EDITORIAL

Before the citizenry can properly evaluate their government they must have access to the information which the government controls. Without access to the documentary evidence of this information, knowledge must depend on the extent to which the government is willing to disclose complete and accurate facts. Unless the development of a well-informed citizenry is encouraged in this way, one of the most effective safeguards of democracy has been lost.

Unnecessary secrecy in Australian Commonwealth government has demonstrated an unfortunate pessimism as to the worth of the democratic process. Though the extent of official secrecy cannot be accurately gauged, the known examples of secrecy are disturbingly impressive. In an address at the Australian Institute of Political Science's Summer School of February 1972, a list was given of at least thirty reports and surveys prepared by Commonwealth departments which have been kept secret. The list includes surveys in areas such as pensions, aboriginal ill-health and tariff policy, test surveys on consumer products, and reports on matters such as the economics of immigration, the cost of tax avoidance schemes, costs of road accidents and the wool industry. In recent history, seemingly needless secrecy has also surrounded many other contentious political issues; for example, the purchase of container-ships and the F111s, the Voyager disaster, V.I.P. flights, the Vietnam War, American defence and space stations in Australia and proposals for the siting of a nuclear power station at Jervis Bay. It is significant that in nearly all these instances, the propriety or advisability of the Government's final action has been strongly questioned. Official secrecy does not, however, only surround the major political issues. Quite often, it affects citizens in their individual capacity. This occurs particularly in the area of "hidden law"—the rules and precedents that have emerged with the exercise of discretionary powers. There is no sound reason why, in areas like taxation, social services, superannuation and employee compensation, much of this law could not be published.

The policy of the Commonwealth Government as to the release of archival records provides a further indication of the penchant for secrecy. Until 1970, the vast number of documents initially kept secret could possibly have retained that status for up to fifty years. On 30 December 1970, Prime Minister Gorton announced that a thirty year rule would apply in future to departmental documents; and on 26 January 1972 Prime Minister McMahon extended the thirty year rule to Cabinet documents. Still this is unsatisfactory! Even for those documents that

should be initially withheld from public scrutiny, thirty years seems inordinately long. Unless Australian government is unique, a complete and accurate public knowledge about recent events should not prejudice our national security. Under the policy announced by Prime Minister McMahon, documents may be withheld for even longer than thirty years if falling within one of three categories: "exceptionally sensitive papers", documents supplied to the government in confidence, and "documents containing information about individuals the disclosure of which would cause embarrassment to living persons or their immediate descendants". The three categories will be acceptable, *if interpreted restrictively*. For in their present wording the third category particularly has the potential to render indefinitely exempt all Cabinet records—does "embarrassment" protect political reputations? Mr McMahon did not explain, as did British Lord Chancellor Gardiner when announcing Britain's thirty year records rules on 11 May 1967, that personal papers means documents "such as criminal or prison records, records of courts martial, records of suspected persons, and certain police records".

Evidence that secrecy has flourished as an Australian political tradition can be seen by the lack of any legislation granting a general right of access to government records. Apart from isolated legislative provisions requiring that company registers be made public or that annual reports be presented to Parliament, legislation primarily restricts the release of information. The main Commonwealth provisions are Public Service Regulations 34(a) and 35 which make it an offence for any officer to use other than for official purposes or to disclose without express authorization, any official information which he has by virtue of his employment. Any breach by an officer will, firstly, under section 55 of the Public Service Act 1922-1972 (Cth), render him liable to disciplinary measures, suspension, a fine, reduction in salary or rank, or dismissal; or secondly, under section 70 of the Crimes Act 1914-1966 (Cth), expose him to a gaol sentence of up to two years. It would not be a defence to any charge, that disclosure was in the public interest. On a proper construction, these provisions do not *forbid* the release of information—they merely ensure that no-one will exercise the initiative in disclosure. For practical purposes, the initiative rests with Ministers of the Crown, most of whom have not evinced a continuing concern for the people's "right to know". The parliamentary process has proved inadequate to ensure ministerial responsibility in this regard.

Justifications of the present system have at times been advanced. The traditional one is that secrecy is necessary to preserve candour and frankness in administration. As comments in recent cases concerned with the doctrine of Crown privilege have indicated, public servants should have nothing to fear when they are sure that what they are writing

or saying is accurate or warranted. The justification is, in truth, based on the accustomed role of public servants working in a traditionally secretive system; it does not relate to their ability to work effectively in a more open system. Other justifications have centered on the argument that it should be for the government, like any private employer, to determine what information should be released for it is the individual Ministers who ultimately accept all responsibility for acts of administration. This argument can only justify governmental regulation of the release of information—not the extent of secrecy that presently exists. However, the fallacies of the justification are more basic. The government is not like any private employer. Not only is it financially dependent on taxpayers' money, it is elected by Australians to govern on their behalf and for their benefit. The concept of ministerial responsibility inherent in the justification is also largely a myth; Ministers cannot possibly know of and control all that occurs within their departments. Ironically, ministerial responsibility is only possible in an open system where both Parliament and citizens will gain knowledge of instances of maladministration.

In contrast with these purported justifications is the telling fact that some countries have managed to preserve secrecy for those aspects of government requiring it, while at the same time allowing maximum disclosure in those spheres where it is warranted. The best example is Sweden, where publicity of official documents is guaranteed in the Constitution. As a result, most documents of administrative agencies are open to public inspection. In policy-making, for instance, the established procedure is for all preparatory material to be published so that specific proposals can be formulated in the light of public discussion and consultation. Other categories of documents normally public include agency budgetary proposals, minutes of parliamentary and agency committees, decisions on reports or informations, adjudicatory files, correspondence from private citizens, and diaries, journals and registers.

A determined effort to alleviate the secrecy dilemma was made in the United States of America in 1966 with the enactment of the Freedom of Information Act [5 U.S.C. § 552]. The Act requires the publication of material descriptive of agency functions and operations, and of general policies or interpretations which an agency has adopted. The more specific information affecting persons as individuals—for the most part, agency case-law—has to be indexed and made available for inspection. This includes, statements of policy and interpretations that have been formulated in the process of adjudication or rule-making, final opinions and orders made in the adjudication of cases, and instructions to staff that affect a member of the public. If any of the preceding material is not published or indexed as prescribed, an agency is debar-

red from relying upon it if a member of the public would thereby be affected. All other records of an agency are to be made available for inspection unless covered by one of nine exemptions, the main ones of which are: documents concerned with national defence and foreign policy; internal personnel rules, such as instructions to negotiators and procedures to be followed in the prosecution and settlement of cases; material exempt from disclosure under other statutes; trade secrets, commercial or financial information, and information obtained from a person which is privileged or confidential; memoranda concerned with policy formulation; information significantly touching upon personal privacy; and investigatory files concerned with current enforcement of laws. A person who has been denied access to records may seek judicial review of the agency's decision.

A very elementary, though valuable, reform which has occurred in America, has been the appointment in some agencies of special staff to handle and assist with requests, and the provision within offices of public information reading rooms. This creation of an identifiable authority to whom requests for information can be made, and the corresponding development of agency public relations work, is a valuable aid to citizen interest in the conduct of government. It is an elementary development sadly lacking in the structure of many Commonwealth departments.

If Australians are to have a tangible "right to know", legislation granting a right of access to documents would seem necessary. The only other alternative for reform is a liberalization within the present legislative framework. The shortcoming of this alternative—and the basic fault with the present system—is that it allows for the continual exercise of discretion; and discretion is always subject to abuse. It is in the interest of those controlling information to release only that which they would *like* the public to know. Recent trends in Great Britain provide evidence of this. Following a reassessment of official secrecy in 1969 which culminated in publication of a White Paper, *Information and the Public Interest,* the British Government opted for liberalization within a legislative framework substantially similar to that in Australia. Administration has as a result become more open, though in comparison with the United States of America, there is still not the same degree of openness. The *Sunday Telegraph* case in 1971, in which two journalists and an editor were charged over the unauthorized publication of an official report on the Nigerian Civil War, demonstrates that governmental control will be used where necessary to prevent the disclosure of politically embarrassing information. A committee chaired by Lord Franks has recently been appointed to review the secrecy problem.

Where legislation is concerned, it is true, also, that the operation of the American Freedom of Information Act has not been entirely suc-

cessful. Two factors causing this have been the vague wording of the Act, and the width of the exemptions—especially the exemption relating to national defence and foreign policy which has provided authority for the withholding of a vast number of innocuous documents that have been given a security classification. Both these problems could be partly overcome with skilful drafting of the legislation: the Foreign Operations and Government Information Sub-committee is intending to hold hearings this year, with a view to amending the Act and restricting the scope of the exemptions. However, the major obstacle to the Act's effectiveness has been the opposition of Civil Service officials to the purpose of the Act. Litigation and public criticism have been effective in remedying individual instances of groundless opposition. More importantly, the civil servants' predisposition to secrecy has been disappearing with their becoming accustomed to the Act. The situation is gradually being reached whereby it is no longer the legislation which is conferring a right of access, but the desire of Congress and administrative officials that people should possess such a right. It is the presence of this factor that has led to the success of open government in Sweden.

It is refreshing to note that in Australia, the Commonwealth Council of Public Service Organizations has requested the Government to enact freedom of information legislation. And although it is the attitude of officials that ultimately determines reform, nevertheless the American experience has demonstrated the initial need for legislation: to establish that the previous secretive system is being changed, to grant a tangible and a permanent right of access, and to define, at the least, the minimum content of that right.

Legislative creation of an immediate right of access to current documents would not constitute a comprehensive reform. There are a small number of documents that, quite legitimately, need to be kept secret initially. As discussed earlier, it would be absurd if all such documents retained that status for thirty years. A ten year period of secrecy, with some limited exceptions, would be sufficient to protect all relevant interests.

The experience of other countries illustrates that reform is not only feasible but is highly beneficial to the governmental system. Even though the Australian system of government is different to that of some other countries, the functions of our bureaucracy and the methods by which it operates are not so significantly different as to destroy any analogy. And the need for present legislative reform in Australia is not merely a theoretical issue. On a practical analysis, relations between governments and the citizenry have not always been happy. Distrust of governments and bureaucracies is commonplace. Perhaps justifiably so, for

not all past decisions and actions have been good ones. Surely, all this cannot be necessary for the governing of thirteen million people? Only by informed public discussion will the most acceptable policies be formulated and public support for those policies be generated.

It is not that democracy functions better when there is open administration—until this exists, it is doubtful whether there is any democracy at all.

EDITOR