Freedom of Information, a Finnish clergyman's gift to democracy

Constitutional rights, guarantees of freedom of speech and freedom of the press tend to be thought of as analogous with republicanism and the Constitution of the United States. It is a matter of record that the First Amendment to the United States Constitution — a document guaranteeing freedoms of religion, speech, the press, assembly, and petition — has been seen as a model and a benchmark in other democratic nations. So too, have United States freedom of information laws and its Bill of Rights. In fact many of the nearly 40 nations around the world which have some form of freedom of information (FoI) statute today,[1] have at least partly based their own legislation on the United States model.[2]

In reality, however, the United States was far from the first nation to enshrine notions of constitutional rights, freedoms and FoI in legislation. To put things in perspective, it needs to be understood that although the United States Constitution is the oldest constitution in the world still currently in force, it was a document of the late-eighteenth century, having been adopted in 1789, the same year as the French National Assembly's Declaration of the Rights of Man and the start of the French revolution.[3] The United States Bill of Rights — a collective term usually taken as encompassing the first 10 amendments to the United Sates constitution,[4] all of which were designed to protect citizens against the excesses of government — was not ratified until 1791.[5] The English Bill of Rights, which has been seen as a precursor to the United States legislation,[6] had gained royal assent a century earlier, in I689. But even the English legislation, which brought an end to the concept of the divine right of kings and was designed to protect citizens from the unrestrained rule of the monarch by subjugating royalty to the laws of parliament, is 'young' relative to the constitutional history of Sweden which dates from the mid-fourteenth century. Similarly, the concept of freedom of access to government-held information, which was enshrined in law in the United States in 1966, had become a constitutional reality in Sweden, a monarchical parliamentary democracy, two centuries earlier in 1766, a decade before the United States gained its independence from England.

But contrary to accounts published by many influential organisations including the United Kingdom and Scottish parliaments,[7] the University of Missouri's Freedom of Information Centre,[8] the Commonwealth Human Rights Initiative[9] and Privacy International,[10] the history of FoI dates back much further than 1766. The story of how the concepts underlying that ideal actually evolved in China more than 1200 years ago and were encapsulated in legislation from the first decade of the eighteenth century in Sweden is both fascinating and highly significant, not the least because one of the most important aspects of the Swedish legislation was that it linked notions of freedom of information, freedom of speech and transparency of government together with the principle of a free press.

Those links were forged by a truly remarkable Finnish clergyman, Anders Chydenius — a visionary who must be regarded as the true father of FoI as we understand it today. The story of how and why Chydenius created such an important legacy appears to have been largely overlooked in published accounts of the history of FoI. It was unravelled through the extensive use of investigative journalism techniques, particularly those of computer-assisted reporting. Among the many facts which emerged was an initially surprising revelation that one strand of the evolution of FoI was deeply rooted in Seventh Century China. It was also discovered that the first legislative moves towards freedom of information in any Western nation, and probably the world, occurred in Sweden and Finland (which was part of the Swedish Realm at the time) in 1707. In that year a statute was adopted compelling the publishers of all printed literature to lodge 'legal deposit copies' of everything they produced with government approved libraries.[11] While not a freedom of information act in the broad sense of making all government-held documents available to all citizens, it was a very significant forerunner of later laws for three reasons. First, it ensured copies of documents were retained and indexed. Second, one clearly and specifically stated aim of the statute was to ensure that 'publications appearing within the realm would be accessible to the country's universities'.[12] Third, key provisions of the legislation were incorporated into later Swedish laws relating to FoI and press freedom. Ironically, in one sense yet understandably in another, a further object of the statute was to facilitate censorship and the control of printing.

Putting aside the latter point at this stage, the legal deposit legislation had been in force for more than 30 years by the time young Finnish student Anders Chydenius enrolled to study theology, physics, mathematics, natural sciences, Latin, philosophy and theology at Turku Academy in Finland. The son of a Lutheran clergyman, Chydenius had been born in 1729 and had grown up in poor, secluded parishes in the north of his homeland. He matriculated from Turku in 1745, aged 16, then moved to the oldest university in Scandinavia, the University of Uppsala in Sweden.[13] It is not know if he accessed 'legal deposit copies' of information during his university education, but it is known that Chydenius graduated from Uppsala with a Master of Arts degree in 1753, aged 24. Later that year he married and became a curate in the Lutheran parish of Alaveteli. Among other things he also practised medicine, inoculating 'common people' against smallpox and performing 'demanding cataract operations'.[14] In 1770 Chydenius was appointed minister in charge of his own parish. Around the same time he became deeply involved in economic politics and started publishing pamphlets on related subjects.

In 1765 he joined the Swedish (and Finnish) parliament, the Diet, in Stockholm as a representative of the clergy from his region. A classical liberal and a radical reformist proponent of free trade, he continued publishing. His most widely acclaimed work, the *Den natiionella vinsten* (*The National Profit),* which supported absolute free trade in the domestic Swedish economy, was published in 1765. It is a document still regarded as so profound and of such lasting impact that Chydenius is now recognised as being not only far ahead of his time politically as 'a forerunner of modern democracy',[15] but also socially and economically as 'a Finnish predecessor to Adam Smith'.[16] In fact, Smith's acclaimed book *The Wealth of Nations* 'introduced' many of the same ideas Chydenius had advocated 11 years earlier in *Den natiionella vinsten* — the difference appearing to be that Smith's work was widely read because it was published in English, while Chydenius's was written in Finnish and therefore had a very limited distribution.[17] (Adam Smith

was a great Scottish economist whose 1776 book on the division of labour, *An Inquiry into the Nature and Causes of the Wealth of Nations (The Wealth of Nations),* is regarded as one of the most important works ever written. Adam Smith 1723–>1790: <http://www.ebs.hw.ac.uk/EDC/edinburghers/adam-smith.html>.)

Although Chydenius was virtually unrecognised outside Scandinavia in his lifetime, his philosophies had a huge impact within his own nation. In 1765, for example, he reportedly caused a sensation in the Swedish parliament when he first called for hitherto unheard-of democratic reforms. His main arguments were that deeply ingrained restrictions on trade and occupations should be abolished, censorship lifted, freedom of the press and freedom of information should be 'rights' and society should operate on the principles of personal freedom and responsibility for one's own life.[18] In a memorandum on the freedom of the press published the same year, Chydenius wrote:

> No proof should be necessary that a modicum of freedom for writing and printing is one of the strongest pillars of support for free government, for in the absence of such, the Estates would not dispose of sufficient knowledge to make good laws, nor practitioners of law have control in their vocation, nor subjects knowledge of the requirements laid down in law, the limits of authority and their own duties. Learning and good manners would be suppressed, coarseness in thought, speech and customs would flourish, and a sinister gloom would within a few years darken our entire sky of freedom.[19]

Incongruous as it seems today in an era of strict government controls on the media in The People's Republic of China, Chydenius based his campaign for press freedom and freedom of information on the way those freedoms were exercised in pre-nationalist and pre-communist China, a nation he described at the time as 'the richest kingdom in the world in population and goods'[20] and 'the model country of the freedom of press'.[21] Yet, for all its wealth and freedoms, China at the time Chydenius was writing pamphlets about it, was a nation ruled by foreigners, the Manchu. Their Ch'ing (Qing) dynasty had gained power in 1644 and it was to persist until 1911. The earlier part of the dynasty, including the era when Chydenius introduced his FoI legislation in the Diet, was a time when the arts, drama and literature flourished in China. It was during the reign of the dynasty's most successful king, Ch'ien-lung (Qianglong), and was a phase of great prosperity when China also made large territorial gains and its population doubled. Taxes were low, commerce and international trade grew. Encyclopaedias and dictionaries were published, Christian missionaries had been allowed into the country, the public service was educated and highly organised and the impact of the West was being felt for the first time.[22]

In one pamphlet in particular, *Berättelse Om Chinesiska Skrif-Friheten, Öfversatt af Danskan* (*A Report on the Freedom of the Press in China*), which was published in Stockholm in 1766, Chydenius described how his interest in individual freedoms in China dated back hundreds of years to the Tang Dynasty in the period from 618 to 907 and especially the reign of Emperor T'ai-tsung (Tai Zhong) from 627 to 649. During his 22 years in power T'ai-tsung had restructured the Chinese government. In the process he established an 'Imperial Censorate' — an elite group of highly educated 'scholar officials'[23] who not only recorded official government decisions and correspondence but who were also expected to criticise the government, including the emperor. An institution founded in humanist Confucian philosophy, the Censorate's main roles were to scrutinise the government and its officials and to expose misgovernance, bureaucratic inefficiencies and official corruption. In the absence of modern media, it often acted in a public interest watchdog role and as an advocate for common people[24] — a tradition that continued until the close of the Ch'ing Dynasty in 1911.[25] Chydenius explained how citizens with a grievance against the government were encouraged to literally 'beat the drum, to be heard' in the emperor's 'castle' during the Tang Dynasty and how they were 'given the assurance that nothing would be taken the wrong way'.[26] He explained that emperors were expected to 'admit their own imperfection as a proof for their love of the truth and in fear of ignorance and darkness'.[27]

It is hardly surprising that Chydenius saw much to admire in the Tang dynasty. It was a high point in Chinese civilization. Among other things, block printing was invented in 868, making printed material widely available.[28] It was also a golden age of poetry, literature and art and a time when a public service system developed in which government employees were selected on merit after sitting civil service examinations[29] — another aspect of Chinese governance adopted hundreds or years later in Western nations. In another pamphlet, *Källan til rikets wan-magt* (*The Source of the Nation's Weakness*), Chydenius told readers that while China was the richest country in the world, it had no special trade privileges for towns, no differences between urban and rural industry, no fences, no customs taxes, and no navigation act — all things unheard of in Sweden in that era.[30]

While one can only speculate about how and why Chydenius became interested in China and its checks and balances on government power — possibly during his own academic research — it is highly unusual and a measure of his stature intellectually and politically that he left direct written evidence linking the conceptual framework of his FoI legislation with Chinese prototypes. The rarity of discovering such good evidential primary source material[31] was highlighted by United States academic and China researcher Edward Kracke (1990) who said that the full extent of Western indebtedness to China 'must remain obscure' because:

> In most cases we can scarcely hope for evidence to show beyond a doubt whether or not the idea or its application was at some point inspired by Chinese precedent.[32]

Fortunately, while Chydenius obviously could not draw on early Chinese society for an exact model of his FoI legislation, there is absolutely no doubt that he was inspired by the precedent of the Imperial Chinese Censorate and its relationship to human rights, individual freedoms and transparency of government. It is also remarkable that he perceived links between the Censorate, FoI and notions of a free press — or, in the latter case, of a total absence of press controls in the China he wrote about.[33] Coincidentally, perhaps, similar connections have been seen and explained in contemporary times by former Georgetown University professor and Asia Foundation Korean representative David Steinberg (1997) who wrote:

> The Chinese, and the Koreans emulating the Chinese model, developed an institution that was critical to how power was executed, and institutionally provided some modest exposure to different views within the general Confucian ideological configuration. This was the Imperial Censorate. It was composed of officials who had access to the Emperor, and whose function was to tell the leader when things were right or wrong, when he was being led astray, and when plans or actions

were likely to have deleterious effects or be contrary to moral or established principles ...

[Today] the press has become, perhaps better has the potential for becoming, the equivalent of the Imperial Chinese Censorate which tells the emperor that he is wrong, and that his actions are unconscionable. If the press does not fulfil this function, the country is the poorer for it, and in greater danger. The press is to provide transparency to the processes of decision-making and to the decisions themselves, because bureaucracies generally abhor light, even when upright and responsible.

Without the press, the modern emperor — whether dictator or elected president - is insulated, encapsulated in a cocoon of many who are either sycophants or who are truly awed by those in power. They do not directly question the leader, sometimes because protocol inhibits it, sometimes because of social ostracism. Even in democracies, this may be difficult. The staff may believe they are protecting the leader, but it is a short term service and a long range disservice both to the individual and to the state. So if the Imperial Censorate is gone, and if the press is not free to perform this role, then the arrogance associated with power will grow, reinforced by a supportive wrapping that inflates egos and hides reality.[34]

Paradoxically, that same 'arrogance associated with power' had bred a degree of laziness among those who opposed Chydenius's reforms. The actual process by which he managed to introduce FoI to Sweden and Finland therefore became something of an entertaining case study in political manipulation. It was described in an edited extract from *The Biography of Finland* as follows:

Chydenius and other radicals saw the necessity of improving the political competence of a broad cross-section of the population, consequently adopting the notion of freedom of the press with great zeal. Chydenius' memorandum on this matter in 1765 was signed by an elderly representative of the clergy. Furthermore, the radicals succeeded in making Chydenius a member of a parliamentary committee dealing with the freedom of press issue, and he became its most outspoken member in the winter session of 1765–>66.

The conservatives had a majority in the committee, but since they were extremely lazy about participating in the meetings, the freedom of press supporters could handle the planning stage almost by themselves. Most of the work was done by Chydenius, with enormous industry and competence. The conservatives could not find tenable arguments against him in the big deputation revising the committee report. In its final recommendation in spring 1766 the freedom of press committee suggested abolishing censorship on other than religious articles, which would be subject to cathedral chapter control. The committee also suggested giving the public free access to all official documents as well as parliamentary committee reports and records. The conservatives did not succeed in voting these propositions down. In autumn 1766 the parliamentary majority ... approved the propositions ... Thus the Freedom-of-Press and the Right-of-Access to Public Records Act came into force at the end of the year, and Sweden had acquired the most progressive freedom-of-the-press law in the world.[35]

Chydenius was later reported as saying he believed that the passing of the Freedom-of-Press and the Right-of-Access to Public Records Act was one of his greatest achievements.[36] The Act granted all citizens a right of access to all government-held documents. It required that official documents should 'upon request immediately be made available to anyone making a request' at no charge.[37] In the same year it ratified the FoI statute the Swedish parliament also passed legislation establishing the position and defining the role of the world's first Parliamentary Ombudsman.[38] That was 23 years before the United States Constitution was adopted and 25 years before ratification of the First Amendment to that constitution.[39] Unlike the Swedish legislation, however, neither the United States Constitution nor its first amendment provided for freedom of access to government-held documents or for an ombudsman.

Because Sweden was the first nation in the world to enact specific libertarian legislation based on concepts of press freedom, freedom of information and the role of an ombudsman, it is instructive to look beyond Chydenius and examine the Swedish experience in a wider context. According to the official Swedish Parliamentary Web site, 'The Riksdag in Swedish Society',[40] the nation entered what is now known in Swedish history as 'The Age of Liberty' after the death of King Carl XII in 1718. New constitutions which were broadly based on the concept of parliamentary rule and influenced to some extent by the philosophies of John Locke[41] had been ratified in 1719/1720 when:

A new form of [parliamentary] government took shape, which became known, significantly, as Age of Liberty government, and captured the imagination of the great philosophers of the age like Voltaire, Rousseau and Mably.[42]

Just as Chydenius' philosophies are still highly relevant today, the constitutional innovation and change which occurred in Sweden during the Age of Liberty is still reflected in the traditions and workings of its present Riksdag. In addition to new freedoms, the period saw the evolution of a two-party system of government and a system of parliamentary committees. There was also a separation of powers between the parliament and the monarchy. The way the Swedish system evolved also meant that its Constitution was unlike many other constitutions which were adopted later in other nations because the guiding principles of government reflected in the Swedish legislation were not contained in a single document but in four separate legislative elements, or 'fundamental laws' known collectively as the Instrument of Government. They became, and still are, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. Of particular interest in the current context is the fact that Chydenius's Freedom-of-Press and the Right-of-Access to Public Records Act of 1766 specifically aimed to create an open society in which even documents such as letters from foreign heads of state to the Swedish prime minister were, and still are, open to public scrutiny.[43]

In one sense, however, Chydenius was fortunate to have been in the right place at the right time because the Age of Liberty ended in 1772 after King Gustaff III, who had succeeded to the Swedish throne in 1771, became an autocratic ruler. Providentially, as it turned out, Gustaff's influence was little more than a blip in the democratic process and the country reverted to democratic rule in 1809 with the start of a new era which became known as the Age of Enlightenment. Subsequently a new Freedom of the Press (and FoI) Act was incorporated in the Instrument of Government in 1810. A further new Freedom of the Press Act was adopted in 1812. It was replaced again in 1949 and amended several times in the 1970s when the law was altered to encompass computerisation the electronic preparation and storage of documents.

Chapter One of the current Swedish Instrument of Government sets out the basic principles of Swedish democracy in everyday language. Section 4.2 is headed 'Fundamental Rights and Freedoms'. Under the subheading 'background' it says, in part:

The philosophers of the Age of Enlightenment put forward ideas concerning the need to protect citizens not just against their fellow-citizens but also against the state. They believed that public officials were the servants of the people, not their masters, and that it should be possible to hold them to account should they overstep the mark.

> Ideas of this kind led to declarations of rights: in England in 1689, in France in 1789, in the constitutions of individual American states and in the [First Amendment to the] Constitution of the United States thereafter, in 1791. These sets of rules formed the model for the constitutions of many other countries. In Sweden, the ideas first took root in respect of printed matter. Sweden's first Freedom of the Press Act was drawn up in 1766. Censorship was banned (except in the case of theological writings), and the written material of public authorities became in principle accessible to the public. ... In this breakthrough for the ideas of the Age of Enlightenment, a significant influence was the political system of the Age of Liberty ...
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> After the more or less autocratic regimes of the Gustavian period, the ideas of the Age of Enlightenment enjoyed a renaissance in the 1809 Instrument of Government, primarily in the form of Article 86, which re-established the basic elements of the freedom of the press, namely freedom from censorship and other prior interventions, a requirement that interventions should have support in law and be subject to examination before a court of law, and the principle of the public nature of official documents.[44]

The next nation after Sweden to adopt FoI legislation, the South American Republic of Colombia, has had a starkly contrasting record of political instability and a shocking record of human rights abuses for most of its history.[45] Its FoI statute, the Code of Political and Municipal Organisation of 1888 provided for access to government records. It was adopted after a reformist liberal Constitution was endorsed in 1886.[46] That Constitution was to go on and become the oldest surviving Constitution in Latin America and was not fully revised until 1999.[47] Access to documents under the 1888 code was available to individuals who could 'request documents held in government agencies and archives, unless it was specifically forbidden by another law'.[48] The current Colombian Constitution still contains a 'right' of access to government-held information. The wording of the relevant current law, which was approved in 1985, bears a remarkable similarity to the 1888 legislation with the Inter American Press Association reporting that the right to FoI in Colombia is currently regulated by an administrative code which says:

> As a general principle, there shall be free access to official documents and these shall be considered as classified only if so provided by specific laws.[49]

However the true impact of that law is far from clear — something not aided by Colombian president Andrés Pastrana Arango, who, while describing himself as a journalist and lawyer as well as 'a governing ruler', enigmatically told the World Association of Newspapers on World Press Freedom Day in May 2001, that:

> As our Constitutional Court has said, freedom of information is a 'duty and a right, it is not an absolute right unless it has a special responsibility which conditions the achievement of that freedom'.[50]

The third nation to introduce, or in a sense re-introduce, its own freedom of information laws appears to have been none other than Finland. It had been split from Sweden in 1809 as a result of the Napoleonic wars and became an autonomous Grand Duchy of Russia. However Finland declared itself independent in 1917. It was wracked by civil war in 1918[51] but the war over, Finland elected its first president and officially became a republic in 1919. In doing so it passed a Constitution Act which was modelled to a large extent on Sweden's system of Fundamental Rights. The legislation included a Finish version of Sweden's Freedom of the Press Act, which also codified freedom of access to government-held information, and provided for the appointment of an ombudsman.[52] The Finnish FoI legislation was revised in its Publicity of Documents Act 1951, and again in 1999 in the Act on the Openness of Government Activities which states, in part:

> The objectives of the right of access and the duties of the authorities provided in this Act are to promote openness and good practice on information management in government, and to provide private individuals and corporations with an opportunity to monitor the exercise of public authority and the use of public resources, to freely form an opinion, to influence the exercise of public authority, and to protect their rights and interests.[53]

Then came freedom of information in the United States. However, its first FoI legislation was not as is widely reported, the Freedom of Information Act of 1966. Neither was it FoI legislation in various states of the republic. In fact there was important precursor legislation in the United States just as there had been in Sweden and Finland. In the same way that the 1707 statute in Sweden and Finland had required records to be archived, the United States Congress passed the Administrative Procedure Act of 1946 which, for the first time, made it mandatory for all federal agencies in that nation 'to keep and maintain records which were to be open to inspection by the public'.[54]

Around the same time, the idea of freedom of information was being heavily promoted by United States newspaper interests. In May 1946, the United States delegation to the United Nations persuaded the Commission on Human Rights to create a sub-commission on FoI. The United Nations General Assembly subsequently called an international conference on FoI in Geneva in 1947/48.[55] However a specific 1953 draft convention on FoI which came out of the Geneva meeting and which would have provided a benchmark and template for all nations, was later dumped. Ironically, some western journalists and editors had fought the proposal. They said they believed it would actually threaten press freedom. One of their leaders was an Australian, Sir Llyod Dumas. At the time he was managing director of Advertiser Newspapers Limited, the publisher of the *Adelaide Advertiser*.[56] A biographical note published by the Australian National Library says Dumas was concerned that if Australia signed the convention, too much power over the Australian press would pass to the federal government. He argued that the convention might have prohibited the publication of articles critical of foreign governments or it could have ensured that foreign governments were given an equal right of reply to any article which offended them. The note reported that:

> As a consequence, Dumas became very active in opposition to the draft Convention. He liaised with members of the Commonwealth Press Union, the American Society of Editors and the International Press Institute and was ultimately instrumental in the abandonment of the Convention.[57]

Another who spoke against the draft convention was a former president of the American Bar Association , Frank Holman. He argued that it conflicted with the United States Bill of Rights and was opening the way to dictatorship.[58] Meanwhile United States President Harry Truman had been recruited to the cause. He was reported to have pursued the ideal of 'the free flow of information in the world' in the immediate post World War II years.[59] In several speeches in 1947, Truman had specifically included freedom of information in explanations of his personal concept of human rights.[60] Presidential lobbying aside, the actual term 'Freedom of Information' is believed to have entered the vernacular in 1949 after it appeared as the title of a book published by journalist Herbert Brucker. A passionate believer in a free press whose distinguished

career included a stint as president of the American Society of Newspaper Editors and teaching in Columbia University's School of Journalism,[61] Brucker (1973) recorded how lobbying by the press led to the first United States federal FoI law being introduced — not in 1966 as widely reported today, but in 1958. He recalled that:

> The drive for freedom of information had its origin in World War II. In 1945, before the war ended, the American Society of Newspaper Editors sent a three-man committee around the world in an attempt to persuade the world's governments that, when peace came again, they should break down the barrier to the free flow of information across national borders. It was clear that these barriers had done much to bring on wars in the past.[62]
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> In 1958 the first federal freedom-of-information law was signed by President Eisenhower. The late Harold L. Cross, a dedicated lawyer acting on behalf of the American Society of Newspaper Editors, had discovered that when bureaucrats were challenged as to what legal right they had to keep the public's business secret, they scurried the law books to come up with ... a statute dating back to 1789. It had simply ... authorised regulations covering 'the custody, use and preservation' of records and papers. Therefore the 1958 law's one-sentence text read simply, 'This section does not authorise withholding information from the public or limiting the availability of records to the public'.[63]

It is highly significant from a journalist's perspective that as in Sweden/Finland, the drive to introduce FoI in the United States was inextricably linked to freedom of the press. But respected United States journalism historian Frank Luther Mott (1962) said that the simple 1958 law in the United States did not go nearly far enough and:

> The question remained as to what might in given cases be proper to be kept secret 'in the public interest'.[64]

He said the main problem was that a 'cult of secrecy' developed during the Cold War after World War II and that the culture of the public service fostered a:

> ... reluctance to give up the 'executive privilege' of withholding information of government activities on the grounds of 'public interest', and an inclination to regard all such questions from the point of view of how much it is possible to conceal rather than how little must necessarily be kept secret, were difficult forces to combat.[65]

Despite the setback in the United Nations and a far from enthusiastic reception from public servants, notions of FoI spread like wildfire. Among other things a Freedom of Information Centre that still exists today was established at the University of Missouri in 1958. Mott reported that by 1960 in the United States 'some 30 states' had passed 'open meeting laws' which decreed that meetings of governmental boards, commissions, and councils must be open to the public. He said there were exceptions for bodies such as juries, parole boards, commerce commissions, 'and about half these laws also called for free access to records'.[66] Having allowed FoI a toe in the door in 1947 with the Administrative Procedure Act, then a foot in the door in 1958, pressure mounted on Congress to go further and open the door properly. The impact of the next and final steps in the process of introducing FoI in the United States was well summarised by journalism educator Margaret DeFleur (1994):

> During the decade of the 1960s, pressures mounted for greater disclosure of the activities of all branches of government. In 1966 Congress passed a lengthy amendment to the Administrative Procedure Act, and called it the Freedom of Information Act. This amendment, commonly called FOIA, placed the burden of compliance squarely on the agencies and required that they prove they were justified when denying access to records. It also clarified the conditions under which agencies could legally withhold records by specifying nine exemptions to the Act. In order to protect against unwarranted invasions of personal privacy, the law allowed agencies to delete identifying details, but required that the agencies justify any decisions in writing.
>
> The FOIA amendment was written with some very real teeth to enforce its provisions. If records were not released, citizens could register a complaint in court about the agency. That could then enjoin that agency and order the production of any records improperly withheld. More forcefully, that statute stated that 'in the event of non compliance with the court's order, the district court may punish the responsible officers for contempt'. Finally, a provision was included requiring that such court cases 'take precedence on the docket over all other cases and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.'[67]

After the United States Freedom of Information Act become law on 4 July 1966 —Independence Day — pressure intensified on governments around the world to allow their citizens similar rights. Research indicates that the next nation after the United States to adopt a form of specific FoI law was Denmark in 1970 followed by Norway in 1971 and France in 1978. (On a sub-national level the provincial government in Nova Scotia, Canada enacted legislation in 1977). The former British dominions of Australia, Canada and New Zealand all enacted their own national legislation in 1982, although Canada's statute did not actually pass into law until 1983. Then came laws in Austria and the Philippines which came into effect in 1987; Brazil 1988; Italy 1990; the Netherlands 1991; Hungary 1992, Portugal 1993; Belize (formerly British Honduras) 1994; Hong Kong and Russia 1995; Iceland, Lithuania and South Korea 1996; Thailand and the Ukraine 1997; Ireland, Israel and Latvia 1998 and the Czech Republic 1999. South Africa enacted legislation in 2000 but it did not pass into law until March 2001. In the United Kingdom, that nation's first 'proper' FoI legislation, its Freedom of Information Act 2000, received royal assent on 30 November 2000, but its provisions were to be phased in with a proviso that the law would not be fully operational until 2005.[68]

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The NSW Administrative Decisions Tribunal: Leading Cases

The NSW Administrative Decisions Tribunal (ADT) was established in October 1998. Its jurisdiction is to undertake merits review of determinations made by decision makers on applications under the *Freedom of Information Act 1989* (NSW). It also has wide and growing jurisdiction to consider decisions made under other specified NSW acts.

Its first FoI decision was handed down in March 1999 *(Taylor v RSPCA* [1999] NSW ADT 23). The total is now around sixty decisions plus five decisions by the Appeal Panel which has jurisdiction to consider applications for review of Tribunal decisions on matters of law (s.113 *Administrative Decisions Tribunal Act 1997* (NSW)).

The purpose of this article is to highlight some of the important decisions by the Tribunal and to provide a point of reference for those in NSW and elsewhere who may be interested in exploring some of these decisions in detail.

Relevant provisions of the NSW *FoI Act* are not reproduced in full. The Act can be accessed at <www.austlii.edu.au>. References to clauses are to the exemption provisions which are contained in Schedule 1 of the Act.

The full texts of Tribunal Decisions are available on <www.lawlink.nsw.gov.au/adt> (General Division of the Tribunal and are listed by year). The website includes a 'view by category of decision' page, which lists some FoI decisions but is not a comprehensive index.

Gen ral approach to interpretation

The Tribunal attaches significance to the objects of the Act as set out in s.5. The objects (and the Second Reading speech) are frequently quoted in Tribunal decisions.

The Tribunal places the onus on the agency to justify any decision to withhold documents. There has been frequent reliance on the view expressed by the then President of the NSW Court of Appeal, Mr. Justice Kirby, in the *Perrin* case *(Commissioner of Police v District Court* NSW [1993] 31 NSWLR 606) that 'to withhold disclosure it is for the agency to make out the application for the exemption. Thus the question properly is not why the information should not be disclosed but why it should be exempted'. (See comments by Deputy President Hennessy in *Gilling v Hawkesbury City Council* [1999] NSW ADT 43).

However, this general approach to interpretation does not extend to a 'leaning position' in favour of disclosure when the Tribunal is required to interpret an exemption which includes a public interest test.

> The Clause 9 exemption [internal working documents] is neutral on whether a document ... falling within the description ... does or does not deserve to be kept secret. [S]ecrecy is only justified if disclosure of something in a particular document would be contrary to the public interest. [This] test requires reflection on the objects of the exemption. This indicates the opinion of the legislature that the public interest requires public openness accompanying or following decision making in some cases but that in other cases it requires secrecy. The neutrality of this position prevents approaching the exemption from any general assumption or presumption on the necessity of secrecy or openness of government deliberative documents.
>
> Judicial Member Smith in *Tunchon v Commissioner of Police* [2000] NSW ADT 73.

In weighing up factors relevant to 'unreasonable' disclosure of information concerning a person's personal affairs the Tribunal must have regard to all the factors in the particular case. It should not adopt a 'leaning' position in favour of disclosure. At its core unreasonableness involves public interest considerations. A fundamental aspect of this will be whether withholding the document is 'reasonably' necessary for the proper administration of the government'. (Judicial Member Robinson in *Gliksman v Health Care Complaints Commission* [2001] NSWADT 47).

Scope to neither confirm nor deny the existence of documents

Section 28(3) does not require an agency to include in a notice of determination information which would render the notice an exempt document. This provision can be used particularly in cases that involve law enforcement and public safety documents (cl.4) to neither confirm nor deny the existence of documents if to do so would result in the notice itself being capable of a claim under this clause. (Deputy President Hennessy in *Ekermawi v Police* [2001] NSW ADT 27; Judicial Member Robinson in *Cerminara v Police* [2001] NSW ADT 95). (Deputy President Hennessy in *Murre (No.2) v NSW Police Service* [2001] NSWADT 175).

Law enforcement and public safety clause 4

The Tribunal has examined a number of the law enforcement and public safety exemptions closely, particularly cl.4(1)(b) (disclosure could reasonably be expected to enable the existence or identity of any confidential source of information in relation to the enforcement or administration of the law, to be ascertained).

In order to relate to the enforcement or administration of the law the information must be relevant to the 'policing of criminal laws or civil obligations'. The exemption is comparable to the police informer privilege but can be used not only by police agencies but by others who have similar powers and responsibilities. It is not relevant to information in relation to licensing functions of an agency where the ultimate penalty may involve the withdrawal of a license. (Mr Smith in *Watkins v RTA* [2000] NSWADT 11).

However it can apply to information that leads to investigation where an offence involving a penalty can be