CHAPTER V

Obligation on the Government to Supply Official Information

So far we considered the question of criminal sanctions to maintain official secrecy against "leaks". In this chapter we are concerned with the question of imposing legal obligations, or a positive duty, on the government to supply information when the individual asks for it. There is no law either in England or India which compels the government to give information to the individual at his request, except in the case of "public documents" as known to the Evidence Act. (Here we are not concerned with the questions put to the executive by the members of Parliament). The individual is completely at the sufferance of the government whether it entertains his request for official information or not. United States has, however, the Freedom of Information Act under which the executive is under a duty to publish certain information and allow to the individual access to its records. Let us examine the provisions of the statute and the experience of that country.

The Freedom of Information Act was enacted by the Congress in 1966 (amended in 1974). Schwartz says : "Before then, the people's 'right to know' was a journalistic slogan rather than a legal right. The 1966 statute changed this, since it gave the citizen, for the first time, a legally enforceable right of access to government files and documents. The FOIA effects a profound alteration in the position of the citizen vis-a-vis government. No longer is the individual seeking information from an administrative agency a mere suppliant."[1]

The Act ensures access to governmental information and records in three broad ways—publication in the Federal Register, making available for inspection and copying certain specified information, and making available reasonably described records on requests. Firstly, each administrative agency is required to publish certain information in the Federal Register for the guidance of the public. The information to be published in the Federal Register is :

(*i*) descriptions of its central and field organisation and the established places at which, the employees (and in the case of a uniformed

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1. *Administrative Law* 128 (1976).

service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions ;

(*ii*) 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 ;

(*iii*) 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 ;

(*iv*) 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

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

Secondly, the following information is to be made available for public inspection and copying :

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

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

(*iii*) administrative staff manuals and instructions to staff that affect a member of the public.

Thirdly, each agency is to make promptly available to a person upon any request for records which (*a*) reasonably describes such records, and (*b*) is made in accordance with published rules, stating the time, place, fees (if any), and procedures to be followed.

There are certain specified exemptions from these provisions. If the document falls under any of these categories, the public has no right to access. These exemptions have been described in chapter IV.[2]

In substance, thus, the agency is to promptly make available to any person identifiable records (the obligation of the individual is to describe these records reasonably) on request for such records. If the records are withheld, the individual, as seen in chapter IV, can file a complaint before a district court. Under the ordinary rule, presumption of validity is attached to officials' acts, but under the FOIA the burden is on the agency to sustain its action in withholding information. All that the complainant has to see is that he made a request for identifiable records which the agency turned down.

Before 1974, there was absence of judicial review in relation to the exception to openness which related to national defence or foreign policy.

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2. *Supra* at 28-29.

In *Environmental Protection Agency* v. *Mink*[3], it was held by the Supreme Court that the Act did not authorize or permit in camera inspection of contested documents. Thus, the concerned section was interpreted as prohibiting judicial review of any document classified in a procedurally appropriate manner by an executive agency. In 1974, the Congress overrode *Mink's* determination by adding the words that documents "are in fact properly classified", thus giving judicial review over the executive determination or the executive privilege to withhold documents.

Oddly enough, the press has hardly made use of the Freedom of Information Act. It is said : "Although the news media were instrumental in persuading Congress to enact the FOIA, they have rarely made direct use of it in the news-gathering process. This neglect probably stems from the nature of the business, which requires daily coverage of newsworthy events. Typically, there is insufficient time to pursue the formal procedures for access. Reporters can usually find knowledgeable sources who are willing to discuss the information, thereby enabling the story to come out quickly, albeit less accurately."[4]

The working of the FOIA did give rise to certain problems and difficulties. The agencies received a large number of requests from the public. Their compliance produced problems in terms of time, personnel and costs. Some agencies could not give replies within the time prescribed by the Act. The Act also gave rise to an unforeseen problem. This is described by Rowat as under :

> Another problem is that the Information Act is being used for purposes not intended by Congress. It was expected by the Act's proponents that it would be mainly of use to the press in digging embarrassing information out of a reluctant government. Instead, it has been mainly used by individuals, scholars and business firms. No one imagined the large number of individual requests that would come pouring in... .
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> It was not anticipated that business corporations would make so much use of the Act. They have used it not only to get general information from the government that would be of value to them, but to get information on their competitors. New business and law firms have sprung up which specialise in this activity, and which carry appeals to the courts. Now the competitors are fighting back with what are called 'reverse freedom of information cases', in which they seek a court injunction forbidding the government to release requested documents, and the government is having greater

3. 410 U.S. 73 (1973).

4. Article on United States by Michael J. Singer in Rowat (ed.), *Administrative Secrecy in Developed Countries* 343 (1979). Footnotes omitted.

difficulty in collecting sensitive information from business corporations.[5]

On the whole, however, it appears that the American experience with the Freedom of Information Act has been happy. Rowat concludes :

> The general opinion in the United States is that the Freedom of Information Act as amended in 1974 and supplemented by the Privacy Act has been highly successful in meeting its objectives. Many of the difficulties that its enforcement has created are temporary problems of implementation, and the others can be solved by further minor amendments to refine the law. Clearly, a strong Freedom of Information Act has not, as opponents feared, seriously slowed the wheels of government administration. Indeed, it appears to have been well accepted by most administrators, who are attempting to implement it in good faith. Many of them even admit that its effect on the administration has been salutary, and results in the preparation of better documents and reports. As Professor Anderson has noted, open records laws exert 'a pervasive preventive effect by virtue of the sobering influence of prospective public scrutiny.'[6]

It is high time that other democracies in the common law world, like India, take steps to enact legislation on the lines of the U. S. Freedom of Information Act.

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5. Rowat, Laws on Access to Official Documents in T.N. Chaturvedi (ed.), *Secrecy in Government* at 15-16.

6. *Ibid.* at 16. For an analysis of the judicial response to the Freedom of Information Act, see Furby, The Freedom of Information Act : A Survey of Litigation under the Exemptions, 48 *Mississippi L.J.* 784 (1977); Singer, *supra* note 4.