TABLE OF CONTENTS

PAGE NO.

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REPORT ON CONFIDENTIALITY OF GOVERNMENT HELD INFORMATION

I. INTRODUCTION

In preparing this memorandum two major difficulties were encountered and were for the most part, impossible to overcome.

1.1 A major problem, which presented itself from the beginning, was that it was not made clear by the Attorney General exactly to what limits the proposed study should be carried. If a basic criticism of the proposed legislation is what is desired surely concrete steps, as suggested in Mr. Hurlburt's letter of March 15 (see file 2-PDC-14), should be taken to ascertain the situation, as it exists presently within the government, in regards to the various methods adopted by government departments and agencies to deal with "private information"[1] which has been collected by them.

1.2 No surveys have yet been made; no interviews have yet been conducted, thus, this memorandum is written without the benefit of knowing such things as the following:

(a) the agencies or departments which do collect "private information";

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[1] *See*, Appendix A, *infra*, p. 75, proposed legislation s.1(where "private information" is defined. Although the proposed l legislation deals only with "private information", i.e., medical educational, employment and social services information, it has been suggested by Professor Bowker that these are artificial categories in the sense that they may not be exhaustive. The need of exploring the collection and use of other types of information may, therefore, arise.

(b) the type of information gathered;

(c) to what use the information is put when it is gathered;

(d) whether or not "private information" is treated as confidential;

(e) if there are any other types of information which are treated as confidential;

(f) how information is stored;

(g) the practicability of converting personal information to statistical information;

(h) whether or not the public does view the matter of confidentiality of government held documents as being so pressing as to warrant placing it in a top priority position.

1.3 Despite these limitations it is hoped that this report will, at least, provide some ground-breaking research on the subject of confidentiality of government documents; give sufficient coverage of the present law and initiate through the basic criticisms that follow a much more detailed and extensive study of this area and of the proposed legislation found in Appendix A, *infra*, p. 74.

II. EXPLORATION OF THE EXISTING LAW--EXISTING LEGISLATION; THE POSSIBILITIES OF A COMMON LAW REMEDY FOR BREACH OF CONFIDENCE

2.1 The Public Service Act, R.S.A. 1970, c. 298, requires all employees of the provincial government, with certain exceptions, to take an oath of secrecy. Section 20 reads,

> 20. Every new employee shall take and subscribe an oath in the following form:
>
> I, ..., do swear that I will execute according to law and to the best of my ability the duties required of me as an employee in the public service of Alberta and that I will not, without due authorization, disclose or make known any matter or thing which comes to my knowledge by reason of my employment in the public service.

A penalty for breach of this oath was added by The Public Service Amendment Act, S.A. 1972, c. 80, s. 3.

> 3. Section 20 is amended by renumbering it as subsection (1) and by adding the following subsection:
>
> (2) Any employee who without due authorization discloses or makes known any matter or thing which comes to his knowledge by reason of his employment in the public service of Alberta, is guilty of an offence and liable on summary conviction to a fine of not more than $500.

Section 3 of The Public Service Act, *supra*, states,

> 3. (1) This Act applies to all departments of the Government, including employees of the Executive Council and of the Legislative Assembly.

It then goes on to make the following exceptions,

> (3) This Act does not impair nor otherwise affect
>
> (a) the rights and privileges of the Legislative Assembly with regard to the appointment or removal of any employee of the Assembly, or
>
> (b) an already established authority or control of the courts and judges over their officers.
>
> (4) This Act does not apply to the members or employees of
>
> (a) The Alberta Liquor Control Board, or
>
> (b) The Workmen's Compensation Board, or
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> (c) The Energy Resources Conservation Board (as amended S.A. 1971, c. 30, s. 133.1(9)), or
>
> (d) The Research Council of Alberta, or
>
> (e) The Alberta Human Resources Research Council.

2.2 Some questions have been raised by the failure of the proposed legislation (Appendix A, *infra*, p. 74) to extend prohibition against disclosure of government documents beyond M.L.A.'s and members of the Executive Council to include employees of government generally. It is possible to conclude, however, because of section 3 quoted above, that any legislation requiring employees of the Government of the Province of Alberta to keep confidential information that they have access to because of their employment would be redundant. The Public Service Act, *supra*, does not, of course, extend to M.L.A.'s nor does it cover members of the Executive

Council. This gap in the requirement of confidentiality is, no doubt, the reason the provisions under consideration (see Appendix A, *infra*, p. 74) have been drafted. One question remains, however. If it is considered redundant to include public servants under the proposed provisions, why are there existing statutes which contain separate confidentiality provisions which do apply to public servants? Since the legislators have deemed it necessary to include "secrecy" sections in these various Acts in spite of the provisions found in The Public Service Act, *supra*, perhaps it is a valid criticism of the proposed legislation to say that, in confining itself to M.L.A.'s and members of the Executive Council, it does not cover a wide enough number of government employees who have access to "private information".

2.3 It is submitted that the confidentiality provisions found in the Public Service Act, as amended, *supra*, are not entirely adequate in truly coping with the problem of disclosure of information which comes to a public employee in the course of his employment. Even a superficial examination of these sections reveals the inadequacy. This particular inadequacy, however, in fairness, must be said to be merely one of the many illustrations of the vague and ambiguous laws and government regulations which are concerned with this area of confidentiality of government documents.

It can be seen that although the 1972 sanction does apply to prevent disclosure of unauthorized information it does not indicate who is to authorize the disclosure. This creates a problem. Presumably the intention of the amendment is that the one who does authorize such disclosures (assuming that he is a higher ranking public servant) does not face the penalty that is provided. Should this be so? Are there not certain types of information, for example

information that would be classed as "private information" by the proposed legislation under present consideration, that should not be allowed to be disclosed even though someone higher in government echelons than the one who, in fact, gives out the information authorizes the disclosure? If, indeed, it is the government's intention to adequately protect people by keeping confidential certain types of "private information" then the Public Service Act, *supra*, should make it clear that certain types of information are not to be disclosed regardless of what the high ranking public administrators tell.

The words "without due authorization" may also be intended to mean that, in cases where it is applicable, the permission to disclose must come from the person whom the information is about. It is submitted that this is a morally fair interpretation to place on these words and that "due authorization" should at least include the permission of the person affected. However, it is simply not clear from the legislation itself that this interpretation should be employed. Certainly a more measured and explicit statement could be made.

2.4 As indicated above the employees and members of certain Crown corporations do not fall within The Public Service Act, *supra*, and, therefore, would not be governed by the confidentiality requirements of that Act. These corporations are, The Alberta Liquor Control Board, The Workmen's Compensation Board, The Energy Resources Conservation Board, The Research Council of Alberta and The Alberta Human Resources Research Council (the writer has been informed that this Council is no longer in existence)

A study of the statutes which set up these corporations was made. These statutes include The Liquor Control Act, R.S.A. 1970, c. 211; The Workemn's Compensation Act, R.S.A. 1970, c. 397; The Energy Resources Conservation Act, S.A. 1971, c. 30; The Research Council Act, R.S.A. 1970, c. 321; and the Human Resources Research Council Act, R.S.A. 1970, c. 177. Nowhere in any of these Acts is found a reason for the fact that The Public Service Act, *supra*, does not apply to the corporations.

The only Acts that seem to contain provisions on confidentiality of information are The Research Council Act, *supra*, and The Workmen's Compensation Act, *supra*, in the following provisions. (Italics added).

The Research Council Act

12. (1) The Director of Research or the Acting Director or Deputy Director of Research may, for the purpose of obtaining information and statistics as to the trades, businesses and industries of the Province, require any or all persons engaged in such a trade, business or industry to furnish such information with regard to that trade, business or industry and any agricultural, industrial or commercial activities thereof as the Director, the Acting Director or Deputy Director considers proper.

(2) Information required under subsection (1) shall not include

(a) information of a secret or confidential nature, or

(b) information the disclosure of which would be injurious to the person carrying on the trade, business or industry with respect to which information is sought.

(3) Each person engaged in a trade, business or industry who defaults for a period of 30 days after the receipt of such demand or such longer period as may be appointed in complying with a demand in writing for information made under the provisions of subsection (1), when such person has or is able to procure such information, is guilty of an offence and liable on summary conviction to a fine of $10 for each day during which such default continues.

(4) Information furnished pursuant to this section shall be used solely by the Research Council, its members and officers for the purpose of the proper performance by the Research Council of the powers conferred upon or vested in it by this Act.

(5) A member or officer of the Research Council who uses information furnished under this section for a purpose other than that referred to in subsection (4) is guilty of an offence and liable on summary conviction to a fine of not more than $500.

The Workmen's Compensation Act

(11) No member or officer of the Board and no person authorized to make an examination or inquiry under this Act shall divulge or allow to be divulged, except in the performance of his duties or under authority of the Board, any information obtained by him or that has come to his knowledge in making or in connection with an examination or inquiry under this Act.

(14) No member or officer or employee of the Board shall divulge information respecting the business of an employer or a workman obtained by him in his capacity as such

> *member or officer or employee unless it is divulged under the authority of the Board to the persons directly concerned or to agencies or departments of the Government of Canada or of the Government of any province.*
>
> [R.S.A. 1955, c. 370, s. 67; 1960, c. 80, Schedule, 27; 1969, c. 117, s. 37.]

Considering the wide investigative powers possessed by these Boards it is important that there are confidentiality provisions in these Acts. It might be well to attach similar provisions to the other Acts also.

2.5 An examination of the statutes of Alberta from the Revised Statutes, 1970, to the Statutes of Alberta, 1972, was made. It revealed that there are a number of statutes passed prior to 1972 which contain independen confidentiality provisions even though the government employees affected are also covered by The Public Service Act, *supra*. This raises a question of *res judicata*-- would it be possible for a public servant who is covered by The Public Service Act, *supra*, as well as the Act relating to his particular department, agency, etc., and who, therefore, is subject on summary conviction to a fine of $500 under both Acts to be charged and convicted under both statutes? This writer is unable to satisfactorily answer the question except to say that the courts may view charging and convicting under both as being redundant and the leaning of the court is away from redundancy.

2.6 In addition, then, to The Public Service Act, *supra*, and The Public Service Amendment Act, *supra*, statutes containing confidentiality provisions applicable to public servants and the provisions which they contain are listed as follows.

A. The Alcoholism and Drug Abuse Act, R.S.A. 1970, c. 16,

8. (1) Except as otherwise provided in this section

(a) a person who is or has been a member or employee of the Commission or is or has been employed or engaged in the administration of this Act shall not disclose or be compelled to disclose any information obtained by him that pertains to a patient or the treatment, care or services provided by the Commission to a patient, and

(b) any file, record, document or paper in the custody of the Commission that pertains to a patient or to the treatment, care or services provided to a patient shall not be disclosed to any person or be admitted in evidence in any proceedings.

(2) In this section "patient" means a person who has been provided with treatment, care or other services by the Commission or at any hospital, clinic or centre operated by the Commission.

(3) Subsection (1) does not apply

(a) where the disclosure is necessarily made in the course of the administration of the business and affairs of the Commission or in the courts of the administration of this Act, or

(b) where the disclosure is made at the request of or with the consent of the patient concerned, his personal representative or the committee of his estate, or

(c) in any special case where permission is given by an order of the Lieutenant Governor in Council.

(4) Information in the hands of the Commission pertaining to patients and the treatment, care and services provided to patients may be published by the Commission or by the Government in statistical form if the individual names of patients are not thereby revealed or made identifiable.

(5) A person who contravenes a provision of this section is guilty of an offence and liable on summary conviction to a fine of not more than $500 and in default of payment to imprisonment for a term not more than 90 days.

B. The Child Welfare Act, R.S.A. 1970, c. 45,

13. (1) In the public interest, any file, document or paper kept by any person in any place

(a) that deals with the personal history or record of a child or an adult, and

(b) that has come into existence through any thing done under or pursuant to this Act,

shall not be disclosed to any person except upon the written consent of the Minister.

(2) No person shall disclose or be compelled to disclose any information obtained by him in the course of the performance of any duties under this Act

(a) except at a trial, hearing or proceeding under this Act, and

(b) in any other case, except upon the written consent of the Minister.

(3) Subsection (1) and (2) do not apply to a disclosure specifically authorized to be made by or under this Act or The Vital Statistics Act, or to a disclosure

(a) to any employee of the Department or of any other department or agency of the Government, or

(b) to any official of a municipal government or of the Government of Canada or of any province or territory of Canada or an agency thereof, or

(c) to any person assisting or acting as an agent of the Department,

or to a solicitor acting on behalf of any of them, where the disclosure is made to enable the giving of assistance and information required for the proper administration of this Act.

(4) No person shall publish in any form or by any means

(a) the name of a child or his parent concerned in any judicial proceedings under this Act, or

(b) an account of the circumstances brought out at such a judicial proceeding.

(5) Nothing in this section prohibits the Director from publishing notice of hearings or other notices as may be necessary in the interests of justice or for the proper administration of this Act.

(6) A person who contravenes this section is guilty of an offence and liable upon summary conviction to a fine of not more than one hundred dollars and in default of payment to a term of imprisonment of not more than three months.

61. (1) Where an order of adoption is made the clerk of the district court shall cause a sufficient number of certified copies of the order to be made and shall transmit

(a) two certified copies of the order to the Director, and

(b) one certified copy or, where the adopted child was born outside Alberta, two certified copies of the order to the Director of Vital Statistics, together with such other information as the Director of Vital Statistics requires to enable him to carry out the requirements of The Vital Statistics Act.

(2) After the certified copies of the order have been made the clerk shall put the petition, the material used on the petition, the record of proceedings and the order of adoption in a sealed packet.

(3) The sealed packet may be opened on the written request of the Director for the purpose of supplying further certified copies of the order to the Director, but otherwise the packet shall not be opened and any information contained therein shall not be made public or disclosed to any person except upon the order of a court.

62. (1) When an order of adoption is made the Director shall put his records relating to the child in a sealed packet.

(2) The Director may arrange for

(a) the microfilming of his records relating to an adopted child, and

(b) the destruction of all or part of the records so microfilmed,

in which case the microfilm shall be put in a sealed place.

(3) A sealed packet containing records and any sealed place containing microfilm of records shall not be opened and any information contained therein shall not be made public or disclosed to any person except

(a) by the Director or upon the written direction of the Director, or

(b) upon the order of a court.

(4) The Director, upon request therefor

(a) by a parent of an adopted child, or

(b) by an adopted child,

may at any time supply a copy of the order of adoption to the parent or the child.

C. The Department of Highways and Transportation Act, R.S.A. 1970, c. 98,

12. (1) There may be established a Highway Accident Investigation Section (hereinafter called "the Investigation Section") in the Department.

(2) The purpose of the Investigation Section is

(a) to investigate every aspect of motor vehicle accidents with a view to compiling comparative statistics on the cause of accidents, and

(b) to make recommendations, based on the investigations of the Investigation Section, for increased road safety.

(3) To fulfil its purpose the employee in charge of the Investigation Section may, in writing, with respect to any accident, require from any insurance company carrying on business in Alberta, any or all of the following:

(a) copies of statements made by any person in connection with the accident;

(b) copies of reports made by insurance company investigators into the cause of the accident and the conclusion of the insurance company on the liability of the persons involved;

(c) details of any money paid by an insurance company in respect of property damage.

(4) The employee in charge of the Investigation Section, or a person authorized by him, may interview

(a) the drivers involved in the accident,

(b) any witnesses to the accident, and

(c) any other person who may be able to give information (whether directly relevant or not) which will assist in determining the reasons for the accident,

and with the consent of the person interviewed take statements in writing.

(5) Any person interviewing under subsection (4) shall carry with him an identification card (issued to him by the employee in charge of the Investigation Section) and shall produce it for the inspection of any person who requests to see it.

(6) In the interests of obtaining full and true information concerning an accident, any file, document or paper kept by any person in the Investigation Section that deals with an accident, including all matters incidental thereto, and that has come into existence through anything done under or pursuant to this section

(a) shall not be disclosed to any person who has not taken the oath pursuant to subsection (10), or

(b) shall not be used in any court proceedings, or

(c) shall not be used for any other purpose other than for the purposes stated in subsection (2).

(7) No person who has taken the oath under subsection (10) shall disclose or be compelled to disclose any information obtained by him in the course of the performance of any duties under this section.

(8) In order to inform the Minister or the public of the nature and cause of accidents, the Investigation Section may publish reports, statistics or other information but no

(a) report, or

(b) statistics, or

(c) other published information,

shall contain particulars which would enable any person to identify the publication as being particulars relating to any particular person or accident unless the previous consent in writing of the person (or if more than one, all of them) has been obtained for release of the information.

(9) Publication of reports under subsection (8) is not a contravention of subsection (6), (7) or (12).

(10) Every employee or any other person employed in or in connection with the Investigation Section, before commencing his duties, shall take the following oath of secrecy:

"I ..... do solemnly swear that I will not, without due authority, disclose or make known any matter or thing that comes to my knowledge by reason of any employment in or by the Highway Accident Investigation Section.".

(11) Any person or employee engaged in the work of the Investigation Section who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding $500 or in default of payment to imprisonment for 90 days.

(12) No cause of action lies against any person by reason of the disclosure, for the purposes of this section, of any document or information to a person who has taken an oath pursuant to subsection (10).

(13) Notwithstanding anything in this section, no person shall be compelled to disclose any information if the disclosure will prejudice that person.

D. The Fire Prevention Act, R.S.A. 1970, c. 144,

26. (1) The fire commissioner shall keep in his office a record of fires occurring in the Province together with all facts, statistics and circumstances, including the origin of fires, as are determined by inquiry.

(2) The record shall be open to public inspection, but only after final closing of the inquiry.

E. The Health Care Insurance Act, R.S.A. 1970, c. 166,

25. (1) Every member and employee of the Commission and every other person employed in the administration of this Act shall preserve secrecy with respect to all matters that come to his knowledge in the course of his employment and which pertain to basic health services rendered and benefits paid therefor and shall not communicate any such matters to any other person except as otherwise provided in this section.

(2) A person referred to in subsection (1) may furnish information pertaining to the date on which basic health services were provided and the general nature of those services, the name and address of the person who provided the service, the benefits paid by the Commission for that service and the person to whom they were paid, but such information may be furnished only

(a) in connection with the administration of this Act, the regulations, the by-laws or the federal Act, or

(b) in proceedings under this Act or the regulations or by-laws, or

(c) to the person who provided that service, his solicitor or [p]ersonal [sic] representative, the committee of his estate, his trustee in bankruptcy or other legal representative, or

(d) to the person who received the services, his solicitor, personal representative or guardian, the committee or guardian of his estate or other legal representative of that person.

(3) Information in the hands of the Commission may be published by the Commission or the Government in statistical form if the individual names of persons are not thereby revealed or made identifiable.

(4) With the consent of the executive director of the Commission or a member or employee of the Commission authorized by him to do so, information of the kind referred to in subsection (2) and any other information pertaining to the nature of the basic health services provided and any diagnosis given by a person who provided the service may be disclosed or communicated to the professional association of which he is a member if an officer of that association makes a written request therefor and states

that the information is required for the purposes of investigating a complaint against one of its members or for use in disciplinary proceedings involving that member.

(5) The executive director of the Commission may disclose to a professional association any information referred to in subsection (2) and any other information that pertains to basic health services rendered by a member of that association if he considers that it is in the interests of the public and of the professional association that the information be so disclosed.

(6) In subsections (4) and (5), "professional association" means

(a) the council of the College or an investigating committee under The Medical Profession Act, or

(b) the board of directors of The Alberta Dental Association or an investigating committee under The Dental Association Act, or

(c) the Council of Management of The Alberta Optometric Association or an investigating committee under The Optometry Act, or

(d) the council of the Alberta Chiropractic Association, or

(e) the Council of Management of the Alberta Podiatry Association.

(7) A person who contravenes the provisions of this section is guilty of an offence.

(8) No report, form or return prescribed by or required for the purposes of this Act or the regulations or by-laws shall be admitted in evidence in any judicial proceeding, other than a judicial proceeding under this Act, to adversely affect the interest of the person making the report, form or return.

26. No action lies against a person providing basic health services or a member of his staff in respect of information furnished to the Commission in respect of basic health services provided by him.

F. The Health Care Insurance Statutes Amendment Act, S.A. 1972, c. 109 (amends s. 25 of the Health Care Insurance Act, *supra*),

22.2...

6. Section 25 is amended

amends s. 25

(a) by adding the following subsection after subsection (1):

(1.1) A member of the Commission or an employee of the Commission authorized by a member may disclose or communicate information pertaining to the date on which basic health services were provided and a description of those services, the name and address of the person who provided the service, the benefits paid by the Commission for that service and the person to whom they were paid, the name and address of the person to whom the services were provided and any other information pertaining to the nature of the basic health services provided, to the Provincial Cancer Hospitals Board, The Workmen's Compensation Board, the Alberta Hospital Services Commission, or the Division of Social Hygiene of the Department of Health and Social Development, if

(a) a member or officer of the Board or Commission, or an officer of the Division, as the case may be, makes a written request therefor, and

(b) the information required is necessary and relevant to a matter being dealt with by the Board or the Division.

(b) *as to subsection (2), by striking out the words "the general nature" and by substituting the words "a description",*

(c) as to subsection (2) by adding the word "or" at the end of clause (d) and by adding the following clause:

(e) to a board of directors, council or committee of an association referred to in section 22.1, subsection (4) for purposes in connection with that section,

(d) as to subsection (4) by striking out the words "to the professional association" and by substituting the words "to a disciplinary body of the College or association, as the case may be,",

(e) as to subsection (5) by striking out the words "may disclose to a professional association" and by substituting the words "may disclose to a disciplinary body",

(f) by striking out subsection (6) and by substituting the following:

(6) In subsections (4) and (5), "disciplinary body" means

(a) the council of the College or a discipline committee under The Medical Profession Act, or

(b) the board of directors of The Alberta Dental Association or the discipline committee of that Association, or

(c) the Council of Management of The Alberta Optometric Association or the discipline committee of that Association, or

(d) the council of the Alberta Chiropractic Association, or

(e) the Council of Management of the Alberta Podiatry Association.

G. Under The Franchises Act, S.A. 1971, c. 38, The Alberta Securities Commission is given wide powers of investigation. The confidentiality provisions, such as they are, hardly seem adequate in the face of such wide investigative powers.

> 44. No person, without the consent of the Commission, shall disclose, except to his counsel, any information or evidence obtained or the name of any witness examined or sought to be examined under section 41 or 43.
>
> 45. Where an investigation has been made under section 41, the Commission may, and, where an investigation has been made under section 43, the person making the investigation shall, report the result thereof, including the evidence, findings, comments and recommendations, to the Minister, and the Minister may cause the report to be published in whole or in part in any manner which he considers proper.

H. The Hospital Act, R.S.A. 1970, c. 174,

> 35. (1) The board of each approved hospital shall cause to be kept by the attending physician a record of the diagnostic and treatment services provided in respect of each patient in order to assist in providing a high standard of medical care.
>
> (2) For the purposes of assessing the standards of care furnished to patients, improving hospital or medical procedures, compiling medical statistics, conducting medical research, or for any other purpose deemed by the Minister to be in the public interest, the Minister, or any person authorized by the Minister, may require that all or any of the following be sent to him:

(a) medical and other records of any patient;

(b) extracts from and copies of any such records;

(c) diagnoses, charts or any information available in respect of a patient.

(3) Information obtained from hospital records or from persons having access thereto shall be treated as private and confidential information in respect of any individual patient and shall be used solely for the purposes described in subsection (2) and such information shall not be published, released or disclosed in any manner that would be detrimental to the personal interests, reputation or privacy of a patient, or the patient's attending physician.

(4) Any person who knowingly and wilfully releases or discloses such information to any person not authorized to receive the same is guilty of an offence and liable upon summary conviction to a fine of not more than $100 and in default of payment to a term of imprisonment not exceeding 15 days.

(5) Notwithstanding subsection (3) or any other law, a board or employee of a board, the Minister or a person authorized by the Minister, or a physician may

(a) with the written consent of a patient, divulge any diagnoses, record or information relating to the patient to any person, and

(b) without written consent of a patient, divulge any diagnoses, record or information relating to the patient to

(i) a Workmen's Compensation Board, or

(ii) the Alberta Blue Cross Plan, or

(iii) any other provincial hospital insurance authority,

if the information is required in order to establish responsibility for payment by the organization or insurer, or to any other hospital to which the patient may be transferred or admitted or to other attending physicians.

36. The board of each approved hospital shall forward or cause to be forwarded to the Deputy Minister of Hospital Services such records, reports and returns as may be required at such times and in such form as the Minister may from time to time prescribe.

37. The Deputy Minister of Hospital Services and inspectors or other persons appointed for the purpose, may make all necessary inquiries into the management and affairs of hospitals, may visit and inspect hospitals and may examine hospital records for the purpose of verifying the accuracy of reports and ensuring that this Act and the regulations are being adhered to.

I. The Legislative Assembly Act, R.S.A. 1970, c. 204 (as can be seen no restrictions are presently placed on disclosure by a member of the Legislative Assembly before the Assembly),

40. No member of the Legislative Assembly is liable to any civil action or prosecution, arrest, imprisonment or damages by reason of any matter or thing brought by him before the Legislative Assembly by petition, bill, resolution, motion or otherwise, or anything said by him before the Legislative Assembly.

J. The Ombudsman Act, R.S.A. 1970, c. 268,

18. (1) Where the Attorney General certifies that the giving of any information or the answering of any question or the production of any document, paper or thing might involve the disclosure of

(a) the deliberations of the Executive Council, or

(b) proceedings of the Executive Council, or committee thereof relating to matters of a secret or confidential nature and would be injurious to the public interest,

the Ombudsman shall not require the information or answer to be given or, as the case may be, the document, paper or thing to be produced, but shall report the giving of the certificate to the Legislature.

(2) Subject to subsection (1), the rule of law that authorizes or requires the withholding of any document, paper or thing, or the refusal to answer any question, on the ground that the disclosure of the document, paper or thing or the answering of the question would be injurious to the public interest, does not apply in respect of any investigation by or proceedings before the Ombudsman.

19. (1) The Ombudsman and every person holding an office or appointment under him shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions.

(2) Notwithstanding subsection (1), the Ombudsman may disclose in any report made by him under this Act such matters as in his opinion ought to be disclosed in order to establish grounds for his conclusions and recommendations.

K. The Public Documents Act, R.S.A. 1970, c. 293,

2. In this Act,

(a) "Archives" means the Provincial Museum and Archives maintained under The Alberta Heritage Act; . . .

(c) "document" includes any paper, record, map, photograph, book or other documentary material regardless of physical form or characteristics; . . .

(e) "official document" means any document created in the administration of the public affairs of the Province, other than a public document;

(f) "public document" includes any certificate under the Great Seal of the Province, legal document, security issued by the Government under The Financial Administration Act, voucher, cheque and accounting record and any other document created in the administration of the public affairs of the Province that is designated by the Lieutenant Governor in Council as a public document. . . .

6. The Lieutenant Governor in Council may direct that any official document or public document transferred to the Archives shall not be made available for public inspection for such period as he specifies.

L. The Statistics Bureau Act, R.S.A. 1970, c. 350,

9. (1) No report, summary of statistics or other publication issued under this Act shall contain any of the particulars contained in any individual return so arranged as to enable any person to identify any particulars so published as being particulars relating to any individual person or business except when the previous consent in writing of the individual person or of the person in authority in the business has been obtained for the release of the information.

(2) No person shall communicate or allow to be communicated to any person who has not taken the oath of secrecy required by section 10, the contents of any individual return, report or answer made or given pursuant to this Act.

10. (1) Every officer and other person employed in the execution of any duty under this Act, before entering on his duties shall take the following oath of secrecy:

"I . . . . . do solemnly swear that I will not, without due authority, disclose or make known any matter or thing that comes to my knowledge by reason of my employment in or by the Alberta Bureau of Statistics."

(2) The oath shall be taken before the Clerk of the Executive Council and recorded in such manner as the Minister prescribes.

11. A person

(a) who, in the pretended performance of duties under this Act, obtains or seems to obtain information that he is not duly authorized to obtain, or

(b) who contravenes the provisions of Section 9, subsection (2),

is guilty of an offence and liable on summary conviction to a fine of not more than $100 and in default of payment to imprisonment for a term of not more than 30 days.

M. The Alberta Income Tax Act, R.S.A. 1970, c. 182,

47. (1) Every person who, while employed in the administration of this Act, communicates or allows to be communicated to a person not legally entitled thereto any information obtained under this Act or allows any such person to inspect or have access to any written statement furnished under this Act is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred dollars.

(2) Subsection (1) does not apply to the communication of information between

(a) the Minister and the Provincial Treasurer, or

(b) the Minister, acting on behalf of Alberta, and the Provincial Treasurer, the Provincial Secretary-Treasurer or the Minister of Finance of the government of

(i) an agreeing province, or

(ii) a non-agreeing province to which an adjusting payment may be made under section 55, subsection (2).

N. The Vital Statistics Act, R.S.A. 1970, c. 384,

38. (1) The Director may compile, publish and distribute such statistical information respecting the births, still-births, marriages, deaths, adoptions and changes of name registered during any period as he may deem necessary and in the public interest.

(2) As soon as convenient after the first day of January in each year, the Director shall make for the use of the Assembly and for public information, a statistical report of the births, stillbirths, marriages, deaths, adoptions and changes of name during the preceding calendar year.

39. (1) All records, books and other documents pertaining to any office under this Act are the property of the Crown.

(2) Where a vacancy occurs in any office under this Act the person having the possession, custody or control of any books, records or other documents pertaining to the office shall give up possession of and deliver them to the successor in office or to any person appointed by the Director to demand and receive them, and any person who fails to comply with this subsection is guilty of an offence.

40. (1) No district registrar, no deputy district registrar and no person employed in the service of Her Majesty shall communicate or allow to be communicated to any person not entitled thereto any information obtained under this Act, or allow any such person to inspect or have access to any records containing information obtained under this Act.

(2) Nothing in subsection (1) prohibits the compilation, furnishing or publication of statistical data that does not disclose specific information with respect to any particular person.

47. Every person who violates section 40 is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred dollars.

2.7 Perhaps, at this stage, three general points which cover most of the Acts quoted above can be made concerning certain confidentiality problems that are posed. First, most of these statutes, The Health Care Insurance Act, *supra*, s. 25(3), being an example of an exception to this statement, contain no "sterilization" provisions similar, for example, to s. 15(2) of the federal Statistics Act, which prevents publication in a form which would allow connection of the published information with any particular person.

Second, a criticism voiced at the Computers and Law Conference is relevant. No civil cause of action is provided for a person or organization that is injured by an improper use or disclosure of information collected under any of the above statutes.[2]

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[2]Leal, *Privacy and the Computer*, 3 June 1968 (unpublished), p. 1.

Third, there seem to be few objective standards in these statutes to limit the type of information that may be collected.

These three criticisms are also discussed below in relation to the proposed provisions in Appendix A.

2.8 A request for a list of confidentiality provisions which might exist in various other provinces was made and it met with good response. The information received from the other provinces was helpful in compiling the above list for Alberta. The essence of the responses is set out in Appendix B.

2.9 The following material on the present state of the common law on the duty of confidence is based for the most part, on a Master's Thesis submitted to the University of Manitoba in October of 1972 by Peter Wakefield. It will be seen that developments have been made in the area and that it may be possible to side step the old methods of attempting to obtain relief through property and contract law by bringing an action in negligence or for breach of confidence itself. By far the majority of the existing cases in this area do not involve government held information but it is not difficult to imagine areas where the court's decisions in many of the cases discussed could be used as precedent for situations involving wrongful disclosure or misuse of confidential information in government. Certainly these common law decisions should be heeded in framing any legislation establishing confidentiality guidelines.

2,9.1 Negligence as a basis for action

There is only one case, to date, in which negligence has been used as a basis for an action for breach of confidence. It is the New Zealand case of *Furniss* v. *Fitchett* [1958] N.Z.L.R. 396.[3] The plaintiff and her husband were regular patients of a doctor and when their marital relationship became strained the husband asked the doctor for a certificate relating to his wife's sanity, her consent not being sought. One year later, when the wife sued her husband for separation and maintenance, the certificate was produced in court and as a result the wife suffered nervous shock. An action founded on breach of contract was not pursued, on technical grounds, and an action for defamation was also abandoned, presumably because the statements in the certificate were true. However, damages were awarded on the basis of a claim in tort. Barraclough C.J. held that although the claim was novel, it fell within the law as propounded by *Donoghue* v. *Stevenson* [1932] A.C. 562 (H.L.), in that the relationship of doctor and patient gave rise to a duty of care. The doctor, as a reasonable man, should have foreseen that disclosure to the wife of her mental condition would be harmful. Furthermore, although he had not told the wife, by giving a certificate to her husband he should have realized that the contents were likely to come to the wife's knowledge.

It is conceivable that situations containing the elements of this case could arise in cases involving

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[3] *See also* (1958) 34 N.Z.L.J. 65.

government-held information. Those departments and agencies of government which collect personal medical information would probably be the most likely to be involved.

2.9.2 Breach of confidence as an action

In the cases earlier considered the courts may have based their decisions concerning breach of confidence on grounds of property and contract, but there is considerable evidence to support the contention that actions would die for breach of confidence in its own right, when necessity arose. In *Albert* v. *Strange* (1849) 41 E.R. 1171 (Ch.D.) at 1178, Lord Cottenham L.C. said,

> . . . but this case by no means depends solely upon the question of property, for a breach of trust, confidence, or contract, would of itself entitle the Plaintiff to an injunction.

In *Tuck* v. *Priester* (1887) 19 Q.B.D. 629 at 639, the making of extra copies of a picture to be used for unauthorized purposes was held to be ". . . a gross breach of contract *and* a gross breach of good faith. . ." (emphasis added).

In an early case,[4] in 1825, an injunction was granted for breach of confidence, though this was not expressly stated in the judgment. A distinguished surgeon

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[4] *Abernethy* v. *Hutchinson* (1825) 3 L.J.Ch. 209.

sought to restrain the publication of lectures which he had given at St. Bartholomew's Hospital, London. Lord Eldon doubted whether there could be a property right in the lectures (which had not been reduced to writing) and an implied contract between the plaintiff and the defendant, who had been a student of his could not be established.

> . . . but whether an action could be maintained against them [student and publisher] on the footing of implied contract, an injunction undoubtedly might be granted.[5]

One might also remember the statement of Lord Eldon in *Gee* v. *Pritchard* 36 E.R. 670 (Ch.D.) where he worded his judgment so as to cast doubts as to his faith in property rights as being the true basis for an action for breach of confidence.

However, the case most relied on in recent English decisions to establish an action for breach of confidence is *Morison* v. *Moat* (1851) 68 E.R. 492 (Ch.D.). The plaintiff sought an injunction to restrain the use of a secret formula for a medicine, which was not patented, and also to restrain the sale of it by the defendant, who had acquired knowledge of it, it was alleged, by violating his contract with the party who had communicated it to him, as well as breaching his duty of trust and confidence. It was held that the plaintiff did not have a right to secrecy against the

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[5] *Abernethy* v. *Hutchinson*, *supra*, at p. 219.

world, since the formula was not patented, but that he did have a right against the defendant. The two parties had been partners, but the plaintiff had himself invented the medicine and generally prepared it. The following extract from p. 498 of the judgment of the Vice-Chancellor, Sir G. J. Turner is relevant.

> That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence, meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred. . . .

The Vice-Chancellor then proceeded to consider the earlier case law. In *Williams* v. *Williams* (1817) 86 E.R. 61 (Ch.D.) , a father divulged a secret formula for medicine to his son and delivered to him a stock of medicines. This was done in contemplation of a future partnership being formed between them when the son was of age. At p. 62 Lord Eldon said,

> If, on a treaty with the son, while an infant, for his becoming a partner when of age, the Plaintiff had, in the confidence of a trust reposed in him, communicated to him this secret, and at the same time given him the possession of the articles mentioned in the Bill; and, instead of acting according to his trust, the son had taken to himself the exclusive dominion over these articles, and

> begun to vend them without permission, it must be said that he had no right in any case so to act--and that he was bound, either to abide by, or to waive, the agreement.

The Vice-Chancellor in *Morison* v. *Moat*, *supra*, at p. 499, concluded that this statement lays down the doctrine

> . . . that articles delivered over upon the faith and in the confidence of a future arrangement cannot be used for a purpose different from that for which they were delivered over.

It is of relevance to note that these observations, however, relate solely to the misuse of confidential information rather than to its wrongful publication or divulgence, and it is pertinent to note what Lord Eldon said in *Williams* v. *Williams*, *supra*, at p. 62, about the latter situation.

> But so far as the injunction goes to restrain the Defendant from communicating the secret, upon general principles, I do not think that the Court ought to struggle to protect this sort of secrets in medicine.

A few lines later he questioned whether protection ought to be given 'by restraining a party to the contract from divulging the secret he has promised to keep' and continued that 'that is a question which would require very great consideration' for which the case at hand did not call.

In *Morison* v. *Moat* the Vice-Chancellor referred also to *Yovatt* v. *Winyard* 37 E.R. 425 (Ch.D.), a case involving a defendant who had surreptitiously made copies 'recipes for medicines' whilst in the plaintiff's employment. This case was referred to as one in which Lord Eldon granted an injunction upon the express ground of breach of trust and confidence, which indeed is correct, yet it is important to note that the plaintiff's counsel, Mr. Wetherell at p. 426, thought it necessary to distinguish *Williams* v. *Williams*, *supra*, in the following way

> . . . contending that though the Court *might not protect a secret from disclosure by one to whom the proprietor had himself communicated it*, yet it would, when the person sought to be restrained had clandestinely possessed himself of it. In those cases the knowledge was communicated for a particular purpose, and it was attempted to prevent the party from using it for any other; but here the first discovery was obtained by a breach of duty, and in violation of a positive agreement.
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> (Emphasis added.)

It is contended that, at most, these two cases show that it was uncertain when protection would be given from a breach of confidence, and such protection, if given, would seem to be limited to the misuse of confidential information in ways other than disclosure of it, despite Lord Eldon's judgment in the latter case.

Morison v. *Moat*, *supra*, however, has been followed in recent cases, as being the important decision granting a remedy for breach of a confidence. The conclusions reached in it, and from it, moreover, seem to be logically

correct. If a remedy is to be granted for the misuse of confidential information, through the employing of it for ends not authorized by the person who divulged it, there is no reason why one should not be given for misuse of information, through the wrongful disclosure of it. In both cases the confidence imposed in the receiver of the information by its donor, has been abused, and a remedy based on the wider concept of good faith is warranted.

2.9.3 A new approach towards confidential information

A. Basis and reasons for protecting confidential information today

The leading case concerning confidential information is *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.*[6] The facts are as follows:

(a) S owned the copyright for drawings for leather-punching tools.

(b) The defendants, C, were instructed to manufacture these tools as agents or subcontractors for S.

(c) It was an implied condition of delivery of the drawings to C that they treat the drawings as confidential, and that they use them only to construct tools for S.

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[6](1948) (C.A.), noted at [1963] 3 All E.R. 413.

(d) C had kept the drawings, converted them to their own use, constructed tools, and had sold them on their own account, in infringement of copyright.

When the case reached the Court of Appeal, the only substantial, relevant cause of action was for breach of confidence. Lord Green, M.R., at p. 414, stated that breach of confidence may arise as an action without the necessity of a contractual relationship existing. If two people were to make a contract, under which one of them obtained, for the purpose of it, or in connection with it, some confidential matter, then, even though the contract were silent on the matter of confidentiality, the law would imply an obligation to treat the confidential matter in a confidential way, as one of the implied terms of the contract. He remarked that the judge below had failed to find a contract so he had found no breach of confidence. He had not dealt, however, with the substantial point in the case: whether the defendants had committed a breach of confidence, infringing S's rights.

This view was expanded upon by Lord Salmond in *Initial Services Ltd.* v. *Putterill* [1967] 3 All E.R. 145, at p. 150, (C.A.), where he said,

> As I understand it, this duty of confidence is put in two ways. First of all, it is said that there is an implied term of the contract of employment that the servant will observe this confidence; alternatively, it is said that this is a duty which is imposed by the law because, manifestly in the public interest, servants should not disclose to the world what they are confidentially told about their master's business. . . .

A recent decision in Ontario[7] illustrated that an employee owes a certain duty of confidence to his employer, should he come to know customers or clients of the latter in the course of his job. He will not be allowed to use such knowledge, on leaving his employer, for his own or another's interests. This case is interesting, since a covenant in the contract of employment preventing the employee competing with his former master was declared unenforcable on the grounds of public policy; yet it was felt necessary to restrain the servant's breach of confidence by granting the master an injunction regarding 32 job orders and 148 prospect files which the servant had gained knowledge of whilst in his employ. In this case the court was forced to uphold the duty of confidence in its own right.

B. Misuse of confidential information in ways other than by disclosure

Disclosure of secret or confidential information is not the only way that the confidence of its 'owner' is abused. The foundation for an act for breach of confidence *per se* lies in cases that deal not with the revelation of secret matters but with situations in which confidential information had been used in ways other than those intended for it by the person who divulged it. In a government context, this becomes particularly relevant if it is true that information collected by one department or agency for a specific reason and probably by authority of the Legislature can be accessed by other departments or agencies

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[7] *Management Recruiters of Toronto* v. *Bagg* (1970) 15 D.L.R. (3d) 684 (Ont. H.C.).

for their own particular purposes which are not purposes the individual knew of when he let such information out. It may be relevant, therefore, to discuss developments relative to this aspect of confidentiality.

The principles behind the law in this area seem to be those of good faith.[8] This was illustrated by an Ontario case, *Lindsey* v. *LeSueur* (1913) 27 O.L.R. 588 (Ont. H.C.). The defendant had been allowed access to a private collection of manuscripts, to help him in writing a biography about an early Canadian pioneer. He represented to the owner of the manuscripts that his book would present a favourable impression of its subject, but, in fact, it turned out to be unfavourable. Britton, J. stated that no question of copyright was involved, but that it was a question of someone getting access to the house of another, and using property in it, for purposes different to those consented to by the owner. He stated at p. 591,

> I deal with this matter simply as a matter of contract and good faith. . .
>
> He stated the basic facts of the case in no uncertain terms. But this is a question of how the defendant came to get possession of what is now the plaintiff's property, and of the use he made of it, as distinguished from the use the plaintiff supposed the defendant would make of it, and as distinguished from the use the defendant led the plaintiff to think would be made of it, and as to the use the defendant now proposes to make of it.

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[8] It is submitted that the government officials who collect and control information should be no less responsible for good faith than anyone in a similar position in the private sector.

This principle has been employed in later cases. These have often involved the wrongful use of plans or designs which had been communicated to the defendant for a special purpose only.[9]

It is apparent that the misuse need not be intentional. This is shown by the case of *Seager* v. *Copydex* [1967] 2 All E.R. 415 (C.A.), where the plaintiff had disclosed his ideas for a new type of carpet grip when trying to sell to the defendant company another sort of grip. The latter, some time later, made a similar type of grip to that disclosed to them by the plaintiff, fully believing it to be their own idea. Lord Denning held that on broad principles of equity the plaintiff was entitled to a remedy. The plaintiff's information had at least provided them with a 'springboard'.[10]

The above cases seem to show that misuse of information occurs most frequently in the field of industry. Actions are brought in this area because of the financial losses that a company can suffer when its confidential information is wrongly used. However, it is clear that misuse could very well, and undoubtedly does, occur elsewhere and the area of government (both as regards employees of government and members of Legislatures

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[9] *See, also, Ackroyds Ltd.* v. *Islington Plastics Ltd.* [1962] R.P.C. 97 (Q.B.D.) and *Breeze corps.* v. *Hamilton Clamp and Stampings* (1961) 30 D.L.R. (2d) 685 (Ont. H.C.).

[10] *See, also, Accord, Terrapin Ltd.* v. *Buildings Supply Co. Ltd.* [1967] R.P.C. 375; *Peter Pan Mfg. Corp.* v. *Corsets Silhouette Ltd.* [1963] 3 All E.R. 402 (Ch.D.).

or of Parliament) can be no exception. Two factors might, however, prevent actions arising: that of ignorance of the misuse; and the difficulty of showing any harm occasioned, especially in financial terms, to make the bringing of an action worthwhile. The important fact, however, is that a potential remedy must exist for anyone injured in this way.

C. When is information confidential?

Again, the cases here are confined to the field of industry, however, there seems to be no apparent reason why the principles which have emerged could not be equally applicable in the government sphere either in respect of "private information" originating from the citizenry and passed along to public servants or, and probably more in keeping with the general type of case that has come before the courts, in respect of information originating with the government which the public servant, as an employee, has access to. Of course, it should be kept in mind that many statutes already class as confidential *all* information that comes to a public servant in the course of his employment.

Lord Green, M.R., gave the most obvious case law definition of confidential information in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.*, *supra*, at p. 416, when he stated that ". . . it must not be something which is public property and public knowledge." Yet, he continued, stating that it would be possible to have a confidential

document which is the result of work done by the maker on materials, and which may be available for the use of anybody.

> . . . what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

It seems that in using the terminology "maker of the document" the Master of the Rolls means the inventor or producer of some article. Could not, however, this reference to the "maker of the document" be extended to include, for example, a private individual with whom "private information"[11] originated; or, even to the government itself where information (plans, formulae, new developments, etc.) has originated with it.

The meaning of Lord Green's overall statement was brought to light in three cases. The first is *Mustad* v. *Dosen* (1928), [1963] R.P.C. 41 (H.L.). It concerns the employee of a Norwegian firm who signed an express contract with his firm requiring secrecy regarding information learnt through his employment. This is analogous to the oath required by the Public Service Act, *supra*. When the firm went into liquidation, believing himself to be no longer bound by this contract, he disclosed particulars about an engine to his employees. M had bought the liquidated firm and applied for an injunction against the defendant. It was held, however, that because essential

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[11]Again "private information" is used here as meaning what the provisions in Appendix A have defined it to mean.

parts of the engine were revealed in its patent specification, the information could be considered no longer secret, and since no ancillary secrets had been revealed, the injunction was set aside.

In the second case, *Terrapin Ltd.* v. *Builders Supply Co. Ltd.*[12] Roxburgh, J. sought to explain the *Saltman* case, at p. 391,

> As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and spring-board it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.

The defendants had manufactured prefabricated buildings, to the plaintiff's design, and, after termination of the contract, had continued to build similar buildings for their own profit, making use of confidential information, given to them by the plaintiffs, for the purposes of the earlier contract. It had been argued in the defense that the selling of the buildings and the publication of a brochure, disclosing all features of it, by the plaintiff, had destroyed the confidential element.

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[12](1959), [1967] R.P.C. 375 (Ch.D.), aff'd [1960] R.P.C. 128 (C.A.).

Roxburgh, J., continued,

> The brochures are certainly not equivalent to the publication of the plans, specifications, other technical information and know-how. . . . It is, in my view, inherent in the principle upon which the *Saltman* case rests that the possessor of such information must be placed under a special disability in competition to prevent an unfair start.

It would appear that these two cases conflict to some extent and this was the basis of the defense counsel's argument in the third case, *Cranleigh Precision Engineering Co. Ltd.* v. *Bryant* [1966] R.P.C. 81 (Q.B.D.), where it was claimed that the *Terrapin Case* was wrong, in so far as it conflicted with *Mustad* v. *Dosen*. B, the managing director of the plaintiff company, had invented an above ground swimming pool with two unique features: a plastic clamping strip which held the outside walls to their inside lining, and the constitution of the frame of the pool. B left the plaintiffs and formed his own company, producing a swimming pool with these features, using a foreign model of pool as his basic model and adding the special features.

In considering the decision in *Mustad* v. *Dosen*, it was said that the effect of that decision was that if a master published his secret to the world, his servant could not be bound to secrecy concerning that matter. In the present case, the master of B had never published anything; it was the foreign firm who had patented their product. It was further held that the *Terrapin* decision was consistent with that in the *Saltman* case. In other words, knowledge that a certain clamping strip was the

correct one to use, and the ability to define it to a plastics manufacturer, as well as knowing which one to approach, gave the other company a 'springboard' which the issue of a leaflet and the marketing of the pool by the plaintiffs did not supply. The other company thus avoided having to use their brain and go through the same process as the plaintiff company through B, their servant, had been forced to go through. Therefore, B had committed a breach of confidence, in giving this advantage to the other company.

Thus the law which *Mustad* v. *Dosen* seemed to lay down, that publication to the world (through the taking out of the patent) meant the information was no longer confidential, has been severely restricted by the other two cases, which followed the principles set out in the *Saltman* case. One must consider its effect today. Because *Cranleigh* distinguished *Mustad* as a case where the employer patented his design, it has been suggested that *Mustad* is confined to cases involving a breach of confidence between employer and employee,[13] though why the law should see adequate disclosure in these cases and not in others is difficult to imagine. Another suggestion is that *Mustad* be confined to cases involving publication through a patent specification,[14] even though *Cranleigh* involved such a matter and disclosure was not seen. The issue really seems to revolve around how much is disclosed, either by the patent specification or by whatever other means may be used. If there is any chance

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[13] J. Jacob and R. Jacob, "Confidential Communications" (1969), 119 New L.J. 133, p. 134.

[14] *Ibid.*

of the receiver of the information gaining any sort of advantage, in any way (e.g., money, time, or effort), then the information must still be regarded as confidential between the parties handing over and receiving it.

This is emphasized in the case of *Seager* v. *Copydex* [1967] 2 All E.R. 415 (C.A.) where, at p. 417, Lord Denning stated,

> The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it.

He continued by saying that information divulged can be both public and private in nature and concludes at p. 418 with the following,

> They thought that, as long as they did not infringe his patent, they were exempt. In this they were in error. They were not aware of the law as to confidential information.

The *Cranleigh* case brings out another point also: the simplicity of secret information does not mean that it can not be confidential. It was claimed that anybody could buy the plastic strip and use it for clamping the lining of the pool to its walls. Similarly it was said that any competent engineer or sheet metal worker could have constructed the interfitting outer wall on viewing a model or a leaflet. However, at p. 90, Roskill J. held that these elements were nonetheless confidential. The

knowledge that this particular clamp was the right one to use, the ability to define to a plastics manufacturer what was required, and the knowledge of which one to approach were trade secrets. Following *Terrapin, supra,* the leaflet and marketing of the pool did not sufficiently disclose the features of the interfitting frame to mean that these were not confidential. Time and effort would have been needed to work them out.

Thus, it has been shown when, and for how long, information can be classed as confidential in order that an action may arise for breach of confidence. However, the plaintiff must have also been owed a duty by the defendant.

D. A duty must be owed

The fact that the plaintiff must be owned a duty by the defendant was stated by Somervell, L.J., in the *Saltman* case, *supra,* as being the first matter to be considered in any action of breach of confidence. *Fraser* v. *Evans* [1969] 1 All E.R. 8, a case involving information passed between an individual and a government, shows how this applies in practice.

The plaintiff's firm was employed by the Greek government as a public relations consultant. There were express conditions in the contract between the two parties to the effect that the plaintiff owned the Green government a duty of confidence, but nothing was mentioned about the latter owing the plaintiff any such duty. A document prepared by the plaintiff's company for the Greeks, fell into the hands of a journalist, and, because of its content,

the plaintiff sought to prevent publication. It was held that the person complaining about breach of confidence must be owed a duty, and that although it was evident that the plaintiff owed such an obligation to the Greek government, no similar duty was expressed, or could be implied, in their contract with the plaintiff. The only evidence in the latter's favour was an affidavit stating that, as a matter of practice, the Greeks kept these reports confidential. This policy, however, left them free in law to circulate the documents to whom they wished. They had paid for the information and as the owners of it, they were entitled to use it as they wished. They had, therefore, committed no breach of confidence.

It appears that the important point here is that the plaintiff had relinquished all rights he might have had to the information when he sold it to the Greek government. The element of property in the confidential information is evident in this case, but property is not the foundation for the decision. The very nature of confidentiality demands that two parties have interests in the information or idea, which is the subject of the confidence. One might have possession or use of it, yet the other still retains 'ownership' of it. Once the 'ownership' of the secret passes to the other person, it is he to whom the duty of confidence is owed. In other words the right to have the confidence respected follows the 'ownership' of the secret, whether this is capable of being called property or not.

E. When is disclosure justified?

The duty of confidence cannot be an absolute one, unless, of course, an absolute duty is legislated. Apart

from such a legislated duty, however, legally as well as morally, disclosure will , in certain circumstances be justified. The leading case is *Tournier* v. *National Provincial and Union Bank of England* [1924] 1 K.B. 461 (C.A.). It was laid down in this case, that the duty of confidence could be breached in the following circumstances.

(a) Where disclosure was compelled by law, as where a statute compelled it.

(b) Where there was a duty to the public to disclose for example, where crimes were about to be committed. A review of three[15] cases which fall under this heading lead one to the conclusion that:

(i) disclosure of most wrongful acts will be allowed, but only to the right persons;

(ii) wrongful acts of the donor of the secret which are independent of the information contained in the confidence will not permit disclosure *unless* they have resulted in the lack of a confidential element in the first place;

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[15] *See*, *Weld Blundell* v. *Stevens* [1919] 1 K.B. 520, at p. 527, per Bankes L.J.; *Initial Services Ltd.* v. *Putterill* [1967] 3 All E.R. 145, at p. 148, per Lord Denning and *Argyll* v. *Argyll* [1965] 1 All E.R. 611 (Ch.D.).

the confidential element will only be destroyed in 'confidences' imparted after the wrongful act;

(iii) disclosure of confidences in the past by the donor, will only allow the receiver to disclose confidences of the same order.

(c) The duty can be breached also if the interests of a bank (holder of the duty of confidence) required disclosure, for example, where it was being sued by the customer to whom it owed the duty.

(d) And disclosure can be made if there was implied or express consent to it.

F. Some conclusions

Historically, rights under the law relating to confidentiality were generally found in property law or through contract, though in some cases like *Abernethy* v. *Hutchinson, supra,* in order to administer justice the court was reluctantly forced to go outside these areas.

Recent cases, however, as has been seen above, give remedies expressly for breach of confidence. What is perhaps most encouraging, though, is the fact that they expressly decline to base their decisions on property

or contract.[16] It seems, therefore, that the protection granted from breach of confidence can only increase as further examples of it come to light. At present the cases seem confined mainly to fields of industry but there is every reason why the principles expounded so far should be extended to further horizons thus allowing for civil actions for breach of confidence to be taken against public servants and members of the Legislative Assemblies.* It may be a long while, however, before enough cases from which to derive any firm guidelines on government held information and the action of breach of confidence come before the courts. In the meantime, it is submitted that any step towards the preservation of one's right to have certain information kept confidential would be welcome progress. Such a step might be taken in the form of legislation which forbids disclosure of "private information" by members of the Legislature and members of the Executive Council unless the requirements of certain exceptions are met. The

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[16] In *Saltman*, for example, the drawings of the tools were the property of the plaintiff and remained so throughout the transaction or agreement with the defendant. Lord Greene, M.R., pointed this out, and also the fact that the defendant knew this to be so. However, the case is dealt with solely on the grounds of breach of confidence. In *Triplex Safety Glass* v. *Scorah* (1938) 55 R.P.C. 21 (Ch.D.), the plaintiff's claim on an express contract of service was dismissed because the contract was too wide and in restraint of trade. Yet a remedy was given on the grounds of breach of confidence. The employee was seen as a trustee of his employer's trade secret and bound to respect it since the employer, as beneficiary, had to expressly or impliedly release him from the obligation before he was free of it. This seems to show that contract is not the basis of the action for breach of confidence--and in no uncertain way.

*S. 40 of the Legislative Assembly Act, R.S.A. 1970, would, of course, need to be amended if such a result were to be realized as far as M.L.A.s are concerned.

proposed legislation makes it an offence to disclose and creates a cause of action against the Crown for any damages or loss occasioned as a result of the disclosure (*See* Appendix A, ss. 6 and 7). It is to this proposed legislation that full attention is now turned.[17]

III. SCOPE OF THE PROPOSED PROVISIONS

3.1 An Outline of the Provisions

A. Simply stated the proposed Act (Appendix A, *infra*, p makes it an offence for any "public representative" to disclose any private information that

> (a) is contained in a public document, and
> (b) is prejudicial, embarrassing or detrimental to the person to whom the private information relates (s. 4).

B. A "public representative" is defined as,

> (a) a member of the Legislative Assembly, or
> (b) a member of the Executive Council who is not a member of the Legislative Assembly (s. 19).

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[17]For convenience, it is noted here, that a very brief statement of the law on confidentiality in the United States is found in Appendix C.

C. Section 4(2) expands the prohibition against disclosure to include "former" public representatives if they come to the knowledge of the information while they were holding office as a "public representative".

D. "Private information", as indicated above,[18] means information relating, in general, to

(a) an individual's health including any diagnosis or treatment;
(b) any social services provided to the individual;
(c) the individual's educational record including examination results, reports, abilities, aptitudes, or reports regarding any disciplinary action taken against him;
(d) the employment record of the individual including any earnings, abilities and aptitudes or any disciplinary action taken against him as an employee, trade union member, or as a member of any employee's organization (s. 1(e)).

E. Finally, a "public document" is defined as being the whole or any part of any document, recording, tape, film, or thing that contains or can, by means of any device or process, be made to show or communicate any information and which is owned by the government or government agency or constitutes part of the records of a department or government agency (s. 1(b) & (f)).

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[18] *See*, fn. 1.

3.2 Application of the Proposed Legislation to M.L.A.s and Members of the Executive Council Only.

It becomes immediately apparent that the scope of the provisions being considered is not very wide. The prohibition against disclosure is limited solely to members of the Legislature and Executive Council who have received "personal information" about an individual during the term of their office. A reason has been suggested in paragraph 2.2, *supra*, for confining the prohibition to such narrow grounds, but, as was implied above, in light of the fact that many other statutes contain secrecy provisions in spite of the oath required by the Public Service Act, *supra*, it seems that the Public Service Act provisions for secrecy are not regarded as adequate. If the Public Service oath of secrecy is, indeed, inadequate to meet the needs of government it may be that the proposed legislation should be expanded to include a much broader group of government people. In this broadened class might be any official in any department or agency which collects or uses "personal information". It is entirely possible that a file clerk who possessed the right information about an individual could do as much damage through disclosure as could a member of the Legislature who was possessed of the same information.

3.3 Private Information and its Control

Subject to what is mentioned in footnote 1 about the types of information not being exhaustive, by including under the heading "personal information" information relating to physical or mental health, social services, educational records, employment records, and ". . . any other information designed by the regulations as private information for the purposes of this Act" (s. 1(e)) the drafters have covered

the areas which have been of primary concern in many of the studies done on privacy in recent years. The *Younger Report*,[19] to mention one, although peripheral in that it does not deal specifically with government held information, includes, as information that should be strictly regarded as confidential and tightly controlled, that pertaining to an individual's educational record;[20] his medical history[21] and his employment record.[22] In general, studies[23] which have dealt with invasion of individual privacy in these spheres do outline present practice regarding the use of such information and conclude that disclosure without consent should be conscientiously avoided. Strict control[24] minimizes the effect of prejudicial informants; it allows persons who would otherwise be manacled by their past mistakes to gain a new start in life and it, in general, minimizes the overall harm that can be done by false information. The studies are replete with examples which illustrate damage being done to individuals as a result of circulation of false information that has been passed on as fact.

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[19]Younger, *Report of the Committee on Privacy*, Cmnd. 5013, July 1972.

[20]*Ibid*, chapter 12, at pp. 99-107.

[21]*Ibid*, chapter 13, at pp. 108-115.

[22]*Ibid*, chapter 11, at pp. 93-98.

[23]*See* the bibliography.

[24]The term "strict control" is meant to mean not only control as between the government department or agency which has the information and the member of the public who wants access to it but it also means inter and intra governmental control.

3.4 Collection of Information; What is done after Collection

The major studies--prime examples are *The Younger Report, The Ontario Law Commission Report on Privacy, Privacy and Freedom* by Alan Westin, *The Death of Privacy* by Jerry Rosenberg and *The Assault on Privacy* by Arthur Miller--in assessing present practices and in offering solutions, do not deal solely with the use made of confidential information once it has been gathered. These studies treat as equal, if not more important, the careful examination of the information collector's powers of inquiry and the methods by which information is collected. The provisions under consideration do not mention collection.

A. In outlining the tremendous governmental powers of collection, *The Report of the Ontario Law Commission on Protection of Privacy*, 1968, lists the following as intrusions into individual privacy.

> Government Intrusions into Privacy" Firearms registration, automobile registration, liquor licences, taxi licences, fingerprints, mental hospital records, court records, vital statistics, the census, armed forces records, education records, property records, tax records, welfare records, old age assistance record, security clearances, government employment records, police intelligence files, required disclosures for corporations, promoters, and securities vendors, fire department records, driving records, passport records, venereal disease records, voters lists, police wiretaps and electronic surveillance.[25]

The Report goes on to state, in commenting on the dangers associated with this wide power of collection, that

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[25] *The Report of the Ontario Law Commission on Protection of Privacy*, by Edward F. Ryan, p. 11.

> As an initial measure, the inquiry powers of the government should be carefully re-defined. . . . It is widely accepted that wherever the government licenses controls or otherwise regulates economic and social activities for the common good in pursuit of deliberate public policies, then it has the right and need to gather enough relevant data to do this efficiently. Yet the fact that a large mass of personal data about the people and businesses in the province exists in government files does not justify either the collection of more then is necessary to implement these policies, or any disclosure outside of either the government department or ministry or the government as a whole to persons who have some interest in the same data for different reasons. The government should not become a vehicle for distribution of personal information that it happens to possess simply because it has a right and need to collect it in the first place.[26]

Through the eyes of Westin, Miller and Rosenberg is gained a glimpse of what very well might occur in this province if preventative steps are not taken. These authors paint a frightening picture in describing Orewellian-tainted practices which are presently carried on in the United States within and on the outside of government. The new technology has given the information gatherers fantastic capabilities for collection as well as storing and using personal information.[27]

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[26] *Ibid*, at pp. 77-79.

[27] Of particular noteworthiness is the discussion found in Westin, *Privacy and Freedom*, Part 2, p. 65, on the use of the polygrah, various forms of psychological testing and methods of eavesdropping.

Rosenberg observes the following,

> . . . with present technical capability, it is possible to develop a composite picture of an individual that can be stored in a single information warehouse. Each year we offer information about oursevles that becomes part of that record. . . . It begins with our birth certificate and is followed by a series of medical notations. Early in life we are documented as an added income tax deduction by our parents. Then there is information on what schools and colleges, public or private, were attended. At school, records are made of our abilities, grades, intelligence and attendance. For some there will be car registration and drivers license, or military service. Then job history is recorded: working papers, social security number, a first job, our performance with each employer, recommendations, references. This makes an interesting dossier. Then, perhaps, a marriage license, a home mortgage, and when children come the cycle begins anew. Should we divorce the court records will be added. These records would increase should we be arrested, convicted or serve time in prison. And, of course, when we die a last footnote is made.[28]

Rosenberg goes on to state that any official who could draw from such a central information warehouse[29] a file containing

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[28]Rosenberg, *The Death of Privacy*, p. 7.

[29]Much of the criticisms of present governmental methods of collecting and of dealing with information in the United States, in recent years, was motivated by that government's proposal to create a central data bank into which would be channelled all the information that was collected, in various ways, throughout the country.

all the data which had ever been collected on any particular person would possess great manipulative power indeed.

It is possible, too, that some of the critics of the information collecting methods, both Canadian and American, are unduly alarmed and are presenting a viewpoint that is one-sided. It has been observed that Bacon's statement to the effect that information is power is not one hundred per cent correct. The amount of power that information carries varies with the type of information. Sometimes information that is helpful has power, sometimes it has not. Sometimes information with a potential for harming people has power, sometimes it has not. Sometimes, information has power regardless of whether or not it will hurt people. Merely because information is collected, stored and used does not, then, necessarily mean that the power to harm, through disclosure of that information, automatically exists.

At the Conference on Computers and Privacy held at Queen's University it was acknowledged, in regard to the information part of the huge overall subject of confidentiality, that the study of the types of information collected, of the uses it was put to and of the effects of such usage was cloaked in ambiguity. However, one certain conclusion in regards to the potential of information was reached and that was that there is ". . . a tendency for information that has already some power to become more powerful as man's ability to store and manipulate it improves"[30] and this "somewhat powerful"

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[30] *Conference Report--Computers: Privacy and Freedom of Information*, Department of Communications, p. 34. ("In other words, with each invention--hieroglyphics, the alphabet, paper, the printing press and so on--that has [Continued on next page.]

information seems to be, in the main, what the critics of present government methods are concerning themselves with[31] despite the occasional alarmist approach. These critics, quite realistically, recognize that as improvements are made by government and private gatherers as well, in the collection and storage capabilities of such information, our system becomes more manipulative and unforgiving. This frightening consequence is magnified when one further considers that the information which is being used by public officials to make important, far reaching decisions *may be incorrect.*

B. It is recognized that the political values of the last century which were centered around the concept of minimum government interference and the sanctity of the individual at all costs are rapidly being diluted and that such remaining vestiges of this philosophy as individual privacy must be modified as the government expands more and more into such traditionally private spheres as education, medical care and welfare; as it continues to employ such a vast number of the citizenry and continues to assume, to such a great extent, the role of protector and director of our economy. It is recognized, as Professor Ryan states, that,

> These activities require enormous amounts of information. . . . No one can quarrel with the proposition that if the state is

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[Continued from page 60.]

increased man's ability to store information, so the potential for an individual to accumulate information that can be used to advantage has grown. And more recently, with the development of mechanical, electro-mechanical and finally electronic devices for manipulating and analyzing information, this potention power has flowered even more rapidly. . . ."

[31] *See, supra,* fn. 25 and fn. 28.

> going to play an expanded role, supported by public funds, then it should have all the means and relevant data at its disposal in order to do this as effectively as possible, with a minimum government wastage of tax monies.[32]

However, with this entrance of government into the private sector, surely the officials collecting the type of "private information" described in Appendix A should still be governed by "private sector" ethics when approaching their duties within these relatively new areas of government concern. Such ethics still demand, it is submitted, controlled collection as well as usage.

It is suggested, therefore, that rather than confine all efforts to controlling the vast quantity of information once it is collected some attention should be directed towards the controlling of the methods of collection and the kinds and amounts of information collected.[33]

3.5 Documents--Computer

Section 1(b) in Appendix A, *infra*, p. 74, in describing what is included within the meaning of "document" is commendably complete. It obviously covers computer stored information. The storing of information in computers is a relatively new concept with widespread ramifications which will

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[32] *Supra*, fn. 25, at pp. 5, 6.

[33] This would be a logical place to make practical recommendations as to what measures of control should be taken. Without background on present governmental practices this, of course, is impossible. It is, therefore, left to another report.

A general survey would confirm, it is hoped, that the private sector ethic is one of controlled collection and usage.

necessitate adjustments in the law. Indeed, as has been noted above, the possibilities and subsequent dangers of the computer age are, to a large extent, responsible for the concern which is shown by many of the authors who have written on privacy and certainly by those participating in the Conference on Privacy and the Computer held at Queen's University in May of 1970.

The computer, although a new concept, does not create a new problem. It seems to merely emphasize a pre-existing one--how far should the law extend to control the information market? Miller gives an idea of the dimension of the extension which may be necessary in order for the law to come to grips with this rapidly growing problem.

> . . . we are dealing with an entirely new medium of communications that is having a profound impact on our society. The adjustment process is bound to be difficult, especially for the legal system, which historically has been slow in accommodating its doctrines to new technologies, let alone in generating new jurisprudential principles. The length of time it took the rules of law relating to warrantly and negligence to take account of the automobile and our mass-production economy testifies to the system's somewhat ponderous reaction to novel problems created by scientific advance.[34]

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[34]Canada has not yet progressed even as far as the United States in adjusting to these modern problems.

> It would not be completely surprising if the existing patchwork of legal principles governing personal privacy, information collection and dissemination, and confidentiality--whether they happen to be the product of legislative or administrative regulation or are grounded in the common law--proves to be unequal to the challenge posed by the computer revolution.
>
> The law currently deals with information in terms of two old and well understood friends--the printed page and the file cabinet. With few exceptions it has not even begun to come to grips with machine-readable formats, electronic storage, and high-speed information transfer techniques. But the current doctrines cannot be dismissed as irrelevant. We have barely begun to identify the types of difficulties that legislatures and courts are likely to encounter in attempting to preserve individual privacy, let alone really started to undertake the process of formulating meaningful legal restraints on the information flow of the future.[35]

Questions which will require answers in the not too distant future are: should all data banks be licensed, and, if so, who is to register and license them and what rights of inspection, access and corrections should be available to an individual who feels that his computerized file is doing him less than justice? The Appendix A, p. 74, provisions make no mention of whether or not a person could inspect files containing information about him, indeed they would seem to imply that he cannot. It may be desired to direct more serious attention to this aspect of the confidentiality question.

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[35]Miller, *The Assault on Privacy*, pp. 125-126.

One suggestion was made by Parkhill at the Conference on Privacy and the Computer to the effect that every person ". . . named in a file is the ultimate owner* of that file and, consequently has the sole right to determine the person to whom access is to be granted."[36] This suggestion also included a proposal that ". . . improperly authorized access to an individual's file should be a serious crime punishable under the Criminal Code by severe penalties."[37] Proposals were also made to forbid storage of unverified information obtained by interviewing neighbours and for establishing cut-off dates in advance for certain types of information. Parkhill suggested that it should be

> . . . the responsibility of the data bank or organization [this could apply to any organization which stored information] to provide each individual named in that bank with a monthly statement of the contents of his file and the names of those people and organizations who have been granted access.

He also suggested that

> . . . every person have the right to inspect his file at any time, to question its contents and, where disputes arise, to order the offending entries deleted until such time as the data bank operator (again, or any other kind of information holder) demonstrates their accuracy before an independent tribunal.[38]

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[36] *See supra*, fn. 30, at p. 82.

[37] *Ibid*, at p. 82.

[38] *Ibid.*

*The common law at present recognizes the proprietary interests of the collector of the information in the file but not of the subject of the file. The subject may bring an actio for defamation in certain special circumstances, however. The rules is that the action can be brought if he finds out the the existence of erroneous information and the information is actually untrue and prejudices him. *See*, *Macintosh* v. *Dun* [190 A.C. 390.

A modification to this proposal was made by Professor Sharpe who suggested that "The process could be expensive; in this case, charge the individual a realistic fee. This would avoid undue expense to the (agency) involved and also deter frivilous and spurious requests."[39]

3.6 More Proposals

Several more recommendations and proposals on the regulating of government held information as between government agencies and departments themselves and as between the government and the public were made in the Task Force Report on Privacy[40] and, again, at the Queen Conference. It may be useful to review them.

(a) An independent regulatory board should be set up which reports directly to the [Legislature].

(b) Or, a regulatory board that reported to a Minister and hence was part of the executive structure should be established.

(c) Or, some form of ombudsman, perhaps patterned on the Data Commissioner of the West German State of Hessen, or possibly attached to a Human Rights Commission could be created.

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[39] *Ibid.*

[40] *Task Force Report on Privacy and Computers*, Departments of Communication and Justice 1972, p. 181.

(d) Or, a central department with authority particularly over expenditures, throughout the Public Service, could enforce administrative rules.

(e) Particular attention might also be given to proposals that seek to combine the advantages of visibility (an ombudsman) with those day to day effectiveness (administrative rules enforced by a central agency).

3.7 Exceptions

Sections 3 and 5 outline exceptions to the prohibition against disclosure which the proposed legislation in Appendix A, p. 74, sets up. Even a superficial examination of these sections reveals that the intent of the government is to confine their prohibition within very narrow limits. That is, the exemption provisions are so wide that they come close to turning the ban against disclosure inside out and making disclosure the law rather than the exception. The only situation that seems to be covered by the prohibition is where a private individual seeks, for his own purposes, information from a M.L.A. or a member of the Executive Council about another private individual and is given that information. Surely an individual could be harmed, prejudiced or embarrassed by other types of disclosure than this, e.g., where private information is simply volunteered by the M.L.A. or the member of the Executive Council.

A. One of the specific exceptions mentioned in Appendix A receives criticism from Miller. The essense of his criticism is that intergovernmental transfers of information pose a threat to individual privacy. The exception section reads:

> 5. (2) Section 4 does not apply where the disclosure is made . . .
>
> (c) to the Government of Canada, the government of a province or territory of Canada, any government outside Canada, any agency of those governments, any municipal corporation in Alberta, or any police force inside or outside Alberta,
>
> (d) to an employee of a department, or member or employee of a government agency, if the disclosure is made in the ordinary course of administration of the department or government agency, or . . .

Miller states the following

> All things considered, the threat to individual privacy from the sharing of information among different levels of government (especially if transfers are extended to the private sector) may well be greater than the threat from the transmission of data within the federal government. The latter is a relatively closed system with comparatively few people having access to significant portions of the data store. On the other hand, local information handlers are more numerous and may be more likely to be inefficient, insensitive, or animated by malice or idle curiosity about the content of the data than are their federal

> counterparts. For example, [province] and city officials usually are geographically closer to individual data subjects and therefore are in a better position to cause injury than relatively remote federal officials. Moreover, the difficulties--and therefore the dangers--of interpreting and drawing conclusions from noncomparable bodies of information are likely to arise in more extreme form when individual data centers that have been designed to meet the particular needs of a single agency at one level of government later are patched together to permit data transfers on an intergovernmental basis. Finally, in the case of interagency information exchanges at the national level, both sides of the transaction are under the aegis of the federal government, which can supervise the use being made of the data. This type of control is much more difficult to exercise in the intergovernmental transfer situation. True, federal statutes can make misuse of federal information by a state or local official a crime, as is done in the tax field, but the likelihood of being able to identify someone using the data improperly is minimal when the federal agency is not in a position to keep tabs on what is happening to the borrowed data.[41]

B. The consent exceptions (s. 5(1)) to the rule of confidentiality seem adequately wide to cover any situation where consent would be given. There is, however, a problem in employing the mere word "consent". Does this mean express consent only or does it mean express and implied consent? If the intention is that the meaning is only express consent it is suggested that any Bill that is drawn up should so state. If this is not done, even though the legislative intention may have been express

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[41] *See, supra,* fn. 35, at p. 151

consent it seems foreseeable that the court in circumstances conducive to such, would entertain arguments of whether or not implied consent had been given and was adequate. Likewise, if both implied and express consent are intended that should be made explicit.

3.8 Freedom of Information as an Alternative to Blanket Confidentiality

A major criticism of a general prohibition against disclosure of confidential information has its roots in the concern that the right of the public to know could be seriously threatened if it were not also provided for by the Legislature. A strong argument was made by Professor Crawford at the Kingston Conference that

> The common law has been reluctant to recognize a right to privacy because such a right would endanger a more fundamental right of free speech. Such restrictions as the common law has placed upon the freedom to communicate information have been narrowly construed.[42]

It has been stressed repeatedly by many people that citizens need access to government documents in order to play a meaningful role in the process of democratic government. Indeed the British tradition of administrative secrecy that the Canadian government seems to have inherited[43]

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[42] *See, supra,* fn. 30, at p. 29.

[43] Rowat, *How Much Administrative Secrecy,* (1965) Can. J. Econ. and Pol. Sc. p. 479.

seems highly unresponsive and undemocratic. It must be recognized, however, that the conflict between the general public's right to know what its government is doing and the individual's right to have some control over the dissemination of personal information held by the government is an extremely difficult one to resolve and that any legislative formula such as The American Freedom of Information Act, 5 U.S.C.A. §552 can offer no more than general guidelines for handling the factual problems that are almost certain to arise. General guidelines are, nonetheless, better than no guidelines at all. It is submitted, then, that a better approach to this confidentiality problem could be taken through legislation patterned, to some extent, after the Freedom of Information Act,[44] or certain guidelines established by the federal government.[45] This type of approach recognizes the democratic principle of free access and then goes on to outline certain exceptions which seem generally accepted as being within the confidential or private sphere.

Both the Freedom of Information Act and the Federal Guidelines regard "private information" about members of the pul as confidential. Section (b)(6) of The Freedom of Information Act states,

> (b) This section does not apply to matters that are . . .

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[44]In the short time since its enactment the American Freedom of Information Act has given rise to a great deal of discussion. Most of the criticisms of the Act are centered around the vagueness of the statutory language and the narrow interpretation being placed on it by the courts. *See*, Appendix D for a reproduction of the Act and a short bibliography of discussions of it.

[45]*See*, Appendix D, n. iii.

> (6) personnel and medical files and smilar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

The Federal Guidelines make the following exemptions from disclosure, after declaring an intention to make public as much factual information as possible,

> (5) Papers containing information the release of which could allow or result in direct personal financial gain or loss by a person or group of persons.
>
> (6) Papers reflecting on the personal competence or character of an individual.

If the provincial legislature saw fit to use this approach the problem of confidentiality would be met as it should be--confidentiality as an exception to the rule of free access rather than as a rule by itself. As has been stated,

> The right of freely examining public characters and measures, and of free communications thereon, is the only effectual guardian of every other right.[46]

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[46] Madison, *Writings of James Madison*, p. 398.

A P P E N D I X A

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

1. In this Act

(a) "department" means

(i) a department of the public service of Alberta established by an Act, or

(ii) any part of the public service of Alberta that is designated as a department by the Lieutenant Governor in Council under The Public Service Act, or

(iii) any other division or branch of the public service of Alberta that is not part of a department referred to in subclause (i) or (ii);

(b) "document" means the whole or part of any document, recording, tape, film or thing that contains or can, by means of any device or process, be made to show or communicate any information;

(c) "former public representative" means a person who was but has ceased to be a public representative;

(d) "government agency" means

(i) any corporation, or

(ii) any unincorporated board, commission, council or other body that is not part of a department, all of whose members or a majority of whose members are appointed or designated, either in their personal names or by their names of office, by an Act, an order of the Lieutenant Governor in Council or by a Minister of the Crown, or by any combination thereof;

(e) "private information", with reference to any person, means any information relating to

(i) the physical or mental health of that person, including any information pertaining to diagnoses, services or treatment made or rendered to or in respect of that person, or

(ii) any social services provided directly or indirectly to that person or any application to a department for social services, or

(iii) the educational record of that person, including results of examinations taken by him, reports or other records pertaining to his performance, ability or aptitude as a student, and records pertaining to disciplinary action taken against him as a student, or

(iv) the employment record of that person, including records of his salary, wages, or other earnings as an employee, reports or other records

pertaining to his performance, ability or aptitude as an employee, and records pertaining to any disciplinary or other punitive action taken against him as an employee, or as a member of a trade union or employee's organization, or

(v) any other class of information designated by the regulations as private information for the purposes of this Act;

(f) "public document" means a document owned by the Government or a government agency or constituting part of the records of a department or government agency;

(g) "public representative" means

(i) a member of the Legislative Assembly, or

(ii) a member of the Executive Council who is not a member of the Legislative Assembly;

(h) "social services" means

(i) the provision of money, things or other assistance under The Social Development Act or its predecessors, or

(ii) the payment of money or the provision of other social assistance under any other Act administered by the Minister of Health and Social Development, or

(iii) the payment of money or the provision of other social assistance prior to the commencement of The Department of Health and Social Development Act under any Act then administered by the Minister of Social Development or the Minister of Public Welfare.

2. This Act shall operate notwithstanding anything in section 40 of The Legislative Assembly Act.

Section 40 of The Legislative Assembly Act reads:

> 40. No member of the Legislative Assembly is liable to any civil action or prosecution, arrest, imprisonment or damages by reason of any matter or thing brought by him before the Legislative Assembly by petition, bill, resolution, motion or otherwise, or anything said by him before the Legislative Assembly.

3. Nothing in this Act shall be construed

(a) to permit the disclosure of any private information if the disclosure is prohibited by any other Act, or

(b) to prohibit the disclosure of any private information if the disclosure is expressly authorized under any other Act.

4. (1) No public representative shall disclose any private information that

(a) is contained in a public document, and

(b) is prejudicial, embarrassing or detrimental to the person to whom the private information relates.

(2) No former public representative shall disclose any private information that

(a) is contained in a public document, and

(b) is prejudicial, embarrassing or detrimental to the person to whom the private information relates,

where that private information came to the knowledge of the person making the disclosure during the period when he held office as a public representative.

5. (1) Section 4 does not apply where the disclosure of private information relating to a person is made to, or with the consent of,

(a) that person, or

(b) the executor or administrator of the estate of that person, or

(c) the committee of that person, in the case of a mentally incompetent person, or

(d) either parent of that person or the guardian of the person or estate of that person, where that person is a minor, or

(e) a solicitor acting for any of the persons referred to in clauses(a), (b), (c) and (d), or

(f) the Public Trustee, where the Public Trustee is the custodian of that person's property under The Public Trustee Act.

(2) Section 4 does not apply where the disclosure is made

(a) in compliance with a resolution of the Legislative Assembly requiring the disclosure to be made, or

(b) in the course of administration of an Act or other law in force in Alberta under which the public representative or the department or government agency having the information has powers, duties or functions to exercise or perform, or

(c) to the Government of Canada, the government of a province or territory of Canada, any government outside Canada, any agency of any of those governments, any municipal corporation in Alberta, or any police force inside or outside Alberta, or

(d) to an employee of a department or a member or employee of a government agency, if the disclosure is made in the ordinary course of administration of the department or government agency, or

(e) in the course of or for the purpose of giving evidence in any civil or criminal proceeding (including a prosecution under section 6 or an action under section 7) or in any other proceeding in which the public representative or former public representative may be required to give evidence, or

(f) in a publication in which the information is in statistical form, if the individual names of the

persons to whom the information relates are not thereby identified or made identifiable, or

(g) to another public representative.

6. Every person who contravenes section 4 is guilty of an offence and liable on summary conviction to a fine of not more than $500.

7. (1) Where any person contravenes section 4, the person whose private information was disclosed has a cause of action against the Crown in right of Alberta for damages for any loss occasioned to him as a result of the disclosure.

(2) An action under this section shall for all purposes be deemed to be an action for a tort under section 51 of The Administration of Estates Act.

8. (1) Where a prosecution is commenced under section 6 or an action is commenced under section 7

(a) a public representative is not required to attend at any proceedings in connection with the prosecution or action during any period when the Legislative Assembly is in session and any such proceedings shall be adjourned to a date during a period when the Assembly is not in session, and

(b) the period during which the Assembly is in session shall not be reckoned in computing the time limited for the filing of any pleading or other document, or the doing of any other act, in the course of the prosecution or action by the public representative.

(2) For the purposes of subsection (1), the Assembly shall be deemed not to be in session during any period of adjournment, if the Assembly is adjourned for a period of more than 30 days.

9. It is a defence in a prosecution under section 6 or an action under section 7 if it is shown that

(a) the private information disclosed was common knowledge to persons residing in the vicinity of the place where the person to whom the information related also resided or where the person to whom it was disclosed also resided, or

(b) the private information or the public document containing it was accessible to public inspection, or that a copy was obtainable from any other source, either as of right or upon payment of a fee, or

(c) the person to whom the private information was disclosed already had received, at the time of the disclosure, the same or substantially the same information from another source, whether lawfully or not, or

(d) the private information had, prior to the disclosure, been made public by a person other than the accused or the defendant, by means of publication in a news-

paper or magazine or by a radio or television broadcast, or

(e) the disclosure was justifiable on the ground that

(i) any person had previously made a public statement that involved an accusation or imputation of misconduct or impropriety on the part of a public representative or former public representative, whether in the conduct of his office or not, and

(ii) the disclosure by the public representative or former public representative of private information contained in a public document was reasonably necessary to refute the accusation or imputation of misconduct or impropriety.

10. The Limitation of Actions Act is amended as to section 51 by adding the word "or" at the end of clause (g) and by adding the following clause:

(h) the wrongful disclosure of private information under section 7 of The Public Document Confidentiality Act,

The following is the original Bill drawn up by the Conservatives while they were in opposition in 1971. It has changed form considerably in being transformed into the proposed legislation under present consideration which is reproduced beginning at page 74 above.

1971 Bill 136

Fourth Session, 16th Legislature, 20 Elizabeth II

THE LEGISLATIVE ASSEMBLY OF ALBERTA

BILL 136

The Public Document Confidentiality Act

MR. WERRY

First Reading .....

Second Reading .....

Third Reading .....

Printed by L. S. Wall, Queen's Printer, Edmonton

BILL 136

1971

THE PUBLIC DOCUMENT CONFIDENTIALITY ACT

(Assented to , 1971)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

1. This Act may be cited as The Public Document Confidentiality Act.

2. In this Act

(a) "Crown Agencies" means

(i) The Alberta Liquor Control Board, or

(ii) The Workmen's Compensation Board, or

(iii) The Oil and Gas Conservation Board, or

(iv) The Research Council of Alberta, or

(v) The Alberta Human Resources Research Council, or

(vi) The Alberta Government Telephones, or any other board or agency which may from time to time cause to be established;

(b) "Department" means any department established by the Government to conduct the affairs of the Province which is in existence or may from time to time cause to be establshed;

(c) "employee" means any employee appointed to a position pursuant to The Public Service Act, Crown Agencies, Employee Relations Act and who are appointed to a position by the Lieutenant-Governor in Council;

(d) "Minister" means any member of the Executive Council;

(e) "person" means an individual, co-operative, corporation, partnership.

3. (1) In the public interest, any file, document or paper kept by any person

Explanatory Notes

Under the terms of this Bill any file, document or paper that has come into being by a Department or Crown Agency of the Government that relates to the personal history and record of a child or adult cannot be disclosed to any person without the written consent of the person.

There are exclusions where the information is required at a trial, hearing or proceeding where provisions are provided by other Acts and for information which is ordered by the Legislative Assembly.

When private information has been disclosed, the aggrieved person has full recourse in a court of law.

Employees of the Government, including Ministers of the Crown, who contravene this Act are guilty of an offence and are subject to fines.

(a) that deals with the personal history or record of a child or an adult, and

(b) that has come into existence through any Department or Crown Agency

shall not be disclosed to any person except upon the written consent of the person, parent or guardian of a child.

(2) No employee or Minister shall disclose or be compelled to disclose any information mentioned in subsection (1) above which has been obtained by him in the course of the performance of any of his duties, or available to him

(a) except at a trial, hearing or proceeding which provisions are provided for by other Acts, or

(b) except as ordered by the Legislative Assembly.

(3) Any employee who contravenes this section is guilty of an offence and liable upon summary conviction to a fine of not more than $500.00 and not less than $100.00 and in default of payment to a term of imprisonment of not more than three months.

(4) Any Minister who contravenes this section is guilty of an offence and liable upon summary conviction to a fine of not more than $10,000.00 and not less than $500.00 and in default of payment to a term of imprisonment of not more than three years.

4. Every person whose private information has been disclosed contrary to section 3 shall

(a) have recourse in a court of law for damages incurred, and

(b) does not have to receive permission from the Crown to cause an action to be taken against the Government of the Province of Alberta.

5. This Act comes into force on the day upon which it is assented to.

A P P E N D I X B

Appendix B

Responses to requests for statutes or regulations dealing with confidentiality of government documents.

British Columbia

Audit Act, R.S.B.C. 1960, s. 17(2),

Revenue Act, R.S.B.C. 1960, ss. 48, 49,

Securities Act, R.S.B.C. 1960, ss. 5(3) and (4), 143,

Energy Act, S.B.C. 1973, ss. 16, 17 (proclaimed May 8, 1973),

Adoption Act, R.S.B.C. 1960, s. 13(1),

Huamn Rights Act, R.S.B.C. 1960, ss. 23(1) and (2),

Venereal Diseases Suppression Act, R.S.B.C. 1960, s. 14.

Saskatchewan

The Public Service Act, R.S.S. 1965, c. 9, s. 19(2),

The Ombudsman Act, S.S. 1972, c. 87, ss. 8, 9,

The Income Tax Act, R.S.S. 1965, c. 62, s. 47(1),

The Department of Social Services Act, S.S. 1972, c. 35, s. 17,

The Child Welfare Act, R.S.S. 1965, c. 268, s. 144.

Manitoba

The Child Welfare Act, R.S.M. 1970, c. 80, s. 88(4),

The Gift Tax Act, S.M. 1971, c. 10, s. 52,

The Health Services Insurance Act, R.S.M. 1970, c. H-35, s. 109,
The Hearing Aid Act, S.M. 1971, c. 22, s. 6,
The Income Tax Act, R.S.M. 1970, C. I-10, s. 501,
The Succession Duty Act, S.M. 1972, c. 9, s. 70,
The Statistics Act, R.S.M. 1970, c. V-60, s. 40,
The Prescription Drugs Cost Assistance Act, S.M. 1973 c. 27, s. 10.

Ontario

The Public Service Act, R.S.O. 1970, c. 386, s. 10(1),
The Statistics Act, R.S.O. 1970, c. 443, s. 4(1),
The Vital Statistics Act, R.S.O. 1970, c. 483, s. 48(1).

Quebec

No response has been received as of July 10, 1973.

New Brunswick

No response has been received as of July 10, 1973.

Prince Edward Island

The Evidence Act, R.S.P.E.I, 1951, c. 52, s. 29.

Nova Scotia

The Gift Tax Act, S.N.S. 1972, c. 9, s. 52,
The Succession Duties Act, S.N.S. 1972, c. 17, s. 70,
The Auditor General Act, S.N.S. 1973, c. 2, s. 4,

The Consumer Reporting Act, S.N.S. 1973, c. 4, s. 19, The Income Tax Act, R.S.N.S. 1967, c. 134 is the basis of an agreement between Nova Scotia and the Government of Canada concerning the collection of income tax. For the purposes of this memorandum the relevant part of the agreement is paragraph 11.

Newfoundland

A response was received. It stated that no legislative provisions on confidentiality of government documents have been passed in Newfoundland.

ADDENDUM

A response was received from Quebec, in late August. The reproductions of the complete sections are on file. The relevant statutes and section numbers are as follows:

STATUTES OF QUEBEC DEALING WITH CONFIDENTIALITY

Code of Civil Procedure	- section 308
Hospital Insurance Act	- Revised Statutes of Quebec 1964, chapter 163, section 11
Bureau of Statistic Act	- Revised Statutes of Quebec, 1964, chapter 207.
Civil Service Act	- 1965, chapter 14, annex B.
Quebec Pension Plan	- 1965, chapter 24, sections 214-220.
Public Protector Act	- 1968, chapter 11, section 33.
Police Act	- 1968, chapter 17, section 22.
Labour Code Amendment	- 1969, chapter 48, section 24i.
Social Aid Act	- 1969, chapter 63, section 51 and 52.

Adoption Act	- 1969, chapter 64, sections 30 and 31.
Health Insurance Act	- 1970, chapter 37, sections 50-55.
An Act Respecting Health Services and Social Services	- 1971, chapter 48, section 7.
Legal Aid Act	- 1972, chapter 14, section 90.
Revenue Department Act	- 1972, chapter 22, sections 69-71.
Public Health Protection Act	- 1972, chapter 42, sections 4-7.
Mental Patients Protection Act	- 1972, chapter 44, section 29.

A P P E N D I X C

APPENDIX C

CONFIDENTIALITY IN THE UNITED STATES

As has been stated, an action for breach of confidence originally had to be founded on a proprietary or contractual right, but as has been shown, today an action in England or Canada might arise on negligence grounds, or, more importantly, on the ground of breach of confidence itself.

It might be of value to compare developments in the United States in this field. The most cases appear to involve the doctor-patient relationship, and actions for wrongful disclosure by the doctor of confidential information. The possibilities of such an action arising independently of any contract were shown in *Smith* v. *Driscoll* (1917) 162 Pac. 572 (Wash. Sup. Ct.). It was said,

> Neither is it necessary to p[e]rsue [*sic*] at length the inquiry of whether a cause of action lies in favour of a patient against a physician for wrongfully divulging confidential communications. For the purposes of what we shall say it will be assumed that, for so palpable a wrong, the law provides a remedy.

The duty has been based on the licensing provision for doctors which exists in many, if not all, states. The famous case of *Simonsen* v. *Swenson* (1920) 177 N.W. 831 (Neb. Sup. Cr.) is an example. The license could be revoked, here, for unprofessional conduct, and was seen to make mandatory the doctor's obligation to preserve as secret, confidential information about his patients.

> By this statute, it appears to us, a positive duty is imposed upon the physician, both for the benefit and advantage of the patient as well as in the interest of general public policy.*

However, the doctor was held justified in making disclosure of a patient's contagious disease, to the latter's landlady. He had earlier warned the man to leave the hotel in question, and informed on the patient merely to protect other guests in the hotel.

In *Berry* v. *Moench* (1958) 331 P. 2d 814 at 817 it was said, after quoting from *Smith* v. *Driscoll, supra,* that,

> It is our opinion that if the doctor violates that confidence and publishes derogatory matter concerning his patient an action should lie.

This followed a statement that the privilege statute protecting confidential communications between doctor and patient from being divulged in court, showed the policy of the law, namely that confidence between them be encouraged.

In another case, *Alexander* v. *Knight* (1962) 177 A. 2d 142 (Pa. Super. Ct.), the duty of care owed by a doctor was stated to be more than just covering medical care, rather it was a total care. In yet another, *Clark* v. *Geraci* (1960) 208 N.Y.S. 2d 564 (Supt. Ct.), a *prima*

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*.177 N.W. 831, at p. 832.

facie, tort through deliberate disclosure was held to have been justified by waiver of the patient. A possible action based on breach of implied trust has also been indicated in *Hammonds* v. *Atena Casualty and Surety Co.* (1965) 237 F. Supp. 96 (Ohio D.C.),

> Those confidences in the trust of a physician are entitled to the same consideration as a *res* in the control of a trustee, and the activities of a doctor in regard to those confidences must be subjected to the same close scrutiny as the activities of a trustee in supervising a *res*.

It would seem, therefore, that in certain confidential relationships at least the possibility of a remedy for breach of confidence in its own right exists.

A P P E N D I X D

Appendix D

The Freedom of Information Act, 5 U.S.C.A. §552 provides as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy,

interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. [illegible]; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54.

Historical and Revision Notes

Reviser's Notes

Derivation: United States Code
5 U.S.C. 1002

Revised Statutes and Statutes at Large
June 11, 1946, ch. 324, § 3, 60 Stat. 238.

Explanatory Notes.

In subsection (b) (3), the words "formulated and" are omitted as surplusage. In the last sentence of subsection (b), the words "in any manner" are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1967 Amendment. Subsec. (a). Pub.L. 90-23 substituted the introductory statement requiring every agency to make available to the public certain information for former introductory provision excepting from disclosure (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating to internal management of an agency, now covered in subsec. (b) (1) and (2) of this section.

Subsec. (a) (1). Pub.L. 90-23 incorporated provisions of: former subsec. (b) (1) in (A), inserting requirement of publication of names of officers as sources of information and provision for public to obtain decisions, and deleting publication requirement for delegations by the agency of final authority; former subsec. (b) (2), introductory part, in (B); former subsec. (b) (2), concluding part, in (C), inserting publication requirement for rules of procedure and descriptions of forms available or the places at which forms may be obtained; former subsec. (b) (3), introductory part, in (D), inserting requirement of general applicability of substantive rules and interpretations, added clause (E), substituted exemption of any person from failure to resort to any matter or from being adversely affected by any matter required to be published in the Federal Register but not so published for former subsec. (b) (3), concluding part, excepting from publication rules addressed to and served upon named persons in accordance with laws and final sentence reading "A person may not be required to resort to organization or procedure not so published" and added provision deeming matter, which is reasonably available, as published in the Federal Register when such matter is incorporated by reference in the Federal Register with the approval of its Director.

Subsec. (a) (2). Pub.L. 90-23 incorporated provisions of former subsec. (c), provided for public copying of records, eliminated requirement of agency publication of final opinions or orders and authority for secrecy and withholding of opinions and orders required for good cause to be held confidential and not cited as precedents, latter provision now superseded by subsec. (b) of this section, designated existing subsec. (c) as clause (A), including therein provision for availability of concurring and dissenting opinions, added provisions for availability of policy statements and interpretations in clause (B) and staff manuals and instructions in clause (C), deletion of personal identifications from records to protect personal privacy with written justification therefor, and provision for indexing and prohibition of use of records not indexed against any private party without actual and timely notice of the terms thereof.

Subsec. (a) (3). Pub.L. 90-23 incorporated provisions of former subsec. (d) and substituted provisions requiring identifiable agency records to be made available to any person upon request and compliance with rules as to time, place, and procedure for inspection, and payment of fees and provisions for federal district court proceedings de novo for enforcement by contempt of noncompliance with court's orders with the burden on the agency and docket precedence for such proceedings for former provisions requiring matters of official record to be made available to persons properly and directly concerned except information held confidential for good cause shown, the latter provision now superseded by subsec. (b) of this section.

Subsec. (a) (4). Pub.L. 90-23 added subsec. (a) (4).

Subsec. (b). Pub.L. 90-23 added subsec. (b) which superseded provisions excepting from disclosure any function of the United States requiring secrecy in the public interest or any matter relating to internal management of an agency, formerly contained in former subsec. (a), final opinions or orders required for good cause to be held confidential and not cited as precedents, formerly contained in subsec. (c), and information held confidential for good cause found, contained in former subsec. (d) of this section.

Subsec. (c). Pub.L. 90-23 added subsec. (c).

Effective Date of 1967 Amendment. Section 4 of Pub.L. 90-23 provided that: "This Act [amending this section] shall be effective July 4, 1967, or on the date of enactment [June 5, 1967], whichever is later."

Legislative History. For legislative history and purpose of Pub.L. 90-23, see 1967 U.S. Code Cong. and Adm. News, p. —.

Cross References

Federal Register Act, see section 391 et seq. of Title 44, Public Printing and Documents.

Section applicable to functions exercised under International Wheat Agreement Act of 1949, see section 1642(i) of Title 7, Agriculture.

(ii) Some discussions of the American concept of freedom of information and of The Freedom of Information Act are:

Davis, *The Information Act; A Preliminary Analysis* (1967) 34 U. Chi. L. Rev. 761;

Gilmore and Barron, "Freedom of Information: Access to Rules and Records of Government Agencies", *Mass Communication Law Cases & Comments*, St. Paul, 1969.

Hennings, *Constitutional Law: The Public's Right to Know* (1959) 45 A.B.A.J. 667;

Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, (1970) 48 Texas L. Rev. 1261;

Nader, *Freedom from Information: The Act and the Agencies*, (1970) 5 Harv. Civil Rights L. Rev. 1;

Parks, *The Open Government Principle: Applying the Right to Know under The Constitution*, (1957) 26 Geo. Wash. L. Rev. 1;

Rowat, *How Much Administrative Secrecy*, (1967) The Can. Jo. of Econ. and Pol. Sc. 479;

Saloman, Wechsler, *Freedom of Information Act*, (1969) Geo. Wash. L.R. 150;

Note, *The Freedom of Information Act: A Branch Across the Moat* (1973) Drake L. Rev. 570;

Note, *Developments Under the Freedom of Information Act--1972*, (1973) Duke L.J. 178.

(iii) The following is taken from *Commons Debates*, March 15th, 1973. It is a policy statement by the Federal Government on confidentiality

NOTICES OF MOTION FOR THE PRODUCTION OF PAPERS

General Principle

To enable Members of Parliament to secure factual information about the operations of government to carry out their parliamentary duties and to make public as much factual information as possible consistant with effective administration, the protection of the security of the state, rights to privacy and other such matters, government papers, documents and consultant reports should be produced on Notice of Motion for the Production of Papers unless falling within the categories outlined below in which case an exemption is to be claimed from production.

Exemptions

The following criteria are to be applied in determining if government papers or documents should be exempt from production:

1. Legal opinions or advice provided for the use of the government.

2. Papers, the release of which would be detrimental to the security of the State.

3. Papers dealing with international relations, the release of which might be detrimental to the future conduct of Canada's foreign relations; (the release of papers received from other countries to be subject to the consent of the originating country).

4. Papers, the release of which might be detrimental to the future conduct of federal-provincial relations or the relations of provinces inter se; (the release of papers received from provinces to be subject to the consent of the originating province).

5. Papers containing information, the release of which could allow or result in direct personal financial gain or loss by a person or a group of persons.

6. Papers reflecting on the personal competence or character of an individual.

7. Papers of a voluminous character or which would require an inordinate cost or length of time to prepare.

8. Papers relating to the business of the Senate.

9. Papers, the release of which would be personally embarrassing to Her Majesty or the Royal Family or official representatives of Her Majesty.

10. Papers relating to negotiations leading up to a contract until the contract has been executed or the negotiations have been concluded.

11. Papers that are excluded from disclosure by statute.

12. Cabinet documents and those documents which include a Privy Council confidence.

13. Any proceedings before a court of justice or a judicial inquiry of any sort.

14. Papers that are private or confidential and not of a public or official character.

15. Internal departmental memoranda.

16. Papers requested, submitted or received in confidence by the government from sources outside the government.

Ministers' Correspondence

Ministers' correspondence of a personal nature, or dealing with constituency or general political matters, should not be identified with government papers and therefore should not be subject to production in the House.

Consultant Studies

In the case of consultant studies, the following guidelines are to be applied:

1. Consultant studies, the nature of which is identifiable and comparable to work that would be done within the Public Service, should be treated as such (the reports and also the terms of reference) when consideration is being given to their release.

2. Consultant studies, the nature of which is identifiable and comparable to the kind of investigation of public policy for which the alternative would be a Royal Commission, should be treated as such and both the terms of reference for such studies and the resulting reports should be produced.

3. Prior to engaging the services of a consultant, Ministers are to decide in which category the study belongs, and in cases of doubt are to seek the advice of their colleagues.

4. Regardless of the decision as to which category (1. or 2. above) the consultant report will belong, the terms of reference and contract for the consultant study are to ensure that the resulting report comprises two or more volumes, one of which is to be the recommendations while the other volume(s) is (are) to be the facts and the analysis of the study. The purpose of this separation is to facilitate the release of the factual and analytical portions (providing that the material is not covered by the exemptions listed above) enabling the recommendations (which, in the case of studies under category 1., would be exempt from production) to be separated for consideration by Ministers.

February 16, 1973

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2. Cornfield, *The Right to Privacy in Canada*, 1967, 125 Fac. L. Rev. 103.

3. Departments of Justice and Communication, *Task Force Report on Privacy and Computers*, Ottawa, 1972.

4. Dworkin, *The Common Law Protection of Privacy*, (1967) 2 U. of TAS. L. Rev. 418.

5. Hearing of the Congressional Subcommittee on Administrative Practice and Procedure Part 3, *Evasions of Privacy (Government Agencies)*, Washington, July and August, 1965.

6. Hofstadter and Horowitz, *The Right of Privacy*, New York, 1964.

7. Long, *The Intruders*, New York, 1966.

8. Miller, *The Assault on Privacy*, Ann Arbour, 1971.

9. Prosser, *Privacy*, (1960) 48 Calif. L. Rev. 383.

10. Queen's Conference Proceedings, *Computers and the Law*, Kingston, 1968.

11. Report of the Ad Hoc Committee, *Protection of Privacy*, Ottawa, 1971.

12. Report of the Special Legislative Committee, *Invasion of Privacy*, Edmonton, 1969.

13. Rosenberg, *The Death of Privacy*, New York, 1969.

14. Ryan, *The Ontario Law Commission Report on the Protection of Privacy in Ontario*, Department of the Attorney General, 1968.

**See, also,* The Bibliography in Appendix D which lists some articles that discuss The Freedom of Information Act and the concepts which it is based on.

15. Snider, *Towards the Development of a Socio-Political Data Bank for Alberta*, (Study for The Human Resources Research Council), Edmonton, 1972.

16. Taylor, *Privacy and the Public*, (1971) 34 Mod. L. Rev. 288.

17. Wakefield, *Duty of Confidence and the Professions*, (Master's Thesis), Winnipeg, 1972.

18. Warren and Brandeis, *The Right to Privacy*, (1890) 4 Harv. L. Rev. 193.

19. Westin, *Privacy and Freedom*, New York, 1972.

20. Wiggins, *Freedom of Secrecy*, New York, 1964.

21. Williams, *Invasion of Privacy*, (1973) 11 Alta L. Rev. 1.

22. Younger, *Report of the Committee on Privacy*, Cmnd. 5012, London, 1972.