Chapter – 2

Origin, Concept and Historical development of openness of Government

2.1: Origin and Concept of open Government:

Most of the countries in the world are very much interested towards the tendencies of Democratic vis-à-vis Parliamentary form of Government which give an opportunity to the people for their active participation in all the times. This is fortified by the ‘Preamble’ of the Constitution of India. In this regard the Constitution of India provides the necessary provisions and where the head of the executive is also elected indirectly by the people and it is clear that the said post is not hereditary. At the same time the framers of our Constitution have borrowed the concept of Parliamentary form of Government from the United Kingdom.

Therefore, as the active participation of people in a democracy as well as in a Parliamentary form of Government is a must, so that people may have access to the right to information about the functioning of Government. With this end in view, at the present
moment, in the democratic countries the accent is on "Open Government." According to the meaning of 'open government' it can be stated that it is the direct emanation from the 'right to know', implicit in the right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution and hence a Fundamental Right. Therefore, it is the right of the citizen to know or to be informed regarding the functioning of the government in a democratic country. As a result the Parliament of our country India enacted the 'Right to Information Act, 2005' for the greater benefit of the citizens. The Act requires all public authorities to maintain records and furnish requisite information relating to their day to day works towards the people those who are seeking such information. Thus, the present trend towards transparency and accountability which are promoting the concept of openness of government in the country as a whole. The topic relates to 'Open Government' or 'Right to Know' is of growing importance in Administrative Law. Significant progress has been made towards the goal of open government in recent years in the U.S.A., Australia and New Zealand. A mass of literature has accumulated around this topic. Though the concept of open government is a growing concept and has its importance in Administrative Law yet there are quite a few things which must be kept confidential in the interest of public security or national interest.
Sometimes law may impose secrecy in the interest of the people of the society. But then the secrecy ought not to be more than what is absolutely necessary. At the same moment, it is necessary to draw a balance between 'secrecy' and 'openness' with an accent on the latter. For suggesting an open government, there we found many reasons at the present moment. Participation in government by the people is regarded as an important aspect of democracy and people can not participate unless they have information as to what is going on in the country. A modern democratic state being answerable to the people and the people are entitled to know what policies and programmes, how, and why, are being followed by the government. On the performance of the government, people have to pass verdict and decide whether it should stay in office or not. Without having adequate information about the functioning of the government, people can not exercise their choice intelligently. In its another reason for justifying openness of government is that being an activist entity, government gathers a vast arsenal of powers in a welfare state. These powers are used to affect economic interests and personal liberty of the individual. It is pertinent to note that these powers are exercised for public good, not improperly, and for the purposes for which the powers are conferred. This objective is best ensured by giving access to the individual to governmental information and not covered in
secrecy as to how the government exercises its powers in individual cases. Since power tends to corrupt, and absolute power tends to corrupt absolutely, there is an inherent danger that the vast powers available to the executive may be used not for public good but private gain, or for corrupt motive. And hence, it is essential that the people have as much information as possible about government operations. Openness in government is bound to act as a powerful check on the abuse or misuse of powers by the government. In the exercise of legislative powers by the government, there must be public consultation in every cases. This idea has to be made applicable to the whole range of governmental functioning. The eminent jurist Schwartz opined that —“Americans firmly believe in the healthy effects of publicity and have a strong antipathy to the inherent secretiveness of government agencies. *1 Regarding the progress towards open government, in India, it has been rather tardy. But the consciousness towards the same is still there. In S.P. Gupta —vs- Union of India, *2 Bhagwati J. advised that, “open government is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception”.

This approach is illustrated by a British case Attorney General –vs- Jonthan cape Ltd.*3 An action was brought for injunction to restrain the publication of the political diaries of the late Richards Crossman who was a cabinet minister in the Labour Government of 1964 to 1970. The plea was that the publication of the diaries would reveal the cabinet secrets and infringe the principle of collective responsibility of the government. Lord Widgery, CJ accepted the proposition that when a cabinet minister receives information in confidence the improper publication of such information can be restrained by the court. Collective responsibility was held to be ‘an established feature of the English form of government’ and that “some matters leading up to a cabinet decision may be regarded as confidential.” But, in the instant case, injunction was refused against publication of the materials in question as they were about ten years old and no longer required protection in public interest. The court emphasized that it should intervene “only in the clearest of cases where the continuing confidentiality of the material can be demonstrated.”

In this connection we are having so many references. Amongst which an Australian case may be made as reference to the same that in Common Wealth of Australia vs John Fairfax and sons Ltd.*4 Two journalists had obtained a number of foreign office cables and memoranda covering several matters like Indonesia, East Timor, Anzus defence treaty. The government applied for an injunction to prohibit publication of the materials on the ground of breach of confidentiality. In this connection Mason J. Said –

"But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to the government where the only vice of that information is that it enables the public to discuss and criticize government action."

Manson J. Also said –

"............ The court will determine the government’s claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest it will not be protected. The court will not prevent the publication of information which merely throws light on the past workings of

*4 (1981) 147 CLR 39, 52
government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and promoting the discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained."

2:2 A Comparative Study on Open Government, Right to Know, Right to Information and Official Secrecy:

Government openness is a sure and basic technique to minimize administrative faults. It is obvious that light is a guarantee against theft, on the other hand governmental openness is a guarantee against administrative misconduct. However, the courts in India had taken initiative in promoting the right to information. In state of U.P. vs Raj Narain, *4a, the apex court observed – "In a Government of responsibility like ours, where all agents of the public must be responsible for their conduct, there can be few secrets. The people of

*4a. AIR 1975 SC 865
this country have a right to know every public Act, everything that is done in a public way, by their public functionaries”.

This right to information received further impetus in subsequent decision of the court. Thus in Reliance Petrochemicals Ltd. Vs India Express Newspapers, 4, Justice Mukherji, said that- “right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age of our land under Article 21 of the Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who takes upon themselves responsibility to inform.” In Maneka Gandhi vs Union of India5, Brandis J. rightly observed as- “A government which revels in secrecy not only acts against democratic decency but busies itself with its own burial.” The right to know the truth is paramount and it must outweigh the right to property and other personal rights. Information is the core value of democracy and good governance. John Adams said, “Remember a democracy never lasts long. It soon wastes and exhausts itself. There was never a democracy which did not commit suicide” The agent which induces

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* 4b. AIR 1989 SC 190
suicide is 'secrecy' in the functioning of public offices. Ignorance undermine democracy. Lord Nolan Committee identified openness, objectivity and accountability as fundamental standards in public life. These standards can be enforced only if information on public decisions and actions is available to the people. Louis Brandis once said that the live wire when snapped darkness prevails. In darkness even shadows are not formed. In crooked lights shadows are also crooked. Information is the 'live wire' which illuminates democracy and governance. In spite of this fact, one phenomena which is common all over the world, is that no government appreciate 'right to information' and create barriers in free access to information because it feels comfortable under the protected umbrella of secrecy.

The Constitution of America is one of the oldest written Constitution of the world where it contains no specific right to information. However, the US Supreme court has read this right into the First Amendment of the Constitution and granted access to information where there is a tradition of openness to information in question and where access contributes to the functioning of the particular process involved. *6 Administrative Procedure Act, 1946

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(APA) was the first enactment which provided a limited access to executive information. The act was vague in language and provided many escape clauses:

1) Every person had no right to information and only persons properly and directly connected could have access;
2) Agencies were permitted to withhold information without justification;
3) There was no provision for judicial review.

Taking these deficiencies into consideration the congress in 1966 passed Freedom of Information Act, 1966, which gives every corporate or individual, regardless of nationality, a legally enforceable right of access to government unpublished documents which the administrators may be tempted to keep confidential. If any person is denied this right, he can seek injunctive relief from the court.\footnote{National Labour Relations Board vs Robbins Tyre and Rubber Co 437 US 251 (1977)}

However, this right to information recognizes the following nine well-defined exceptions. They are—

1) Information specifically required by executive order to be kept secret in the interests of national defence or foreign policy.
2) Information related socially to internal personal use of the agency.

3) Information specifically exempted from disclosure by statute.

4) Information relating to trade, commercial or financial secrets.

5) Information relating to inter-agency on intra-agency memorandums or letters.

6) Information relating to personal medical files.

7) Information compiled for law enforcement agencies except to the extent available by law to a party other than the agency.

8) Information relating to agency regulation or supervision.

9) Information relating to geological and geophysical maps.

Besides these nine exceptions, agencies within the intelligence communities are prohibited from making any record available to a foreign government or a representative of the same pursuant to a information request.
In 1974, the congress amended the Freedom of Information Act, 1966 after due investigation of the operation of the Act. After the amendment it was provided that (i) for disclosure of "any reasonably segregable portion" of otherwise exempted records; (ii) for mandatory time limit of 10 to 30 days for responding to information requests; (iii) for rationalized procedure for obtaining information, appeal and cost. According to the statistical data it shows that maximum (80%) use of this Act is being made by business executives and their lawyers and editors, authors, reporters and broadcasters whose job is to inform the people have made very little use to this Act. Further the Act was amended in 1996 to provide for public access to information in an electronic form or format. The Judiciary in USA shares the same concern of the congress which is reflected in the Freedom of Information Act, 1966. In New York Times vs US*8, Justice Douglas observed: "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open discussion based on fully information and debate on public issues are vital to our national health". In 1974, the Supreme Court in US vs- Nixon allowed inter branch access to President's tape relating to Watergate needed for criminal prosecution.

* 8. 48 U.S. 403
In this respect, the congress passed Sunshine Act, 1977 to provide access to Federal Government meetings which mandates open meetings for regular session of federal agencies. However, closed door meetings are allowed in cases like—(i) national defence and foreign policy; (ii) confidential commercial, financial information; (iii) invasion of privacy; (iv) law enforcement and criminal investigatory records; (v) pre-decisional discussions of general policy; (vi) bank examiners' record and (vii) information which may lead to financial speculation. According to the provision of the Act, the people may be obtained injunctive relief to force a pending meeting to be open and to force closing of a meeting held in violation of law. And hence, the meetings of federal agencies are to be open with at least one week's public notice unless prescribed exceptions are attracted. Accordingly, The Federal Advisory Committee Act also contains similar provisions regarding the meeting of outside groups advising federal agencies.

In England, the Freedom of Information Act, 2005 came into operation the thrust of the legislation was not on 'information' but 'secrecy'. The law was contained in the Official Secrets Act, 1911, 1920 and 1939. Under section 2 of the Act of 1911 it was an
offence punishable with up to two years imprisonment to retain without permission, or failure to take reasonable care of information obtained as a result of one's present or future employment, or to communicate information so obtained, or entrusted to one in confidence by a person holding office under Her Majesty, or obtained in contravention of the Act, to anybody other than a person to whom one is authorized to convey it or to whom it is one's duty to impart it in the interest of state; or to receive such information, knowing or having reasonable cause to believe that it has been given in contravention of the Act. Under these wideranging prohibitions it may be an offence for a civil servant to pass on, or for a research worker to acquire from him, information even if such information has no bearing on security or is not classified as confidential.*9

To see the desirability of 'openness' of governmental affairs in a democratic society, the Franks committee recommended a repeal of section 2 of the 1911 Act and its replacement by Official Information Act. The concerned proposal restricted criminal sanctions to defined areas of major importance: Wrongful disclosures of (i) information of major national importance in the fields of defence,

security, foreign relations, currency and reserves, (ii) cabinet documents and (iii) information facilitating criminal activity or violating the confidentiality of information supplied to the government by or about individuals, and the use of information for private gains. Mere receipt of protected information would not be an offence under the Act, but communication to journalists and others would still be an offence if the author or speaker had reasonable grounds for believing that it had been conveyed to him in breach of the Act. Only material classified as ‘Top Secret’ or ‘Secret’ or ‘Defence Confidential’ would be protected. Further it can be stated here that section 2 of the British Official Secrets Act concerns with leakages of official information in such a wide range of situation that, according to one calculation, the provision could give rise to 2000 differently worded charges. Section 2 makes it a crime, without any defence, “to report the number of cups of tea consumed per week in a government department....”. The Act contains no limitation as to materiality, substance or public interest. *10 After the
recommendation of the Franks committee to repeal section 2 of the Act, it can be read as follows –

“(...having) extensive ramifications, section 2 is short but it is in very wide terms and is highly condensed. It covers a great deal of ground and it created a considerable number of different offences. According to one calculation over 2000 differently worded charges can be brought under it. It is obscurely drafted and to this day legal doubts remain on same important points of interpretation..........”

The Franks Committee commented further on this section:

“............... leading characteristic of this offence is its catch all quality. It catches all official documents and information of kind and no distinction of degree. A blanket is thrown over everything: nothing escapes.” *11

In 1993, the government in England published a white paper on ‘open government’ and proposed a voluntary code of practice of providing information. This code is voluntary and thus cannot be equated to a statutory law on access to information. It provides policies and principles relating to disclosure of government

information. The sanction behind code is moral and not legal. If a request for information has been refused then only a complaint can be made to the Parliamentary Ombudsman through a Member of Parliament.

The local government (Access to Information) Act, 1985 provided a legal right to information against local governments. The Act provides for greater public access to meetings and documents of the major local councils. However, this Act leaves many more to the discretion of the councils and mentions at least fifteen categories of exempted information. Any one individual seeking information has no adequate legal redress. But this situation was not continued for a long period, because of popular pressure and citizen's charter, the British Parliament in 2001 passed the Freedom of Information Act which came into operation in 2005. Accordingly the people in England might have the new enactment i.e. the Act of 2005 which may give rise to access to information in the governmental proceedings.

Howard Simpsen, Managing Editor of the Washington Post Observed in the context of the right to obtain information and to
publish it in USA and England that, "In USA the publishers have a right to print anything. If you get hold of a state secret, it is the editor who has the determining authority whether to hold it or print it. The government has the right to keep secrets, but if we come by it, nobody can stop us. Whereas in Britain, the press believes in national security, which means they can be told to hold a story back, they have Official Secrets Acts, etc."*12

Referring to India, it is heartening to note that the highest Bench in India while recognizing the efficacy of the 'right to know' which is a sine qua non of a really effective participatory democracy raised the simple 'right to know' to the status of a fundamental right. In S.P. Gupta vs Union of India, *13 the court held that the 'right to know' is implicit in the right of free speech and expression guaranteed under the Constitution in Article 19(1) (a). The right to know is also implicit in Article 19 (1) (a) as a corollary to a free press which is included in free speech and expression as a fundamental right. The court decided that the right to free speech and expression includes: (i) right to propagate one’s views, ideas and their circulation, *14. (ii) right to seek, receive and impart information

* 12. Indian Express, February 22, 1980
* 14. Express Newspaper (P) Ltd. Vs Union of India; AIR 1958 SC 578
and ideas; *15 (iii) right to inform and be informed; *16 (iv) right to know *17; (v) right to reply *18; and (vi) right to commercial speech and commercial information.*19 Furthermore, by narrowly interpreting the privilege of the government to withhold documents under section 123 of the Evidence Act, the court has widened the scope of getting information from government files. In the same way by narrowly interpreting the exclusionary rule of Article 72(2) of the Constitution, the court ruled that the material on which cabinet advice to the president is based can be examined by the court. *20 However, this judicial creativity is no substitute for a Constitutional or a statutory right to information. Against this backdrop the provisions of the Official Secrets Act, 1923 suffer from the stigma of unconstitutionality. Strange as it might seem, the 1981 study of the Indian Law Institute, New Delhi on the Official Secrets Act is the only competent review of the Act ever undertaken in this country. *21

The Act, broadly speaking, falls into two parts. One concerns

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* 16. Hamdard Dawakhana vs-Union of India; AIR 1960 SC 554
* 17. Indian Express Newspapers vs Union of India; (1985) 1 SCC 641
* 18. LIC vs Manubhai Shah; (1992)3 SCC 171
* 20. S.P. Gupta vs Union of India; 1981 Supp SCC 87
espionage and the other which the press, deals with unauthorised disclosure of official information. Section 5 of the Act lays down that if any person having in his possession any document or information which has been entrusted to him in confidence by any government official, or which he has obtained as an official, communicates it to any person other than a person to whom he is unauthorized to communicate it, he shall be guilty of an offence. Hence, a person who receives such document or information 'knowing or having reasonable ground to believe' that it is being communicated in breach of the Act. Later, the Act was amended to penalize disclosure of documents or even information which is "likely to affect friendly relations with foreign states." Considering the gross arbitrary abuse to which this vaguely and widely-worded expression may be subjected, the Act may be regarded as violating the provisions of Article 19 (1)(a) of the Constitution and hence unconstitutional.

2.3 Concept of open Government in other countries:

(A) Position in United Kingdom:

The present law in U.K. regarding the question of criminal liability for disclosure of official secrets is similar to India.
The Indian Act is modelled on the English Act of 1911. The concerned English Act is said to have been conceived in hysteria when England faced the prospects of a great war and the major countries were engaged in rearmament. Accordingly it seeks to make everything secret, even these matters which should not be secret. In England, the law has been reviewed by the Franks Committee and in its report a general dissatisfaction with the Act has been expressed. The committee has suggested the substitution of section 2 of the English Act with other more specific provisions. The committee accordingly suggested that section 2 should be replaced by a separate statute to be known as Official Information Act. In making recommendations as to the contents of the section, it started with the basic premise that the criminal law should not be invoked except where there is a specific reason for giving this special protection to the information in question. The committee recommended that the following information should be protected by criminal sanctions: (i) Official information relating to matters which concern or affect the defence or security of the realm; (ii) Foreign relations, i.e. matters which concern or affect foreign relations or the conduct of foreign relations. Some foreign affairs, as distinct from foreign relations between governments, are not secret at any stage; (iii) Information
relating to any proposal, negotiations or decision connected with alterations in the value of sterling, or relating to the reserves, including their extent or any movement in or threat to them.

Furthermore criminal sanctions should also apply to protect the following official information as per the statement of the committee. They are: (1) Information which relates to maintenance of law and order i.e. information which is (a) likely to be helpful in the commission of offences; (b) likely to be helpful in facilitating an escape from legal custody or prejudicial to prison security; and (c) likely to impeded the prevention or detection of offences or the apprehension or prosecution of offences; (2) cabinet proceedings and documents; (3) Information given to government by private individual, whether given by reason of compulsory powers or otherwise, and whether or not given on an express or implied basis of confidence. Moreover, the use or disclosure of official information for purposes of private gain should be made an offence. The institution or prosecutions should be controlled by the Attorney General and the Director of Public Prosecutions.
In U.K., the Local Government (Access) to Information Act, 1985 enforced a statutory duty on local authority to disclose information. In the year 1994 the Government issued a code of practice on access to government information, which was revised in the year 1997. This code was non-statutory one and a little publicized document. However, the obligation under the code was to be legally enforceable. Thereafter in the year 2000, the Freedom of Information Act, 2000 was enacted in U.K. which came into operation in 2005. Section 1 of the Freedom of Information Act, 2005 provides a general right of access to information held by public authorities, local authorities and a wide variety of bodies listed in Schedule one. An aspect of right to know is the right of the individual to know what information is held about him in the government record. U.K.'s Freedom of Information Act, 2005 is a major step towards "open Government".

(B) **Concept of Open Government in U.S.A.**

Amongst the common law countries, the U.S.A. has a much better tradition for open government than any other country. One manifestation of this has been the court refusal to accept extreme claims of executive privilege so as to allow the government, by its
mere fiat, to suppress evidence required by parties in a legal proceeding.*22 The most dramatic assertion of this principle occurred when the court rejected the claim of President Nixon to an unreviewable privilege to withhold Watergate tapes.*23 The U.S. Constitution does not contain any specific provision for access to administrative documents but such a right has been conferred by statutes. Originally, the Administrative Procedure Act, 1946, contained provisions for routine disclosure of government held information. Section 3 stated as a general principle that there should be free access to documents, but there were broad exemptions from this provision. The A.P.A. attempt failed because of broad exemptions and vagueness of the language. The A.P.A. exempted from disclosure records involving “any function of the United States requiring secrecy in the public interest” as well as “information held confidential for good cause found”. Furthermore, only “persons properly and directly” concerned were entitled to procure certain public records. There was no provision for judicial review. Thus recalcitrant government officials could easily find reasons for withholding information,

notwithstanding clear congressional intent to the country. *24 In 1966 was enacted the Freedom of Information Act (FOIA) replacing A.P.A. The enactment of FOIA is regarded as a “landmark event” in the history of American Administrative Law. * 25 It rejects the notion that the executive should enjoy a conclusive and unchallengeable right to withhold information from the public. The FOIA entitles any one to have access to any identifiable document as it casts a positive duty on the government to supply information as it states unequivocally that public access to most documents is to be the general rule and no document is to be withheld unless it falls under any of the exempted categories. On the U.S. Freedom of Information Act, 1966, Schwartz says, “before then, the people’s ‘right to know’ was a journalistic slogan rather than a legal right. The 1966 statute changed all this, since it gave the citizen, for the first time, a legally enforceable right of access to government files and documents. The FOIA effects a profound alternation in the position of the citizen vis-à-vis government. No longer is the individual seeking information

from an administrative agency a mere suppliant." As stated by the Attorney-General, the policies underlying the Act are as follows –

- that disclosure be the general rule, not the exception;
- that all individuals have equal rights of access;
- that the burden be on the government to justify the withholding of a document, not on the person who requests it;
- that individuals improperly denied access to documents have right to seek injunctive relief in the court;
- that there be a change in government policy and attitude. The whole purpose of the Act was to reverse the self protective attitude of the agencies.

The Act ensures access to governmental information and records in three broad ways (a) publication in the Federal Register; (b) making available for inspection and copying certain specified information; and (c) making available reasonably described records on request. If the document falls under any of the above mentioned

categories, the public has no right of access. In substance, thus, the agency is to promptly make available to any person identifiable records on request for such records. If the records are not so made available, the individual can file a complain before a district court. This is an important safeguard against abuse of power by agencies. The federal district courts have jurisdiction to enjoin the agency from withholding records and to order the production of records improperly withhold from the complainant. Under the normal rule in a court action against actions of agencies, the presumption of validity is attached to agency acts, and the individual challenging any such action has the onus to prove its invalidity, but under the FOIA the burden is on the agency to sustain its action in withholding information.

On the whole, however, it appears that the American experience with the Freedom of information Act has been happy. No longer does an individual seek information from an administrative agency as a mere suppliant. In 1974, a similar Act regulating government control of document which concern a citizen was enacted namely Privacy Act, 1974. The Privacy Act furthers right of an individual for gaining access to information held by the Government.
The Privacy Act, 1974 confers on an individual: (a) The right to see records about oneself subject to exemption, contained in Privacy Act, 1974; (b) The right to amend the record if it is inaccurate, irrelevant untimely or incomplete; (c) Right to sue the government for violation of the statute including permitting others to see one’s record unless specifically permitted by Act.

C) Access to information vis-à-vis open Government in Australia:

The Freedom of Information Act, 1982 (FOIA) extends to all commonwealth government departments and most authorities. It deals with three principal matters. They are - (1) It requires the publication of information concerning the functions and documents of agencies and making available for inspection and purchase of certain specified documents; (2) It provides for general access to documents of an agency and official ministerial documents; subject to a number of exceptions; and (3) The Act provides a machinery whereby a person who claims that a document of an agency or an official document of a minister contains information relating to his personal affairs that is incorrect and can seek the amendment of that
information.*27 Section 3 (1) asserts the right of the Australian Community to access to government information. Section 11 states the general principle that every person is to have a legally enforceable right to obtain access to official documents other than documents exempted from access under the Act. Thus, access has to be given to official documents unless the FOIA Act itself withholds the same. A person wishing access to a document has to make a written request to the concerned body. There is no test of standing required of an applicant, nor need he show any reason for wishing to have access to a document. The body has to make a decision within 30 days. If no decision is made within the prescribed period, it would mean that the access to the document has been denied. Fess may be charges for permitting access to the documents. Under certain circumstances, access to a document may be deferred, viz. where publication of the document in question is required by law; where the document has been prepared for presentation to a particular person or body; if the premature release of the document concerned would be contrary to the public interest; where the minister considers that the document concerned is of such general public interest that the Parliament should be informed of its contents before it is otherwise made public.

A number of documents are exempt from access, e.g., documents are exempt if it would be contrary to the public interest to disclose them because disclosure could reasonably be expected to cause damage to the security, defence, or international relations of the commonwealth. Also, documents are exempted the disclosure of which divulge information communicated in confidence between governments. Documents are exempted if disclosure would cause damage to the commonwealth-state relations. Other documents exempt from disclosure are - documents submitted to the cabinet for its consideration or proposed to be submitted; internal working documents revealing opinions, advice, consultation which may have taken place within a body and disclosure of which be contrary to the public interest; documents affecting enforcement of the law and protection of public society, e.g. endangering the life and physical safety of any person. The following documents inter alia are also exempt- (1) Documents affecting financial or property interests of the commonwealth; (2) Documents affecting adversely the national economy. These are documents dealing with such matters as exchange rates, interest rates, borrowings by the governments etc.

the amendment of 1983 that inter alia to provide greater right to access to documents created before enactment of Freedom of Information Act, transfer the review functions under the Act to Administrative Appeals Tribunal and to empower the tribunal to consider whether there are reasonable ground for a claim that a documents is exempted in case where a conclusive certificate has been issued and to require the relevant minister to consider whether to revoke a certificate if the tribunal finds no reasonable ground for its issue. The time for compliance of requests has also been reduced from 60 days to 30 days. Section 33-A has been incorporated with a view to apply an overriding public interest to commonwealth state relations exemption.

D) **Open system of Government in New Zealand**:

The Official Information Act, 1982 represents a significant development in New Zealand Administrative Law as it is an advance towards a more open system of government. The Act seeks to make official information more freely available and regulates the manner in which official information is to be made available to members of the public. It also establishes a right for individuals to seek access to personal information held about them, and to request
correction of that information where necessary. There is a further provision enabling individuals to find out the reasons for any decisions made in respect of them. The concerned Act applies to all central government departments and most central government corporations and organizations. It also applies to Ministers of the crown. However, it does not apply to local organizations such as councils, education boards and hospital boards. In short, the Act establishes the principle that official information is to be made available unless good reason exists under the Act for withholding it. A New Zealand citizen or permanent resident or a body incorporated in New Zealand can request for official information. A request for official information can not be refused because the applicant does not have a sufficient personal interest. The Act contains a number of reasons why information can be withhold, for example, to protect the privacy of natural persons, or to avoid prejudice to the maintenance of the law, or to New Zealand’s security or defence or international relations, or to prevent damage to New Zealand’s economy. Information can also be denied for several other reasons, e.g., maintain “collective and individual ministerial responsibility”, “political neutrality of Officials.” When access to information is denied, the applicant can seek the concerned department or organization to have the decision reviewed by another officer.
The Ombudsman also have the function of reviewing decisions made under the Act.

The Ombudsman's power is to make investigation and review any decision which a Minister, department or organization refuse to make official information which is available to any person etc. Investigations under Official Information Act are handled by the Chief Ombudsman. The Chief Ombudsman conducts his investigations and reviews under the Official Information Act in the same manner as if they were investigators under the Ombudsmen Act. The courts also have a significant role to play under the Act, but only after recourse to the Ombudsman. Courts can review: (i) the initial unfavourable decision by a department, Minister, or organization; (ii) Ombudsman's unfavourable determination on at least two ground, viz. "without jurisdiction" and "error on the face of the record", (iii) a Minister's veto on the ground that it contains material errors of law. The Act also provides for the preparation of the Directory of Official Information containing (a) the structure and functions of departments and organizations; (b) a general description
of the kinds of documents held; (c) a list of manuals and documents containing policies, principles, rules or guidelines, in accordance with which decisions are made.

Finally, the Law Commission released a detailed review of the Official Information Act, 1982. It was found that biggest problems were large and broadly defined requests, delays in responding the requests, resistance to the Act outside the Core State Sector and absence of coordinated approach to supervision, compliance, policy advice and education. The Commission made several recommendations including reduction of response time to 15 days, requiring bodies that do not appeal Ombudsman’s decision to court to release information and giving the Ministry of justice Core Coordination responsibility in lieu of creating an Information Commission.

2.4 Open Government vis-à-vis Right to Information:

The right to information has been on the legislative agenda of the Government of India since 1989. The legislation giving right to information exists in the United States Since 1966,
in Denmark and Norway since 1970, in Australia and New Zealand since 1982 and in Canada since 1983. It has also existed in Greece since 1986 and Ireland since 1998. The Constitution of post apartheid South Africa guarantees it. In 1997 a working group was set up by the Government of India to examine the feasibility of such legislation. That group was headed by an activist K.D. Shourie and has members such as Soli Sorabjee, and Secretaries of various departments of the government. The group submitted a model Bill for right to information. Two other such model Bills were provided by the Press Council of India and the Consumer Education and Research Council Ahmedabad. In the meantime various states had passed their own right to information laws.

The Right to Information Act should state what type of information would be accessible; who will be entitled to it, and how would one get it? It should clearly specify which information will not be accessible and for how long? The law will also provide for adjudication of disputes arising out of refusal of information by the authority.
In its historical perspective, the right to information has been recognized by the Supreme Court of India in its decisions since 1973. It was first recognized in Bennet Coleman vs Union of India*28 where the Newsprint Control Order was challenged. The impugned order provided that a newspaper would get newsprint in proportion to the copies sold in the previous year. Further, the chain newspapers were to get less newsprint than the single newspapers. This was in fact an indirect way of bringing back the newspaper, which had been held invalid by the Supreme Court in Sakal Newspaper pvt. Ltd. Vs Union of India.*29 Here for the first time the court said that readers had the right to read newspapers and this emanated from their right to know which was part of their right to freedom of speech and expression was recognized in Several other decisions.*30 Its one of the most important decision made by the Supreme Court of India in people’s Union for civil Liberties vs Union of India.*31 The Supreme Court held section 33 B of the Representation of the people (Amendment) Act, 2002 invalid on the ground that it violated

*29. A.I.R. 1962 SC 305
*31. (2003) 4 SCC 399
people’s right to know the antecedents of the candidates who contested elections to the legislature. Section 33 A of the impugned Act specified the information, which a person had to give in her nomination application. Information regarding previous convictions in criminal cases for offences punishable by more than two years imprisonment and pending cases in which charge had been framed had to be provided at the time of filing nomination papers. Section 33B said that notwithstanding any judgment of any court, the candidate would not have to give any other information. This was clearly in contrast with the decision of the Supreme Court, which made giving of information regarding assets and liabilities and educational qualifications by the candidate obligatory as being in fulfillment of the voters' right to information.*32 The Supreme Court therefore held it to be void. This was further reaffirmation of the peoples’ right to information. The right to information is not always locatable only in the Right to Freedom of Speech and Expression. A detained person’s right to be informed on the grounds of detention is not covered by right to freedom of speech and expression but is given by Art 22 (1) and is part of the personal liberty guaranteed by Art 21

* 32. India vs Association for Democratic Reforms (2002) 5 SCC 294
of the Constitution. The people’s right to know how a developmental plan was finalized, what effect such development would have on environment or how administrative discretion was exercised in respect of distribution of largesse emanates from the right to equality and the right to life and personal liberty. The right to information, as a deterrent against corruption, also emanates from the right to equality and the right to live and not to be deprived of personal liberty except according to the procedure established by law. The right to information is also inherent in the principles of natural justice and fair hearing, and therefore, could be located in several provisions of the Constitution and of Administrative Law.*33 In fact the right to information is the foundation of and a condition precedent to the right to freedom of speech and expression and several other fundamental rights. The right to information is needed not only by a person who wants to make a speech or write but by an ordinary citizen who wants to know about the stock of sugar in a ration shop and why one required to pay such a high tariff for electricity. The right to information would doubtless make government more transparent and

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*33. S.P. Sathe, The Right to know, PP. 46-49 (Trapathi 1991)
therefore accountable. It would also ultimately be more participatory. Democracy must not remain merely representative but must become participatory. It can further be explained with the help of the following chart-2.1

**Chart 2.1** *

*34. Dr. Goel, S.L.: Good Governance An Integral Approach*
The right to information became a cause of public action and there was a strong demand for a formal law on freedom of information. This freedom of information is regarded as a major step towards the concept of “Open Government” since the year 1977, the states of Goa, Tamil Nadu and Rajasthan have enacted laws ensuring public access to information, although there may be various restraints and exemptions. There was a pressure on the Central Governments also to enact law granting right to information. Various drafts were submitted for consideration by empowered bodies like the Press Council of India and by independent citizens’ groups. As a result Freedom of Information Act, 2002 was passed which was assented to by the President on January 6, 2003. However, on the suggestion of the National Advisory Council and others, for significant changes in the law, Government decided to repeal the Freedom of Information Act, 2002 and in its place enacted the Right to Information Act, 2005 to effectuate the right to information recognized under Article 19 of the Constitution. Preamble of the Act provides for setting up the practical regime of right to information for all citizens to secure access to information under the control of public authorities in order to promote transparency and accountability in the working of every public authority.*35 Thus the Act aims at making Government

* 35. Refer to chart 2.1
a participating Government. Present law converts ‘freedom of information’ into a ‘right to information’ for all citizens. ‘Information’ includes any mode of information in any form of record, document, e-mail, circular, press releases, contract, sample electronic data etc. The right to information covers inspection of works, documents, records and its certified copies and information in the form of diskettes, floppies, video cassettes in electronic forms, tapes or stored information in computers etc. By paying nominal fee, information can be provided to the person (citizen) concerned on written request or request by electronic means. It is incumbent for the authority to supply required information within 30 days from the date of request and if information relates to life or liberty of a person, then it can be obtained within 48 hours. Penalty for refusal of application or for not providing information within stipulated time is Rs. 250 per day but the total amount should not exceed Rs. 25,000. The concerned Act prohibits information in certain specified categories and puts restrictions on third party informations.

For the administration of the Act, provisions is made for the appointment of public Information Officers (PIOs), State Information Commissions and Central Information Commission.
Central Information Commission is a multimember Commission and Mr. Wajahat Habibullah has been appointed its first chairperson. State Commissions are to be constituted by the respective state Governments. These Information Commissions have been constituted into an independent and autonomous Commissions so that they may discharge their functions without fear or favour. They enjoy immunity from any prosecution or proceedings for anything done in good faith under the Act. Commission shall have the power of the civil court while enquiring into any matter. Any aggrieved person can appeal against the decision of PIO to the officer who is senior in rank within 30 days and a second appeal is also provided before the central or state Information Commission as the case may be within 90 days. At the end of each year Central and state Information Commission shall prepare a final report on the implementation of the Act and would submit to the respective governments which shall be laid before Parliament/State Legislature along with Action Taken Report.

Though the provisions of the Act are laudable yet like all openness law, this Act also faces huge problem of implementation because bureaucrats do not relish openness. Bureaucrats give lip services to any attempt at openness. This become clear from the fact
that the Administrative Reform Commission on Right to Information Act, 2005 recommended, (i) that public information officers be given power to refuse a request for information if, in his opinion, it is manifestly frivolous or vexatious; (ii) that the public information officers be given power to deny request if work involved in processing the request would substantially and unreasonably divert resources of public body; (iii) that armed forces be excluded from the purview of the Act. These recommendations, if implemented, would certainly be a retrograde step on the road to openness. Bureaucratic insensitivity to openness also becomes clear from the fact that the Government for a long time was thinking of amending the law to prohibit 'note files' from disclosure. Consequences of non disclosure of 'note files' would have been disastrous as notings play an important role in understanding the decision and disclose reasoning and nexus with the ultimate decision. Imagine a well reasoned note presented to a Minister, he must indicate his views if he disagrees with the decision. Thus 'notes' are considered as live wires snap them and darkness prevail.

Nevertheless trend indicates a movement towards more government accountability and transparency. It can not be over
emphasized that while the normative framework for upholding 'openness' is now reasonably well established in India, enforcement remains a key challenge. Central Information Commission Report suggests that people generally exercise their right to information for settling personal scores and not for enforcing governmental transparency and accountability. The 'Right to know' has a definite implication for courts also.*36 people have a right to access to courtrooms and court judgments irrespective of the fact whether it affects them individually or generally as a member/members of the community. People in an open society do not demand infallibility from judicial institutions but it is difficult for them to accept a situation when they are prohibited from observing or reading. According to Benthan, "Where there is no publicity there is no justice".

The Supreme Court in S.P. Gupta vs Union of India*37 rejected the government’s claim for privilege and ordered disclosure of correspondence and documents pertaining to non-confirmation of Justice Kumar. Thus, the seed of freedoms of information has been

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* 36. Soli Sorabjee: The Right to know, Indian Express, March 16, 1982
* 37. 1981 Supp SCC 87; AIR 1982 SC 149
planted but it requires careful nurturing by Parliament and the Executive. However, after the passing of the Right to Information Act, 2005 access to information regarding judiciary, especially when it exercises administration functions, has become a matter of concern. Today judiciary enjoys absolute powers in matters of appointment of judges of the Supreme Court and the High Courts, there seems to be no reason that why the information regarding appointment of a judge be kept secret. It is surprising that the Central Information Commissions, deferring to the wishes of the Supreme Court, ruled that no information relating to any court or tribunal can be assessed under the Act. Fact remains that judicial arbitrariness is perhaps more worse than legislative or executive arbitrariness. In a society like ours where freedom suffers from atrophy and activism, it is essential for participative democracy that the narrow pedantry which now surrounds the privilege to withhold information must be replaced by the ‘right to know’ mobilization. Right to know also has another dimension. The Bhopal gas tragedy and its disaster syndrome could have been avoided had the people known about the medical repercussions and environmental hazards of the deadly gas leaked from the Union Carbide Chemical Plant at Bhopal. Therefore, the government has a duty to provide people baseline health data around
existing hazardous plants. Failure to undertake such studies and to provide information to people must render government liable.

Bureaucrats in India place serious difficulties in the way of the public’s legitimate access to information. The reason for this can be found in colonial heritage. Even after independence, a government official feels that he is acting on behalf of the public. Hence, he had to remain anonymous and his actions secret, for the convenience of the government in power. A democratic government, to use the words of *Woodrow Wilson*, “out to be all outside and not inside”. Today in India Secrecy prevails not only in every segment of governmental administration but also in public bodies, statutory or non-statutory. The government has also in 1986 amended the Commissions of Enquiry Act,1952 in such a way as to empower the government to suppress reports of any inquiry Commission under the Act if it is satisfied that in the interest of sovereignty and integrity of India, security of state, friendly relations with foreign states or in the public interest, it is not expedient to lay the report before Parliament of the state Legislature, as the case may be. This was done in the wake of the Thakkar Commission Report relating to the assassination of Mrs. Indira Gandhi and also the Ranganathan Commission Report
relating to the riots following Mrs Gandhi’s assassination. This may also seriously jeopardize the people’s right to know if power of withholding information is not properly exercised.

At a seminar on “Press Society and Government” organized by the servants of the People Society at Chandigarh,*38 the “Right to Know” received mammoth support B.C. Verghese, the then Editor-in-Chief, Indian Express said that information can not be doled out like ration and the “executive privilege” was an invasion against democracy which was sustained by the people. In a democracy the citizen’s right to know is assumed rather than guaranteed. In fact the right is derived from the government’s accountability to the people. Therefore, no government should think that people must be told only that much which it thinks to be good for the people and safe for itself. Dealing directly with ‘Right to Know’ the Apex Court has held on various occasions that it is a fundamental right of the people covered under Articles 19 (1) (a) and 21 of the Constitution. Moving forward in the same direction the court in Union of India vs Assn. For Democratic Reforms*39 held that voter’s right to know antecedents

* 38. Indian Express, Chandigarh, December 12, 1982
* 39. (2002) 5 SCC 294
including Criminal past of a candidate to membership of Parliament or Legislative Assembly is also a fundamental right. Court observed that voter's speech and expression in case of election would include casting of vote, that is to say, that voter speaks out or expresses by casting of vote and for this purpose information about candidate to be selected is a must. In this case the Supreme Court had further directed the Election Commission to acquire information about Crime and property and education status of the candidates as a part of nomination paper. Subsequently Parliament amended the Representation of People (Third Amendment) Act, 2002 by which a candidate was required to supply information about his conviction in a criminal case, however, he was not required to give information about his assets and education. Declaring the amendment as illegal, null and void as violative of voter's fundamental right to know under Article 19 (1) (a), the court in People's Union for Civil Liberties vs Union of India*40 held that the information allowed by the Amendment Act, 2002 is deficient in ensuring free and fair elections which is the basic structure of the Constitution. Similarly, Court held that people have a right to know the circumstance under which their representatives got allotment of petroleum retail outlets.*41

*40. (2003) 4 SCC 399
*41. Onkar Lal Bajaj vs Union of India, (2003) 2 SCC 637
Above all these it may appears that the Freedom of Information Act gives the right to information to citizens alone and not to persons. The Constitution of India makes a distinction between citizens and persons. The right to equality or right to life and personal liberty are available to persons and right to freedom of speech and expression is confined to citizens.\(^42\) The two model Bills submitted by the Press Council of India as well as the Consumer Education and Research Council (CERC), Ahmedabad had extended this right to persons while the Shourie Committee had confined it to citizens. It seems the long association of right to information with the right to freedom of speech and expression might have been responsible for such a restriction. Regarding the concept of the right to know and the right to privacy of public figures, there appears to be a conflict in between the two through whom the machinery of government moves. Our experience in India suggests that a public figure should not be allowed protection against exposure of his private life which has some relevance to his public duties on the plea that he has a right to privacy. Right to privacy should not be allowed as a pretext to suppress information.\(^43\)

\(^42\) Article 14 and 21 give right to persons. Article 19 gives right only to citizens.
\(^43\) This was also the consensus at a seminar on Right to know.
Finally, Parliament has passed the law to authorize the right to information. One good aspect of the legislation is that it will prevail over the existing legislation such as the Official Secrets Act, 1923 or other legal provisions, which inhibit the giving of information. This, however, is likely to generate litigation. A seminar was held on ‘Right to privacy’ organized by the Haryana Union of Journalists on August 20, 1983 (Indian Express, Chandigarh, August 23, 1983). It would have been far better if the Parliament had repealed the Official Secrets Act by incorporating the provisions against espionage in the Freedom of Information Act, 2002. Since courts have held that the right to information was a fundamental right and part of the freedom of speech and expression, the restrictions imposed by the Freedom of Information Act, 2002 might be challenged and courts will have to hold whether or not they are reasonable restrictions on the fundamental right. The grounds on which information may be refused are rather vague and omnibus. Some phrases through which restrictions are permissible seem to be outside the limits drawn by clause (2) of Art 19. In section 8 (1) (a) of the Right to Information Act, 2005 it is said that, information which would prejudicially affect the sovereignty and integrity of India and security of the state could be validly refused. However, a question
may arise in mind that, can information be refused on the ground of strategic or economic interests? Art 19 (2) of the Constitution does not permit restrictions on freedom of speech and expression on these grounds. Writ petitions would also lie against the decisions of appellate authorities which would be tribunals within the meaning of Art. 227 and 136 of the Constitution.

Moreover, it can be stated here that according to the concept of Right to Information Act, 2005 a good deal of information must be made available without being asked for presently we are having all kinds of informations which are out of restrictions available as a matter of Course through an information regime which is an outcome of the Act of 2005 and also the basic concept of an "openness of Government". In a democratic system of Government the mere concept of openness of Government is the basic phenomenon and the same might have available like other countries in India also through the better understanding of the Right to Information Act, 2005. Now-a-days every public authority i.e. any authority or body established or constituted- *firstly*, by or under the Constitution and *secondly*, by any law made by the appropriate Government and includes any body owned, controlled or substantially
financed by funds provided directly or indirectly by the appropriate Government is bound to make information accessible and also give information. Such transparency is undoubtedly promoting greater accountability. In our country India, the policy makers of the country have realized the importance of the right of the Indian citizens to seek information and the corresponding duty of the public authorities to make available the said information. Most of the states like Andhra Pradesh, Assam, Goa, Gujrat, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Orissa, Rajasthan and Tamil Nadu and National capital Territory of Delhi have enacted the Right to Information Acts and Bills. At the central level, the first attempt to be made to enact a law on information eliminated in the enactment of the Freedom of Information Act, 2002. But however, it was not notified and could not be brought into force as it was felt that it needs to be made more progressive, participatory and meaningful. Therefore, as a result, the Indian Parliament has enacted the Right to Information Act, 2005 (Act 22 of 2005), passed by the Lok Sabha on 11th May, 2005 and by the Rajya Sabha on 12th May, 2005. Accordingly the National Advisory Council suggested some important changes that are incorporated in the New Right to Information Act, 2005, which
repealed the earlier Freedom of Information Act, 2002. Accordingly, it restricts the veil of secrecy in government. And hence, it is now well accepted that "open government" is a part of effective democracy.