, it was only in 1993 that the government decided that it would be appropriate to reveal to inquirers under which of the relevant criteria individual records had been retained or closed<sup>15</sup>.

The arbitrary nature of some decisions relating to public records has often been remarked on. The Wilson Committee referred to:

“the discovery by ingenious researchers that the criteria for closure and for privileged access (as opposed to general opening to the public) have differed fairly widely among Whitehall departments”<sup>16</sup>

It noted that:

“Cases have been brought to our attention in which one department has made available in the PRO copies of material which another has felt bound to retain”<sup>17</sup>

In relation to the ‘privileged’ access sometimes granted to academics, it noted that:

“The suspicion can too easily arise that departments giving access to individuals, tend to favour ‘safe’ people dealing with safe subjects, while journalists are not happy that academics should be given privileges denied to them”<sup>18</sup>

Concern has also been expressed at the removal from the PRO of records which were formerly publicly available there. Section 4(6) of the Act permits departments temporarily to retrieve records from the PRO. The Wilson Committee noted that instead of acknowledging that this had happened, such records had in the past been described in the PRO as “missing” - which the Committee regarded as a “bogus” description<sup>19</sup>. The Advisory Council reported in 1984 that requests for the temporary removal of records from the PRO were running at over 17,000 per year<sup>20</sup>, while in 1989 it was reported that as many as 1,350 records had been withdrawn from the PRO by departments and retained by them for over a year<sup>21</sup>.

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<sup>14</sup> ‘Modern Public Records’, London, HMSO, Cm 8204, paragraph 182

<sup>15</sup> Cm 2290, para 9.26

<sup>16</sup> Cm 8204, para 49

<sup>17</sup> Cm 8204, para 173

<sup>18</sup> Cm 8204, para 211

<sup>19</sup> Cm 8204, para 184

<sup>20</sup> ACPR Annual Report 1984, page 60

<sup>21</sup> ACPR Annual Report 1989, page 35

## **The PRO**

A degree of scrutiny over closed and retained records is intended to be provided by the Public Record Office itself. The head of the Office - the Keeper of Public Records - has a statutory responsibility for “co-ordinating and supervising” the measures taken to select and preserve records<sup>22</sup>. The PRO provides advice, direction and support to departments in the management and selection of departmental records. It also acts on behalf of the Lord Chancellor in seeking to confirm that records for which extended closure or retention is sought fall within the specified criteria, and attempts to ensure uniformity in applying these definitions<sup>23, 24</sup>.

However the Wilson Committee found that the PRO was unable to exercise any influence in relation to decisions taken on the basis of national security:

“As regards the disclosure of material which might affect national security...policy is promulgated by an official Cabinet Office committee specially constituted for the purpose in which the PRO does not take part. PRO officials may be consulted, especially about implementation, but the Lord Chancellor, although generally responsible for policy on public records, seems to have little chance at this stage of making known any views which he may have.

PRO...regard themselves as unable to judge the justification for withholding access from particular records under section 5(1) or retaining them in departmental custody under section 3(4), especially where the reason for doing so is the possibility of endangering the security of the State. They consider that the departmental view is bound to prevail, and regard themselves as totally unqualified to argue.”<sup>25</sup>

## **The Advisory Council on Public Records**

A second source of independent check is in theory provided by the Advisory Council on Public Records, a body chaired by the Master of the Rolls<sup>26</sup> (the head of the Civil Division of the Court of Appeal). Its members, who are appointed by the Lord Chancellor, include distinguished historians and other academics and generally include two Members of Parliament, one from an opposition party. A number of former civil servants have served on the Council, including retired permanent secretaries and cabinet secretaries. Its statutory role is to:

“advise the Lord Chancellor on matters concerning public records in general and, in particular, on those aspects of the work of the Public Record Office

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<sup>22</sup> PRA, s 3(2)

<sup>23</sup> Cm 8204, para 178

<sup>24</sup> 31st Annual Report of the Keeper of Public Records on the Work of the Public Record Office for 1989, HMSO, 1990, pages 8-9

<sup>25</sup> Cm 8204, paras 164-5

<sup>26</sup> The appointment of the Master of the Rolls as chairman is required under section 1(2) of the PRA.

which affect members of the public who make use of...[its] facilities”<sup>27</sup>.

It typically meets between 3 and 6 times a year: one of its main functions is to advise the Lord Chancellor on proposals to retain records or to close them for longer or shorter periods than the normal 30 year period. Its role is purely advisory though the Wilson Committee noted that it sometimes described its activities in terms which suggested an executive role (for example by stating that it had “approved” the revised categories for extended closure in 1970<sup>28</sup>.) Its recommendations are generally accepted and it has reported a number of specific cases in which its advice has led to closure periods being reduced.<sup>29</sup>

On the other hand the restrictions placed on the Advisory Council, at least until 1993, have severely limited its ability to exercise effective oversight. For most of its existence the Council has been consulted only about proposals to vary the normal closure period under section 5(1) but not about applications to retain records in departments under section 3(4). The Council itself described this distinction as “illogical”<sup>30</sup>, and reported to the Lord Chancellor that it was:

“concerned that records could be retained by departments by direct application to you without the Council being given the opportunity to comment on such applications”<sup>31</sup>.

The Wilson committee also noted that the Council had been “much hampered by lack of information”<sup>32</sup>, and reported :

“Even information available to the Advisory Council about closures is scant. The Council receives from the PRO memoranda relating to cases only under section 5(1) which specify the applicant department, the title and number of the record class concerned, the period and reason for which extended closure is requested (“intelligence”, “national security”, “personally sensitive”, etc.). The file title and piece reference are not disclosed and there is seldom any information about the date when the records were created. The Advisory Council is not shown the instrument and schedules for extended closure as ultimately approved by the Lord Chancellor under section 5(1).”<sup>33</sup>

A further concern was that the Council, remarkably, was not permitted to actually inspect the records on which it was asked to offer an opinion. It described this as “a serious

<sup>27</sup> PRA s. 1(2)

<sup>28</sup> Cm 8204, para 305

<sup>29</sup> For example, in its annual report for 1993-94 it reported: “On two occasions the Council was asked specifically by Government departments for a view about whether records relating to particular events might justifiably be closed and the Council’s advice was that they should not. In each case the Council’s advice was accepted and the records were released” (page 95). In its report for 1994-95 it noted that it had “asked for more information about a number of applications and refused to agree to the extended closure of a few records, a decision which was accepted by the relevant department.”(page 113).

<sup>30</sup> ACPR, Annual Report 1990, page 40

<sup>31</sup> ACPR Annual Report 1992-93, page 62

<sup>32</sup> Cm 8204, para 313

<sup>33</sup> Cm 8204, para 182

impediment to its effective performance”<sup>34</sup>, and on another occasion reported to the Lord Chancellor that:

“we continue to feel that we are unable properly to advise you on applications for extended closure unless we are permitted to find out more about the records themselves”<sup>35</sup>

One former member of the Advisory Council, the genealogist Lord Teviot, who served on the council from 1974 to 1982 described the Council’s procedures “as that of the rubber stamp...The Public Record Office simply presented us with something that we had to accept”<sup>36</sup>. Another distinguished former member of the Advisory Council, Lord Trend a former Cabinet Secretary, also used the term “rubber stamp” to describe the Council’s functions when dealing with highly sensitive information<sup>37</sup>.

The Wilson Committee felt these shortcomings placed the Advisory Council in a “false position”<sup>38</sup>. It recommended that the Council should be given information about all classes of records which were not available to the public in the PRO, including those retained in departments under section 3(4)<sup>39</sup>; and that it should establish a “confidential panel” made up of those of its members who were Privy Counsellors or otherwise qualified to see material of the highest sensitivity, which could discuss and where necessary inspect highly confidential materials which might be too sensitive to place before the whole Council<sup>40</sup>. Both recommendations were rejected by the Government, which stated:

“The evaluation of the sensitivity of public records, and thus the potential damage arising from their premature release, requires an intimate knowledge of current policies and developments which Advisory Council members, even those who are former Crown servants, cannot be expected to have. For this reason, it is not possible to accept the recommendation for a confidential panel”<sup>41</sup>.

The Government did however acknowledge that the existing arrangements were unsatisfactory, and announced that in order to supply the Lord Chancellor with “independent advice” he would in future be able to ask the Cabinet Secretary to look into any question relating to the withholding of records<sup>42</sup>.

It is unlikely that such advice would be regarded as “independent” by anyone outside

<sup>34</sup> ACPR Annual Report 1993-94, page 94

<sup>35</sup> ACPR Annual Report 1990, page 40

<sup>36</sup> House of Lords debates, 25.10.93, col 753

<sup>37</sup> ‘Public Records’, Minutes of Evidence, House of Commons, Education, Science and Arts Committee, Session 1982-83, (hereafter “ESAC”) Q.176.

<sup>38</sup> Cm 8204, para 313

<sup>39</sup> Cm 8204, Recommendation 18

<sup>40</sup> Cm 8204, paras 313-319

<sup>41</sup> Cm 8531, para 39

<sup>42</sup> Cm 8531, para 40

government. Indeed, Lord Denning, who at that time was Master of the Rolls and chairman of the Advisory Council, described the government's response to these and certain other recommendations of the Wilson report<sup>43</sup> as "entirely inadequate" adding "The whole of the Advisory Council takes that view"<sup>44</sup>.

It was not until 1993 that the Government sought to address some of these shortcomings. In the 'Open Government' white paper of that year it accepted that the Advisory Council should in future be consulted about applications for the retention of records under section 3(4). It also agreed that historians and others should be able to approach the Council if their requests for the release of previously closed records had been turned down by departments<sup>45</sup> (though it appears that to date not a single approach of this kind has been made). Shortly afterwards, the government also agreed to permit one or more members of the Council to inspect records directly where the Council could not satisfy itself in any other way about the need for the records to be withheld. However, this arrangement does not extend to "records relating to security and intelligence"<sup>46</sup>.

Though substantially improved, the Advisory Council's role is still limited in practice. For example, in 1995-6 it considered applications to retain, or vary the normal closure period on, some 6,000 items. It also considered applications to reduce previously determined extended closure periods on some 5,000 further items<sup>47</sup>. This volume of material was dealt with at just three meetings, each of which typically lasts some two or two-and-a-half hours, suggesting that the great majority of applications cannot be considered in any meaningful way.

Moreover, although the Council has been permitted, since September 1993, to examine records on which it is being asked to advise, by February 1996 it had still not done so in any case<sup>48</sup>. This may perhaps be explained by the enormous volume of records with which it deals (though PRO staff would examine records and report on their content to the Council, if required).

Finally, since records falling within the scope of the "blanket" approvals can be retained within departments without specific reference to the Lord Chancellor, proposals to retain records within these classes would not come before the Council. Decisions to retain records created between 1956 and 1965 relating to the defence applications of atomic energy, or records relating to the work of the security and intelligence agencies (two of the existing blanket approvals<sup>49</sup>) are therefore not subject to any form of external consultation.

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<sup>43</sup> Notably, that departments should be advised on the selection of records of preservation by 'sector panels' whose members would include academics and others specialising in the the relevant subject matter.

<sup>44</sup> ESAC, Q.119

<sup>45</sup> Cm 2290, para 9.30

<sup>46</sup> ACPR Annual Report 1993-4, page 7

<sup>47</sup> ACPR Annual Report 1995-6, page 64

<sup>48</sup> ACPR Annual Report 1995-6, page 64

<sup>49</sup> Public Record Office, Manual of Records Administration, February 1995, paragraph 5.5.5

In our submission the existing arrangements do not provide effective, independent review of Government decisions in this field. Ultimately it should be remembered that the Council is an advisory body, not an executive body. It has previously made clear its preference for this role:

“we have become uneasy about the extent to which the Council was being held responsible for the closure of records and about proposals that it might become an independent arbiter of the justification for individual closure applications. Even if departments were prepared to allow the Council to inspect all the records involved, which seems unlikely, we would be unable to work through the number of records which would have to be examined.”<sup>50</sup>

There appear to be no plans to change this aspect of the Council’s work. In the 1993 Open Government white paper the government noted:

“The role of the Advisory Council, as its name implies, will however remain advisory; the final responsibility for the release or otherwise of departmental records rests with Ministers.”<sup>51</sup>

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<sup>50</sup> ACPR Annual Report 1977, page 30

<sup>51</sup> Cm 2290, para 9.30

## 2. ACCESS TO MEDICAL RECORDS IN THE UK

A right of access by individuals to their own health records exists principally under two UK statutes.

- The *Data Protection Act 1984* which provides a right of access to computerised records, including health records
- The *Access to Health Records Act 1990* which provides a right of access to non-computerised health records.

In addition, the *Access to Medical Reports Act 1988* provides a more limited right of access, to medical reports supplied for employment or insurance purposes by a medical practitioner who has been responsible for the care of a patient.

### **The Data Protection Act**

Under section 21(1) of the Data Protection Act (“DPA”) an individual is entitled to be informed whether personal data relating to him is held by a data user and to be supplied with a copy of any such data. “Data” is defined as “information recorded in a form in which it can be processed by equipment operating automatically in response to instructions given for that purpose”<sup>52</sup>.

These so-called “subject access provisions”<sup>53</sup> are subject to a number of exemptions which permit the withholding of: information about another identifiable individual who has not consented to the disclosure, including someone who has supplied information about the data subject to the data user<sup>54</sup>; information whose disclosure would prejudice various law enforcement and tax functions<sup>55</sup>; information for which legal professional privilege could be claimed<sup>56</sup>; the intentions of the data user towards the data subject<sup>57</sup>; and certain other matters. Data is also exempt from access on national security grounds<sup>58</sup>, and the fact that exemption is required for the purpose of safeguarding national security may be demonstrated by a

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<sup>52</sup> DPA s.1(2)

<sup>53</sup> DPA, s. 26(2)

<sup>54</sup> DPA, s.21(4)(b) and 21(5)

<sup>55</sup> DPA, s.28(1)

<sup>56</sup> DPA, s.31(2)

<sup>57</sup> The intentions of the data user are excluded from the definition of “personal data” in s 1(3)

<sup>58</sup> DPA, s. 27(1)

certificate signed by a Minister which “shall be conclusive evidence of that fact”<sup>59</sup>. Such a certificate would prevent a court from inquiring into the validity of any refusal to grant access on these grounds.

Additional exemptions applying specifically to data concerning the physical or mental health of the subject of the data have been introduced<sup>60</sup>. These permit data to be withheld where disclosure would be likely to cause serious harm to the health of the data subject or reveal to the data subject information about another identifiable individual<sup>61</sup>.

### **The Access to Health Records Act**

A separate right of access to non-computerised health records, subject to certain exemptions, is provided under the *Access to Health Records Act 1990* (“AHRA”). However, the right of access under the AHRA is in several respects more limited than that which applies to computerised health data under the DPA.

First, the right of access under the AHRA is limited to information contained in a “health record”. This is defined as:

“a record which consists of information relating to the physical or mental health of an individual who can be identified...and...has been made by or on behalf of a health professional in connection with the care of that individual”<sup>62</sup>.

The classes of persons who are “health professionals” are defined in section 2(1)<sup>63</sup>.

The effect of this definition is to exclude from access:

- health information which has been recorded by a person who is not, or is not acting on behalf of, one of the specified classes of health professionals. For example, records created by a person who has provided psychological counselling to an individual, but who is not a medical practitioner, clinical psychologist or child psychotherapist (and who does not otherwise fall within the definitions in section 2(1)) are not accessible;
- information recorded by a health professional other than in connection with the care provided to the individual. Thus, a record compiled by a doctor who has examined an individual solely for the purpose of an epidemiological study, or to advise an

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<sup>59</sup> DPA, s.27(2)

<sup>60</sup> by means of the Data Protection (Subject Access Modification)(Health) Order 1987 made under s 29(1) of the DPA.

<sup>61</sup> Other than a health professional involved in his or her care, or an individual who has consented.

<sup>62</sup> AHRA section 1(1)

<sup>63</sup> They include: a registered medical practitioner, dentist, optician, pharmaceutical chemist, nurse, midwife, health visitor and chiropodist; a dietician, occupational therapist, orthoptist, physiotherapist, clinical psychologist, child psychotherapist or speech therapist; an art or music therapist employed by a health service body; and a scientist employed by such a body as head of department.

employer on the individual's fitness for work, is not subject to the AHRA, unless the same doctor has at some time also been responsible for the care of the patient<sup>64</sup>.

Neither of these restrictions applies to requests for access under the Data Protection Act.

Second, the exemptions in the AHRA are defined by reference to "the opinion of the holder of the record" on the matter in question, an approach not found in the equivalent exemptions under the the DPA.

For example, section 5(1) of the AHRA states:

"Access shall not be given under section 3(2) above to any part of a health record...which, *in the opinion of the holder of the record*, would disclose -

- (i) information likely to cause serious harm to the physical or mental health of the patient or of any other individual; or
- (ii) information relating to or provided by an individual, other than the patient, who could be identified from that information;..." (*emphasis added*).

The equivalent provision under the DPA, however, provides that:

"The subject access provisions shall not have effect...where...the application of the subject access provisions...would be likely to cause serious harm to the physical or mental health of the data subject"<sup>65</sup>.

The result is that an applicant may find it more difficult to succeed in court with a challenge to a decision to deny access under the AHRA than would be the case were the same information withheld under the equivalent provisions of the DPA.

Finally, the AHRA does not apply to any part of a health record made before the Act's commencement, in November 1991<sup>66,67</sup>. The only exception is where, in the opinion of the holder of the record, access to part of the earlier record "is necessary in order to make intelligible any part of the record to which access is required to be given"<sup>68</sup>. The right of access under the DPA, on the other hand, is fully retrospective.

## **Codes of Practice**

Some retrospective access to manually recorded personal health information held by a government department or National Health Service (NHS) body may, however, be possible under two non-statutory codes of practice, introduced by the government: the *Code of*

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<sup>64</sup> In which case, a right of access to a report which the doctor supplied for employment or insurance purposes - but not for other purposes - would exist under the Access to Medical Reports Act 1988.

<sup>65</sup> Data Protection (Subject Access Modification)(Health)Order 1987, paragraphs 4(1) and 4(2)(a)

<sup>66</sup> AHRA s. 5(1)(b)

<sup>67</sup> AHRA s. 12(2)

<sup>68</sup> AHRA s. 5(2)

*Practice on Access to Government Information* introduced in April 1994, and the *Code of Practice on Openness in the NHS* introduced in June 1995. The codes apply to bodies within the jurisdiction of the Parliamentary Commissioner for Administration (the “Parliamentary Ombudsman”) and the Health Service Commissioner (the “Health Ombudsman”) respectively. They commit the bodies concerned to disclosing information on request, including information recorded before the codes’ introduction, subject to various exemptions.

However, the codes explicitly stated that they are not intended to provide access to actual documents or files, only to “information” from them. The Code of Practice on Access to Government Information states:

“There is no commitment that pre-existing documents, as distinct from information, will be made available in response to requests” and “the Code should not be regarded as a means of access to original documents or personal files”<sup>69</sup>

The Code of Practice on Openness in the NHS states:

“NHS organisations are not required to make available...copies of the documents or records containing the information”<sup>70</sup>

Furthermore, a request for information under the code on access to government information may be refused if it would “require unreasonable diversion of resources” for example because of “the need to retrieve information from files not in current use”<sup>71</sup>. This exemption might well become relevant where requests are made for information from older health records. No such exemption appears in either the AHRA or the DPA.

Finally, the codes are not legally enforceable, although complaints about the failure to release information in accordance with their provisions may be made to the appropriate Ombudsman. While in practice the Government generally accepts recommendations of the Ombudsman it is not obliged to do so.

### **The British Government’s response to the Gaskin judgment**

Following the judgment of the European Court of Human Rights in the Gaskin case<sup>72</sup>, the UK Department of Health circulated a consultation paper containing proposals for amendments to UK legislation and practice<sup>73</sup>. The proposals were not circulated until

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<sup>69</sup> Paragraphs 4 and 8

<sup>70</sup> Section 6

<sup>71</sup> Exemption 9

<sup>72</sup> Gaskin v United Kingdom, Series A No.160,(1990) 12 EHRR

<sup>73</sup> Department of Health. Response to the judgment of the European Court of Human Rights in the Case of Graham Gaskin (Access to Records), 26 February 1992 (hereafter “consultation paper”)

February 1992, some two and a half years after the judgment.

The consultation paper's proposals were restricted to records held by social work authorities - the class of records involved in the Gaskin case. It stated:

“The Government's view is that application of the judgment should be restricted to the operation of the Access to Personal Files (Social Services) Regulations and related data protection legislation”<sup>74</sup>.

The consultation paper accordingly contained no proposals relating to access to medical (or other kinds of) records. The Government subsequently confirmed in response to a Parliamentary Question that:

“At this stage it is not the Government's intention to apply the [Gaskin] judgment to the disclosure of personal health records”.<sup>75</sup>

The exclusion of health records from the Government's proposals may be regarded as surprising, given that:

- (a) in certain circumstances, such records may be particularly likely to contain an individual's “principal source of information about his past and formative years”<sup>76</sup> (for example, in cases of persons suffering from mental handicap or some other illness, injury or disability who are in receipt of prolonged medical care at a time when they are unable to take full responsibility for decisions concerning themselves);
- (b) the applicant in the Gaskin case had made clear that he required access to his social work records in part because “he wished to establish his medical condition”<sup>77</sup>
- (c) UK legislation on access to medical and social work records has generally developed in parallel. Both forms of records are the responsibility of the Department of Health. A margin note in the Data Protection Act refers to “Health and social work” and provides for special provision to be made to deal with requests for access to both classes of record. Parallel orders, containing equivalent exemptions, have been made under this section of the Act<sup>78</sup>. Separate legislation also provides access to both manually held social work and health records and these provisions also share many common features. Moreover, although both sets of provisions apply only to

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<sup>74</sup> Consultation paper, paragraph 5

<sup>75</sup> House of Commons, Written Answers, 22.6.92, col.44

<sup>76</sup> Gaskin v UK, para 36

<sup>77</sup> Gaskin v UK, para 45

<sup>78</sup> The Data Protection (Subject Access Modification)(Social Work) Order 1987 and the The Data Protection (Subject Access Modification)(Health) Order 1987

information recorded after their respective dates of commencement<sup>79</sup>, the Department of Health's policy has been to encourage the holders of both kinds of records to permit retrospective access on a voluntary basis, subject to appropriate safeguards<sup>80,81</sup>.

The consultation paper proposals were however intended to apply to "social services records relating to any period of a person's life"<sup>82</sup> and not just to records of the kind involved in the Gaskin case, which related to a young person in the care of a social services department. It addressed the problem of how to reconcile the interests of the subject of a record in obtaining access to it with the interests of a past contributor to the record who could not be traced or who has withheld consent for disclosure of information which he has provided in confidence. The court held that such matters should be assessed by an independent authority<sup>83</sup>. However, the Government's view was that in such a case "the local authority itself is the independent decision-making body envisaged by the judgment", and should be given "the right to make a final decision"<sup>84,85</sup>. In cases where the past contributor was an employee or member of the authority, it proposed that the right to object to access should be removed altogether<sup>86</sup>. It noted that these changes would apply retrospectively and require amendment to the Access to Personal Files (Social Services) Regulations.

In fact no such amendment has been made. Instead the government later indicated that it might include measures to comply with the Gaskin judgment as part of comprehensive new legislation on access to manual personal files held by public authorities. However, it gave no firm undertaking to do so, despite being questioned on the matter in Parliament in 1994<sup>87</sup> and

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<sup>79</sup> Social work records are accessible under the Access to Personal Files Act 1987 and the Access to Personal Files (Social Services) Regulations 1989, which together came into effect on 1 April 1989. The Access to Health Records Act 1990 came into effect on 1 November 1991.

<sup>80</sup> "Although the [Access to Health Records] Act does not grant a general right of access to records made before 1 November 1991, questions of access to documents made before that date are matters for the judgment of the health professional primarily responsible for the patient's clinical care. However it is our policy that access be given whenever possible." [Mr Tom Sackville, health minister, House of Commons, Written Answers, 13.7.95, col 756]

<sup>81</sup> "The Secretary of State shares the increasingly held view that people receiving personal social services should, subject to adequate safeguards, be able to discover what is said about them in social services records." Department of Health and Social Security, Circular LAC(83)14, September 1983.

<sup>82</sup> Paragraph 5

<sup>83</sup> Paragraph 49

<sup>84</sup> Paragraph 12

<sup>85</sup> The degree to which the local authority can be regarded as "independent" in such cases has been questioned. See for example an article by Professor Phyllida Parsloe, *Social Work Today*, 6 August 1992.

<sup>86</sup> Paragraph 10

<sup>87</sup> "Mr Kirkwood: To ask the Secretary of State for Health what changes she intends to make to existing legislation or practice on access to social work records following the proposals issued for consultation by her Department on 26 February 1992 entitled 'Response to the judgment of the European Court of Human Rights in the case of Graham Gaskin (Access to Records).

Mr Bowis: The 1993 White Paper on open Government sets out the Government's proposals for a new statutory right of access to personal records, adding to existing rights of access." *House of Commons, Written Answers, 20.6.94, col.25*

1996<sup>88</sup>.

The commitment to introduce new personal files legislation was announced in a white paper in July 1993<sup>89</sup>. The white paper did not itself indicate that the changes required by the Gaskin judgment would be implemented. Indeed, the contrary might have been inferred. Complying with the Gaskin judgment would require changes to the way in which records compiled in the past are handled. However, the white paper made clear that the proposed new legislation would not apply retrospectively as “making the access right itself retrospective could put an unacceptable administrative burden on authorities”<sup>90</sup>.

At the time of writing, nearly 8 years after the Gaskin judgment, the British Government has still neither introduced the promised personal files legislation, nor otherwise implemented the changes required to comply with the judgment.

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<sup>88</sup> “Mr Kirkwood: To ask the Secretary of State for Health what action he has taken to implement the proposals on access to social work records set out in his Department’s consultation paper of February 1992, following the European Court of Human Rights decision in the case of Graham Gaskin.

Mr Bowis: The Open Government White Paper, Cm 2290, proposed a statutory access right to personal records, which will be introduced as soon as the parliamentary timetable allows. The Government are reviewing the scope for including in this measure provisions to implement the European Court of Human Rights decision in the case of Graham Gaskin.” *House of Commons, Written Answers, 21.3.96, col.320*

<sup>89</sup> ‘Open Government’, Cm 2290, chapter 5.

<sup>90</sup> Open Government, Cm 2290, page 41.

### 3. COMPARATIVE INTERNATIONAL HUMAN RIGHTS STANDARDS CONCERNING ACCESS TO INFORMATION

There is an increasing body of legislation and jurisprudence, both in the field of international human rights law and in domestic legal systems, providing for a right of access to information held by government and/or other public authorities. The reasons underlying this right are twofold:

- (a) the importance for the public in a democratic society of adequate information on public issues; and
- (b) the need to strengthen public confidence in the administration.

The right to freedom of information was first recognised and enshrined in the Swedish Freedom of the Press Act which was enacted on 2 December 1766. There has been continuous freedom of information legislation in Sweden ever since, the current statute being the Freedom of the Press Act 1949. This legislation has constitutional status thereby providing for the highest possible protection for this right. Chapter 2, section 1 of the Act sets out the underlying principle that:

"To further free interchange of opinions and enlightenment of the public, every Swedish national shall have free access to official documents."<sup>91</sup>

This general principle is subject to some inevitable though well-defined exceptions such as security of the realm, its relations with international organisations and other states, activities of inspection, control or other supervision carried out by public authorities, the prevention and prosecution of crime and the protection of private and economic information about individuals.<sup>92</sup>

Any decision by a public authority concerning a request for access to information is subject to review by the administrative courts upon a challenge brought by the applicant for the information. The final appeal lies to the Supreme Administrative Court. There is no right of appeal for either a public authority or a third party seeking to prevent disclosure.

#### **International measures**

Internationally, the principles underlying this right of access to information were first set out in Recommendation R(81)19 of the Committee of Ministers of the Council of Europe adopted on 25 November 1981:

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<sup>91</sup> Translation taken from Prof. Peter Seipel, *Public Access to public sector-held information and dissemination policy - the Swedish experience*, contribution to Conference on "Access to Public Information: A Key to Commercial Growth and Electronic Democracy" 27/28 June 1996 - Conference proceedings at <http://www2.echo.lu/legal/stockholm/welcome.html>

<sup>92</sup> Chapter 2, section 2 of the Freedom of the Press Act - for further information on the Swedish law on free access to public documents see the statement of the relevant domestic law in *Leander v Sweden* Series A No. 116, (1987) 9 EHRR 433.

"The following principles apply to natural and legal persons. In the implementation of these principles regard shall duly be had to the requirements of good and efficient administration. Where such requirements make it necessary to modify or exclude one or more of these principles, either in particular cases or in specific areas of public administration, every endeavour should nevertheless be made to achieve the highest possible degree of access to information

I.

Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities.

II.

Effective and appropriate means shall be provided to ensure access to information.

III.

Access to information shall not be refuted on the ground that the requesting person has not a specific interest in the matter.

IV.

Access to information shall be provided on the basis of equality.

V.

The foregoing principles shall apply subject only to such limitations and restrictions as are necessary in a democratic society for the protection of legitimate public interests (such as national security, public safety, public order; the economic well-being of the country, the prevention of crime, or for preventing the disclosure of information received in confidence), and for the protection of privacy and other legitimate private interests, having, however, **due regard to the specific interest of an individual in information held by the public authorities which concerns him personally.**

VI.

Any request for information shall be decided upon within a reasonable time.

VII.

A public authority refusing access to information shall give the reasons on which the refusal is based according to law or practice.

VIII.

Any refusal of information shall be subject to review on request." (emphasis added)

There is no express guarantee for the right of access to information in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("ECHR") or the African Charter on Human and Peoples' Rights 1981 ("AfCHPR"). Article 10 ECHR, as well as Article 9(1) AfCHPR, only provides for a right to "receive" information. In the context of the ECHR this has been held to be limited to receiving information "that others wish or may be willing to impart"<sup>93</sup>. It does not, however, provide:

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<sup>93</sup> *Leander v Sweden*, *loc. cit.*, para. 74; see also *Gaskin v United Kingdom*, Series A No. 160, (1990) 12 EHRR 36 at para. 52; it should however be noted that Professor Cohen-Jonathan in Pettiti, Decaux and Imbert, *La Convention Européenne des Droits de L'Homme*, Economica, 1995 at page 374 sets out how the Committee of Ministers abandoned a proposal for an additional protocol incorporating a right to seek information following advice from the Court of Human Rights (dated 23 October 1981, not published) that such a right is implicit in Article 10; see also: Velu and Ergeç, *La Convention Européenne des Droits de L'Homme*, Bruylant, 1990.

"a right of access to a register containing information on his personal position, nor embody an obligation on the Government to impart such information to the individual."<sup>94</sup>

In the case of Gaskin v. United Kingdom<sup>95</sup>, however, the European Court of Human Rights developed a limited right of access to information by way of a positive obligation under Article 8 (respect for private and family life). The Court there held that Article 8 protected the applicant's:

"vital interest...in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent."<sup>96</sup>

Unlike the ECHR and the AfCHPR, Articles 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights 1966 ("ICCPR") and Articles 13(1) of both the American Convention on Human Rights 1969 and the UN Convention on the Rights of the Child 1989 provide for a right to "actively seek information" as compared with the passive right to receive information<sup>97</sup>. In relation to personal data and other specific information concerning an individual, Article 19 ICCPR implies a right of access to such information, subject only to restrictions justified on compelling grounds of confidentiality invoked by the state or private individuals<sup>98</sup>

Furthermore, Article 17 of the ICCPR, which protects the right to privacy, requires that

"In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files.

<sup>94</sup> *ibid.* It should be noted, however, that Judge Walsh in his dissenting opinion in Gaskin held that in his opinion the applicant's right to receive information under Article 10 ECHR (rather than Article 8) did apply to his request for information from the local authority which he was refused on grounds of confidentiality. Judge Walsh concluded that though Article 10(1) had been breached by the local authority's refusal to allow access, this breach was justified under Article 10(2).

<sup>95</sup> *loc. cit.*

<sup>96</sup> *Ibid.* para. 49, emphasis added

<sup>97</sup> see Manfred Nowak, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll - CCPR-Kommentar*, NP Engel Verlag, 1989, Article 19 para. 15

<sup>98</sup> Manfred Nowak, *loc. cit.* para. 16

If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination."<sup>99</sup>

### **Domestic legislation**

Since the adoption of the ICCPR in 1966, where the States of Western Europe and the United States resisted an attempt to water down the right to actively "seek" information<sup>100</sup>, there has been a marked increase in domestic legislation guaranteeing the right to freedom of information. In 1966 the United States adopted their Freedom of Information Act, which for the first time established an effective statutory right of access to government information; a right that is enforceable in court. Under the US Freedom of Information Act virtually every record held by federal agencies must be made available to the public subject only to nine discretionary exemptions provided for in the Act<sup>101</sup>. This federal Freedom of Information Act was followed by similar legislation in the individual states.

In 1982, the Australian Commonwealth parliament also adopted a Freedom of Information Act, which guarantees a general right of access to information subject to a number of specific exceptions. The refusal of access to information is subject to an internal appeal and the supervisory jurisdiction of the Administrative Appeals Tribunal. The Commonwealth legislation was followed by similar legislation in all the states and the Australian Capital Territory.

New Zealand also introduced freedom of information legislation in 1982. Its Official Information Act of that year provides for a right of access to information held by government departments and public organisations listed in the Act. The application of the Act is supervised and any complaints against refusal of access are determined by the Information Ombudsman. In 1993 this legislation was supplemented by the Privacy Act 1993, which provides for a right of access to personal information held by public and private sector organisations. Any complaints against refusal of such access are determined by the Privacy Commissioner.

Canada's Access to Information Act RSC 1985 entered into force in 1983. Section 2(1) of the Act sets out its purpose:

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<sup>99</sup> UN Human Rights Committee in its General Comment 16/32 adopted on 23 March 1988

<sup>100</sup> Manfred Nowak. loc. cit., para. 15

<sup>101</sup> These are:

1. records authorised to be kept secret in the interest of national defence or foreign policy;
2. internal personnel and practices of an agency;
3. those specifically exempt by other federal statutes;
4. privileged or confidential trade secrets or commercial or financial information;
5. interagency and intra-agency memoranda not available in law to any party other than an agency in litigation with another agency;
6. personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
7. investigatory records compiled for law enforcement purposes;
8. records relating to reports prepared by or for the use of agencies responsible for the regulation or supervision of financial institutions;
9. geological and geographical information concerning wells.

"...to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on disclosure of government information should be reviewed independently of government."

As a consequence, "the general rule is disclosure, the exception is exemption and the onus of proving the entitlement to the benefit of the exception rests upon those who claim it"<sup>102</sup>. Access is to be given within 30 days from the request<sup>103</sup>.

The Act applies to any information under the control of a government institution and not merely government information, ie. information pertaining to government and the workings of government<sup>104</sup> and is subject to a number of specified exceptions similar to those in the US Freedom of Information Act. Where access to information is refused notice of such refusal has to be given indicating either that the record does not exist, the specific exception in the Act under which access is refused or where the institution does not want to indicate whether the record exist, the exception under which the refusal could reasonably be based if the record existed. Complaints against non-disclosure can be made, in the first instance, to the Information Commissioner who will investigate such complaints in private<sup>105</sup>. The Information Commissioner may take evidence on oath and he is entitled to examine any record covered by the Act and no record may be withheld from him on any ground<sup>106</sup>. Furthermore, the Information Commissioner has a right to enter any premises occupied by any government institution, to converse in private with any person on those premises and to carry out therein such inquiries as he thinks fit. A further appeal lies to the Federal Court by either the applicant<sup>107</sup>, who may be supported before the court by the Information Commissioner, the Information Commissioner himself (with the consent of the applicant)<sup>108</sup> or an affected third party<sup>109</sup>. Just as in the case of the Information Commissioner the Act specifically states that the court, in such proceedings, may examine any record and that no such record may be withheld on any grounds<sup>110</sup>. The court is, however, required to take all reasonable precautions to avoid disclosure which may include receiving representations *ex parte* or conducting hearings *in camera*<sup>111</sup>. The burden of proving that the refusal of access

<sup>102</sup> Rubin v Canada (Canada Mortgage and Housing Corp.) [1989] 1 FC 265 (C.A)

<sup>103</sup> s. 7

<sup>104</sup> Canada Post Corp. v. Canada (Minister of Public Works) [1993] 3 FC 320 (TD), affd. (1993) 64 FTR 62 (FCA)

<sup>105</sup> ss. 34 and 35

<sup>106</sup> s. 36

<sup>107</sup> s. 41

<sup>108</sup> s. 42

<sup>109</sup> s. 44

<sup>110</sup> s. 46

<sup>111</sup> s. 47

to information falls within one of the exceptions under the Act lies with the government institution concerned<sup>112</sup>; where the review relates to matters relating to international affairs or defence the application will be determined by the Associate Chief Justice of the Federal Court or another judge specifically designated to hear such applications, such hearings being conducted *in camera* and with an opportunity to make *ex parte* representations where this is required<sup>113</sup>. In this way the Canadian legislation seeks to ensure that there is an effective and independent review of any decision not to disclose information to an applicant, be it because the information or documentation is stated to be not in existence or because non-disclosure is claimed to be justified under one of the exceptions under the Act.

### **European institutions**

In addition to these developments in the various national jurisdictions set out above and legislative developments in the Member States of the European Community<sup>114</sup>, there has been an increasing awareness within the European Community, at an institutional level, that in principle there is, or should be, a right of access to information subject only to specific exceptions. This was reflected in Declaration 17 attached to the Treaty on European Union<sup>115</sup> which required the Commission and the Council to take measures to improve public access to information available to the institutions. The measures adopted in this context are, however, limited to those areas of law and policy in which the European Community or the European Union had jurisdiction, in particular to its internal institutional procedures and to environmental law. As a consequence of the call for increased access to information, both the Council and the Commission adopted a Code of Conduct<sup>116</sup>, Article 1 of which sets out the general principle that, subject to exceptions laid down in the Code of Conduct:

"The public will have the widest possible access to documents held by the Commission and the Council."

The procedures and practices under the Code of Conduct have been the subject of a number

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<sup>112</sup> s. 48

<sup>113</sup> s. 52

<sup>114</sup> see e.g.: Article 32 of the Belgian Constitution as consolidated on 17 February 1994, Article 10(2) of the Finnish constitution, Loi 78/17 of 6 January 1978, Loi No 78-573 of 17 July 1978 and Loi No 79-18 of 3 January 1979 in France, Acts No 571 and 572 of 19 December 1985 in Denmark, Article 16 of Law No 1599/1986 in Greece, the Dutch Act on Public Access to Government Information of 31 October 1991 and the constitutional provisions in Spain and Portugal providing for a general right of access to information.

<sup>115</sup> otherwise known as the Maastricht Treaty

<sup>116</sup> Decision 93/731 (OJ 1993 L 340/43) for the Council and Decision 94/90 (OJ 1994 L 46/58) for the Commission

of cases both before the European Court of Justice and the Court of First Instance<sup>117</sup>. In Case C-58/94 *Netherlands v Council*<sup>118</sup>, Advocate General Tesauro, reviewed the status of the right of access to information in the Member States of the EC and concluded:

"The purpose of such rules is, in the first place, to enable a person party to an administrative procedure to put across his point of view properly: for that reason, it supplements the principle *audi alteram partem*. Secondly, access to information in the possession of public authorities aims at increasing citizens' participation in the decision making process of the administration and hence is conferred irrespective of whether the person concerned can show a specific, legally protected interest in having such access. **In other words, it is no longer true that everything is secret except what is expressly stated to be accessible, but precisely the converse.**"<sup>119</sup>

Reviewing the developments both in the EC and in the Council of Europe<sup>120</sup> he concluded that:

"It may be considered that the right of access to information is increasingly clearly a fundamental civil right."<sup>121</sup>

In addition to its own internal Code of Conduct the EC Council has also adopted a Directive on "Freedom of access to information on the environment"<sup>122</sup>, which requires that Member States ensure that, subject to specific exception set out in the Directive, their public authorities make available information on the environment<sup>123</sup> to any natural or legal person without that person having to prove an interest. Furthermore, Article 4 of the Directive requires that:

"A person who considers that his request for information has been unreasonably refused or ignored, or has been inadequately answered by a public authority, may seek a judicial or administrative review of the decision

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<sup>117</sup> Case T-194/94 *John Carvel and Guardian Newspaper Ltd v Council* [1995] ECR II-2765, where a decision refusing access to documents under a discretionary exception was quashed because the Council had not balanced the competing interests of the citizen's right of access to information and the Council's interest in maintaining confidentiality of its proceedings; Case C-58/94 *Netherlands v. Council* [1996] ECR I-2169 in which the Dutch government challenged the legality of the Decision adopting the Code of Conduct; and Case T-105/95 *WWF UK v. Commission*, judgment of 5 March 1997, where the Court of First Instance annulled a decision to refuse access to information because the decision failed to comply with the requirement that the decision indicate the reasons for which the documents are considered to fall within an exception.

<sup>118</sup> [1996] ECR I-2169

<sup>119</sup> at para. 15, emphasis added

<sup>120</sup> referring in particular to Recommendation R(81)19 and the "Declaration on Media in a Democratic Society" adopted at the Fourth European Ministerial Conference on Mass Media Policy, adopted in Prague in December 1994

<sup>121</sup> para. 16

<sup>122</sup> Directive 90/313 (OJ 1990 L158/56)

<sup>123</sup> whether in written, visual, aural or data-base form

in accordance with the relevant national legal system."<sup>124</sup>

Most recently, on 10 April 1997, the House of the Oireachtas in Ireland has adopted the Freedom of Information Act 1997 which provides for a general right of access to information subject to specified exceptions, and provides for three levels of review, first an internal review by the head of the government institution, a review of the decision by the head of the institution by the newly created Information Commissioner and an appeal on a point of law from the decision of the Information Commissioner to the High Court.

The South African government is currently consulting on a draft Open Democracy Bill, which would again operate on very similar principles to those applied in the other countries referred to above.

## **Conclusion**

In conclusion, from the international standards and the domestic freedom of information legislation described above there appears to be a developing consensus that there is a general right of access to information based on the following fundamental principles:

- there is a general right of access to information held by public authorities subject only to specific specified exceptions;
- there is no requirement for the individual to establish an interest in the information sought;
- requests for information must be dealt with within reasonable time;
- there is an obligation on the public authority to specify its reasons for a refusal of access; and
- any refusal of access to information is to be subject to effective independent review on request, which includes a review of the actual existence of the records sought.

As the European Court of Human Rights noted in its judgment in Gaskin it is vital for the protection of the right of the individual of access to information (be it general or personal information) that refusal of access to such information is subject to review. Such review must be both independent of the decision maker and effective within the definition used for an "effective remedy" in Article 13 ECHR. The consequences of a failure to provide for such an effective review of a refusal to give access to information on grounds of one of the specified exceptions can most clearly be seen in the recent case of Chahal v United Kingdom<sup>125</sup> where the Commission, in its report, held:

"The Commission has been given data which was not before the national courts. In the applicants' submission, it cannot be said that the Members of the

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<sup>124</sup> Article 4

<sup>125</sup> judgment of 15 November 1996, (1997) 23 EHRR 413

Commission could be trusted with material not suitable for disclosure to such courts. **The nature of the material disproves any overriding question of confidentiality. The national courts and the applicants appear to have been misled as to the limits of disclosure and deprived of material which could have been considered domestically.**<sup>126</sup>

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<sup>126</sup> (1997) 23 EHRR 413 at para 145 of the Commission report; see also the judgment in Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651 where the ECJ held that a provision under which a ministerial certificate that conditions for an exclusion were met constituted conclusive evidence to that effect was incompatible with the right to an effective remedy as provided inter alia in Articles 6 and 13 of the ECHR.