CHAPTER- III

RIGHT TO INFORMATION: CONVENTIONS & LEGISLATIVE TRENDS

Despite, Article 19 (1)(a) and Article 21 of the Indian Constitution, Universal Declaration of the Human Rights (1948) and some other International Conventions have formed the sheet anchors of the right to information. Researcher has also made attempt to get a comprehensive source of freedom of information in legislative trends in various countries. Accordingly this Chapter has been discussed under following heads:

i. Declarations & Conventions Inspiring Right to Information.

ii. Legislative Trend in Different Countries.

3.1 Declarations & Conventions Inspiring Right to Information

The democracy rests on good governance founded on transparency, openness and accountability. Democracy is the best form of government for a country, more especially with a large population like us, which is based on the principle of government of the people, for the people and by the people. Modern constitutions established welfare states. These welfare states are exercising vast arsenal of power conferred by various statutes. These statutes have conferred powers on the government for achieving certain objectives. An important principal of administrative law is power should be exercised for purpose for which it has been conferred. The people should know whether the power has been exercised properly or not by the Government. For all these reasons the right to information is sine-qua-non in the proper functioning of a democratic state. The Right to Information has been recognized at the global level. The Right to Information is as much a human right as the right to free speech and expression. It has been so recognized in the internationally accepted and binding documents such as the U.N. Declaration on Human

2 Dr. K. Madhusudana Rao, "The Legal Regime of Right to Information: An Overview" All India High Court Cases, July 2008 (Journal Section) at 113.
Rights, the European Convention and also the American Convention on Human Rights.

Therefore it is essential to highlight some of the important declaration like the U.N. Declaration on Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights and some other Conventions.

3.1.1 Universal Declaration of Human Rights, 1948

Within the United Nations, freedom of Information was recognized early on as a fundamental right. In 1946, during its first session, the U.N. General Assembly adopted Resolution 59 (1) which stated:

"Freedom of information is a fundamental human right and ......the touchstone of all the freedoms to which the UN is consecrated. Freedom of Information implies the right to gather, transmit and publish information anywhere and everywhere without fetters. Freedom of information requires an indispensable element, the willingness and the capacity to employ its privileges without abuse."  

The Resolution resulted in holding the UN Conference on freedom of information held in Geneva in 1948. In ensuing international human rights instruments, freedom of information was not set out separately but as a part of the fundamental right of freedom of expression, which includes the right to seek, receive and impart information. In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights. Article 19 of UDHR, guarantees freedom of opinion and expression as follows:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart

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3  hereinafter mentioned as UN.
4  14 December 1946.
5  hereinafter mentioned as UDHR, Resolution 217 A (III), 10 December 1948.
It may be observed that it is not exactly the right to obtain Governmental information. It is the private individual’s right to seek, receive and impart information and ideas through any media and regardless of frontiers; which is more broader in concept and content, but too general in nature.

3.1.2 International Covenant on Civil and Political Rights, 1966

UN Economic and Social Council (ECOSOC) was responsible for the International Covenant on Civil and Political Rights, a legally binding treaty was adopted by the UN General Assembly in 1966 and, as of today, had been ratified by some 150 States. India is a signatory to the Covenant. It declared right to people to be fully and reliably informed so as to improve their understanding through free flow of information and opinion. The ICCPR consists of 53 Articles and is divided into six parts, this treaty also made provision regarding freedom of information. The corresponding provision in this treaty, Article 19, guarantees the right to freedom of opinion and expression in very similar terms:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   a. For respect of the rights or reputations of others;

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6 hereinafter mentioned as ICCPR, Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.

7 International Covenant on Economic, Social and Cultural Rights 1966, Preamble.
b. For the protection of national security or of public order or of public health or morals.

3.1.3 UN Convention on the Rights of the Child, 1989

The UN Convention on the Rights of the Child, 1989 was adopted by General Assembly consensus, on the 30th Anniversary of the Declaration.\(^8\) The Convention has 54 Articles and is divided into three parts; This Convention has also made provisions regarding freedom of information. Articles 13 of this Convention declare that:

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media or the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   
   (a) For respect of the rights or reputations of others; or
   
   (b) For the protection of national security or of public order or of public health or morals.

3.1.4 UN Commission on Human Rights

In 1993, the UN Commission on Human Rights\(^9\) established the office of the UN Special Rapporteur on freedom of Opinion and Expression, and appointed Abid Hussain to the post.\(^10\) Part of the Special Rapporteur's mandate is to clarify the precise content of the right to freedom of opinion and expression. As early as 1995, the Special Rapporteur noted:

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\(^8\) Adopted 20 November 1989, entered into force 2 September 1990.

\(^9\) The Commission was established by the UN Economic and Social Council (ECOSOC) in 1946 to promote human rights and is composed of 53 representatives of the UN Member States, rotating on a three-year basis. It is the most authoritative UN human right body and meets annually for approximately six weeks to discuss and issue resolutions, decisions and reports on a wide range of country and thematic human right issues.

The right to seek or have access to information is one of the most essential elements of freedom of speech and expression.\(^{11}\)

He returned to this theme in 1997, and since that year has included commentary on the right to freedom of information in each of his annual reports to the Commission. In 1997 he stated: "The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large through such measures as censorship is to be strongly checked.\(^{12}\) His commentary on this subject was welcomed by the Commission, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications.\(^{13}\) In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State. "The right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems...."\(^{14}\) Once again, his views were welcomed by the Commission.\(^{15}\)

In November 1999, the three special mandates on freedom of expression- the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS\(^{16}\) Special Rapporteur on Freedom of Expression- came together for the first time under the auspices of Article 19. They adopted a joint Declaration which included the following statement:

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\(^{13}\) Resolution 1997/27, 11 April 1997, para. 12 (d).


\(^{15}\) Resolution 1998/42, 17 April 1998, para. 2.

\(^{16}\) Organization of American States, hereinafter mentioned as OAS.
Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participations in government would remain fragmented.17

The UN Special Rapporteur further developed his commentary on freedom of information in his 2000 Annual Report to the Commission, noting its fundamental importance not only to democracy and freedom, but also to the right to participate and realisation of the right to development.18 He also reiterated his “concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs.”19

In his 2000 Annual Report, the UN Special Rapporteur elaborated in detail on the specific content of the right to information. After noting the fundamental importance of freedom of information as a human right, the Special Rapporteur made the following observations:

the Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations, important are: Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; “information” includes all records held by a public body, regardless of the form in which it is stored; freedom of information implies the public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body

19 Id. at para. 43.
functions and the content of any decision or policy affecting the public; As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government; A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest; All public bodies should be required to establish open, accessible internal systems for ensuring the public’s right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusals; The Cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself; The law should establish a presumption that all meetings of governing bodies are open to the public; The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it, Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a
miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.\textsuperscript{20}

The UN has also recognized the fundamental right to access information held by the State through its administration of the territory of Bosnia and Herzegovina. In 1999, the High Representative to Bosnia and Herzegovina\textsuperscript{21} required the adoption of freedom of information legislation in accordance with the highest international standards, in order to provide practical protection for the right to freedom of expression, it was said: Although the Constitution of Bosnia and Herzegovina provides for full recognition of Freedom of Expression as a fundamental human Right protected in accordance with relevant international instruments, the numerous exhortations contained in peace implementation council documents.....concerning the freedom of the media are a clear signal of the continuing lack of clarity in the approach of the legal system of Bosnia and Herzegovina to vital matters, such as ..........the public's rights to know.

Considering the urgent need to uphold the constitutionally recognized freedom of expression, to ensure genuine media freedom, and to uphold the public's right to know about the activities of elected government bodies........I.....require that the state of Bosnia and Herzegovina and Entity governments and parliaments prepare and adopt freedom of Information legislation, and amend existing legislation as necessary, which upholds the citizen's right to information except for narrowly defined categories.\textsuperscript{22}

3.1.5 European Convention on Human Rights, 1950

The Statute of the Council of Europe,\textsuperscript{23} established by the Congress of Europe consisting of members who were like minded and have a common heritage of political tradition, ideals, freedom and the rule of law, stressed that

\textsuperscript{20} \textit{Id. at para. 44.}  
\textsuperscript{21} This mandate was established by UN Security Council Resolution 1031, 15 December 1995, in accordance with the Dayton Peace Agreement.  
\textsuperscript{23} An intergovernmental organization composed of 43 member states.
the maintenance and promotion of human rights were one of the means to achieve the ultimate objective of European unity, one of its foundational documents is the European Convention on Human Rights. Article 10 guarantees freedom of expression and information as a fundamental human right. It states:

1. Everyone has the right to freedom of expression. These rights shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedom, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10 differs from guarantees found in Articles 19 of the UDHR and ICCPR, and Article 13 of the ACHR, in that it protects only the right to "receive" and "impart" and not the right to "seek" information.

The European Court of Human Right has considered claims for a right to receive information from public authorities in at least three key cases, Leander v. Sweden, Gaskin v. United Kingdom, and Guerra and Ors. v. Italy. In each case, the Court rejected the notion that the guarantee of freedom of expression under the ECHR included a right to access the

24 hereinafter mentioned as ECHR, E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.
25 American Convention on Human Rights hereinafter mentioned as ACHR.
26 26th March 1987, 9 EHRR 433.
27 7th July 1989, 12 EHRR 6.
information sought. The following interpretation of the scope of Article 10 from Leander features in similar form in all three cases.

The right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that other wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access......nor does it embody an obligation on the Government to impart...information to the individual.29

By using the words, "in circumstances such as those of the present case", the court has not ruled out the possibility of a limited right to access information held by the State under Article 10. However, given the specific nature of the requests which were rejected in these three cases (details given), it would be a very limited right.

The European Court of Human Rights has not, however, denied redress in these cases. Rather, in all three cases, it found that to deny access to the information in question was a violation of the right to a private and family like, life under Article 8 of the Convention. In the first case, Leander, the applicant was dismissed from a job with the Swedish government on national security grounds, but was refused access to information about his private life, held in a secret police register, which had provided the basis for his dismissal. The Court held that the storage and release of the information, coupled with a refusal to allow the applicant an opportunity to refute it, was an interference with his right to respect for private life. The interference was, however, justified as necessary to protect Sweden's national security.30

The problem with the Court's reasoning in the Leander case was that it essentially accepted at face value the government’s claim of a risk to national security. The problem with this was highlighted that this was a problem became abundantly clear in 1997, more than ten years after the decision, when the plaintiff's lawyer was finally granted access to the relevant files, then

29 Supra note 26 at para 74.
30 Id. at paras. 48, 67.
it was found that showed the government's claims were false. The government subsequently admitted that "there were no grounds in 1979 or today, to label Mr. Leander a security risk, and that it was wrong to dismiss him from the museum," and paid him 400,000 Swedish Kronor (US$4,000) in compensation. The Leander ruling was followed by Gaskin, where the applicant, who as a child had been under the care of local authorities in the United Kingdom, had applied for but was refused access to case records about him held by the State. The final case was Guerra, where the applicants, who lived near a "high risk" chemical factory, complained that the local authorities in Italy had failed to provide them with information about the risks of pollution and how to proceed in event of a major accident.

In both Gaskin and Guerra, the Court held that there was no State interference with the right to respect for private and family life, but that Article 8 imposes a positive obligation on the State to ensure respect for such rights:

Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference, in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.32

In Gaskin, the Court held that the applicant had a right to receive information necessary to know and understand his childhood and early development, although that had to be balanced against the confidentiality interests of third parties who contributed information. Significantly, this placed a positive obligation on the government to establish an independent authority to decide whether access is to be granted if a third party contributor is not available or withholds consent. Since it had not done so, the applicant's rights had been breached.33

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32 Supra note 28 at para. 58.
33 Supra note 27 at para. 49.
In *Guerra*, the Court held that severe environmental problems may affect individuals' well-being and prevent them from enjoying their homes, and thereby interfere with their right to private and family life. As a result, the Italian authorities had a positive obligation to provide the applicants with the information necessary to assess the risks of living in a town near a high risk chemical factory. The failure to provide the applicants with that essential information was a breach of their Article 8 rights.34

Although the European Court has recognized a right to access information held by the State, the decisions are problematic. First, the court has proceeded cautiously, making it clear that its ruling was restricted to the facts of each case and should not be taken as establishing a general principle, In *Gaskin*, for example, the Court stated:

> The records contained in the file undoubtedly do relate to Mr. Gaskin's "private and family" life in such a way that the question of his access thereto falls within the ambit of Article 8.

This finding is reached without expressing any opinion on whether genera rights of access to personal data and information may be derived from Article 8 (1) of the Convention. The Court is not called upon to decide in abstract on questions of general principle in this field but rather has to deal with the concrete case of Mr. Gaskin's application.35

The second, and more serious problem, is that relying on the right to respect for private and family life places serious limitations on the scope of the right to access information held by the State. This is clear from the *Guerra* case, where it was a considerable leap to find, as the Court did, that severe environmental problems would affect the applicant's right to respect for their private and family life. *Guerra* is representative of a class of situations where justice and democracy clearly demand a right to information, but where this is hard to justify under the right to respect for private and family life. In effect, the Court has backed itself into a corner.

34 *Supra* note 28 at para. 60.
35 *Supra* note 27 at para. 37.
While it is a positive, and significant, that the European Court has recognized that individuals have a right to access information held by the State, it would have been far more logical and coherent if it had recognized it as part of the right to freedom of expression, rather than as part of the right to respect for private and family life. The political bodies of the Council of Europe have made important moves towards recognizing the right to access information held by the State as a fundamental right. As early as 1970, the Consultative Assembly, the forerunner of the Parliamentary Assembly, passed a Resolution stating:

"There shall be a corresponding duty [to the right to freedom of expression] for the public authorities to make available information on matters of public interest within reasonable limits............"36

In 1979, the Parliamentary Assembly recommended that the Committee of Ministers37 "invite member states which have not yet done so to introduce a system of freedom of information, i.e. access to government files............"38 The Committee of Ministers responded two years later by adopting Recommendation No. R (81)19 on the Access to Information held by Public Authorities, which stated:

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. ..... 

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

37 The Political decision-making body of the Council of Europe (Composed of the Ministers of Foreign Affairs from each Member State)
38 Recommendation No. 854 (1979) on access by the public to government records and freedom of information, adopted 1 February 1979, para. 13(a).
private interests, having, however, due regard to the specific interest of an individual in information held by the public authorities which concerns him personally.39

In 1994, the 4th European Ministerial Conference on Mass Media Policy adopted a Declaration recommending that the Committee of Ministers instruct its Steering Committee on the Mass Media to consider "preparing a binding legal instrument or other measures embodying basic principles on the right of access of the public to information held by public authorities."40 This was followed by a study for the Steering Committee on the Mass Media, which noted the need for a binding legal instrument on public access to official information.

The Steering Committee for Human Rights has set up a Group of Specialists on access to official information, which is expected to finalise a draft recommendation on access to information. The draft will then be forwarded via the Steering Committee to the Committee on Ministers for adoption. The current draft includes the following provisions:

III

General Principle

Member States should guarantee the right of everyone to have access on request, to official documents held by public authorities.

IV

Possible limitations

1. Member States may derogate from the right of access to official documents. Limitations or restrictions must be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of providing protection on:

   i. national security, defence and international relations;

   ii. public safety;

40 Declaration on Media in a Democratic Society, DH-MM (95) 4, 7-8 December 1994, para. 16.
iii. prevention, investigation and prosecution of criminal activities.
iv. privacy and other legitimate private interests;
v. commercial and other economic interests, be they private or public;
vi. equality of parties concerning court proceedings;
vii. nature;
viii. inspection, control supervision of public authorities;
ix. economic, monetary and exchange rate policies of the state;
x. confidentiality of deliberations within or between public authorities for an authority's internal preparation of a matter.

2. Access may be refused only if disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph I and if the interest in question overrides the public interest attached to disclosure....

IX

Review Procedure

1. An applicant whose request for a document has been refused, whether in part or in full, or dismissed, or has not been dealt with within the time limit set out in principle VI.3 shall have access to a review procedure before a Court of law or another independent and impartial body established by law.41

3.1.6 American Convention on Human Rights, 1969

The ACHR42 also made provisions regarding freedom of information. Article 13 of this Convention declares that freedom of thought and expression:

41 Draft Recommendation of the Committee of Ministers to Member States on access to official information, elaborated by the DH-S-AC at its 7th meeting, 28-30 March 2001.
1. Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure:

(a) Respect for the right or reputation of others; or

(b) The protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private control over new-sprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offences punishable by law.

The language of this guarantee closely resembles that of Article 19 of the UDHR, as well as Article 19 of the ICCPR. In a 1985 Advisory Opinion, the Inter-American Court of Human Rights, interpreting Article 13 (1), recognised freedom of information as a fundamental human right, this is as important a free society as freedom of expression. The Court explained:
Article 13 establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. [Freedom of expression] requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts, in that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.43

The Court also stated that "For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion", concluding that "a society that is not well-informed is not a society that is truly free."44

In 1994, the Inter-American Press Association45 organized the Hemisphere Conference on Free Speech, which adopted the Declaration of Chapultepec, a set of principles on freedom of expression.46 The principles explicitly recognize freedom of information as a fundamental right, which includes the right to access information held by public bodies:

2. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.

3. The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector.

Although the Declaration of Chapultepec originally had no formal legal status, as Dr Santiago Canton, the OAS Special Rapporteur for Freedom of Expression, has noted, "It is receiving growing recognition among all social

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44 Id., paras. 32,70.
45 A regional non-governmental organisation.
46 Mexico City, 11 March 1994.
sectors of our hemisphere and is becoming a major point of reference in the area of freedom of expression.47

To date, the Heads of State or Governments of 21 countries in the Americas have signed the Declaration.48

The Special Rapporteur, whose Office was established by the Inter-American Commission on Human Rights49 in 1997,50 has frequently recognized that

Freedom of Information is a fundamental right, which includes the Right to access information held by the State. In his 1999 Annual Report to the Commission, he stated:

The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information. Information that the State uses and produces with taxpayer money.51

In October 2000, the Commission approved the Inter-American Declaration of Principals on Freedom of Expression,52 which is the most comprehensive official document to date on freedom of information in the

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48 The Countries are Argentina, Bolivia, Belize, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Puerto Rico, Uruguay and the USA.
49 The Commission was established in 1960 by the OAS Council and has Jurisdiction over all OAS Member States. It has treaty responsibilities for implementation of the human rights obligations set out in the American Convention on Human Rights, which apply to State Parties to the Convention.
51 Supra note 47 at 24.
52 108th Regular Session, 19 October 2000.
Inter-American system. The Preamble reaffirms with absolute clarity the aforementioned developments on freedom of information:

CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions;

REAFFIRMING Article 13 of the American Convention on Human Rights, which establishes that the right to freedom of expression comprises the freedom to seek, receive and impart information and ideas, regardless of borders and by any means of communication;........

REAFFIRMING that the principles of the Declaration of Chapultepec constitute a basic document that contemplates the protection and defense of freedom of expression, freedom and independence of the press and the right to information;

The principles unequivocally recognize freedom of information, including the right to access information held by the State, as both an aspect of freedom of expression and a fundamental right on its own:

1. Every person has the right to access information about himself or herself or his/ her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.

2. Access to information held by the stated is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.
It is, therefore, clear that in the Inter-American system, freedom of information, including the right to access information held by the state, is a guaranteed human right.

### 3.1.7 African Charter on Human and People's Rights, 1981

Development on freedom of information at the African Union has been more modest. The African Charter on Human and people's Right rectified or acceded to by 49 States out of the 50 members of the Organization of African Unity (OAU)\(^5^3\). Article 9 of this Charter made provisions regarding freedom of information. It declares that-

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

### 3.1.8 African Commission on Human and People's Rights, 2002

The Commission adopted a Declaration of Principles on Freedoms of Expression in Africa at 32nd Session in October 2002. The Declaration clearly endorses the right to access information held by public bodies, stating:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
   - Everyone has the right to access information held by public bodies;
   - Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;

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any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;

- public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;

- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society, and;

- Secrecy law shall be amended as necessary to comply with freedom of information principles.

3. Everyone has the right to access and update or correct his personal information, where it is held by public bodies. 54

3.1.9 United Nations Development Programme

The United Nations Development Programme (UNDP) adopted a Public Information Disclosure Policy in 1997. 56 The rationale for the Policy is as follows:

The importance of information disclosure to the public as a prerequisite for Sustainable Human Development (SHD) has been recognized in major United Nations intergovernmental statements, including the Rio Declaration on Environment and Development. ......As a custodian of public funds, UNDP is directly accountable to its member Governments and indirectly accountable to

54 African Commission on Human and People's Rights, 32nd Session, 170, October 2002, Banjul, the Gambia.
55 hereinafter mentioned as UNDP.
their parliaments, their taxpayers, and the public in donor and programme countries.\textsuperscript{57}

The Policy provides for a presumption in favour of disclosure,\textsuperscript{58} subject to the following exceptions:

a. Proprietary information, intellectual property in the form of trade secrets, or similar information that has been disclosed to UNDP under conditions of confidentiality and the release of which would cause financial or other harm;

b. Internal notes, memoranda, and correspondence among UNDP staff, including documentation relating to internal deliberative processes among UNDP staff, unless these are specified for public circulation;

c. Privileged information (e.g., certain legal advice concerning matters in legal disputes or under negotiation), including disciplinary and investigatory information generated within UNDP or for UNDP;

d. Personal, health or employment-related information about staff, except to the individual staff member concerned; and

e. Information relating to procurement processes that involves prequalification information submitted by prospective bidders, or proposal or price quotations.\textsuperscript{59}

The Policy also enumerates specific documents that shall be made available to the public.\textsuperscript{60}

In terms of process, the Policy requires the UNDP to respond to a request within 30 working days. Any denial of access must state the reasons\textsuperscript{61} and the requester may then apply to the Publication Information and

\textsuperscript{57} \textit{id.} at para. 3.
\textsuperscript{58} \textit{id.} at para. 6.
\textsuperscript{59} \textit{id.} at para. 15.
\textsuperscript{60} \textit{id.} at paras. 11-14.
\textsuperscript{61} \textit{id.} at para. 19.
Documentation Oversight Panel to have the refusal reconsidered. The Panel consists of five members—three UNDP professional staff members and two individuals from the not-for-profit sector—appointed by the UNDP Administrator.62

There are problems with the UNDP Policy, but at the same time it is relatively progressive in comparison to other IGOs and has definitely made UNDP more open. Specific problems include the excessively broad nature of some of the exceptions, the lack of a public interest override for exceptions and the fact that the Oversight Panel is not sufficiently independent, However, the Policy is subject to ongoing review with a view to improvement.63

3.1.10 International Financial Institutions

Like the UN, international financial institutions increasingly recognise that they are subject to basic democratic principles, such as public participation in decision-making and public access to information. Since the adoption of the Rio Declaration in 1992, the development-oriented international financial institutions—the World Bank,64 the Inter-American Development Bank,65 the African Development Bank Group,66 the Asian Development Bank67 and the European Bank for Reconstruction and Development68 have all implemented information disclosure policies.

The World Bank, which first began issuing instructions on disclosure to its staff in 1985,69 adopted a formal detailed Policy on the Disclosure of Information in 1993.70 The Policy recognizes the “importance of accountability and transparency in the development process” and that as “an organization owned by governments, the Bank is accountable for its stewardship of public

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62 Id. at paras. 20-23.
63 Id., Chapter III.
70 Supra note 64.
moneys and has an obligation to be responsive to the questions and concerns of shareholders."\(^{71}\)

The Policy establishes a presumption in favour of disclosure,\(^{72}\) subject to certain minimum constraints, which the Bank has summarized as follows:

information is provided to the Bank on the understanding that it is proprietary or confidential, disclosure would violate the personal privacy of staff members, and thus such information is disclosed only to the extent permitted by Staff Rules; in the Bank’s judgment, disclosure could impede the integrity and impartiality of the Bank’s deliberative process and the free and candid exchange of ideas between the Bank, its members, and its partners, in the Bank’s judgment, disclosure would be detrimental to the interests of the Bank, a member country, or Bank staff, for example, disclosure would have a significant adverse effect on Bank-country relations, proceedings of the Board are, under the Board’s Rules of Procedures, confidential in the Bank’s exercise of sound financial management practices, it does not disclose certain financial information for prudential reasons; and disclosure would be impracticable for the Bank or its members for reasons of excessive cost or logistics.\(^{73}\)

The Policy also sets out a list of specific documents which are available on a routine basis from the Bank.\(^{74}\) The Policy does not meet international standards on freedom of information for a number of reasons:

some of the exceptions are too broad and others are subjective in nature, referring to the “Bank’s judgment” rather than an objective harm test; there is no provision

\(^{71}\) Id. at para. 3.
\(^{72}\) Id. at para. 4.
\(^{74}\) Supra note 64 at paras. 10-47.
ford information to be disclosed if the public interest in disclosure outweighs the harm, there is no provision for an independent review of refusals to disclose information; and as a matter of practice, several significant documents are not disclosed, including for example, the Country Assistance Strategy, a key document which provides the development framework for Bank assistance in a client country for certain countries.75

Although the content of the Policy is flawed, the Bank has taken concrete steps to review it in 1995, 1997, 1998 and 1999 resulting in progressively more openness and an increase in the number of documents subject to disclosure. A major review, with a public consultation process, is currently underway, and this should further extend the range of documents subject to disclosure.76

The regional development banks have largely followed the World Bank's lead and the disclosure policies that they have adopted are very similar.

3.1.11 European Union

The European Union,77 a body committed to furthering the political, social and economic integration of its 15 Member States, has undergone a number of major institutional changes over the years. The EU's predecessors the European Economic Community, the European Atomic Energy Community and the European Coal and Steel Community were essentially completely opaque in terms of information disclosure. Meetings were often held in secret and minutes were not published. Moreover, public access to documents held by the Communities was not generally regulated by rules, but was a matter of wide, often arbitrary, discretion.

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75 See Discussion Draft, Supra note 73 at para. 7.
76 See Discussion Draft, Supra note 73.
77 hereinafter mentioned as EU.
The Treaty of the European Union (the Maastricht Treaty), which came into force in 1993,\textsuperscript{78} represented the first major step towards openness and included a Declaration on the Right of Access to information which stated:

The conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

This Declaration was put into effect by the Commission, the EU's executive body and the Council, the EU's main decision-making body, composed of ministerial representatives from Member States, through the adoption in 1994 and the Commission, the EU's executive body, put this Declaration into effect through the adoption in 1993 and 1994, respectively, of a Code of Conduct on public access to Commission and Council documents.\textsuperscript{79} The Code of Conduct is guided by the general principle that "the public will have the widest possible access to documents held by the Commission and the Council." Access to any document must be refused where disclosure could undermine the protection of the public interest, privacy, commercial and industrial secrecy. In 1997, the European Parliament adopted its own rules on public access, which provide that "the public shall have the right of access to European Parliament financial interest, and/or confidentiality, documents under conditions laid down in this Decision."\textsuperscript{80}

Neither the Declaration nor the Code of Conduct explicitly confer a legal right to access official information held by the Commission and Council, and the European Court of Justice (ECJ) has refused to read in such a right.\textsuperscript{81} However, the Amsterdam Treaty, which amended the Treaty of Rome and

\begin{itemize}
\item[78] It was signed by the Foreign Ministers of Member States on 7 February 1992.
\item[79] Annexed to commission Decision 94/90/ECSC, EC, Euratom on public access to Commission documents, 8 February 1994; Council Decision 93 / 731 / EC / ECSC / Euratom on public access to documents, 6 December 1993.
\item[80] European Parliament Decision 97/632/EC, ECSC, Euratom on public access to European Parliament documents, 10 July 1997.
\item[81] \textit{Netherlands v. Council Case C-58/94, ECR I- 2169.}
\end{itemize}
came into force in 1999, does effectively recognise this right in a new article, Article 255, which states:

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

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

To give effect to this Treaty right, in May 2001 a new code of access was adopted by the European Parliament and the Council adopted a regulation on access to European Parliament, Council and Commission documents.\(^{82}\) It will replace the Code of Conduct and the European Parliament rules from 3 December 2001.\(^{83}\) The preamble, which provides the rationale for the Regulation, states in part:

> Openness enables citizens to participate more closely in the decision making process and guarantees that the administration enjoys greater legitimacy and is more effective and accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights.


\(^{83}\) Id., Article 19.
Like the Code of Conduct, the purpose of the Regulation is "to ensure the widest possible access to documents", but, in contrast to the Code, it also provides for a legal right to access documents. Article 2 states:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.85

The Regulation has several other positive features, including a narrow list of exceptions, all of which are subject to a harm test and some which are subject to a public interest override. Article 4 states:

1. The institutions shall refuse access to a document where disclosure would undermine protection of:

   (a) the public interest as regards: public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or Member State;

   (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection or personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the

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84 Id., Article 1(a).
85 Id., Article 2(1).
document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the decision-making process, unless there is an overriding public interest in disclosure. The Regulation also provides for an application for reconsideration of a decision to refuse to disclose information, as well as an appeal to the courts and/or the Ombudsman.86 However, the Regulation is flawed in the following respects:87

the fact that exceptions to disclosure for the protection of public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State, and the privacy and integrity of the individual88 are not subject to a public interest override, the provision that a Member State may request that a document which originated from that Member State shall not be disclosed without its prior agreement, and sensitive documents originating from the EU institutions, Member States, third countries or international organizations, which relate to public security defence and military matters, can only be released with the consent of the originator.89 These exceptions are not subject to a harm test or a public interest override, the requirement that a Member State that holds a document which originated from an EU institution must consult with

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86 Id., Articles 7 and 8.
87 The Regulation has been harshly criticised by some freedom of information watchdog group, who believe that it weakens the right of citizens and does not fulfill the Amsterdam treaty requirements. See European Citizens Action Service, European Environmental Bureau, European Federation of Journalists, the Meijer's Committee, and State watch. "Open letter from civil society on the new code of access to documents of the EU Institutions," 2 May 2001. See also critical comments on the rafting process in Tony Bunyan, Deirdre Curtin and Aidan White, Essays for an Open Europe, European federation of Journalists, November 2000.
88 Supra note 82 at Article 4 (1).
89 Id., Articles 4 (5) and 9.
the institution in order to take a decision on disclosure
that does not jeopardise the attainment of the objectives
in the Regulation.\textsuperscript{90} This has the potential to undermine
domestic freedom of information legislation which is more
open and progressive than the EU Regulation.

At the same time, the European Union is taking steps to establish for
the very first time a Charter of Fundamental Rights relation to its own
activities. The Charter, which was signed and proclaimed by the Presidents of
European Parliament, the Council and the Commission on 7 December 2000,
guarantees both freedom of expression and a right to access information held
by European institutions. Article 42 states:

\begin{quote}
Any citizen of the Union, and any natural or legal person
residing or having its registered office in a Member State,
has a right of access to European Parliament, Council
and Commission documents.
\end{quote}

The question of whether to make the Charter legally-binding by
incorporating it whether, and if so how, the Charter will be incorporated into
European Union law is currently being considered as part of the general
debate on the future of the EU.

3.2 Legislative Trend in Different Countries

The beginning of the twenty first century is marked with the
developments made in the field of information and technology. Information is
indispensable for the functioning of a true democracy. As a citizen of a
democratic country, a person has a right to know about the policies, laws and
other information that may affect once directly or indirectly. The right to
information has been recognised as a fundamental human right, as discussed
before, intimately linked to respect for the inherent dignity of all human beings.
Right to information is outcome of struggle against governmental secrecy in
various Countries. Even only "out of 54 of the Commonwealth's Member
states have freedom of information legislations; Antigua & Barbuda, Australia,

\begin{footnote}
\textsuperscript{90} \textit{Id.}, Article 5.
\end{footnote}
What remains necessary for this purpose is to refer to one significant aspect of Right to Information that is growing up in different Countries like Sweden, Australia, Canada, United Kingdom, United States and India. Therefore, in this chapter an attempt has been made to study legislative provisions of the Right to Information, in recent time have been discussed hereunder briefly.

3.2.1 Sweden

A jurisprudential journey relating to freedom of information in historical perspectives informs that Sweden enjoys the credit of being the first Country in the World which guaranteed the Right to Information as early as 18th Century, to be precise in 1766. The people in Sweden have tasted the fruits of openness in administration for an uninterrupted period of more than 230 years, apparently without any harm occurring to it, or loss suffered by it. In Sweden, access to government is a right and non-access an exception.92

The principle of openness "Offeentlighetstegnadsatsen" has been long enshrined in Swedish law. Sweden enacted the world's first Freedom of Information Act in 1766.

There are four fundamental laws that make up the Swedish Constitution. Of those, the Instrument of Government and the Freedom of the Press Act specifically provide for freedom of information.

Chapter 2, Article 1 of The Instrument of Government guarantees that all citizens have the right of:

(2) Freedom of information: that is, the freedom to procure and receive information and otherwise acquaint oneself with the utterances of others.

91 Angela Wadia, Global Sourcebook on Right to Information (2006) at 361.
Specific rules on access are contained in the Freedom of the Press Act, which was first adopted in 1766. The current version was adopted in 1949 and amended in 1976. Chapter 2 on the Public Nature of Official Documents, decrees that NQ very Swedish subject [and resident] shall have free access to official documents. Public authorities must respond immediately to requests for official documents. Requests can be in any form and can be anonymous.93

Each authority is required to keep a register of all official documents and most indices are publicly available. This makes it possible for ordinary citizens to go to the Prime Minister’s office and view copies of all of his correspondence.

There are four exceptions to the registration requirement: documents that are of little importance to the authorities activities; documents that are not secret and are kept in a manner that can be ascertained whether they have been received or drawn up by the authority; documents that are kept in large numbers which the government has exempted under the secrecy ordinance; and electronic records already registered and available from another ministry. Importantly, internal documents such as drafts, memoranda and outlines are not considered official documents unless they are filed and registered or they contain new factual information that is taken into account in decision-making. There is no obligation to keep nonofficial documents.

Under the Act, there are discretionary exemptions to protect national security and foreign relations; fiscal policy, the inspection and supervisory functions of public authorities; prevention of crime; the public economic interest; the protection of privacy; and the preservation of plant or animal species.

All documents that are secret must be specified by law. A comprehensive list of the documents that are exempted is provided in the 1980 Secrecy Act which has over 160 sections. Most of the restrictions require a finding that their release would cause harm to the protected interest.

Information can be kept secret between 2 and 70 years. The Secrecy Ordinance sets additional regulations on some provisions of the Secrecy Act. A government panel in 2003 found that the Act has been continually changed since 1980. The government classified the list of dead and missing Swedes from the Tsunami in January 2005 because of fears that the houses of the missing would be robbed. The Supreme Administrative Court ruled in February 2005 that the withholding was illegal and the names were released.94

Decisions by public authorities to deny access to official documents may be appealed internally. They can then be appealed to general administrative courts and ultimately to the Supreme Administrative Court. Complaints can also be made to the Parliamentary Ombudsman. The Ombudsman can investigate and issue non-binding decisions. The Ombudsman received 288 complaints relating to access to documents and freedom of the press between July 2004 and June 2005 and issued admonitions to government departments in 90 cases.

The government announced a proposal in 2002 to merge the Secrecy Act and the Public Records Act into a single Management of Official Documents Act that would yet all the requirements to be met by public authorities throughout the process of handling official documents. The proposal was stopped because of concerns about its constitutionality. The government is now considering a proposal by a panel to write a new Secrecy Act. The panel recommended making the Act more user-friendly by restructuring it, modernising the language, and including definitions in the Act. They also recommended some form of external oversight, an improvement on the requirement to show harm in some cases, a public interest test, increasing the secrecy of information on the health or the sexual activities of an individual if it would cause harm, and improving the protection of sensitive personal information and the link between real and fictitious identities.95

94 Id. at 240.
95 Id. at 241.
Even in a country with such a longstanding principle, there are still problems with access. The regular change to the Secrecy Act has raised concerns. The plans for the building of Prime Minister Goan Person's house were classified in April 2005. There are also problems with awareness of the Act. A researcher at the University of Gothenburg was fined $4500 in July 2005 for refusing to follow a court order to release his records, instead shredding them. The Ombudsman said that the University did not do enough to get the records back. The Deputy Ombudsman stated in the 2004-05 report that there was "often a lack of fundamental knowledge of these areas" particularly with local administrations. The government ran "Open Sweden Campaign" in 2002 to improve public-sector transparency, raise the level of public knowledge and awareness of information disclosure policies, and encourage active citizen involvement and debate. It was coordinated by representatives from the national government, country councils, municipalities and trade unions. The government said:

Clear signals from the public, journalists and trade unions and professional organizations indicate that inadequacies exist in terms of knowledge about the public access to information principle, and with respect to its application. Examples of such inadequacies include delays in connection with the release of official about the public access to information principle, and with respect to its application. Examples of such inadequacies include delays in connection with the release of official documents, improper invocations of secrecy and cases where employees do not feel at liberty to exercise the freedom of expression and communication freedom guaranteed them by law. Many citizens have insufficient knowledge of these rights, making it difficult for those citizens to exercise them. The government believes that this type of openness is one of the cornerstones of a democratic society, and that it must continue to be so.

Individuals have a right to access and correct personal information held by public and private bodies under the Personal Data Act. It is enforced by the Data Inspection Board.96

3.2.2 United States

The Americans having a spring belief in the healthy effects of "openness" and "publicity" have developed a strong antipathy to the inherent secretiveness. The constitution of America does not contain any specific provision of access to administrative document, but first amendment of USA provides that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise there of, or abridging the freedom of speech or the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Although the First Amendment traditionally comprehended only individual's freedom form restraints on his communication, certain constitutional scholars argue that affirmative rights to acquire information exist as a corollary of the First Amendment freedoms. Response to such arguments from the Supreme Court may be analyzed here briefly.

The Supreme Court, on a number of occasions, has recognized a constitutions right to know. In Lamont v. Postmaster General,97 the Supreme Court invalidated a provision of a statute conferring power on the Postmaster General to detain mailings printed or prepared in a foreign country and found by the Secretary of Treasury as communist political propaganda. Such mailings were delivered only after a request from the addressee. This limitation was held to be a restriction on the unfettered exercise of first Amendment rights,98 Justice Brennan observed:99

96 Id. at 242.
97 14 L. Ed. 2d. 398 (1965).
98 Id. at 401 per Douglas J., who delivered the opinion of the Court.
“It is true that the first Amendment contains no specific guarantee of access to publications. However the protection of the Bill of rights goes beyond the specific guarantees to protect from Congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful....I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren market-place of ideas that had only sellers and no buyers.”

Later in 1969, in Stanley v. Georgia, the Supreme Court protected the right to receive information and ideas. The First Amendment was held to involve not only the right to speak and publish but also the right to hear, to learn and to know. Thus freedom of speech necessarily protects the right to receive information.

However, sometimes the Supreme Court had ignored the right to know of the citizens also. In Zemel v. Rusk, the Department of State denied a citizen’s request to have his passport validated for a travel to Cuba as a tourist and for the purpose of satisfying his curiosity to know the state of affairs there. The action of the Department of State was challenged inter alia, on the ground that it violated the citizen’s First Amendment rights. The Court held that the right to speak and publish did not carry with it an unrestricted right to speak and publish did not carry with it an unrestricted right to gather information. However Goldberg, J., in his dissenting opinion observed that freedom of speech and press included the right to travel for gathering information.

99 Id. at 403 per Brenan J., with whom Goldberg J., joined in a separate but concurring opinion.
100 22 L.Ed. 2d. 542 (1969).
101 14 L.Ed. 2d. 179 (1965).
Again, in *Kleindienst v. Mandal*, 102 a Belgian Journalist, a scholar in Marxian economic theory, was invited to speak at various American colleges. He applied for nonimmigrant visa. But his advocacy of communist doctrine made him ineligible for the visa. Though the Advocate General could have waived this ineligibility, he did not do it. This refusal to grant a waiver was challenged on the ground that it violated the First Amendment rights of American citizens to hear the alien’s views. The majority found that the First Amendment guaranteed no such independent and enforceable right against the Government’s bonafide exercise of discretion in the exclusion of aliens. Alternative methods of communication such as writings, recordings etc. weaken the argument for visa for the purposes of right to know. However, the dissenters Douglas, Marshall and Brennan, JJ., observed that the First Amendment embodied affirmative constitutional rights. Justice Marshall thus observed:103

".....In a variety of contexts, this Court has held that the First Amendment protects the right to receive information and ideas, the freedom to hear as well as the freedom to speak. The reason for this is that the First Amendment protects a process.......and the right to speak and hear-including that right to inform others and to be informed about public issues - is inextricably part of that process. The freedom to speak and the freedom to hear are inseparable; they are tow sides of the same coin. But the coin itself is the process of thought and discussion."

The *Kleindienst* case and the *Zemel* case show that the First Amendment does not give an affirmative right to receive which is capable of outweighing the government interests in imposing reasonable limits on the free flow of information.

In all the cases referred to above, there is a common feature, that is, the government’s stand against the right to know of a citizen form a private

102 33 L.Ed. 2d. 683 (1972).
103 Id. at 699.
source. The right was not asserted against the government itself. Where the governmental officials exercised there discretion properly, the courts did not interfere. However, certain judges in the process have categorically established that people acquire an affirmative right under the First Amendment.

Now let us consider cases, which are more direct on the topic of right to know from the government itself. There are a series of cases.\(^\text{104}\) Pell’s case, Saxbe’s case and Houchin’s case, in which press demanded, under the First Amendment, personal interviews with the inmates of the prisons. In fact, by allowing access to government facilities (prisons), the right to know of the people the press on behalf of the people in these cases - can be enjoyed. In Pell and Saxbe cases, Steward, J., for the majority held that the First Amendment did not guarantee the press a constitutional right to special access to information not available to the public generally. However, Douglas, J., along with Marshall and Brennan, JJ., in their dissent, in Pell’s case, argued that the First Amendment embodied an affirmative right to know and the press on behalf of the public, could vindicate informational interests in the operation of the government.\(^\text{105}\) The Pell and Saxbe cases demonstrate the appeal of the political ideal of an informed public. The cases also highlight the divisions within the Supreme Court over the issue.

Later, in Houchins v. K.Q. E. L.,\(^\text{106}\) the division became more clear. In this case, a broadcasting station applied to the jail authorities for permitting access to a portion of the jail where a prisoner’s suicide had occurred. It was reportedly a result of the condition of prison. On the rejection of the application, the broadcasting station challenged it as a denial of the First Amendment right. The Court found that press had no special privileges superior to the public generally.


\(^{105}\) Pell Case, Id. at 512 Justice Powell, dissenting, found that absolute prohibition on prisoner-press interviews would impair the right of the people to a free flow of information and ideas on this conduct of the government (p.509).

\(^{106}\) Houchins Case Supra note 104.
In all the three cases *Pell*, *Saxbe* and *Houchins*, the Supreme Court confronted with access claims of the journalists, to the prison. Since the claims were form the press, the Court had no occasion to consider a generalized right of access applicable to all citizens. In *Pell* and *Saxbe*, the Court failed to define the content of the press right to gather information. In both cases, equating the press right with that of the public, the Court denied that the Constitution of the United States imposed upon the government any affirmative duty to make available to journalists sources of information not available to members of the public generally.\textsuperscript{107} In *Houchin’s* case, Berger, C. J., flatly denied that public and media have a First Amendment right to government information regarding the conditions of jails and, presumably, all other public facilities, such as, hospital and mental institutions.\textsuperscript{108} He found that such a right lacked a discernible basis in the Constitution and could not be translated into reasonably enforceable standards. Steward J., while rejecting the right to gather information when the government had not opened its doors, suggested that the strict equality of press and public might be relaxed because the terms of access imposed on individuals would be unreasonable if applied to journalists. In the dissenting opinion Stevens J., asserted a rationale for a constitutional right to gather information on the basis of self-governing rights of the people. It was observed that the judiciary must weigh the governmental reason for denying access to the requested information against the public interest in receiving that information.

The most direct case on right to know from the government seems to be *Richardson’s* case.\textsuperscript{109} In this case, Richardson, a taxpayer, sought to obtain form the government information concerning detailed expenditures of the Central Intelligence Agency, the ground being based on Article 1, Section 9, clause 9 of the constitution.\textsuperscript{110}

The Supreme Court rejected the informational interests of Richardson on the ground of standing. He lacked standing since the challenge was no

\textsuperscript{107} Sexbe Case Supra note 104 at 520; Pell Case Supra note 104 at 508.

\textsuperscript{108} Houchins Case Supra note 104 at 564.

\textsuperscript{109} United States v. Richardson, 41 L.Ed.2d. 678 (1974).

\textsuperscript{110} Article 1, Section 9, Clause 7 of the Constitution reads as follows: “No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published form time to time.”
addressed to the taxing or spending power of Congress and he did not claim that appropriated funds were being spent in violation of any constitutional limitations. However, Brennan J., in his dissenting judgment, observed that violation of the said Article caused an injury not only in respect of one’s right as a citizen to know how Congress spends public money but also in respect of one’s right as a voter to receive information to aid his decision how and for whom to vote.\(^{111}\) Steward J., joined by Marshall, J., in his’ dissenting opinion, observed that Richardson as a taxpayer and citizen voter had a right to receive information as to Central Intelligence Agency expenditure and government had a corresponding duty to supply the same.\(^{112}\)

The Pell, Saxbe, Houchins and Richardson cases were primarily decided on the locus stand problem. In the first three cases, the press was held not to have standing to seek information regarding prison details because it could not be given any privilege that is not available to the members of the public. These cases were decided on a basis that a common man is unconcerned with the facilities and other things in a prison existing in a country. It is the public money spent on a prison. Again the criminal after sentence has to come back to the society. Thus a citizen has definitely got a standing to know all those things, and so the press on behalf of such persons. Richardson’s case also showed that he had no standing. It was also an instance where national security would have been another hurdle, had the standing issue not been brought in. Thus, these cases do not ultimately decide that an individual, with proper standing has no right to know under the First Amendment. The trend in the United States is thus in favour of allowing an affirmative First Amendment right.

Quite typically, the American experience shows the historical perspective pertaining to Freedom of Information in America reveals more of a conflict of interests between the noted political heavy weights viz., Republicans and Democrats. Interestingly, the struggle pertaining to this campaign was initially heralded by a coalition of certain newspaper editors,

\(^{111}\) Schlesinger v. Reservists to Stop the War, 41 L.Ed. 2d. 705 (1974) at 727; Justice Brennan delivered his opinion in Richardson’s case along with his opinion in the Schlesinger’s case. 

\(^{112}\) Richardson Case Supra note 109 at 702.
However, the fact that this struggle has lasted for more than 10 years to bring about the law of Freedom of Information in a Country like America which is considered to be a natural home of freedoms and liberties is not only quite intriguing but also deeply inexplicable.\(^{113}\)

In 1966 the United States Congress passed the Freedom of Information Act.\(^{114}\) It gives every citizen a legally enforceable right to have access to government files and documents, to the extent; the security of the nation permits it. Act made disclosures, as the normal rule and refusal as exception. Right to know has become the cornerstone of citizen participation in democracy. If any person is denied this right, he can seek injunctive relief from a District Court.\(^{115}\) If the order of the court is not complied with, the District court may punish for its contempt the responsible employee.\(^{116}\)

Freedom of information Act was further liberalized in 1974. Amendments provided:

i. for disclosure of “any reasonably segregably portion” of otherwise exempted records;

ii. for mandatory time limit of 20 to 30 days for responding to Information requests;\(^{117}\)

iii. for rationalized procedure for obtaining information, appeal and cost,

iv. allowing federal judge to review a decision of the government to classify certain material,

v. setting deadlines for the agency to respond to a request, and

\(^{113}\) Prof. (Dr) S.V. Joga Roa, Law Relating to Right to Information (A Comprehensive and Insightful Commentary with Comparative Perspectives) 2009 Volume 1 at 18.


\(^{116}\) U.S. Freedom of Information Act, 1966, Section 4(G).

vi. permitted judges to order payment of attorney's fees and court costs for plaintiffs who have won suits brought for information under the Act.

It may be worthwhile to mention here that the act is mostly being used by business executives and their lawyers. Editors, authors, reporters and broadcasters whose job was to inform the people rarely used the Act.

The amended law placed more material on-line and expanded the role of agency reading room. However, in a period of government downsizing, the number of requests for information continues to rise. Growing number of requests are for information that required declassification or in which there is a proprietary interest or a privacy concern. It results in huge back log of requests with many government departments.

Sunshine Act 1977,\textsuperscript{118} provide access to Federal Government meetings. It mandates open meetings for regular sessions of federal multi-agency body. However, closed door meetings are allowed in the following cases:

i. national defence and foreign policy;

ii. confidential/commercial / financial information;

iii. invasion of privacy;

iv. law enforcement and criminal investigator records;

v. pre-decisional discussions of general policy;

vi. bank examiners record and

vii. information which may lead to financial speculation.

The Act provides that injunctive relief may be obtained to force a pending meeting to be open and to force closing of a meeting held in violation of law. After the enforcement of the Act, all meeting of federal agencies are to be open with at least one week’s public notice unless prescribed exceptions

\textsuperscript{118} Sunshine Act, 1977, 5 U.S.C. 552.
are attracted. The Federal Advisory committee Act, 1972 provides for open meetings of outside groups advising federal agencies or the president.\textsuperscript{119}

The Privacy Act of 1974 works in conjunction with the FOIA to allow individuals to access their personal records held by federal agencies.\textsuperscript{120} Electronic Freedom of Information Act, in 1996 applies to records maintained in electronic format.\textsuperscript{121} The law allows any person or organization, regardless of citizenship or country of origin, to ask for records held by federal government agencies. Agencies include executives and military departments, government corporations and other entities except the Congress, the courts or the president’s immediate staff at the White House, including the National Security Council.

The Freedom of Information Act, 1966 established an effective legal right of access to government information. Since 1966, the world has changed a great deal. Records are no longer principally maintained in paper format. Now they are maintained in a variety of technologies including CD ROM and computer discs, making it easier to put more information on-line. US Supreme Court in Department of Justice v. Tax Analysts\textsuperscript{122} has interpreted “record” to include any record created or obtained by the agency in question, which is under the control of that agency when the materials are requested.

U.S. Government has launched numerous initiatives to bring more information to public. It has established World Wide Web Pages, which identify and link information resources of the Federal Government. An enormous range of documents and data including the Federal budget is now available on-line or in electronic format, making government more accessible than ever. It has declassified unprecedented amount of national security material, including information on nuclear testing.

\textsuperscript{119} Federal Advisory Committee Act, 1972, 5 U.S.C. Appt II.
\textsuperscript{120} Privacy Act, 1974, 5 U.S.C. 552.
\textsuperscript{122} 492 US 136 (1989) at 144-145.
The legislation extended the legal response period to 20 days from 10 days.\textsuperscript{123} The reason is obvious. At the end of the year 1999 there were 331,333 requests pending with federal agencies. Number of requests received in the year 2000 were 2,35,042. Number of requests processed were 2,35,090 and number of requests pending at the end of the year 2000 was 33,085.\textsuperscript{124}

As a result of the 1996 amendments, U.S. Agencies maintain both conventional as well as electronic reading rooms. The act also provides that 20 days time limit may also be extended to another 5 days or more on account of unusual circumstances which include heavy workload among others. There are also provisions for expediting the process, where compelling need is shown like

i. imminent threat to life or physical safety,

ii. request made by a person primarily engaged in disseminating information, with an urgency to inform public concerning actual or alleged Federal Government activity.

Since 1999, a common format has been prepared for all agencies for preparing FOIA reports, which should be prepared within four months. It was found earlier, that many FOIA requests were very broad and complex and time spent in processing them only delayed other requests. Amendments of established procedures for an agency to discuss with requesters ways of tailoring large requests to improve responsiveness. This approach explicitly recognizes that FOIA works best when agencies and requesters work together.

There are number of exceptions recognized by the Act, these are as follows:\textsuperscript{125}

1. Information to be kept secret in the interests of national defence or foreign policy.

\textsuperscript{123} U.S. Freedom of Information Act, 1966, S. 8(b).
\textsuperscript{125} Supra note 115.
2. Internal, personal rules and practices of an agency.

3. Information specifically exempted by law.

4. Trade secrets and other commercial or financial information.

5. Inter-agency or intra-agency memorandums, letters or notings,

6. personal information and medical files, the disclosure of which would constitute invasion of privacy.

7. law enforcement investigatory information.

8. Information related to examination, operations, condition reports or supervisory reports of financial institutions.

9. Geological and geophysical information including maps and other data.

No doubt, law enforcement and personal privacy were most cited exemptions for withholding information. There are 142 different statutes that allow for withholding under exemption 3. In 2003, the Homeland Security Act added a provision prohibiting the disclosure of voluntarily-provided business information relating to “critical infrastructure.” Yet recently in the year 2002 again FOIA, 1966 was amended to provide information more and more. The Act provides opportunity of appeal also. Appeals of denial or complaints about extensive delays can be made internally to the agency concerned or to the Federal Courts. The Courts have heard thousands of cases in the 38 years of the Act. But there are some major problems in the implementation of the Act. They are bureaucratic delay cost of bringing suit to force disclosure, and excessive charges levied by the agencies for finding and providing the requested information.

3.2.3 United Kingdom

In England though the democratic traditions are deep-rooted, yet the thrust of legislation in this direction has been not on information but ‘secrecy’. The Power of the British Empire was, however, built through processes of secrecy. The goal of secrecy was achieved through a full-fledged Official Secrets Act. The various laws in England are contained basically in the
Official Secrets Act of 1911, 1920, and 1939. Broadly speaking, it is the Official Secrets Act, 1911, which governs the subject matter substantially. In Britain until recently secrecy was a rule (The Official Secrets Act, 1911 being the legislation of the subject). Its catch-all, Section 2 was based on the theory of privilege, according to which all official information, whether or not related to the national defiance and security, is the property of the crown. It is, therefore, privileged and those who receive officially cannot divulge it without the authority of crown. This Act is said to have been conceived in hysteria, when England faced the prospects of a great war. It seeks to make everything secret, even those matters which should not to be secret. In the opinion of Prof. Wade “the principle Act of 1911 was hasty piece of catch-all legislation which passed through the House of Commons in one day without debate at the time of Agadir Crisis.”

In 1968, the Fulton committee on the civil service stated: The Administrative process is surrounded by too much secrecy. The Public interest would be better served if there were a greater amount of openness. The Committee went on to recommend: The government should set up an inquiry to make recommendations for getting rid of unnecessary secrecy in this country. Clearly, the Official Secrets Act would need to be included in such a review.

One year later the Labour Government published a White Paper entitled “Information and the Public Interest”, based on a “wide inter-departmental basis, studying comprehensively both the existing trend and its possible future development.” Apart from a few self-congratulatory noises, it proposed virtually nothing except retaining Official Secrets Act in its existing forum.

In England Judiciary has approved openness in Government and it is achieved by judiciary by refusing the Government’s claim of secrecy. In 1962, by an administrative decision, the reports of the inquiry inspectors regarding planning permissions were made open to the public. In 1968, the House of

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126 Maheshwari and Mustafa, Supra note 92 at 28.
Lords in *Conway v. Rimmer*,\(^{128}\) established its jurisdiction to order the disclosure of any document and to hold a balance between conflicting interests of secrecy and publicity. This decision enlarged the public access to administrative information but on the other hand the Official Secret Act, 1923 makes almost all kinds of documents secret and punishes any one who leaks them out. The People’s right to know under the ruling of *Conway’s* case gains only indirectly. Only where a party to the suit is deprived of the documents, which are withheld by the Government and at the same time which are not injurious to public interest on disclosure of them, the judiciary helps the party to the suit.

In 1971, the Conservative Home Secretary, Mandling, appointed a Departmental Committee under Lord Franks “to review the operation of Section 2 of the Official Secrets Act 1911 and to make recommendations.”

The main offence which Section 2 created was the unauthorized communication of official information (including documents) by a Crown servant, minister, civil servant, member of the Armed Forces or policeman acquires in the course of his duty was “Official” for the purposes of Section 2, Whatever its nature or importance. A Crown servant who disclosed official information committed an offence under the Section if the information is disclosed to someone other than a person to whom he is authorized to communicate it or to a person to whom it is in the interest of the State to communicate it. Contrary to much outside opinion, the practice is one of implied authorization flowing form the nature of each Job. Ministers are, in effect, self authorizing. They decide for themselves what to reveal. Senior civil servants exercise a considerable degree of personal judgement in deciding what disclosure of official information they may properly make, and to whom. More Junior civil servants, and those persons, whose duties do not involve contact with members of the public, may have a very limited discretion or none at all.

The Franks committee came on heavily against the Official Secrets Act and its main proposal was that Section 2 be repealed, and replaced by a new

\(^{128}\) (1968) A.C. 910.
statute, called the Official Information Act which should apply only to official information relating to-

(a) The defence or security of the realm;

(b) Foreign relations or the conduct of foreign relations;

(c) Proposals, negotiations or decisions connected with alterations in the value of sterling, or relating to the reserves, including their extent or any movement in or threat to them.

Information on the above categories would be included in the Official Information Act if it was classified on the ground that its unauthorised disclosure would cause at least serious injury to the interests of the nation. The prosecution had to satisfy the court that the information fell within a category and that it was so classified, but the Court should not be concerned with the effect on the disclosure on the interests of the nation. The report thus recommended a three-tier classification system for information in the areas of defense and internal security, foreign relations, currency and banking. Material falling within these categories should be protected from disclosure by the criminal law. The definition of the areas was too broad and complicated to be readily understood by those likely to be affected. Further there are no provisions for designating which officials are to classify and declassify such information. It seems that the thrust of the report was to show how the criminal law may be used to protect government information. It conceded that the existing law was too broad, and went on to recommend a number of narrower criminal offences to protect a wide range of government information. Its major failure was that it virtually ignored any right of the citizen to access information over the whole range of government activity.

In 1988, the British Government unveiled its fresh plan to reform Section 2 of the Official Secrets Act 1911. The suggested changes were hardly a surprise given the government's obsession with secrecy and the ineffectiveness of the "catch-all" but discredited Section 2. The stated purpose of the Official Secrets Act 1989 is to reduce the amount of information
protected by criminal sanctions to areas where disclosure would be harmful to the public interest. Yet the Act has an effect of tightening secrecy and makes convictions more likely. Seemingly influenced by the *Spy Catcher* affair, the new Act imposes a life-long duty of confidentiality upon all members and former members of the security service. The Act applies not only to civil servants disclosing unauthorized material, but also to journalists and editors, who are at risk if they publish damaging information where they have reasonable cause to believe that it has been disclosed without official approval. A major omission is a public interest defence in the Official Secrets Act 1989.

The government’s motive is to focus attention on the information released, regardless of the intention of the individual. Thus if the categories where information is classified as secret for the purpose of the 1989 Act, “whistleblowers” will not be able to defend their actions on the grounds of public interest.

Although the need for secrecy is justified in the name of the security of the State, too much information is concealed for reasons of convenience, or political expedience. The 1989 Act has narrowed and tightened the law of secrecy, while excluding large areas of government held information from the ambit of the criminal law. The Act thus leaves unchanged the ethos of secrecy in the United Kingdom.¹²⁹

The Official Secrets Act, 1923 on the other hand, makes almost all kinds of documents secret and punishes anyone who takes them out. A consolation against the rigorous provision is Section 10 of the Contempt of Court Act, 1981. In *Attorney General v. Guardian News papers (Spy Catcher)* case,¹³⁰ the government sought for a permanent injunction to refrain the Guardian Newspapers from publishing the memoirs of a former officer of British Security Service where the memories were alleged to contain information disclosure would be against the public interest affecting badly the

¹²⁹ Maheshwari & Faizan, Supra note 92 at 29-30.
security service. Allowing the arguments of the Newspaper on the basis of free speech and free circulation of ideas, Lord Bridge of Harwich observed:

"Freedom of speech is always the first causality under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road."

On other hand, Section 10 of the Contempt of Court Act, 1981 provides the press and media with protection from disclosure of the sources of their information. A disclosure can only be desired by a judicial finding that it is necessary in the interest of any of the exceptional circumstances specified under the section.

Section 10 reflects the importance which Parliament attaches to the free flow of information to the public.\(^\text{131}\) It recognizes the existence of a *prima facie* right of ordinary members of the public to be informed of any matter that one thinks it appropriate to communicate to them. Such a right encourages purveyors of information to the public. However, a member of the public as such has no right conferred on him by this section to compel purveyance to him of any information. The choice lies with the publisher alone.

Prior to the enactment of the Act, such a protection was a matter for the judge's discretion.\(^\text{132}\) The section substitutes for this judicial discretion subject only to specifically given exceptions. In the exercise of the common law discretion, the courts had never considered any general right of the public to be informed of the reprehensible conduct by persons in responsible positions or of a future action intended to be taken by the government or by other authorities.\(^\text{133}\) But section 10 of the act recognized a *prima facie* right to

\(^{131}\) Secretary of State's v. Guardian Newspapers Ltd., [1984] 3 All E.R. 60 at 615 per Lord Scarman.


\(^{133}\) Spy Catcher case Supra note 130 at 605.
be informed, however subject to the choice of the publisher and the specified exceptional cases.

Under the ‘newspaper rule’ an exception is allowed to the press, as defendants in actions of libel suits, from the general rule that discovery of documents and answers to interrogations must be made of all relevant matters. The extension of such a protection to protection to areas other than libel may provide a better mechanism for protecting the public’s right to know. In *British Steel Corporation v. Television Ltd.*,134 Lord Denning emphasized the need for more protection for a responsible press. He observed that the courts were reaching toward the principle that public had a right to information of public importance. The newspapers on behalf of the public may collect and divulge them to the public. Such a process to become more successful, the newspapers may not be compelled to disclose their sources. Otherwise the sources would dry up and wrongdoings would not be disclosed. Such a protection is granted and is available to the newspaper on condition that they would act with due sense of responsibility.

Article 10 of the Convention for the Protection of Human and Fundamental Rights provides for freedom of speech and expression. It also includes freedom to hold opinions and to receive and impart Information and ideas. The U.K., being a party of the convention, violation of any Articles of the Convention could be successfully challenged before the European Court of Human Rights. Thus convention may help for indirectly for the protection of freedom of Information. The *U.K. courts in Reynolds v. Times Newspapers Limited* and Others135 have held that "the common law is to be developed and applied in a manner consistent with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."


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guarantees to every person a general right to access to information held by a large number of authorities. The requests for accesses under the Act should be responded within twenty working days. The Act also casts an obligation on public authorities to publish information about their structure, policies and activities. The Act also creates a new office, the information commission who will oversee the freedom of information. The commission shall receive complaints and make decisions. However in some cases the minister of the department can overrule commission's decision. Appeal lies to the information tribunal and then to the High Court. There are a few golden lines in the Act; otherwise, it is full of exemptions. Intelligence agencies are excluded from the purview of Act and their number is estimated to be close to 70,000. Information can be delayed beyond twenty days if it involved public interest. The class exemption is provided to three categories (a) Policy formation (b) effective conduct of public affairs and (c) criminal investigation. It also exempts information relating to defence, international relations, economy, crime prevention, immigration, personal information, confidential commercial interest, other enactments relating to health and safety. The Government has decided not to implement the Act before 2005. Since the Act was passed, there have been various amendments and rules passed in support of the primary legislation.

3.2.4 Australia

The Australian Constitution contains no right to information. In Australia before the enactment of Freedom of Information Act, 1982, the courts did not favour production of documents possessed by state authorities. It was held that "Counsels of the Crown are secret and an inquiry into the grounds upon which the advice was tendered was not allowed." However, later on Courts refused to accept the conclusiveness of the executive certificate of privilege. Thereafter the aforesaid Act was made. It was the first such piece of

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136 Dr. Devinder Singh, "Implementation of Right to Information Act 2005: Some National and International Experiences". *All India Reporter*, July 2006 (Journal Section) at 100.
137 Hereinafter mentioned as FOIA.
138 1951 (81) CLRI.
legislation in a Westminster system of governments.\textsuperscript{139} The salient features of Australian FOIA, 1982 are:

i. the general right to access for the public to official documents in the possession of ministers and agencies except the one that were specifically exempted;

ii. the right to correct inaccuracies;

iii. the internal law of the commonwealth agencies to be published every year; and

iv. a proper procedure for the disposal of requests for access to documents.

But the scope of FOIA is limited to government departments and bodies established for public purposes. The application of FOIA to the independent corporate structures is not uniform. Some government business enterprises are subject to the FOIA and some are not an applicant under the FOIA. The FOIA should pay a fee as prescribed for access to government documents. But under certain prescribed situations the fee can be waived or reduced. Generally fees are waived if the applicant is in hardship to pay the amount. Similarly fee can be waived on the grounds that release of the document would be in the public interests. As per the Australian FOIA, decisions on access must be given within 30 days of an application. If the concerned agency refuses access to documents, the decision of refusal must be accompanied with reason.

The right of access is not unqualified right. It is subject to number of exemptions.\textsuperscript{140} Exemptions include those relating to disclosures, which could damage security of defence interests, international relations, federal state relations, Cabinet or Executive Council documents are also exempt. But there is an exception in the case of documents containing purely factual material. Similarly, internal working documents are exempt where disclosure would reveal deliberations relating to the deliberative functions of an agency or

\textsuperscript{139} Philip Coppel, Information Rights (2004) at 50.
\textsuperscript{140} The Freedom of Information Act, 1982.
Minister or of the Commonwealth government and would be against the public interest. This exemption does not apply to purely factual information. Reports of scientific or technical experts expressing an opinion on technical matters are not exempt from disclosure. Other exemptions relate to Commonwealth financial interests, law enforcement documents the disclosure of which would involve an unreasonable disclosure of personal information, legal privilege, trade secrets, disclosure of which would adversely affect the national economy or which would constitute a breach of confidence. There is also an exemption in respect of applications for all documents that relate to a specified subject matter where compliance with such a request would substantially unnecessarily interfere with the other functions of the agency or minister.\textsuperscript{141}

The FOIA also provides remedies against the refusal of access to information. There is an internal review provision in the Act. An appeal may also be brought to the Administrative Appeals Tribunal. The Administrative Appeals Tribunal has power to make any decision that could be made by an agency or minister. Form the Administrative Appeals Tribunal; there is an appeal on a point of law to the Federal Court. There is another way of review by Commonwealth Ombudsman. The Ombudsman, however, cannot make binding decisions.\textsuperscript{142}

The Freedom of Information Act places a duty on Ministers to publish particulars of agencies including such information as the functions and powers of the organization, arrangements allowing for public participation in the formulation of policy, the organization's administration, the categories of its documents and details on access procedures for documents. Ministers have to publish in the Gazette all documents, which may be used to make decisions or recommendations effecting right, privileges, benefits, obligations and penalties. The FOIA has made provisions for correction of inaccurate person information containing in the records. Similarly, person may seek to have a document that contains his personal information. If the information is incomplete, incorrect, and out of date or misleading the concerned person has

\textsuperscript{141} Ibid.
\textsuperscript{142} Ibid.
right to request to make complete, to correct or to make up to date as it is necessary. It is interesting to note that the FOIA provides that person may apply for annotation of a document. This kind of provision is not found even in USA and Sweden.

The FOIA has been amended substantively in 1983, 1986 and 1991. The 1983 amendment provided greater right of access to documents created before the enactment of 1982 Act. It transferred the review functions under the Act to the Administrative Appeals Tribunal. Similarly, it empowered the Administrative Appeals Tribunal to consider whether there are reasonable grounds for a claim that a document is exempt in cases where a conclusive certificate has been issued and to require the relevant Minister to consider whether to revoke a certificate if the Administrative Appeals Tribunal finds no reasonable grounds for its issue. The amendment made provision regarding the application of overriding public interest test to the commonwealth/state relation’s exemption. Further, it reduced the time limit from 60 to 30 days for compliance with requests.

The amendment of 1986 provides for processing fees for FOI applications and for internal review of decision by an agency. It increased the hourly charge for search from $12 to $15. Requests for personal information that had been provided to the government for the purpose of obtaining income support from the government are not subject to fee or charges.

The Privacy Act made further amendment in 1988. The Privacy Act amended the FOI Act which included a requirement for consultation with a third party prior to a decision to release a document where disclosure of that document might involve unreasonable disclosure of personal information about that person. It provided a right for third parties to seek review of a decision to release a document following the process of consultation.

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143 Ibid.
144 Freedom of Information Amendment Act, 1983, Section 32(F).
145 Section 32(C).
146 Section 17.
147 Freedom of Information Amendment Act, 1988, Section 27 A.
148 Section 59 A.
1991 amendment simplified the procedure for making a request. It also simplified the procedure for imposing charges. It clarified the interpretation of some of the exemption provisions in the Act. It widened the provision that allows a request to be refused if processing it would involve a substantial and unreasonable diversion of agency resources. This amendment also clarified the operation of provisions permitting members of the public to seek the amendment of records containing personal information that is incomplete, incorrect out of date or misleading.

There are many criticisms of the effectiveness of the Act. The Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) released a joint report in January 1995 calling for substantial changes to improve the law. The review called for the creation of an office of the FOI Commissioner, making the Act more pro-disclosure, limiting exemptions, reviewing secrecy provisions and limiting charges. In June 1999, the Commonwealth Ombudsman found widespread problems in the recording of FOI decisions and probable misuse of exemptions to the disclosure of information under the legislation and recommended changes to the Act and the creation of an oversight agency. The Senate held an inquiry in April 2001 on a private members amendment bill to adopt the recommendations of the ALRC and ARC report but to date there has been no substantive changes in the Act. However, an amendment to exempt information on internet sites banned by the Australian Broadcasting Authority was approved in 2003.149

More recently, in February 2006 the ombudsman released a report on the Act which strongly recommended that the specialized and separately funded unit in the office of the Commonwealth Ombudsman. The key was to ensure that an independent body would be tasked with monitoring and promoting the law. The Ombudsman’s report more generally found that requests were often not acknowledged and delayed and that there is still an uneven culture of support for FOI among government agencies, even 20 years after its enactment. It has been previously noted that budget cuts have severely restricted the capacity of the Attorney General’s Department and the

149 Yadav, Supra note 93 at 120.
Ombudsman to support the Act and there is now little central direction, guidance or monitoring.\footnote{150}


In 2005, the intelligence Services Legislation Amendment Act, 2005 Defense Signals Directorate and Defense Intelligence Organization was passed, Schedule 7 of which exempts the Defense Signals Directorate and the Defense Intelligence Organization from the Act. Notably, the Australian Secret Intelligence Service and the office of National Assessments were already exempt. As noted above, Privacy Act requests for access to personal information are funneled through the FOI. The Privacy Amendment (Private Sector) Act 2000 gives individuals the right to access records about themselves held by private parties.\footnote{151}

3.2.5 Canada

In Canada, legislation giving a general right to access to government-held information originated in the provinces. All the Canadian provinces have a freedom of information law and most have a Commissioner or Ombudsman who provides enforcement and oversight. They also have adopted privacy legislation and in many jurisdictions, the privacy and information Commissioners are combined in a single office. In 1977 Nova Scotia became the first Canadian jurisdiction to pass such legislation, followed by New Brunswick in 1978, Newfoundland in 1981 and Quebec in 1982. Federal Legislation giving a general right to access to government-held information was passed in June 1982. Called the Access to Information Act, it was enacted at the same time as the Privacy Act, and they came into force on July 1, 1983.\footnote{152} It was observed in \textit{Dagg v. Canada (Minister of Finance)},\footnote{153} case

\footnotesize{\begin{itemize}
\item Id. at 121.
\item Ibid.
\item Philip Coppel, \textit{Supra} note 139 at 68.
\end{itemize}}
that the purpose of the Privacy Act is, broadly speaking, to protect the privacy of individuals with respect to personal information about themselves held by a government institution and to provide individuals with a right to access to that information.

Section 4 of the Access to Information Act, 1983 gives Canadian citizens and permanent residents a right of access to records under the control of a government institution, subject only to specific exclusions and exemptions. "Records include letter, memos, reports, photographs, films, microforms, plans, drawings, diagrams, maps, sound and video recordings, and machine-readable or computer files. The institution must reply in 15 days. Records can be withheld for numerous reasons: like they were obtained in confidence from a foreign government, international organization, provincial or municipal or regional government; would injure federal provincial or international affairs or national defense; relate to legal investigations, trade secrets, financial, commercial, scientific or technical information belonging to the government or materially injurious to the financial interests of Canada; include personal information defined by the Privacy Act; contain trade secrets and other confidential information of third parties; or relate to operations of the government that are less than 20 years. Decisions granting or refusing access must be made by the "head" of each government institution, with the head of each institution being designated by regulation. The Act gives the Governor in Council power to extend this right to others, and in 1989 the access right was extended to include all individuals and incorporated entities present in the country. But the role of Court is more limited where the exemption relied on turns on where the head of a governmental institution reasonably believes that disclosure will result in an identified harm. There is a two-tiered review process. Applicants have the right to complain to the Information Commissioner about an institution's handling of their request. Following an investigation and report by the Commissioner to

154 Yadav, Supra note 93 pp. 131-132.
155 Philip Coppel, Supra note 139 at 69.
156 Canadian Jewish Congress v. Canada (Minister of Employment and Immigration), [1996] 1 F.C. 268 TD.
the head of the institution, both applicant and Information Commissioner have a right to seek a review of a denial of access in the Federal Court of Canada. Third parties may also apply to the Federal Court in order to prevent disclosure of a record. The appeal to the Federal Court is an appeal on judicial review grounds. The Canadian Federal Court has ruled that government has an obligation to answer all access requests regardless of the perceived motives of those making the requests.157

Since its enactment, the Access to Information Act, 1983 has been amended on three occasions—in 1992, 1999 and 2001. In 1992, the Act was amended to deal with the provision of records in alternate formats to individuals with sensory disabilities. In 1999, it was amended to make it a criminal offence to intentionally obstruct the right of access by destroying, altering, hiding or falsifying a record, or directing anyone else to do so.158 Until late 2001, the Access to Information Act (ATIA) did not include any mechanism for taking particular documents outside of its operation or for reducing the ability to review a non-disclosure decision.159

The ATIA was amended by the Terrorism Act in November 2001. The amendments allow the Attorney General to issue a certificate to bar an investigation by the Information Commissioner regarding information obtained in confidence from a foreign entity or for protection of national security if the commissioner has ordered the release of information. Limited judicial review is provided for. The Information Commissioner described the review as "so limited as to be fruitless for may objector and demeaning to the reviewing judge." Thus so far, no certificates have been issued.160

157 CA; Bland v. Canada (National Capital Commission) [1991] 3 F.C. 325.
158 Coppel, Supra note 152.
159 Id. at 72.
160 Yadav, Supra note 93 pp. 132-133.
3.2.6 India

As we know that in India the British enacted the Official Secret Act, 1889 for Britain; and replicated it for India in the same year to apply to the British territories and princely states and “all native Indian Subjects of Her Majesty without and beyond British India.” Therefore India adopted the line of Britain regarding the confidentiality. Even in Indian constitution there is no specific constitutional right to freedom of information, the chapters on Fundamental Right and Directive principles of the State Policy seem to be totally silent on the subject. However, through Judicial Activism, the courts have started carving out this right in Article 19 (1)(a) which confers the right to freedom of speech and expression and in Article 21 which grants to every citizen the right to life and personal liberty.

In India the right to information is an integral part of right to freedom of speech and expression under the article 19 (1)(a), the supreme court has held on several occasions that the right to know is part of the right to speech and expression because

(a) to speak and express freely, we must have information on any subject;

(b) in a democracy we must know what the government is doing in order to express opinion on it. Expressing opinion includes the right to dissent;

(c) freedom of Information not only means freedom of the media but also access to Government held information which must be made available to other ordinary citizens also.

In the words of Justice Bhagwati, the concept of open Government is the direct from the right to know which seems to be implicit in the right to free speech and expression guaranteed under Article 19 (1)(a) of the Constitution.  

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162 S.P. Gupta v. Union of India, AIR 1982 SC 149 at 234.
Article 21 of the Indian constitution says "No person shall be deprived of his life and personal liberty except according to procedure established by law", the right to life and personal liberty has received wide definition in several Supreme Court rulings. The right to life which covers the right to basic needs such as food, education, health and personal liberty encompasses freedom from illegal and unnecessary restraint. Denial of information relating to these aspects is after all denial of the right itself. In this context, I would like to recall the apt words of Methew, J. in *Gobind v. State of Madya Pradesh*,163 while analyzing the right to privacy as an ingredient of Art 21, it was observed:

"There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior."

In this way Article 19 (1)(a) and 21 of the Indian constitution and UDHR, 1948 have formed the sheet anchors of the Right to Information (RTI) Act, was passed on 15 June, 2005 by the Indian Parliament. Which came into force on 12th October 2005 and extends to whole India except the State of Jammu and Kashmir. It gives legal right to people to seek information from the government and curb corruption. It places India among 55 Countries that have enacted such legislation.164

The Right to Information (RTI) Act, 2005 promises to promote transparency and accountability in the working of every public authority. According to section 7 of Act within 30 days of the receipt of the request, either the information be provided on payment of fee if any or the request rejected and the reason(s) mentioned. If information sought for concerns the life or liberty of a person, the same shall be provided within 48 hours. There is a provision for appeal within 30 days. The Information commission can impose a penalty on the Public Information Officer amounting to Rs. 250 each day delayed till the information is furnished.

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163 AIR 1975 SC 1378.
This Act exempts certain intelligence and Security organizations from its purview. However, information on corruption and human rights violations are not excluded under this section. Information on human rights violation is to be provided within 45 days.165

The comparative study made by the researcher makes it clear that there is a global trend in favour of openness in the system of governance. Openness needs information for survival of democracy. In fact, the right to information gained prominence at the global level, when the General Assembly of United Nations declared freedom of information to be a fundamental human right and touchstone of all other liberties. In some countries, national courts have been reluctant to accept that the guarantee of freedom of expression includes the right to access information held by the State. In U.S.A., for example, the US Supreme Court has held that the first Amendment of the Constitution, which guarantees freedom of speech and the press also include a right to access. Same is the position in India; here also our Supreme Court held that right to information is an integral part of freedom of speech and expression. To replace the culture of control with openness many countries passed legislation to recognize the right to information. It is also notable that though all countries feel that openness is essential to the functioning of a democratic society yet secrecy also bears the same quality on certain genuine grounds like privacy, defence matters, diplomatic affairs, crime investigation, trade secrets and for a few other reasons. So, it is to be admitted that, complete openness is neither feasible nor desirable. Accordingly, a balanced approach has to be drawn between the needs of openness and the requirements of secrecy, but this balance has to be tilted in favour of openness than it had been hitherto. In other words, till now secrecy was rule rather than exception, but this proposition has now to be reversed. It is openness which ought to be the rule and secrecy the exception.