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The Impact of Freedom of Information Legislation on Criminal Discovery in Comparative Common Law Perspective

*Michael Taggart**

ABSTRACT

This Article examines the effect of freedom of information legislation on criminal discovery in the United States, Canada, Australia, and New Zealand. While all of these countries share the common law tradition and have comparable freedom of information legislation, Professor Taggart notes that the impact of that legislation on the law and practice of criminal discovery varies in each country.

The United States courts generally have resisted attempts by criminal defendants to gain access to a wider range of material under the Freedom of Information Act than available by conventional discovery. So far the courts are unwilling to allow that Act to supplement, and thereby possibly supercede, the discovery provisions of the Federal Rules of Criminal Procedure.

Examination of freedom of information legislation in Canada discloses little likely impact on the law and practice of criminal discovery. At the federal level, broad law enforcement exemptions nullify the practical use of the Access to Information Act by criminal defendants. Provincial freedom of information legislation in Canada either exempts from disclosure material desired by criminal defendants, does not cover law enforcement agencies or prosecutorial authorities, or, to date, has not been used for

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criminal discovery.

The language of Australia's federal and state freedom of information Acts appears to allow scope for criminal discovery-motivated requests by criminal defendants. Courts and administrative tribunals, however, have been hostile to freedom of information requests in aid of criminal discovery.

Criminal defendants seeking broader disclosure than conventional criminal discovery allows have had much greater success under New Zealand's Official Information Act. The key New Zealand case interpreting the reach of that Act held that criminal investigations by the police, before criminal charges are laid, will be protected from disclosure; however, once criminal proceedings are begun, the Act has been interpreted in favor of disclosure. At this point, the defendant's right to a fair trial has been said to prevail over the interest in investigative secrecy.

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I. INTRODUCTION

Historically the common law has been hostile to the idea of criminal discovery, fearing that perjury and witness intimidation would result from making the defense aware of the prosecution's case in advance of trial.[1] The belated recognition that fairness demanded some kind of discovery for the defense produced a limited regime of disclosure based substantially on prosecutorial discretion.[2] Attempts to liberalize criminal

1. The arguments for and against pre-trial discovery in the criminal context in the United States have been canvassed extensively. There are over one hundred articles and comments on the subject from 1960 to 1973 and a considerable number since then. *See* 7 U.S.F. L. REV. 369, 388-89 (1973) (bibliography); 5 TULSA L.J. 208-11 (1968) (bibliography).

2. *See, e.g.*, J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1850 (1976) (describing the common law rule); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1180-85 (1960).

discovery further continue to meet resistance throughout the common law world. Some commentators have looked to freedom of information (FOI) legislation as a means of transforming the discretionary and variable conventional practice of criminal discovery into a more liberal regime based on statutory right.[3] This Article examines what impact FOI legislation has had on criminal discovery at the federal level in the United States, the federal and provincial/state levels in Canada and Australia, and in New Zealand.

This survey will reveal that the idea of broadening criminal discovery by use of FOI legislation has met judicial resistance in the United States and to a lesser extent in Australia. In Canada the breadth of law enforcement exemptions virtually rules out criminal discovery-motivated FOI requests. In contrast, the Court of Appeal in New Zealand has fashioned a code of pre-trial criminal discovery out of that country's FOI statute. The varying approaches underline differing judicial postures and social settings in these four countries that share the common law tradition.

II. THE UNITED STATES EXPERIENCE

The battle for criminal discovery in the United States has been fought long and hard but is far from over.[4] The late development and slow evolution of a limited code of criminal discovery at the federal level, and experimentation with broader criminal discovery in several state jurisdictions, typify the United States experience.

At the federal level, Rule 16 of the Federal Rules of Criminal Procedure provides for pretrial discovery of certain information and material in the possession of the prosecution.[5] This rule allows the accused to inspect and copy any statement made by himself,[6] but it does not require

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3. *See, e.g.*, Note, *The Freedom of Information Act—A Potential Alternative to Conventional Criminal Discovery*, 14 AM. CRIM. L. REV. 73 (1976) (authored by Jordan, Kehoe & Schechter).

4. *See supra* note 1.

5. *See generally* 2 C.A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE 2d §§ 251-261 (1982 & Supp. 1989). Apart from Rule 16, several other rules may be used as discovery devices on occasion, but all are hedged about by restrictions. *See* FED. R. CRIM. P. 6(a)(1)(3) (application may be made by defense for a copy of witness testimony before the grand jury), 7 (filing of a bill of particulars), 15 (depositions), 17(c) (subpoenas duces tecum).

6. FED. R. CRIM. P. 16(a)(1)(A). Rule 16(a)(1)(B), (C) and (D) provide for discovery of the accused's prior criminal record, and any documents, tangible objects, reports, and examinations that are in the custody of the prosecution and that are material to the preparation of the defense or are intended for use as evidence.

the prosecution to disclose the names and addresses of any prospective prosecution witnesses;[7] nor does it oblige the prosecutor to furnish the accused with a copy of statements by prospective witnesses.[8] In this last respect, Rule 16 follows the Jencks Act of 1957,[9] which provides that in any federal criminal prosecution no statement or report by any government witness or prospective government witness shall be the subject of discovery until the witness testifies on direct examination at trial. Cutting across this, however, is the due process imperative that the prosecution must disclose all evidence favorable to the accused, provided it is material to guilt (i.e., creates a reasonable doubt) or punishment.[10] Furthermore, the Rules clearly were intended to prescribe the minimum amount of discovery to which the parties are entitled by law and not to limit the trial judge's discretion to order broader discovery in appropriate cases.[11] Even so, criminal discovery at the federal level falls well short of the American Bar Association Standards for Criminal Justice, which require the prosecution to provide, upon request, names and addresses of

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7. *Id.* 16(a)(2). In 1974 the United States Supreme Court approved an amendment to Rule 16 that would have required the government, upon request of the defense, to furnish the names and addresses of all witnesses the prosecution intended to call at trial. Congress did not ratify this "most controversial" amendment. H.R. REP. NO. 414, 94th Cong., 1st Sess. 12 (1975) (Conference Committee Notes); 2 C.A. WRIGHT, *supra* note 5, § 254, at 86, 90 & nn.73-75.

Note that the courts retain a discretion, unaffected by the rules, to order the disclosure of the names and addresses of witnesses. *See* Will v. United States, 389 U.S. 90, 99 (1967); *infra* note 11. As often as not the courts refuse so to order. *See* 2 C.A. WRIGHT, *supra* note 5, § 254, at nn.76-77 (outlining case law). For a discussion of the protection given by exemption (7)(C) of the Freedom of Information Act (FOIA), 5 U.S.C. § 522 (1988), to the names and addresses of persons interviewed by law enforcement officers, see *infra* notes 103-17 and accompanying text.

8. *See, e.g.*, United States v. Tragash, 121 F.R.D. 59 (S.D. Ohio 1988).

9. Pub. L. No. 85-269, 71 Stat. 595 (current version at 18 U.S.C. § 3500 (1988)). The Act was named after the Supreme Court decision in Jencks v. United States, 353 U.S. 657 (1957), in which the court held that reports by prosecution witnesses had to be handed over to the defense at trial. Congress moved to codify that position and to contain the scope of the decision when lower courts began to apply *Jencks* to compel pre-trial discovery. *See* Note, *The Aftermath of the* Jencks *Case*, 11 STAN. L. REV. 297 (1959); Note, *The Jencks Legislation: Problems in Prospect*, 67 YALE L.J. 674 (1958); Palermo v. United States, 360 U.S. 343 (1959).

10. *See* Brady v. Maryland, 373 U.S. 83 (1963) (the *Brady* doctrine); United States v. Agurs, 427 U.S. 97 (1976).

11. United States v. Nobles, 422 U.S. 255, 231 (1975); United States v. Campagnuolo, 592 F.2d 852, 857 n.2 (5th Cir. 1979). *See also* Hewitt & Bell, *Beyond Rule 16: The Inherent Power of the Federal Court to Order Pretrial Discovery in Criminal Cases*, 7 U.S.F. L. REV. 233 (1973).

witnesses, together with any relevant witness statements.[12]

The experience with criminal discovery at the state level varies a great deal. States such as California[13] have demonstrated that broad criminal discovery regimes do not open a Pandora's Box and have encouraged other states to follow suit. A significant number of states, however, remain aligned with the federal stance on criminal discovery.[14]

In response to the restrictive and somewhat complex federal criminal discovery regime,[15] and the diversity of state criminal discovery practice, defense counsel have sought to use the federal Freedom of Information Act[16] (FOIA) and state open record laws as substitutes for or aids to criminal discovery. This Article focuses on discovery-motivated uses of the FOIA.[17]

FOIA access supposedly has a number of advantages over conventional criminal discovery.[18] First of all, whereas a potential defendant cannot seek discovery before charges are laid or after the time provided for by court rule, the defendant can make an FOIA request before charges are brought (i.e., during investigation), during the conventional discovery period, or after that period expires.[19] Second, in theory, the strictly limited response times under the FOIA compare favorably with

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12. 2 AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE ch. 11, § 2.1(a)(i) (Supp. 1986). The American Bar Association promulgated standards for criminal discovery as early as 1970 and has revised them since. *See generally* Norton, *Criminal Discovery: Experience Under the American Bar Association Standards*, 11 LOY. U. CHI. L.J. 661 (1980).

13. *See* Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228 (1964).

14. *See* Note, *Defendant Access to Prosecution Witness Statements in Federal and State Criminal Cases*, 61 WASH. U.L.Q. 471 (1983).

15. For a straightforward treatment of the various criminal discovery devices available under federal law, see Rakoff, *How to Discover the Federal Government's Proof in Criminal Cases*, 29 PRAC. LAW., July 15, 1983, at 13.

16. 5 U.S.C. § 522 (1988).

17. On state open record laws and law enforcement and investigatory information, see 2 B.A. BRAVERMAN & F.J. CHETWYND, INFORMATION LAW: FREEDOM OF INFORMATION, PRIVACY, OPEN MEETINGS, OTHER ACCESS LAWS § 24-5.2.2 (1985); BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PUB. NO. NCJ-95787, CRIMINAL JUSTICE INFORMATION AND POLICY: INTELLIGENCE AND INVESTIGATIVE RECORDS 77-79 (1984).

18. I acknowledge my debt to an exhaustive student note on this subject by Jordan, Kehoe & Schechter, Note, *supra* note 3. On disadvantages of discovery-motivated FOIA requests, see *infra* at notes 54-62 and accompanying text; Note, *supra* note 3, at 134-38; 1 B.A. BRAVERMAN & F.J. CHETWYND, *supra* note 17, § 3-2.6.

19. Note, *supra* note 3, at 133.

the lack of a time limit within which the government must respond to a discovery motion and the largely untrammelled discretion of the trial judge in that respect.[20] Third, in a discovery motion the accused must show that the information sought is relevant and material to his defense, that the request is reasonable, and that the information is within the scope of the disclosure provisions in the Rules; whereas the FOIA requires no showing of reasonableness or relevance.[21] Thus, the FOIA is "the only way for the criminal practitioner to obtain marginally relevant but potentially useful prosecutorial documents such as policy guidelines, prosecutional workbooks, and statistical files."[22] Fourth, the government, not the accused, carries the burden of proof under the FOIA as to the applicability of one or more of the nine exemptions from disclosure.[23] Fifth, and most important, some records that would not be discoverable under the Rules or that would be the subject of privilege are likely available under the FOIA.[24] Finally, the scope of curial review differs significantly; an appellate court will reverse a trial judge's discovery ruling only for abuse of discretion, whereas under the FOIA the district court must consider the matter de novo and reverse if the agency's decision is incorrect.[25] Furthermore, the FOIA applies to agencies of the United States Government, and the wide definition of "agency" covers many bodies from which an accused might desire "records,"[26] including the FBI, the Department of Justice, and the Federal Bureau of Prisons.[27] The United States courts, however, are specifically excluded from the

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20. *Id.* at 71.

21. *Id.* at 132-33.

22. LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT 229 (A. Adler 14th ed. 1989) [hereinafter Adler].

23. 5 U.S.C. § 552(a)(4)(B). A similar provision appears in the Australian Freedom of Information Act, 1982, [1982] 1 AUST. ACTS. P. § 61, but there is no such provision in New Zealand's Official Information Act, 1982, 1982 N.Z. Stat. No. 156. *See* Commissioner of Police v. Ombudsman, [1985] 1 N.Z.L.R. 578 (H.C.) (Jeffries, J.).

24. *See* Note, *supra* note 3, at 139-59 (arguing that witness lists, prosecution guidelines, and instructions to prosecutors are disclosable under the FOIA but are not discoverable under the Rules).

25. *Id.* at 76-77, 133.

26. The FOIA covers only "records," a term it does not define. For a good discussion of what "record" might mean, see Note, *What is a Record? Two Approaches to the Freedom of Information Act's Threshold Requirement*, 1978 B.Y.U. L. REV. 408. In the criminal discovery context it has been said that the record limitation on FOIA access probably excludes only unrecorded oral statements and physical evidence. Note, *supra* note 3, at 101.

27. Note, *supra* note 3, at 78-79.

coverge of the FOIA.[28]

Notwithstanding the apparent utility of the FOIA as an alternative or adjunct to criminal discovery, several courts have refused to permit broader disclosure under the FOIA than that provided by the Federal Rules of Criminal Procedure.[29] These cases rely on the following dicta in Supreme Court cases concerning the interaction of the FOIA and civil and administrative discovery regimes: "The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants";[30] "FOIA was *not* intended to function as a private discovery tool";[31] "The primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery."[32] In applying this dicta to the criminal discovery context, these courts have reasoned that: discovery in criminal proceedings is "governed" by the Federal Rules, and neither the FOIA nor its legislative history disclosed any intention to amend the Rules;[33] the FOIA was not intended to enlarge the scope of criminal discovery beyond that provided in the Rules and specifically cannot supersede the well-established relevancy and materiality requirements of criminal discovery law;[34] any use of the FOIA as a "routine discovery device" would result in "a substantial displacement of the balance established for criminal discovery by Rule 16";[35] FOIA-driven pre-trial disclosure would result in substantial harm to the government's case by diverting scarce resources away from the presentation

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28. 5 U.S.C. § 551(1)(B).

29. United States v. District Court, 717 F.2d 478 (9th Cir. 1983); United States v. Buckley, 586 F.2d 498 (5th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); United States v. Murdock, 548 F.2d 599 (5th Cir. 1977); Fruehauf Corp. v. Thornton, 507 F.2d 1253 (6th Cir. 1974). *See also* Stimac v. Department of Justice, 620 F. Supp 212, 213 (D.D.C. 1985).

30. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975). *See also* Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974), strongly criticized in this respect by 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.7, at 324-26 (2d ed. 1978).

31. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (emphasis in original).

32. Baldridge v. Shapiro, 455 U.S. 345, 360 n.14 (1982).

33. *Murdock*, 548 F.2d at 602. In Murphy v. FBI, 490 F. Supp. 1134, 1142 (D.D.C. 1980), the District Court for the District of Columbia said that exemption (7)(A) was designed precisely to prevent disclosure in advance of that provided by the Federal Rules of Criminal Procedure. The court relied on a statement by Senator Hart during the 1974 amendment debate that the exemption prevented harm to the government's case "by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have."

34. *Murdock*, 548 F.2d at 602-03; United States v. District Court, 717 F.2d at 482.

35. *District Court*, 717 F.2d at 481; *Murdock*, 548 F.2d 599.

of the case to processing FOIA requests;[36] defense use of the FOIA instead of Rule 16 would circumvent reciprocal discovery rights of the prosecution;[37] and FOIA access would operate as a device to delay ongoing litigation.[38]

Thus, the present majority position, representing the views of the Courts of Appeals of three of the twelve federal circuits, limits considerably use of the FOIA as a pre-trial discovery tool. Only in one case, however, has the issue arisen squarely for decision,[39] and, as yet, the Supreme Court has not had occasion to consider the applicability of the FOIA in the criminal discovery sphere. Moreover, even in those circuits that have taken a restrictive approach, the FOIA remains available as an alternative to conventional criminal discovery as long as FOIA disclosure

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36. *District Court*, 717 F.2d at 481.

37. *Id.* at 482.

38. *Id.*; *Murdock*, 548 F.2d at 602.

39. The issue arose clearly for decision in *District Court*, 717 F.2d 478. In Fruehauf Corp. v. Thornton, 507 F.2d 1253 (6th Cir. 1974), the Sixth Circuit Court of Appeals refused to stay a pending criminal conspiracy trial in order to allow defense counsel: (1) to review and assemble voluminous material made available by virtue of a discovery order; and (2) to defend an appeal by the prosecution from a district court order under the FOIA to disclose requested materials and, if successful, to assemble and review that material. In refusing the stay, the Court of Appeals took account of these factors: (1) the petitioners had already received the benefit of extensive discovery in the criminal proceeding; (2) the trial had been pending for a considerable time; (3) it was apparent that another application for further discovery might be made in "what promise[d] to be a protracted trial," (4) there was no reason to believe the district court would not accord the accused a fair trial and grant by discovery that to which they were entitled; (5) any errors with respect to discovery could be corrected on appeal; and (6) "the Freedom of Information Act was not intended to serve as a substitute for criminal discovery." *Id.* at 1254. The accused succeeded after protracted litigation in securing the desired information under the FOIA. Fruehauf Corp. v. IRS, 369 F. Supp. 108 (E.D. Mich.), *aff'd*, 522 F.2d 284 (6th Cir. 1975), *vacated on other grounds* 429 U.S. 1085, *on remand* 566 F.2d 574 (6th Cir. 1977).

In United States v. Murdock, 548 F.2d 599 (5th Cir. 1977), the FOIA was not pleaded at trial; indeed no request under the Act appears to have been made. The Act was raised for the first time on appeal (from conviction) on the ground that the trial judge erred in ruling on a discovery motion that certain documents need not be disclosed. The appellant, appearing for himself, argued as an alternative to the criminal discovery rules that the documents were disclosable under the FOIA. The case United States v. Buckley, 586 F.2d 498 (5th Cir. 1978), following *Murdock*, is similar. Both decisions, however, are suspect on the ground that district courts lack jurisdiction to adjudicate upon an FOIA suit until a request has been made in the proper form and denied in whole or in part and administrative remedies have been exhausted. For a careful and, it is submitted, correct treatment of this issue, see United States v. Steele, 799 F.2d 461 (9th Cir. 1986).

would not exceed that provided by the Federal Rules.[40]

The courts taking this approach have failed to observe that the Supreme Court has also said that an FOIA requester's rights under the FOIA "are in [no] way diminished by its being a private litigant, but neither are they enhanced by [the requester's] particular, litigation-generated need for these materials."[41] The FOIA directs, absent applicable exemption, that requested documents be disclosed to "any person" regardless of need or purpose. Properly understood, the FOIA is "litigation neutral" in that it does not contemplate consideration of the requester's identity, status, or the intended use of the agency records.[42] Any judicially imposed exclusion of litigants (civil or criminal) from the FOIA would create a "status" exemption contrary to the clear words of the FOIA[43] and inconsistent with the FOIA's basic goal of providing all or any member of the public with access to information about the operations of government.[44] As Professor K.C. Davis has pointed out:

> The legislative history is clear that "any person" means any person. One who is entitled to records under the FOIA does not lose his entitlement by becoming involved in a proceeding. The nine exemptions are only nine. Congress has not enacted a tenth exemption for records that are to be used in a proceeding. The FOIA is entirely clear . . . .[45]

This is especially true in the criminal law context because the individual's involvement in the proceeding is involuntary and the presumption of innocence operates.[46]

There is some judicial support for application of the FOIA in criminal

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40. This is clear from the Ninth Circuit's "interpretation" of United States v. Brown, 562 F.2d 1144 (9th Cir. 1977), in *District Court*, 717 F.2d 478.

41. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 n.23 (1978). *See also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975).

42. Adler, *supra* 22, at 225-26. *See* Fiumara v. Higgins, 572 F. Supp. 1093, 1099-1100 (D. N.H. 1983).

43. Hawkes v. IRS, 467 F.2d 787, 792-93 n.6 (6th Cir. 1972); M. Farbman & Sons Inc. v. New York City Health and Hosp. Corp., 62 N.Y.2d 75, 79-80, 464 N.E.2d 437, 439, 476 N.Y.S.2d 69, 71 (1984) (New York's Freedom of Information Law was modeled on the FOIA).

44. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119, 127 (1984).

45. 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.7, at 46 (2d ed. Supp. 1982). For discussion of the policy problems with the "any person" standard, see 1 J.T. O'REILLY, FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW § 4.05 (Oct. 1979).

46. For a similar argument that denial of adequate pre-trial discovery undermines the presumption of innocence, see Goldstein, *supra* note 2, at 1193; Brennan, *Remarks on Discovery*, 33 F.R.D. 56, 57 (1963).

proceedings. In *United States v. Wahlin*[47] the accused, charged with excise tax evasion, filed a discovery motion under Rule 16 seeking access to Internal Revenue Service private letter rulings necessary for the preparation of his defense. At the hearing on the discovery motion the accused argued that apart from Rule 16 the material was available under the FOIA. The prosecution countered that the accused must commence an independent civil suit under the FOIA for disclosure of the information.[48] Chief Judge Reynolds reacted strongly to that suggestion:

> The Government's contention that defendant cannot rely on the Freedom of Information Act to obtain discovery in a criminal action is preposterous. It would be absurd and dilatory to require that a defendant commence an independent civil suit for disclosure under the Freedom of Information Act to acquire the information sought and then return to court with the information to be used in his criminal defense. If this were required, this court would be obligated by basic fairness to hold the criminal action in abeyance until defendant either obtained or was denied the information sought. The applicability of the Freedom of Information Act to specific documents or information sought can be determined by this court in a discovery motion filed in a pending criminal case as easily as it can be determined in an independent civil suit. Thus, judicial economy and basic fairness demand that a defendant in a criminal action have available to him the information he is entitled to as an ordinary member of the public.[49]

The passage is in line with sympathies expressed by the Sixth Circuit,[50] and the Ninth Circuit initially approved of this passage in *United States v. Brown*,[51] but later retreated from it,[52] While this case law primarily concerns the district court's jurisdiction to consider the FOIA and criminal discovery motions together,[53] the judges concerned are clearly sympathetic to use of the FOIA as a criminal discovery tool.

Even if defendants can use the FOIA as a supplement to, or in lieu of,

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47. 384 F. Supp. 43 (W.D. Wis. 1974).

48. *See* United States v. Gavran, 620 F. Supp. 1277, 1281 (E.D. Wis. 1974), *aff'd*, 845 F.2d 1023 (7th Cir. 1988).

49. 384 F. Supp. at 47.

50. *See* Hawkes v. IRS, 467 F.2d 787, 792-93 n.6 (6th Cir. 1972).

51. 562 F.2d 1144, 1151 (9th Cir. 1977).

52. United States v. District Court, 717 F.2d 478 (9th Cir. 1983).

53. United States v. Wahlin, 384 F. Supp. 43 (W.D. Wis. 1974) and United States v. Brown, 562 F.2d 1144 (9th Cir. 1977) are subject to the same criticism leveled at some of the cases denying the application of the FOIA in the criminal discovery sphere. *See supra* note 39. But if the FOIA request has been properly made and declined, and administrative appeal exhausted, then the sentiments expressed in these cases are agreeable.

criminal discovery, they can encounter considerable difficulties with timing, especially in view of the federal Speedy Trial Act's requirement that the accused in a federal criminal prosecution be tried within one hundred days of arrest.[54] The FOIA provides very short response times to requests but, even if FOIA subject agencies meet them (which, in practice, the busiest agencies, such as the FBI, find impossible),[55] a refusal to disclose upheld on mandatory internal review and challenged immediately in the district court will take a minimum of sixty days to be ready for court adjudication.[56] In practice it usually takes much longer.[57] The FOIA once provided for expedited hearing of FOIA suits, but Congress removed this feature in 1984.[58] Furthermore, as the FOIA gives the litigant-requester no greater or lesser rights than any other requester,[59] the prevailing view is that pending litigation is not a good reason to expedite the FOIA request.[60] Thus, the accused cannot rely upon the FOIA as "a speedy discovery device."[61] If the government fights a FOIA suit, it will likely be resolved years after the criminal trial; any material disclosed will be relevant (if at all) to post-conviction appeal or post-appeal challenge but certainly will not assist defense counsel in preparing for the trial itself. For this reason one practicing lawyer has commented that the

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54. 18 U.S.C. § 3161(b), (c). *See generally* Misner, *Legislatively Mandated Speedy Trials*, 8 CRIM. L.J. 17 (1984).

55. *See* Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976); Tomlinson, *supra* note 44, at 149 n.156.

56. If the agency decides to withhold requested records, it must notify the requester within 10 working days after the request is received. 5 U.S.C. § 552(a)(6)(A)(i) (1988). At that time, the agency informs the requester of the right to have the decision reviewed by the agency head, and, if the right is exercised, the agency has 20 working days to make its final determination. *Id.* § 552(a)(6)(A)(ii). Both deadlines are subject to limited extension, *id.* § 552(a)(6)(B), but if the agency fails to comply with any deadline the requester is deemed to have exhausted his administrative remedies and can go to the district court. *Id.* § 552(a)(6)(C), (a)(4)(B). Upon filing a complaint in the appropriate district court, the agency has 30 days to plead unless the court extends the deadline "for good cause shown." *Id.* § 552(a)(4)(C).

57. *See* Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1, 19-21 (1988).

58. 5 U.S.C. § 552(a)(4)(D), *repealed by* Pub. L. No. 98-620, tit. 4, § 402(2), 98 Stat. 3357 (1984). The court may still in its discretion expedite an FOIA case "if good cause therefor is shown." 28 U.S.C. § 1657 (Supp. V 1987).

59. *See supra* note 41 and accompanying text.

60. *See* Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 613-14 (D.C. Cir. 1976); Tomlinson, *supra* note 44, at 127-28 n.24 (citing cases). *See also* McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1287 (9th Cir. 1987) (waiver of fees).

61. Jacoby, *The Uses of FOIA and FOIL*, 16 TRIAL LAW. Q. 12, 19 (1984).

value of the FOIA as a pre-trial criminal discovery tool is "overrated in all but exceptional cases."[62]

Courts could order a stay or adjournment to overcome this timing problem, but on the whole they have been unwilling to do so.[63] Almost all cases have arisen in the administrative discovery context, and the denial of stays there reflects the judicial view that use of the FOIA in agency proceedings interferes with settled agency discovery rules that are often intentionally restrictive.[64] In the infinitesimal case law on this issue in the criminal discovery context, the courts also seem sensitive to the problems of abuse and delay and the "danger of circumventing the strict criminal discovery rules"[65] by use of the FOIA.[66] But the Sixth Circuit Court of Appeals, although recognizing that conflicts can arise where civil FOIA suits and criminal discovery motions both go forward simultaneously, thought that the conflicts would be minimal in nature and could be handled by the courts.[67]

At the heart of the debate over the utility of criminal discovery-motivated use of the FOIA is whether the law entitles a criminal defendant to more material under the FOIA than by conventional criminal discovery. This depends in large part on the scope of the exemptions from disclosure in the FOIA. The FOIA has nine exemptions, three of which have special relevance in the criminal discovery context.[68]

The FOIA's exemption (3) protects records "specifically exempted from disclosure by statute" provided that the statute leaves no discretion

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62. Rakoff, *supra* note 15, at 30. The primary value of the FOIA, according to Rakoff, relates to post-verdict and post-appeal motions involving newly-discovered evidence or allegations of prosecutorial misconduct. *Id. See also* Pratt v. Webster, 673 F.2d 408, 410-11 (D.C. Cir. 1982); Ferri v. Bell, 645 F.2d 1213, 1217-18 (3d Cir. 1981), *modified*, 671 F.2d 769 (3d Cir. 1982).

63. An adjournment or "discontinuance" would not jeopardize the criminal proceeding under the 1974 Speedy Trials Act if the judge made an order under 18 U.S.C. § 3161(h)(8) (1988) that the "ends of justice" required resolution of the FOIA suit. *Cf.* Tomlinson, *supra* note 44, at 183-84.

64. Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 GEO. WASH. L. REV. 843, 867 (1981).

65. *See* Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 597 n.5 (E.D. Penn. 1980) (civil tax case).

66. Fruehauf Corporation v. Thornton, 507 F.2d 1253 (6th Cir. 1974).

67. Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972). *See also* M. Farbman & Sons Inc. v. New York City Health and Hosp. Corp., 62 N.Y.2d 75, 82, 464 N.E.2d 437, 440, 476 N.Y.S.2d 69, 72 (1984) ("The potential for abuse . . . is in a sense a price of open government, and should not be invoked to undermine the statute.") (civil discovery/FOIA case).

68. For a more extensive but now somewhat dated treatment, see Note, *supra* note 3, at 101-26.

on the issue of withholding or establishes particular criteria for withholding.[69] This exemption clearly covers the Jencks Act and hence denies pretrial FOIA access to witness "statements" as defined in that Act.[70]

Exemption (5) covers "matters that are . . . 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."[71] This cryptic provision has been the subject of considerable judicial exegesis, with heavy reliance on legislative history, and has been held to incorporate by "rough analogy" the privileges normally available to a party engaged in civil litigation,[72] including the attorney-client privilege, the attorney work product privilege,[73] and the so-called executive or deliberative privilege.[74] The latter privilege is designed to protect the free flow of full and frank opinion in administrative policy formation and decision-making. In interpreting this aspect of the exemption, the courts have distinguished between factual material and opinion, holding the former to be disclosable under the FOIA.[75] Hence, on this view, material that is purely factual but not always available on discovery, such as witness lists and the like, would fall outside the exemption and be accessible under the FOIA.[76] But note that the exemption does protect the prosecution lawyer's work product,[77] and, more recently, courts have held the work

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69. 5 U.S.C. § 552(b)(3).

70. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 253 n.10 (Powell, J., dissenting in part). *See* discussion of the Jencks Act *supra* note 9 and accompanying text. It has not been authoritatively decided whether the Federal Rules of Criminal Procedure qualify as a "statute" for this purpose, but if so, Rule 16(2) protecting attorney work product would satisfy exemption (3). *See infra* note 77.

71. 5 U.S.C. § 552(b)(5).

72. EPA v. Mink, 410 U.S. 73, 86 (1973).

73. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); FTC v. Grolier Inc., 462 U.S. 19 (1983). In contrast to the Anglo-Australian approach of a single solicitor-client privilege, the United States practice has been to separate attorney-client privilege and attorney work product privilege. *See generally* Gardner, *Privilege and Discovery: Background and Development in English and American Law*, 53 GEO. L.J. 585, 589 (1965).

74. *Mink*, 410 U.S. at 89. *See generally* Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142 (1976).

75. *See generally* 1 K.C. DAVIS, *supra* note 30, §§ 5.33-5.37.

76. *See* Note, *supra* note 3, at 105-11; Mervin v. FTC, 591 F.2d 821, 825-6 (D.C. Cir. 1978); Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 734-37 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214 (1978); Deering Milliken Inc. v. Irving, 548 F.2d 1131, 1138 (4th Cir. 1977); Title Guarantee Co. v. NLRB, 534 F.2d 484, 492-93 n.15 (2d Cir. 1976), *cert. denied*, 429 U.S. 834 (1976).

77. The work product doctrine evolved in civil proceedings but applies equally in the criminal context, United States v. Nobles, 422 U.S. 225 (1974), and has been held to

product privilege to protect from FOIA disclosure purely factual material such as witness statements.[78]

The last exemption of relevance is the seventh one.[79] As originally enacted in 1966, exemption (7) provided for the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."[80] In the mid-1970s congressional concern over judicial unwillingness to scrutinize claims of exemption under this head coincided with the Watergate hysteria to produce a significantly tighter exemption (7)[81] covering:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel . . .[82]

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protect from discovery lawyers' interview notes and witness statements prepared by prosecution lawyers. *See* Feldman, *The Work Product Rule in Criminal Practice and Procedure*, 50 U. CIN. L. REV. 495, 507-10, 516-20 (1981) (citing cases). Most of the cases antedate 1966 because since then Rule 16(2) of the Federal Rules of Criminal Procedure has prohibited disclosure of "reports, memoranda, witness statements, or other internal documents made by an attorney or his agents in connection with the investigation, prosecution or defense of a case." *Id.* at 496. Several commentators have criticized this protection as overbroad and not required by the policy objectives at work in this area of the law. *Id.* at 497-98. Note, *"Work Product" in Criminal Discovery*, 1966 WASH. U.L.Q. 321; Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 WIS. L. REV. 305.

78. *See* United States v. Weber Aircraft Corp., 465 U.S. 792, 800 n.17 (1984); Martin v. Special Counsel, Merits System Protection Bd., 819 F.2d 1181 (D.C. Cir. 1987), *aff'd* 823 F.2d 553 (6th Cir. 1987). *Contra* Kilroy v. NLRB, 633 F. Supp. 136 (S.D. Ohio 1985), *aff'd without op.*, 823 F.2d 553 (6th Cir. 1987). Note the "intra-agency" limitation on exemption (5) places limits on protection of statements by non-governmental employees. *See, e.g.*, Thurner Heat Treating Corp. v. NLRB, 839 F.2d 1256 (7th Cir. 1988). *See generally* Office of Information and Privacy, U.S. Dep't of Justice, *Broad Protection for Witness Statements*, FOIA UPDATE 4-5 (1987).

79. 5 U.S.C. § 552(b)(7).

80. Pub. L. No. 90-23, § 7, 81 Stat. 54, 55 (1967).

81. *See* Hatch, *Balancing Freedom of Information with Confidentiality for Law Enforcement*, 9 J. CONTEMP. L. 1, 7-14 (1983).

82. Pub. L. No. 93-502, § 2(b), 88 Stat. 1561, 1563 (1974).

In 1986 Congress again amended exemption (7), this time in response to strong pressure to give greater protection under the FOIA to law enforcement information.[83] As amended, the exemption provides protection for "records or information compiled for law enforcement purposes", thus eliminating the requirement that the records be "investigatory" in nature, and requires only that disclosure "could reasonably be expected" to cause one of the numerated harms.[84]

Considerable case law addresses exemption (7), but the opinions seldom specifically address criminal discovery issues. Nevertheless, much case law exists concerning pre-hearing FOIA access to witness statements and other material in administrative adjudicatory proceedings that indicates the courts' likely approach.[85] One of the leading cases on this point, *National Labor Relations Board v. Robbins Tire & Rubber Co.*,[86] bears study.

The National Labor Relations Board (NLRB), after investigation, filed an unfair labor practice complaint against defendant Robbins. In order to prepare for the hearing before the NLRB, Robbins requested under the FOIA copies of all potential witness statements collected during the investigation. The request was denied, among other reasons, on the ground that the statements were "investigatory records compiled for law enforcement purposes" and that disclosure "would interfere with enforcement proceedings" (exemption (7)(A)). Upon challenge, the district court held exemption (7)(A) inapplicable; the Fifth Circuit Court of Appeals affirmed.[87]

The Fifth Circuit viewed the 1974 amendment as requiring the NLRB to show that some specific harm might result from disclosure in this particular case.[88] While the court accepted that disclosure of witness statements might pose some risk of "interference" with NLRB proceed-

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83. Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48 to 3207-49 (1986). Earlier attempts to amend the FOIA in this respect are chronicled annually in Notes, *Developments Under the Freedom of Information Act*, 1984 DUKE L.J. 377, 382-3; 1985 DUKE L.J. 742, 750-53; 1986 DUKE L.J. 384, 390-91.

84. Freedom of Information Reform Act of 1986, *enacted in* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802(a), 100 Stat. 3207-48. Other changes include expansion of exemptions (7)(D), (E) and (F).

85. For the case law, see Note, *Backdooring the NLRB: Use and Abuse of the Amended FOIA for Administrative Discovery*, 8 LOY. U. CHI. L.J. 145 (1976); Note, *NLRB Discovery after* Robbins: *More Peril for Private Litigants*, 47 FORDHAM L. REV. 393 (1978). On administrative discovery generally, see Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89.

86. 437 U.S. 214 (1978).

87. 563 F.2d 724, 727 (5th Cir. 1977).

88. *Id.* at 728.

ings in the form of witness intimidation, the NLRB introduced no evidence tending to show that this kind of intimidation was likely to occur in this case and therefore failed to discharge its burden of bringing exemption (7)(A) into play.[89]

The Supreme Court reversed, rejecting the "particularized, case-by-case showing" of interference favored by the Fifth Circuit in favor of a so-called "generic" determination that disclosure of certain kinds of materials (such as witness statements) prior to hearing will "interfere with enforcement proceedings."[90] An obvious risk of coercion and intimidation of witnesses existed so that the NLRB did not have to show it to be likely in any particular case.[91] The Supreme Court relied on a contrast between the wording of exemption 7(A) and the other parts of that exemption,[92] and particularly on the legislative history of the 1966 and 1974 FOIAs.[93] The discovery-motivated use of the FOIA plainly troubled the majority, which said that FOIA disclosure would disturb the existing delicate balance of NLRB practice and would cause delays while FOIA matters were litigated.[94] The Court was reluctant "to override a long tradition of agency discovery" (albeit extremely limited) "based on nothing more than an amendment to a statute designed to deal with a wholly different problem. . . ."[95] The Court remarked finally that the "FOIA was *not* intended to function as a private discovery tool."[96]

Despite attempts to limit the *Robbins* holding to the labor relations context,[97] its rationale would seem applicable to discovery-motivated use of the FOIA in the criminal discovery context. The alleged danger of witness intimidation has been a mainstay argument against liberalizing criminal discovery,[98] and as noted above, the Federal Rules do not pro-

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89. *Id.* at 730, 733.

90. 437 U.S. at 222-24.

91. *Id.* at 239.

92. *Id.* at 223-24 (Exemption (7)(A) speaks in the plural voice about "enforcement proceedings," while exemptions (7)(B), (C), and (D) refer to particular cases).

93. *Id.* at 224-36.

94. *Id.* at 236-38.

95. *Id.* at 239.

96. *Id.* at 242 (emphasis in original). *But see supra* note 41 and accompanying text (discussing the qualification in note 23 on page 234 of the case).

97. *See, e.g.*, Note, *supra* note 3, at 116 ("[I]t may be risky to generalize from the labor relations setting to the criminal context."). *But compare* J.P. Stevens Co. v. Perry, 710 F.2d 136 (4th Cir. 1983).

98. *See, e.g.*, State v. Tune, 13 N.J. 203, 98 A.2d 881, 884 (1953), *aff'd*, 17 N.J. 100, 110 A.2d 99 (1954), *cert. denied*, 349 U.S. 907 (1955). For good discussions of the opposing views on this issue, see C.A. WRIGHT, *supra* note 5, § 252; 2 Y. KAMISAR, W.R. LAFAVE & J.H. ISRAEL, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS

vide for pre-trial disclosure of witness statements. Indeed, Justices Stevens and Rehnquist and Chief Justice Burger joined the majority opinion in *Robbins* only on the understanding that its rationale applied equally to all enforcement proceedings.[99] In their view "[a] statute that authorized discovery greater than that available under the rules normally applicable to an enforcement proceeding would 'interfere' with the proceeding."[100] On this view, use of the FOIA as a discovery tool would constitute interference per se.[101] Since the *Robbins* decision, Congress has passed the FOIA Reform Act of 1986, which relaxed the harm standard in exemption (7) from "would" to "could reasonably be expected" to interfere with enforcement proceedings.[102] This strengthens the protection for this type of information.

Exemption (7)(C) gives similar protection to the names and addresses of persons interviewed in the course of regulatory and law enforcement investigations.[103] It permits withholding of records compiled for law enforcement purposes whose release could reasonably be expected to "constitute an unwarranted invasion of personal privacy".[104] To determine whether an invasion of privacy is unwarranted, a court must balance the extent and seriousness of the invasion against the public benefit in disclosure. The courts have generally held that the privacy interests of those interviewed during law enforcement investigations outweigh any public interest or benefit in disclosure.[105] This is so even though the person interviewed did not give the information in confidence[106] and might tes-

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AND QUESTIONS 1149-50 (5th ed. 1980).

99. *Robbins*, 437 U.S. at 243.

100. *Id.*

101. *See* 1 B.A. BRAVERMAN & F.J. CHETWYND, *supra* note 17, § 11-5.2, at 451-52.

102. *Supra* notes 83-84 and accompanying text.

103. *See generally* B.A. BRAVERMAN & F.J. CHETWYND, *supra* note 17, § 11-7, at 458-63; Waldman, *Privacy Versus Open Government: Section 7(C) Exemption of Freedom of Information Act*, 1986 ANN. SURVEY AM. L. 609; Hammitt, *Privacy and the FOIA: Law Enforcement Records*, 14 ACCESS REPORTS/FOI 4 (1988).

104. There is no space here to treat exemption (6), which closely parallels exemption (7)(C), except to say that it applies to a wider range of material and requires a showing that disclosure is "clearly" unwarranted. *See generally* 1 B.A. BRAVERMAN & F.J. CHETWYND, *supra* note 17, § 10. In the law enforcement field, exemption 7(C) offers much broader protection than exemption 6. *See* Hammitt, *supra* note 103, at 5.

105. *See, e.g.*, Lesar v. Department of Justice, 636 F.2d 472 (D.C. Cir. 1980); Cuccaro v. Secretary of Labor, 770 F.2d 355 (3d Cir. 1985).

106. Confidential sources are protected by exemption (7)(D). 5 U.S.C. § 552(b)(7)(D). *See* New England Apple Council Inc. v. Donovan, 725 F.2d 139 (1st Cir. 1984).

tify at a later hearing.[107] In protecting from disclosure the identities of those who help with law enforcement inquiries, the courts have stressed the potential for harassment and intimidation, the stigma that attaches from any connection with such investigations, and the effect disclosure might have on law enforcement agencies' ability to gather information in the future.[108] While the approach of some courts borders on a blanket exclusion of this type of information under exemption (7)(C),[109] the correct approach undertakes a case-by-case balancing of the relevant privacy and public interests.[110] But outbalancing the privacy interests of those who assist in law enforcement investigations requires a strong showing of public benefit from disclosure.[111] The requester's interest in gathering documents to aid litigation is a private one and has been held irrelevant unless it coincides with a public purpose or benefit.[112] Similarly, exemption (7)(C) operates to prevent the identification of law enforcement officers, although the privacy interests of such officers are less than those of private citizens and are more easily outweighed.[113] The lowering of the risk of harm standard has broadened the protection of exemption (7)(C) here as well.[114] Moreover, the exemption (7)(C) balancing approach cannot affect the protection given confidential sources of

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107. There is a line of cases holding that exemption (7)(C) does not apply to witness statements gathered in (usually) unfair labor practice investigations because the sources are expected to testify at the hearing before the Board. *See, e.g.*, Poss v. NLRB, 565 F.2d 654, 658 (10th Cir. 1977); Borton Inc. v. OSHA, 566 F. Supp. 1420 (E.D. La. 1983). These cases, however, run against the grain of authority. Note also that such a potential witness rule has been rejected in the exemption (7)(D) context. *See* United Technologies Corp. v. NLRB, 777 F.2d 90, 95 (2d Cir. 1985). *See also* GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS § 1.10[4], at 1-168 to 1-169 (J.D. Franklin & R.F. Bouchard 2d ed. Oct. 1989) [hereinafter Franklin & Bouchard] (citing cases).

108. *See supra* note 98; Lame v. Department of Justice, 654 F.2d 917 (3d Cir. 1981); Antonelli v. Sullivan, 732 F.2d 560 (7th Cir. 1983).

109. *See* 2 J.T. O'REILLY, *supra* note 45, § 17.09, at 17-44 (Dec. 1987).

110. *See, e.g., Lame*, 654 F.2d 917.

111. *See, e.g.*, L & C Marine Transp. Ltd. v. United States, 740 F.2d 919 (11th Cir. 1984); Senate of Puerto Rico v. Department of Justice, 823 F.2d 574 (D.C. Cir. 1987).

112. Brown v. FBI, 658 F.2d 71 (2d Cir. 1981); Lloyd v. Marshall, 526 F. Supp. 485 (M.D. Fla. 1981); Miles v. Department of Labor, 546 F. Supp. 437 (M.D. Pa. 1982); Kiraly v. FBI, 728 F.2d 273 (6th Cir. 1984); *L & C Marine Transp.*, 740 F.2d 919.

113. *See, e.g.*, Lesar v. Department of Justice, 636 F.2d 472 (D.C. Cir. 1980); Johnson v. Department of Justice, 739 F.2d 1514 (10th Cir. 1984); Miller v. Bell, 661 F.2d 623 (7th Cir. 1981). *See generally* Waldman, *supra* note 103, at 610-17; Hammitt, *supra* note 103, at 7 (describing this as "[o]ne of the more troubling aspects" of (7)(C)).

114. Franklin & Bouchard, *supra* note 107, § 1.10[3], at 1-157 to 1-158 (Oct. 1989).

information by exemption (7)(D)[115] or the ability by exemption 7(F) to withhold information whose release could reasonably be expected to endanger the life or physical safety of any person, be that person a law enforcement officer or citizen.[116] Thus, as presently interpreted, exemption (7)(C) protects from disclosure much information necessary for trial preparation but not always available by conventional criminal discovery.[117]

Some have viewed the use of the FOIA to circumvent restrictive administrative discovery regimes (as in *Robbins*) or its use as an alternative or adjunct to civil or criminal discovery rules as abusive. A movement began in the early 1980s to amend the FOIA to prevent a party to ongoing judicial or administrative proceedings from requesting under the FOIA records relating to the proceeding.[118] The amendment lapsed, but not before a valuable study of alleged FOIA abuse showed the amendment to be unwarranted.[119] The study found that use of the FOIA for discovery purposes can be burdensome on agencies in several respects: occasionally a litigant would gain access to records under the FOIA without the knowledge of government counsel and produce them at trial to the surprise of opposing counsel; litigants disrupted the government's preparation for trial by seeking records under the FOIA on the eve of trial; and litigants caused disruption by requesting documents both under the FOIA and in discovery, necessitating duplicative searches and releases.[120] These burdens were better alleviated, the study concluded, by a

115. *Supra* note 109. Exemption (7)(D) does not contain a balancing test.

116. The FOIA Reform Act expanded the protection under exemption (7)(F) from "law enforcement personnel" to "any individual." Pub. L. No. 99-570, § 1802(a), 100 Stat. 3207-48. Attempts to use the presence of exemption (7)(F) (and (7)(D)) in order to cut back on the broad scope the courts have given exemption (7)(C) have failed. *See* New England Apple Council Inc. v. Donovan, 560 F. Supp. 231 (D. Mass. 1983), *rev'd*, 725 F.2d 139 (1st Cir. 1984).

117. *Cf.* Note, *supra* note 3, at 124 (discussing the futility of protecting information that will be revealed at trial). *See* Maxwell & Reinsch, *The Freedom of Information Act Privacy Exemptions: Who Does It Really Protect?*, 7 COMM. & L. 45 (Apr. 1985) (arguing in the context of exemption (6) that instead of protecting only the privacy of individuals the exemption has been used to protect the privacy of the agencies); Hammitt, *supra* note 103, at 6.

118. For a description of the proposal, see *Developments Under the Freedom of Information Act—1986*, 1987 DUKE L.J. 521, 523-24.

119. The Report by Professor Edward Tomlinson of the University of Maryland Law School was commissioned by the Administrative Conference of the United States and was published in article form. *See supra* note 44, at 194-200 (objections to the proposed amendment).

120. *Id.* at 200-2.

specific requirement that parties in litigation with the government notify government counsel of all discovery-motivated FOIA requests, thereby preventing surprise and permitting coordination of searches and releases, than by a blanket closing of the FOIA to parties to litigation.[121] The study reported no evidence of any undue burdens or abuses arising from use of the FOIA in the criminal discovery sphere.[122]

Despite the high hopes of the early commentators, to date the FOIA has had little impact on federal criminal discovery practice. The reasons stated above have had some impact, but the major factor is a lack of judicial enthusiasm for the endeavor. Judges seem unwilling to allow the FOIA to supplement (and thereby effectively amend)[123] what might be called the partial code of pre-trial discovery in the Federal Rules of Criminal Procedure. These rules apply to federal criminal proceedings across a vast country and are designed to provide uniform and *minimum* disclosure by way of discovery to be supplemented by the exercise of judicial discretion in appropriate cases.[124] Discovery-motivated use of the FOIA disturbs the delicate balance of interests[125] reflected in the Federal Rules. Judges would no doubt prefer the issue of broader criminal discovery to be hammered out in the federal rule revision process rather than case-by-case in court, because such FOIA requests force the court at the micro level of a particular case to consider the macro-level arguments for and against broader criminal discovery.

III. THE CANADIAN POSITION

Criminal discovery has been the subject of considerable discussion in Canada,[126] probably more so than in any other Commonwealth country. The focal point in recent times has been the pioneering work of the Law Reform Commission of Canada, whose studies, working paper, and (ten

121. *Id.*

122. The Senate Judiciary Committee asserted that "criminal defendants frequently use the FOIA to disrupt the prosecutor's case preparation and to delay trial." *Id.* at 193, *citing* S. REP. No. 221, 98th Cong., lst Sess. 29 (1983). There is, however, no support in Tomlinson's study for this assertion.

123. *See* Note, *supra* note 3, at 91.

124. *See supra* note 11.

125. Words used in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978).

126. *See, e.g.*, Martin, *Preliminary Hearings*, 1955 SPECIAL LECTURES L. SOC'Y UPPER CAN. 1; Hooper, *Discovery in Criminal Cases*, 50 CAN. B. REV. 445 (1972); Wilkins, *Discovery*, 18 CRIM. L.Q. 355 (1975-1976); Branson, *Discovery and Criminal Proceedings*, 17 CRIM. L.Q. 24 (1974-1975).

years later) final Report on Criminal Discovery[127] have been influential in law reform efforts abroad.[128] But the Commission's recommendations have not yet attracted legislative attention at home. As a result, the extent of criminal discovery still varies a great deal across Canada[129] and remains in large part within the discretion of the Crown prosecutor (and, when challenged, the trial judge).[130] There is precious little material that every defense counsel is entitled to before trial as a matter of enforceable legal right. Perhaps in practice most defense counsel get much of what they want or need most of the time, yet this proposition is far from clear, and this highly discretionary regime is hardly satisfactory.[131] It is curious, then, that the appearance of FOI legislation at the federal level and in more than half of the provinces has not aroused the interest of the defense bar. One must ask why defense counsel have ignored this potential source of pre-trial criminal disclosure.

A. *Provincial Legislation*

Of the ten Canadian provinces,[132] the following have enacted FOI legislation: Nova Scotia (1977),[133] New Brunswick (1978),[134] Newfound-

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127. LAW REFORM COMM'N OF CANADA, WORKING PAPER NO. 4, CRIMINAL PROCEDURE DISCOVERY (1974); LAW REFORM COMM'N OF CANADA, STUDY REPORT: DISCOVERY IN CRIMINAL CASES (1974); LAW REFORM COMM'N OF CANADA, DISCOVERY IN CRIMINAL CASES: REPORT ON THE QUESTIONNAIRE SURVEY (1974); LAW REFORM COMM'N OF CANADA, REPORT NO. 22, DISCLOSURE BY THE PROSECUTION (1984). *See also* LAW REFORM COMM'N OF CANADA, WORKING PAPER NO. 56, PUBLIC AND MEDIA ACCESS TO THE CRIMINAL PROCESS (1987); LAW REFORM COMM'N OF CANADA, REPORT NO. 32, OUR CRIMINAL PROCEDURE (1988).

128. In New Zealand the Criminal Law Reform Committee relied on the Commission's work. *See* CRIMINAL LAW REFORM COMM., REPORT ON DISCOVERY IN CRIMINAL CASES para. 4 (1986).

129. *See* R. v. Barnes, 12 Crim. Rep. (3d) 180 (D.C. Nfld. 1979); R.J. DELISLE & D. STUART, LEARNING CANADIAN CRIMINAL PROCEDURE 473 (1986).

130. For an exhaustive survey of the Canadian law, see Ferguson, *Discovery in Criminal Cases*, in 2 CRIMINAL PROCEDURE: CANADIAN LAW AND PRACTICE ch. 13 (J.J. Atrens, P.T. Burns & J.P. Taylor eds. 1987). *See also* B.A. GROSMAN, THE PROSECUTOR: AN INQUIRY INTO THE EXERCISE OF DISCRETION 74-77 (1969).

131. B.A. GROSMAN, *supra* note 130, at 74-77 (relating an example of the prosecutor disclosing information based on his relationship with defense counsel).

132. One of Canada's two territories has freedom of information legislation as well. *See* Access to Information Act, Yuk. Stat. ch. 12 (1983).

133. Freedom of Information Act, N.S. Stat. ch. 10 (1977).

134. Right to Information Act, N.B. Acts ch. R-10.3 (1978).

land (1981),[135] Quebec (1982),[136] Manitoba (1985),[137] and Ontario (1987).[138]

The legislation in the first three provinces, all in the Atlantic region, can be usefully looked at together. The Newfoundland Act covers the Newfoundland Constabulary (the provincial police force responsible for policing the more urban areas), but does not cover either the Royal Canadian Mounted Police (RCMP), which operate by agreement as provincial police in the rural areas, or the municipal police forces.[139] Such also appears to be the case in Nova Scotia.[140] The New Brunswick Act covers neither the provincial police nor municipal police forces.[141] The effect of this is two-fold. First, the police at all levels in New Brunswick, and the municipal police in Newfoundland and Nova Scotia, are free from FOI requests during criminal investigations.[142] Second, in those in-

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135. The Freedom of Information Act, Nfld. Stat. ch. 5 (1981).

136. An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, QUÉ REV. STAT. ch. A-2., Qué Stat. ch. 30, 601 (1982).

137. The Freedom of Information Act, Man. Stat. ch. 6 (1985). Proclaimed into force on 30 September 1988. *See* List of Statutes in Continuing Consolidation of the Statutes of Manitoba, Man. Stat. at 21 (1987-1988).

138. Freedom of Information and Protection of Privacy Act, 1987, Ont. Stat. ch. 25 (1987).

139. The Newfoundland Constabulary is directly under the control of the Minister of Justice, *see* The Constabulary Act, NFLD. REV. STAT. ch. 58, §§ 3, 8, 9 (1970), and so is subject to the Newfoundland Act. I am grateful to the Ombudsman of Newfoundland, Mr. Ambrose Peddle, for drawing this to my attention. The list of departments covered by the Newfoundland Act and the general class of information held by each is published in Nfld. Gaz., May 7, 1982, pursuant to section 5 of the Newfoundland Act. Nfld. Stat. ch. 5, § 5 (1981).

140. The definition of "department" in the Nova Scotia Act includes any "agency, association, or other body of persons" all the members of which are appointed by Order of the Governor in Council. N.S. Stat. ch. 10, § 2(d)(i) (1977). By The Constables Act, N.S. REV. STAT. ch. 49, § 19(1) (1967), all provincial police constables are appointed by the Governor in Council. Hence the provincial police force is a subject "department" under the Act.

141. *See* NINETEENTH REPORT OF THE OMBUDSMAN, NEW BRUNSWICK 16 (1985) (case summary). Reports of investigations by the New Brunswick Police Commission must be filed with the Minister of Justice, who also has access to all files and evidence acquired during investigation, and this material can be requested from the Minister. *See* Police Act, N.B. Acts, ch. P-9.2, § 22(8) (1977). I am grateful to the Ombudsman of New Brunswick, Mr. Joseph Bérubé for this information.

142. For good descriptions of the byzantine structure of the federal, provincial, and municipal police forces in Canada, see Cooper, *The Evolution of Canadian Police* in THE POLICE FUNCTION IN CANADA 37 (W.T. McGrath & M.P. Mitchell eds. 1981); Grant, *The Police: Organization, Personnel and Problems* in THE PRACTICE OF FREEDOM: CANADIAN ESSAYS ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 405,

stances in which the provincial or municipal police act as prosecutors—usually limited to provincial and municipal offenses, and to summary federal offenses of a minor nature in some parts of the provinces[143]—the legislation will apply only to provincial police prosecutors in Newfoundland and Nova Scotia, and not otherwise unless for some reason the information has come into the hands of an agency subject to the Acts before trial.[144]

All serious or indictable offenses, however, are prosecuted by the Crown attorney or the equivalent representing the Attorney General of the Province.[145] Under the Canadian Constitution, enforcement of the federally enacted Criminal Code falls to the provincial Attorneys General.[146] As all of the Atlantic provinces' legislation covers the office of the provincial Attorney General,[147] it follows that FOI requests can be directed to the Attorney General for documents held[148] by prosecuting employees of the Department or Ministry, be they styled Crown counsel, Crown attorneys, or prosecuting officers.[149] This overcomes the first hurdle to criminal discovery-motivated FOI requests.

At this point, however, the breadth of the law enforcement exemptions in the legislation will likely thwart FOI requests by defense counsel. The Nova Scotia Act, the least satisfactory of the three Acts in that it gives a right of access only to listed categories of information,[150] exempts from disclosure information that "would be likely to disclose information ob-

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406-09 (R. St. J. MacDonald & J.P. Humphrey eds. 1979).

143. *See* NATIONAL TASK FORCE ON THE ADMINISTRATION OF JUSTICE: JUSTICE SERVICES IN CANADA 1977-78, at 55-56 (1979) (detailing the practice in each province) [hereinafter NATIONAL TASK FORCE].

144. *See* TWENTY-FIRST REPORT OF THE OMBUDSMAN, NEW BRUNSWICK 3 (1987) (case summary); *infra* note 159 and accompanying text.

145. The title of the prosecutor varies from province to province. *See generally* P.C. STENNING, APPEARING FOR THE CROWN: A LEGAL AND HISTORICAL REVIEW OF CRIMINAL PROSECUTORIAL AUTHORITY IN CANADA 161-63 (1986).

146. *See* Constitution Act 1867, R.S.C. app. II, No. 5, 30 & 31 Vict. ch. 3, 91(27), 92(14) (1985); Criminal Code III R.S.C., ch. C-34, § 2 (1985) (definition of "prosecutor").

147. N.S. Stat. ch. 10, § 2(d) (1977); N.B. Acts. ch. R-10.3, § 1 (1978); Nfld. Stat. ch. 5, § 2(a) (1981). For the history of the Office of the Attorney General in these provinces and the current legislation, see P.C. STENNING, *supra* note 145, at 161-62.

148. N.S. Stat. ch. 10, § 2(f) (1977) (information "on file or in the possession or under the control of a department"); N.B. Acts ch. R-10.3, §§ 1, 3(1) (1978) (information "kept or filed"); Nfld. Stat. ch. 5, § 2(c) (1981) (information "on file or in the possession or under the control of a department").

149. *Supra* note 145.

150. *See* N.S. Stat. ch. 10, § 3 (1977); Evans, *Nova Scotia Freedom of Information Act*, 5 DALHOUSIE L.J. 494, 495-96 (criticizing the Act).

tained or prepared during the conduct of an investigation concerning alleged violations of any enactment or the administration of justice."[151] This is a "class" exemption that protects from disclosure any information falling within the described class irrespective of the actual harm, if any, occasioned by disclosure.[152] The Nova Scotia law enforcement exemption "add[s] insult to this no-injury approach"[153] by making it mandatory for the decision-making official to withhold exempt information.[154] While Newfoundland's law enforcement exemption is permissive rather than mandatory, giving the decision-maker discretion to disclose exempt documents, it is just as broad in scope, permitting nondisclosure of information "respecting the enforcement of any law of Canada or the province" or "the conduct of lawful investigations."[155]

As originally enacted, the New Brunswick Act denied a right to information[156] on law enforcement grounds only when its release "would impede an investigation, inquiry or the administration of justice."[157] The withholding of documents on this ground required proof of impediment to an investigation or the administration of justice (ultimately to the satisfaction of the Ombudsman and/or the Court of Queen's Bench), with the onus of proof on the Minister.[158] But New Brunswick was not to stay out of step with its neighbors for long. An episode involving a persistent FOI requester named Dixon resulted in the provincial legislature

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151. N.S. Stat. ch. 10, § 4(e) (1977).

152. *See* Rankin, *The New Access to Information and Privacy Act: A Critical Annotation*, 15 OTTAWA L. REV. 1, 12 (1983).

153. *Id.*

154. Class exemptions can be expressed in either permissive or mandatory language. The former confers a discretion to release otherwise exempt records, and the latter commands the decision-maker not to release exempt records. *See id.*

155. Nfld. Stat. ch. 5, § 11(b) (1981). The Ombudsman of Newfoundland knows of no instance in which the Newfoundland Act has been used as a criminal discovery tool. Letter from Ambrose Peddle to Michael Taggart (Mar. 2, 1989).

156. While section 6 denies a right to information under the Act where its release would have one of the stated consequences in section 6(a) to (i), the statutory language does not forbid disclosure outside the Act, in the exercise of executive discretion by Ministers or other high ranking self-authorizing officials. In this sense the exemptions are permissive. *See* N.B. Acts ch. R-10.3, § 6 (1978).

157. *Id.* § 6(i). One commentator criticized the general character and vagueness of the exemptions in section 6 (giving section 6(i) as an example) and lamented the Act's failure to benefit from the extensive United States experience by dealing specifically and in detail with points of difficulty. *See* McCamus, *Comment* in FREEDOM OF INFORMATION: CANADIAN PERSPECTIVES 219, 221-22 (J.D. McCamus ed. 1981) [hereinafter CANADIAN PERSPECTIVES].

158. N.B. Acts ch. R-10.3, § 12 (1978).

placing a blanket of exclusion over law enforcement matters.[159]

The tale is a revealing one. In 1982 Dixon applied to the New Brunswick Department of Justice for a firearms acquisition certificate. The application was refused initially, but at some later point a certificate was issued. It came to Dixon's attention, however, that in the course of investigating the application, a Department of Justice official had made inquiries of the local Police Department, the RCMP, and the Crown Prosecutors Office.[160] Dixon requested "copies of all information, confidential or otherwise, the Department of Justice [had] in its possession concerning [himself]."[161] The Department denied having any information about Dixon and, on his further inquiry, simply did not reply. Under the New Brunswick Act, a complaint can be made to the Ombudsman or the Court,[162] and, in the first instance, Dixon referred the matter to the Ombudsman. An investigation by the Ombudsman uncovered twenty-four documents relating to Dixon in Department files. The Minister of Justice released nineteen of the twenty-four documents and a twentieth document with one paragraph deleted.[163] The Ombudsman subsequently recommended the release of the remaining four documents and the deleted paragraph, but the Minister refused, claiming the information was exempt under the law enforcement exemption.[164] Dissatisfied, Dixon took the matter to the New Brunswick Court of Queen's Bench.

All the withheld documents concerned the investigation and prosecution of Dixon for two offenses in 1978. The documents included an undated police department investigation report summarizing in the most general terms the nature of evidence to be given by several witnesses, photocopies of typed statements of two victims on police department statement forms, and a photocopy of a typed summary of the involvement of various witnesses with respect to the incidents. In relation to these incidents, Dixon was charged, tried by jury, and acquitted.[165]

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159. The following account is drawn from EIGHTEENTH REPORT OF THE OMBUDSMAN, NEW BRUNSWICK 2-3 (1984) [hereinafter EIGHTEENTH REPORT]; NINETEENTH REPORT OF THE OMBUDSMAN, NEW BRUNSWICK 16-17 (1985); Dixon v. New Brunswick, 62 N.B.R.2d 137 (N.B. Ct. Q.B. 1985).

160. *Dixon*, 62 N.B.R.2d at 136. Section 106 of the Criminal Code appears to authorize the gathering of relevant information by an investigating firearms officer. *Id.* at 139; III R.S.C. ch. C-46, § 106 (1985).

161. *Dixon*, 62 N.B.R.2d at 138; EIGHTEENTH REPORT, *supra* note 159, at 2.

162. N.B. Acts ch. R-10.3, § 7(1) (1978).

163. *Dixon*, 62 N.B.R.2d at 139.

164. *Id.*

165. *Id.* at 141.

The trial judge had no doubt that the information was not exempt under the Act and ordered its release. All the information, the judge observed, became public knowledge at the trial. The police informants testified as witnesses at the trial, and so their identities no longer required protection.[166] Nor would release of the information "impede an investigation, inquiry or the administration of justice,"[167] for there was nothing to impede; the investigation and trial had been held years earlier[168]

The New Brunswick Legislature reacted swiftly in amending the Right to Information Act to prevent future release not only of the type of material disclosed by court order to Dixon,[169] but of much more as well. The legislature added two new exemptions to section 6:

> There is no right to information under this Act where its release
> . . .
> (h.1) would reveal information gathered by police, including the Royal Canadian Mounted Police, in the course of investigating any illegal activity or suspected illegal activity, or the source of such information;
> (h.2) would disclose any information reported to the Attorney General or his agent with respect to any illegal activity or suspected illegal activity, or the source of such information.[170]

These amendments have extinguished the considerable potential the orig-

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166. *Id.* Mr. Justice Stevenson opined that section 6(a) protects the confidentiality of witness informers before trial. *Id.*

167. N.B. Acts. ch. R-10.3, § 6(i) (1978).

168. *See Dixon*, 62 N.B.R.2d at 141. Mr. Justice Stevenson did uphold exemption of the deleted paragraph, as disclosure would have revealed "personal information, given on a confidential basis, concerning another person." *Id. See* N.B. Acts ch. R-10.3, § 6(b) (1978).

169. There is an epilogue to this tale. After the decision, Dixon, still not satisfied that the department had disclosed all information relating to him, filed a further petition with the Ombudsman. After a detailed investigation of all the departmental files relating to Dixon (12 in all), the Ombudsman prepared a list of documents and submitted the list to the department for its further consideration under the New Brunswick Act. After a protracted review the Department indicated it was prepared to release all but nine of the documents: those nine were said to be exempt under section 6(f), which protects legal professional privilege. *See* TWENTIETH REPORT OF THE OMBUDSMAN, NEW BRUNSWICK 2-3 (1986) (Report No. 85-5180-4).

170. N.B. Acts ch. R-10.3, § 6 (1978), *as amended by* An Act to Amend the Right to Information Act, N.B. Acts ch. 67 (1985). This gap-filling by amendment may be the result of the general and vague character of the exemptions rather than a conscious or deliberate decision to overturn the case that exposed the gaps. *See* Lane, *New Brunswick's Act of 1978*, in CANADA'S NEW ACCESS LAWS: PUBLIC AND PERSONAL ACCESS TO GOVERNMENTAL DOCUMENTS 77, 86 (D.C. Rowat ed. 1983).

inal 1978 Act provided for criminal discovery-motivated requests.

Quebec's freedom of information law was enacted in 1982.[171] Although Quebec is a civil law province, the law of criminal procedure is federal and applies just as much in Quebec as in the common law provinces.[172] The Quebec Act covers the provincial police force (Sûreté du Québec), as well as the numerous municipal police forces, the Quebec Police Commission, the Attorney General, and Crown prosecutors.[173] The Act's section 28 requires withholding of requested information by law enforcement authorities if disclosure of such information would likely impede judicial proceedings or hamper a criminal investigation.[174] Similar in wording to the original law enforcement exemption in the New Brunswick Act, the Quebec FOI legislation likewise is a potential source of criminal discovery. But if the reported decisions of the Commission d'accés á l'information are any indication, that potential is untapped at present.[175]

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171. Qué Stat. ch. 30 (1982).

172. *See* P. BÉLIVEAU, J. BELLEMARE & J.P. LUSSIER, ON CRIMINAL PROCEDURE 35-36 (J. Muskatel trans. 1982).

173. The wide definition of "public body" in Québec's freedom of information law "means that virtually all bodies are subject to the Act." 3 R. DUSSAULT & L. BORGEAT, ADMINISTRATIVE LAW: A TREATISE 304 (M. Rankin trans. 1989).

174. In its entirety the English language version of section 28 provides

> A public body must refuse to release or to confirm the existence of informaton received by a person responsible under the law for the prevention, detection or repression of crime or statutory offences, if its disclosure would likely
>
> (1) impede the progress of proceedings before a person or body carrying on judicial or quasi-judicial functions;
>
> (2) hamper an investigation;
>
> (3) reveal a method of investigation, a confidential source of information, or a program or plan of action designed to prevent, detect or repress crime or statutory offences;
>
> (4) endanger the safety of a person;
>
> (5) cause prejudice to the person who is the source or the subject of the information;
>
> (6) reveal the components of a communications system intended for the use of a person responsible for law enforcement;
>
> (7) reveal information transmitted in confidence by a police force having jurisdiction outside Quebec;
>
> (8) facilitate the escape of a prisoner; or
>
> (9) prejudice the fair hearing of a person's case.

Qué Stat. ch. 30, § 28 (1982).

175. For a comprehensive treatment of the jurisprudence on article 28, see Y. DUPLESSIS & J. HÈTU, ACCÉS À ORGANISMES L'INFORMATION: LOI SUR L'ACCÉS AUX DOCUMENTS DES ORGANISMES PUBLICS ET SUR LA PROTECTION DES RENSEIGNEMENTS PERSONNELS: INDEXÉE, ANNOTÉE ET COMMENTEÉ 128-58 (1988).

Similarly, the more recent provincial FOI legislation in Manitoba and Ontario is not so one-sidedly protective of law enforcement matters. The Manitoba FOIA, which was enacted in 1985 but did not come into force until 1988, is the more straightforward and liberal of the two in this respect.[176] Section 40(1) of that Act is couched in permissive language and is predicated by a "harms" test:

> The head of a department may refuse to give access to any record the disclosure of which could reasonably be expected
> (a) to be injurious either to the enforcement of an enactment or to the conduct of an investigation under an enactment; or
> (b) to facilitate the commission of an offence or to threaten the security of a correctional institution or other building, a computer or communications system, or any other property or system; or
> (c) to violate solicitor-client privilege; or
> (d) to be injurious to the conduct of existing or anticipated legal proceedings.[177]

The Act makes clear that nothing in that subsection prevents disclosure of unlawful investigations or of the use of investigative or enforcement techniques that are contrary to law.[178]

The Ontario Freedom of Information and Protection of Individual Privacy Act 1987 makes similar provision, albeit more specifically and hence at greater length:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
> (a) interfere with a law enforcement matter ["law enforcement" is defined in section 2 to mean "(a) policing, (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and (c) the conduct of proceedings referred to in . . . (b)"];
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement; . . .

La Commission d'accés à l'information (Commission of Access to Information) is the independent Commission established by the Act to review decisions on access made under the FOI law. *See* Qué Stat. ch. 30, §§ 103-134 (1982).

176. Man. Stat. ch. 6 (1985); *see supra* note 137.

177. Man. Stat. ch. 6, § 40(1) (1985).

178. *Id.* § 40(2). Another relevant exemption is *id.* § 41(1)(c) (mandatory exemption of information which discloses identity of an informant who has disclosed information in confidence for any purpose related to enforcement of an enactment).

. . . .

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication . . . .[179]

Remarkably, section 14 (2)(a) of the Ontario Act cuts across this harms-based provision by authorizing a head to refuse to disclose any reports prepared in the course of law enforcement, inspections, or investigations by any agency[180] that has the function of enforcing and regulating compliance with a law. The only independent operation of this subsection will be to catch material that has passed muster under section 14(1)—records the disclosure of which could not reasonably be expected to harm or interfere with any of the twelve defined law enforcement interests. This subsection was not part of the law enforcement exemption package recommended by the Williams Commission, on whose Report the Ontario Act is based,[181] and is completely at odds with the careful balancing of interests undertaken by the Commission and reflected in section 14(1).[182] Although the subsection is unjustifiable in principle, it may prove a considerable barrier to use of the Act as a criminal discovery tool by exempting routine police reports and the like. The subsection's sole redeeming feature is that it is permissive.

In terms of coverage, the Manitoba and Ontario Acts both apply to the Office of the Attorney General,[183] and so documents "in the custody or under the control" of prosecuting employees will be requestable from

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179. Ont. Stat. ch. 25, § 14(1)(a), (b), (c), (e), (f) (1987). Note this is a selection from the 12 exemptions grouped under "law enforcement" in section 14(1).

180. *See id.* § 14(2)(a). The word "agency" is not defined in the Act, which typically refers to those bodies subject to it as "institutions." I assume in the text that the term includes the police.

181. 1-3 PUBLIC GOVERNMENT FOR PRIVATE PEOPLE: THE REPORT OF THE COMMISSION ON FREEDOM OF INFORMATION AND INDIVIDUAL PRIVACY (1980) [hereinafter PUBLIC GOVERNMENT FOR PRIVATE PEOPLE]. *See generally* McCamus, *The Report of the Ontario Commission on Freedom of Information and Individual Privacy: A Synopsis*, in CANADIAN PERSPECTIVES, *supra* note 157, at 306; Eichmanis, *History of Freedom of Information and Personal Privacy in Ontario*, 2 INFO. & PRIVACY COMM'R/ ONT. NEWSLETTER 2-3 (1989).

182. 2 PUBLIC GOVERNMENT FOR PRIVATE PEOPLE, *supra* note 181, at 294-303; McCamus, *supra* note 181, at 315-16 (discussing the Commission's suggested exemption relating to law enforcement).

183. It is the "Department" of the Attorney General in Manitoba and the "Ministry" of the Attorney General in Ontario. Prosecuting employees of the Department of the Attorney General in Manitoba are called Crown attorneys; those in Ontario are called Crown counsel. *See* P.C. STENNING, *supra* note 145, at 114-24, 160-61.

the Attorneys General.[184] Defendants may encounter more difficulty obtaining documents from Crown attorneys and assistant Crown attorneys in Ontario.[185] The Lieutenant Governor in Council appoints these persons under the Crown Attorneys Act,[186] and they are responsible to the provincial Ministry of the Attorney General.[187] That Ministry is charged by statute with the conduct of all litigation for the Crown.[188] Furthermore, by statute Crown attorneys are agents of the Attorney General for the purposes of the Criminal Code, a delegation to them of the Attorney General's prosecutorial power.[189] It is open to question whether documents in the hands of Crown attorneys are "in the custody or under the control" of the Ministry of the Attorney General and therefore subject to the Ontario Act. If not, what can be said to justify treating Crown counsel and Crown attorneys differently in this respect? Even if one accepts that local Crown attorneys should be independent from political control, as some commentators forcefully argue in other contexts,[190] their subjection to the Act promotes nonpolitical accountability and does not infringe upon the reason cited for the claimed independence.

The Manitoba Act may apply to the provincial police,[191] but it does not extend to the RCMP in that capacity, or to municipal police forces in that province. The Ontario Police Commission is subject to the Ontario Act,[192] but the Ontario Provincial Police (OPP) are not.[193] While the

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184. The wording is identical in both Acts. *Compare* Man. Stat. ch. 6, § 3 *with* Ont. Stat. ch. 25, § 10(1) (1987).

185. This may well be a problem in other provinces, but in the interest of brevity this Article will confine the treatment to Ontario.

186. Crown Attorneys Act, 2 ONT. REV. STAT. ch. 107, § 1 (1980).

187. P.C. STENNING, *supra* note 145, at 160.

188. Ministry of the Attorney General Act, 4 ONT. REV. STAT. ch. 271, § 5(h) (1980).

189. *Id.* § 11. *See supra* note 145.

190. *See* Armstrong & Chasse, *The Right to an Independent Prosecutor*, 28 Crim. Rep. New Series 160 (1975); Chasse, *The Attorney General and the Traditional Crown Prosecutor: An Alternative View of Prosecutorial Powers*, 4 CROWN COUNS. REV. 6 (1984-1985).

191. While the language of The Provincial Police Act, 3 MAN. REV. STAT. ch. P-150 (1970), is not as strong as that in the Newfoundland Constabulary Act, NFLD. REV. STAT. ch. 58 (1970), the Commissioner of the Manitoba Provincial Police is under the "control" of the Attorney General, and this may be enough to bring that force within the Department of the Attorney General for the purpose of the Manitoba Act. 3 MAN. REV. STAT. ch. P-150, § 8(3) (1970). The provincial police do not qualify as a "crown agency" as defined in the Manitoba Act, as the appointments are not by order of the Lieutenant Governor in Council but rather under the Civil Service Act. *Id.* §§ 2, 6(1).

192. The Ontario Police Commission is designated as a subject "institution" in the

Ministry of the Solicitor General has responsibility for the administration of the Police Act (which covers the OPP),[194] one can hardly argue that this makes records in the hands of the OPP disclosable under the Ontario Act, notwithstanding the reference to "policing" in one of the exemptions.[195]

The Ontario Act extends to local government in that province on January 1, 1991.[196] The wording of the Act will clearly cover 41 of the 120 municipal police forces in the province.[197] Whether the remaining 79 police forces will be covered is much less clear.[198] Obviously, it would be highly anomalous if some forces are covered and others not. The passage of the Municipal Freedom Information and Protection of Privacy Act in December 1989 may remove the uncertainty by subjecting all municipal police forces in Ontario to FOI legislation.[199]

B. *The Federal Access to Information Act*

In contrast with the incomplete coverage of the provincial legislation, the federal Access to Information Act 1982 (AIA) fortunately covers the major agencies for the administration of justice, including the federal police force (RCMP), the Department of the Solicitor General, and the Department of Justice.[200] The Department of Justice is responsible for

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regulations. *See* Ont. Stat. ch. 25, § 2, para. 3(c) (1987) (definition of "institution"); Ont. Reg. 532/87, *reprinted in* Ont. Gaz. Sept. 26, 1987, at 1987, 1996. *See generally* S.M. MAKUCH & J. JACKSON, FREEDOM OF INFORMATION IN LOCAL GOVERNMENT IN ONTARIO 95-98 (Commission on Freedom of Information and Individual Privacy, Research Publication 1979) ("Police commissions are generally the most closed of all municipal institutions . . . .").

193. The Ontario Provincial Police Negotiating Committee is scheduled in the regulations, Ont. Gaz., *supra* note 192, at 1997, but the OPP itself is conspicuously absent.

194. *See* Ministry of the Solicitor General Act, 4 ONT. REV. STAT. ch. 271, § 5 (1980). *See generally* Gregory, *Police Power and the Role of the Provincial Minister of Justice*, 27 CHITTY'S L.J. 13 (1979).

195. *See* Ont. Stat. ch. 25, § 2, para. 4(a) (1987) (definition of "law enforcement") *and* § 14(1)(a) (incorporating this definition).

196. Ont. Stat. ch. 25, §§ 2(3), 72 (1987). Letter from Joan Smith, Solicitor General, Ontario Ministry of the Soliciter General to Michael Taggart (Apr. 19, 1989) (Ontario has 120 municipal police forces).

197. *Compare* Ont. Stat. ch. 25, § 2, para. 3(b) *with* 6 ONT. REV. STAT. ch. 381, §§ 2(1), 4(1), 20(1) (1980) (police force chosen as described in Revised Statutes fits within definition of Ontario Act).

198. Ont. Stat. ch. 25, § 2, para. 3(b); *see* 6 ONT. REV. STAT. ch. 381, § 15 (1980).

199. Municipal Freedom of Information and Protection of Privacy Act 1989, Ont. Stat. (enacted 14 December 1989).

200. I R.S.C. ch. A-1, § 3; sched. 1 (1985).

prosecutions under all federal statutes, except the Criminal Code, throughout Canada, and enforcement of all criminal law in the Northwest and Yukon Territories.[201] Crown counsel attached to the Department undertake these prosecutions,[202] and hence the records will be under the "control" of the Department[203] and subject to request.

A glance at the "distressingly broad"[204] law enforcement exemptions, however, dispels any optimism that defendants might therefore use the AIA as a criminal discovery tool. The exemptions consist of a curious mix of harms and class exemptions with considerable overlap and significant ambiguity.[205] For the most part, the exemptions are permissive.[206] Section 16(1)(c) permits withholding if disclosure "could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations."[207] This is unobjectionable. The paragraph goes on, however, to specify three classes of information, and it is not clear whether these classes are automatically exempt or are simply illustrations of what might reasonably be regarded as injurious to the stated interest.[208] The three classes of information specified are broad, particularly the third, which concerns information "obtained or prepared in the course of an investigation."[209] If courts hold them to be class exemptions, there will be little scope for use of the AIA as a substitute or aid to criminal discovery.

Furthermore, section 16(1)(a) overlaps with section 16(1)(c); the former provides a class exemption for any documents less than twenty years old obtained or prepared by any government institution in the course of lawful law enforcement activity and where the institution is designated an investigative body by regulation.[210] The Access to Information Regulation[211] designates eight organizations as investigative bodies for this

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201. The Yukon Territory has its own freedom of information statute. *See supra* note 132.

202. *See* P.C. STENNING, *supra* note 145, at 157-58.

203. I R.S.C. ch. A-1, § 4(1) (1985). The act gives no definition of "control." *See* Rankin, *supra* note 152, at 7-8.

204. Rankin, *supra* note 152, at 17. *See also* the well-directed criticisms of McCamus, *Bill C-43: The Federal Canadian Proposals of 1980*, in CANADIAN PERSPECTIVES, *supra* note 152, at 266, 287-89.

205. Rankin, *supra* note 152, at 17.

206. *Id.*

207. I R.S.C. ch. A-1, § 16(1)(c) (1985).

208. Rankin, *supra* note 152, at 13.

209. I R.S.C. ch. A-1, § 16(1)(c)(iii) (1985).

210. *Id.* § 16(1)(a).

211. SOR/83-507, § 9; sched. 1 (1983), *reprinted in* 117 Can. Gaz. 2474, 2476-77 (June 22, 1983).

purpose, including the RCMP. The effect is similar to that of section 14(2) of the Ontario Act, criticized above.[212]

Finally, section 16(3) exempts any record containing "information obtained or prepared by the [RCMP] while performing policing services for a province or municipality" when the province or municipality has requested the government not to disclose such information.[213] It appears that all eight provinces that contract the services of the RCMP as provincial police have requested confidentiality.[214] Thus the circle of protection is complete: the RCMP, acting by arrangement as provincial police in all of the provinces except Ontario and Quebec, are not subject to provincial FOI legislation[215] and are exempt from the AIA. All these exemptions are mirrored in the companion Privacy Act 1982, which provides a code of disclosure for personal information about the requester.[216]

Under the federal legislation, an ombudsman-like Information Commissioner handles in the first instance complaints relating to nondisclosure or delay.[217] The sketchy case summaries in the Annual Reports of the Information Commissioner make it difficult to discern if any complaints have related to discovery-motivated requests. In one case, com-

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212. *See supra* notes 181-82 and accompanying text. A cabinet discussion paper by the then Secretary of State and Minister of Communications dated June 1980 defended class exemptions for law enforcement records on the grounds "1) that very little information . . . would be available under an injury test, and 2) that applying injury tests requires a great deal of time and effort of law enforcement officials[, and u]nder the burden of work, mistakes can readily be made." Access to Information Legislation, *reprinted in* THE RIGHT TO KNOW: ESSAYS ON GOVERNMENTAL PUBLICITY AND PUBLIC ACCESS TO INFORMATION 327, 334-35 (D.C. Rowat 3rd ed. 1981).

213. I. R.S.C. ch. A-1, § 16(3) (1985).

214. Only Québec and Ontario operate provincial police forces without the assistance of the RCMP. *See* NATIONAL TASK FORCE, *supra* note 143, at 35.

215. In Nova Scotia the Ombudsman under his general jurisdiction investigates complaints involving the RCMP. *See, e.g.*, OFFICE OF THE OMBUDSMAN, NOVA SCOTIA ANNUAL REPORT 14, at 44-4 (1984) (Complaints No. 30-4, 30-7, 30-8); OFFICE OF THE OMBUDSMAN, NOVA SCOTIA ANNUAL REPORT 15, at 37 (1985) (Complaint No. 4-3). *Cf.* U. LUNDVIK, THE OMBUDSMEN IN THE PROVINCES OF CANADA 87 (International Ombudsman Institute, 1981) (indicating that provincial Ombudsmen have ceased investigating complaints against the RCMP since *Re* Ombudsman for Saskatchewan, 46 Dom. L. Rep. (3d) 452 (Sask. Q.B. 1974)). The Ombudsmen have always performed a useful role in giving complainants access to information, even prior to the enactment of FOI legislation. *See* Shelton, *The Ombudsman and Information*, 12 VICT. U. WELLINGTON L. REV. 233 (1982).

216. VII R.S.C. ch. P-21, § 22 (1985).

217. *See generally* Ferris, *Freedom of Information in Canada—The Ombudsman-Judicial Review Model*, 4 OMBUDSMAN J. 27 (1984), *reprinted in* 5 J. MEDIA L. & PRAC. 193 (1984).

plaint was made that the RCMP delayed so long in responding to a request that the information could not be made available in time for a court hearing.[218] Other case summaries suggest a criminal discovery motive for requests. One requester, for example, unsuccessfully sought access to reports by named RCMP officers in connection with an assault.[219] The case summaries also disclose use of the AIA in much the same way as the United States FOIA[220]—to ferret out useful background material such as departmental directives concerning drug prosecutions[221] and customs prosecution policy documents.[222] A case in which a requester gained access to all the portions of two wiretap tapes on which his voice appeared shows that application under the Privacy Act 1982 might also prove fruitful notwithstanding the presence of identical law enforcement exemptions.[223]

These, however, are isolated instances. All indications are that the AIA is little used in the criminal discovery context, and the same can be said of the provincial legislation. The real difficulty in Canada—and the reason for the lack of impact of the federal and provincial FOI legislation on criminal discovery practice—is the extraordinary breadth of most of the law enforcement exemptions. These exemptions are far wider than those in the United States FOIA, for instance, and certainly are broader than is necessary or desirable.[224] Resort to FOI laws will unlikely achieve significant improvement in criminal discovery as of right in Canada. Future development must lie with legislation along the lines recommended by the Law Reform Commission of Canada[225] or, as is more likely, the procedural guarantees in the Charter of Rights and Freedoms.[226]

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218. INFORMATION COMMISSIONER, ANNUAL REPORT 29 (1983-1984).

219. INFORMATION COMMISSIONER, ANNUAL REPORT 81 (1985-1986).

220. *See* Note, *supra* note 3, at 144-59.

221. INFORMATION COMMISSIONER, ANNUAL REPORT 20 (1984-1985).

222. *Id.* at 58.

223. PRIVACY COMMISSIONER, ANNUAL REPORT 41 (1986-1987).

224. *See* Rankin, *supra* note 152.

225. *See supra* note 127. Usefully discussed by Ferguson, *supra* note 130, at 101-4 (Commission's proposals are "not an unreasonable compromise" but they do not cover summary conviction offenses or oral unrecorded statements, are restricted to "relevant" witness statements, and do not oblige the prosecution to disclose statements of witnesses it does not intend to call).

226. Constitution Act, 1982, R.S.C. app. II, No. 44, sched. B, pt. 1 (1985). *See generally* Finley, *Is There Now a Constitutional Right to Discovery?*, 36 Crim. Rep. (3d) 41 (1984); Grossman, *Disclosure by the Prosecution: Reconciling Duty and Discretion*, 30 CRIM. L.Q. 346 (1987-1988).

IV. THE AUSTRALIAN EXPERIENCE

A. *Commonwealth Legislation*

The Australian law and practice relating to criminal discovery appears to be as unsatisfactory as that of Canada.[227] In contrast to the Canadian experience, Australian lawyers from the outset were aware of the potential of the Commonwealth Freedom of Information Act 1982 as an aid to criminal and civil discovery.[228] There are quite a number of recorded instances of discovery-motivated FOI requests.[229] Evaluating the Australian experience in a small compass is not easy, however, due to the numerous and detailed exemptions, and the ever-growing jurisprudence interpreting the Commonwealth FOIA. The treatment here will focus on the most relevant exemptions and major developments.[230]

The Australian Federal Police, the Director of Public Prosecutions, the Attorney-General's Department, and the Australian Government Solicitor are all subject to the FOIA,[231] so there is little difficulty regarding coverage.

Section 37 concerns law enforcement, and, while obviously derived from the case law on exemption (7) of the United States FOIA, is much broader in scope.[232] Section 37(1) exempts any document whose disclosure under the FOIA

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227. *See* Elkington, *Discovery Upon Indictment in New South Wales*, 4 CRIM. L.J. 4 (1980); Lane, *Prosecutors: Non-disclosure of Exculpatory Evidence*, 5 CRIM. L.J. 251 (1981); Campbell, *Discovery in Committal Proceedings*, 9 CRIM. L.J. 270 (1985); Campbell, *Discovery in Criminal Trials: Prosecutorial Duties and Judicial Remedies*, 13 U. QUEENSL. L.J. 154 (1984); P. SALLMAN & J. WILLIS, CRIMINAL JUSTICE IN AUSTRALIA 77-80 (1984).

228. *See, e.g.*, P. BAYNE, FREEDOM OF INFORMATION x (1984), Dr. Geoffrey Flick and Mr. Keith Steele, The Freedom of Information Act—An Aid to Pre-trial Discovery, Australian Young Lawyers National Lecture Series at Sydney, (Apr. 16, 1986).

229. Instances of criminal discovery-motivated FOI requests include *Re* Carver and Department of Prime Minister and Cabinet, 12 Admin. L. Dec. 447, 448 (Admin. App. Trib. 1987); Austin v. Deputy Secretary, Attorney-General's Department, 67 A.L.R. 585 (Fed. Ct. 1986); *see also* cases cited *infra* at notes 314-15. Considerable use of the Act has been made in the pre-litigation stage of civil disputes. *See, e.g.*, Johns, *Using FOI in Defamation Litigation*, 14 FREEDOM INFO. REV. 14 (1988).

230. Thanks are due to the following people who were kind enough to provide Australian citations and material while I was in Canada: Peter Bayne, Robin Bell, Denis O'Brien, Joan Sheedy, and Robert Todd.

231. Freedom of Information Act 1982, [1982] 1 Austl. Acts. No. 3, §§ 4, 7; sched. 2.

232. Bayne, *Exemptions Under the Freedom of Information Act 1982*, 14 FED. L. REV. 67, 88 (1983).

would, or could reasonably be expected to—

(a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;

(b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law; or

(c) endanger the lives or physical safety of persons engaged in or in connection with law enforcement.[233]

Subsection (2) of that section similarly protects documents the disclosure of which "would, or could reasonably be expected to . . . prejudice the fair trial of a person . . . [or] disclose lawful methods . . . [of] preventing, detecting [and] investigating . . . evasions of the law" thereby prejudicing their effectiveness.[234]

The Federal Court considered subsection (1)(a) in the leading case of *News Corporation Ltd. v. National Companies and Securities Commission.*[235] The National Companies and Securities Commission (NCSC) commenced an investigation into whether News Corporation had broken certain securities and company laws. NCSC served notices on News Corporation to produce documents and a few weeks later announced that it intended to hold a statutory hearing in relation to specified occurrences involving that corporation. Shortly before that hearing, News Corporation requested under the FOIA access to almost all of the documents obtained by NCSC (from a variety of sources) in the course of the investigation, as well as summaries, analyses, and other memoranda created by the NCSC itself (over 6,000 documents in all). NCSC refused access on the ground that the information was exempt under section 37(1)(a) of the FOIA.[236]

Under the Australian legislation a dissatisfied requester can complain to the federal Ombudsman or the Administrative Appeals Tribunal (AAT), but only the AAT has a binding power of decision.[237] News Corporation appealed to the AAT, which affirmed the NCSC's decision

233. [1982] 1 Austl. Acts No. 3, § 37(1).

234. *Id.* § 37(2).

235. 57 A.L.R. 550 (Fed. Ct. 1984).

236. *Id.* at 552.

237. The administrative arrangements agreed upon to facilitate referral of matters between the Ombudsman and the Administrative Appeals Tribunal (AAT) can be found in COMMONWEALTH OMBUDSMAN AND DEFENCE FORCE OMBUDSMAN, ANNUAL REPORTS 1987-88, app. F, at 132-33.

to withhold under section 37(1)(a).[238] The evidence before the AAT included an affidavit by the executive director of the Commission (who was cross-examined at the hearing) and evidence taken ex parte.[239] The affidavit evidence stated that disclosure would interfere with the investigation in at least three ways: (1) by "tipping the hand" of the NCSC and thereby putting the people under investigation in a position to mislead or divert the investigation either by fabricating defenses, setting false trails, or seeking to influence witnesses; (2) by deterring witnesses from cooperating with the NCSC in the course of its investigation; and (3) by indicating the activities that were and were not subject to the investigation, the nature and extent of the evidence gathered to date, the reliance placed upon particular items of evidence, the direction of the investigation, the methods of surveillance used, the investigatory priorities, the resources available, the hypotheses of investigators, and the methods of investigation.[240]

The AAT read the word "conduct" in section 37(1)(a) to mean primarily the handling or management of the investigation.[241] On that basis, the AAT found the investigation would be prejudiced if disclosure deprived the investigator of one of the techniques of inquiry, i.e., the ability to put questions to persons who are not thoroughly prepared for them.[242] In the alternative, if "conduct" referred instead to the outcome of the investigation, the AAT found prejudice in the deprivation of one of the means of finding the facts.[243] This was so even though the AAT could not point to any person who would be likely to use the disclosed information in order to prevent the NCSC from discovering what in fact occurred.[244]

News Corporation exercised its right of appeal on a question of law to the Federal Court, arguing that disclosure would not prejudice the outcome of the investigation in this particular case because the AAT could not point to any person who would attempt to do so. It also argued that the words "in a particular instance" qualified each limb of section 37(1)(a), including the "investigation of a breach" part. Mr. Justice Beaumont accepted this view as correct, saying "that the question of prejudice under section 37(1)(a) is to be tested, not in any abstract fash-

238. 57 A.L.R. at 552.

239. The Federal Court held this procedure to be lawful. *Id.* at 582. Mr. Justice Beaumont dissented on this point. *Id.* at 567.

240. *Id.* at 554.

241. *Id.* at 575 (Beaumont, J., dissenting).

242. *Id.* at 576.

243. *Id.*

244. *Id.*

ion, but by reference to the particular circumstances of the investigation in hand."[245] For this reason, case law interpreting exemption (7)(A) of the United States FOIA provided no assistance, for the United States provision employs the plural form "investigations."[246] In contrast, Mr. Justice Woodward did not see the need to read the words "in a particular instance" as governing the earlier limbs of subsection (1)(a).[247] "If they did," he said, "they would not add to the existing requirement that a particular breach (or possible breach) must be under investigation."[248] The difference is probably semantic,[249] for both judges agreed on the requirement to focus on the consequences of disclosure in the particular case.

Mr. Justice Woodward accepted that the statutory language required actual prejudice to be expected, not merely the risk or possibility of prejudice.[250] Mr. Justice Fox shared this view.[251] Furthermore, Mr. Justice Woodward said that reasonable expectation falls somewhere between possibility and probability, and in a general sense denotes an even chance of prejudice occurring.[252] He was satisfied that the AAT had applied the correct test, focused on the particular case, and properly found that disclosure could reasonably be expected (on an even chance basis) to prejudice the investigation because the applicants would be forewarned and forearmed against questions.[253] The AAT was able to reach this conclusion even though it said there was no basis in the evidence for a

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245. *Id.* at 578 (approving the view of the AAT in *Re* Murtagh and Commissioner of Taxation, 54 A.L.R. 313, 332 (1984); 6 Admin. L. Dec. 112, 129 (Admin. App. Trib. 1984) ("Regard cannot be had therefore to the possible effect of disclosure in other cases.").

246. 57 A.L.R. at 578.

247. *Id.* at 561 (disapproving of the view in *Re Murtagh*, 54 A.L.R. 313).

248. *Id. Accord* P. BAYNE, *supra* note 228, at 149.

249. Bayne, *Freedom of Information*, in M. ARONSON & N. FRANKLIN, REVIEW OF ADMINISTRATIVE ACTION 308 (2d ed. 1987).

250. 57 A.L.R. at 561.

251. *Id.* at 555. In a subsequent case, Attorney-General's Department v. Cockcroft, 64 A.L.R. 97 (Fed. Ct. 1986), the Federal Court moved away from this test to one requiring "a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd, or ridiculous." *Id.* at 106 (Bowen, C.J. & Beaumont, J., on section 43 of the Australian Act. [1982] 1 Austl. Acts No. 3, § 43).

252. 57 A.L.R. at 562. Mr. Justice Fox refused to paraphrase the statutory language. *Id.* at 555.

253. *Id.* at 555. *See also* Association of Mouth and Foot Painting Artists Pty. Ltd. and Comm'r of Taxation, 12 FREEDOM INFO. REV. 70, 71 (Admin. App. Trib. 1987) (case summary; deferring to claims of exemption and denying access even by counsel based on *News Corporation* decision).

positive finding that any person was presently minded to prejudice the investigation.[254] At the end of his opinion, Mr. Justice Woodward stated there was "ample material" to justify the AAT's findings.[255]

For Mr. Justice Beaumont dicta in an earlier case involving the same parties determined the question of reasonable expectation of prejudice; in that case, the High Court of Australia said, "[f]or an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry."[256] This reasoning indicated to Mr. Justice Beaumont the prejudice "which could reasonably be expected in *any* investigation"[257] and hence in this particular one. This is the generic approach to exemption found in United States cases such as *NLRB v. Robbins Tire & Rubber Co.*,[258] from which, ironically, Mr. Justice Beaumont had refused to derive assistance.

Mr. Justice Fox agreed with Mr. Justice Beaumont. After accepting that the question of prejudice had to be examined objectively in the light of the evidence, he said:

> In relation to many of the documents, it would I think take very little evidence to justify a conclusion of reasonable expectation of prejudice. The courts decided long ago, one imagines with little or no actual evidence of possible prejudice to a fair trial, that an accused should not be entitled to discovery as against the prosecution. What is sought here is analogous to such a claim for discovery.[259]

It had not been the policy of the NCSC to give a company whose dealings were under investigation access to all documents in its possession, and Mr. Justice Fox did not want to suggest that it should be.[260] Clearly disapproving of the applicant's use of the FOIA to whittle away the "accepted principle of non-access," Mr. Justice Fox remarked that "the application [had] all the appearance of a comprehensive fishing expedition, likely in the immediate and ultimate consequences to hinder rather than help the inquiry."[261] Similarly, Mr. Justice Woodward intimated that applying under the FOIA, which had been "designed to advance the

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254. 57 A.L.R. at 562.
255. *Id.*
256. National Co. and Securities Comm'n v. News Corp., 52 A.L.R. 417, 437 (1984) (Mason, Wilson and Dawson, JJ.).
257. 57 A.L.R. at 578 (emphasis added).
258. 437 U.S. 214, 242 (1978).
259. 57 A.L.R. at 555-56.
260. *Id.* at 557.
261. *Id.*

principle of open government," in order to "look over" the Commission's shoulder was a "misuse" of the FOIA.[262]

The language and result in this case is strikingly similar to that in the United States Supreme Court decision in *Robbins*.[263] While the *News Corporation* case did not raise the issue of the FOIA's impact on criminal discovery, the Federal Court's reasoning indicates clearly that it will not warmly embrace the idea. Similarly, the AAT jurisprudence is against use of the FOIA as a substitute or aid to discovery. As in the United States, attempted use of FOI legislation to aid discovery in tax adjudication has been to the fore.

In *Re Murtagh and Commissioner of Taxation*,[264] the applicant, who had appealed to the Taxation Board of Review against an adverse determination by the Commissioner, sought access under the FOIA to documents in the possession of the Commissioner relating to her tax returns. Relying on several exemptions, the Commissioner refused to disclose all the documents.[265] One of the major arguments the Commissioner raised before the AAT upon appeal regarding several of the exemptions was that access under the FOIA would subvert discovery rules if the dispute reached the Supreme Court on further appeal from the Taxation Board of Review.[266] The Commissioner first raised this argument (inappropriately so the AAT thought)[267] in relation to section 36, which generally protects from disclosure documents relating to policy-forming processes unless the public interest dictates disclosure. The AAT rejected the Commissioner's submission for the simple reasons that the Taxation Board of Review had no discovery rules and that no proceeding was presently before any court of law. The AAT did say, however:

> If there were proceedings before a State Supreme court, it would be proper to give consideration as to whether, in the public interest, the grant of access to documents should be left to the decision of the court, it having adequate powers to order disclosure if, having regard to the justice of the case, it considered that disclosure to be appropriate.[268]

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262. *Id.* at 565.

263. 437 U.S. 214 (1978). The *News Corporation* case vindicates Peter Bayne's view that the reasoning in *Robbins* seems equally applicable to the Australian Act. P. BAYNE, *supra* note 228, at 153.

264. 54 A.L.R. 313; 6 Admin L. Dec. 112 (Admin. App. Trib. 1984) (Davies, J., President, Sir Ernest Coates, R.A. Sinclair).

265. *Id.* at 319-26, 6 Admin. L. Dec. at 118-24.

266. *Id.* at 326, 6 Admin. L. Dec. at 124.

267. *Id.* at 327, 6 Admin. L. Dec. at 124 (thought more appropriate under [1982] 1 Austl. Acts. No. 3, § 37(1)(a) (prejudice of law enforcement)).

268. *Id.*, 6 Admin. L. Dec. at 124-25.

A more relevant question under section 36, the AAT thought, was "whether it is injurious to the public interest to reveal documents to a taxpayer which include details of the evidence . . . and the witnesses" to be called before the Taxation Board of Review.[269] That question did not arise for answer in this case, as none of the documents contained such information or indeed any information likely to prejudice the Commissioner's case before the Board.[270]

These observations regarding the public interest factors germane to section 36(2) applied directly to the section 37(1)(a) exemption claim as well. The granting of access would not hinder the Commissioner in presenting his case or unfairly assist the case of the applicant. "The documents in issue," the AAT observed, "do not disclose names of witnesses or statements of witnesses or the like. Nor would the grant of access subvert the application of discovery rules in the Taxation Board of Review proceedings."[271] The AAT left little doubt as to its attitude if the documents sought before adjudication had disclosed the names of witnesses or their statements.

The only other case bearing directly on this issue, *Re Kingston Thoroughbred Horse Stud and Australian Taxation Office*,[272] involved an FOI request for documents while the relevant dispute was before a court of law. The applicant lodged appeals from adverse determinations by the Commissioner of Taxation in the Supreme Court of New South Wales, but at the time of the AAT hearing the Supreme Court had not dealt with the appeals, and the applicants had not sought discovery, although particulars had been sought and supplied, as well as lengthy affidavits filed by the applicants.[273] The Commissioner sought an indefinite adjournment of the AAT hearing until the Supreme Court matter had been determined in order to prevent prejudice to those proceedings.[274] Further, the requests were said to amount to a "fishing expedition" that would not be permitted under the High Court Rules concerning discovery and inspection.[275] Counsel for the applicants opposed the adjourn-

269. *Id.*, 6 Admin. L. Dec. at 125.

270. *Id.*, 6 Admin. L. Dec. at 125.

271. *Id.* at 332, 6 Admin. L. Dec. at 129.

272. 10 Admin. L. Notes N38 (Admin. App. Trib. 1986) (Hon. Sir William Prentice (Senior Member), Dr. A.P. Renouf). *See also* the fleeting references to discovery in *Re* Bartlett and Dep't of Prime Minister, 12 Admin. L. Dec. 659 (Admin. App. Trib. 1987); *Re* N. MacDonald Pty. and Dep't of Territories and Local Gov't, 9 Admin. L. Dec. 236, 242 (Admin. App. Trib. 1985).

273. 10 Admin. L. Notes at N39.

274. *Id.*

275. *Id.*

ment, submitting that the FOIA provided new rights for citizens unqualified by reference to time, circumstances, or motivation, and that there was no room for circumscribing requests by reference to the well-established legal aversion to fishing expeditions.[276] The AAT decided to continue the hearing and rule on an adjournment at the end. The AAT did not have to rule on adjournment, however, as it held most of the documents to be exempt from disclosure.[277]

Responding to the subversion of discovery argument in the context of section 37(1)(a), the AAT had regard to the view of Mr. Justice Davies, sitting as President of the AAT in another case, that "[a]n Administrative Tribunal should not act in such a manner as to prejudice the conduct of proceedings which are on foot before a court of law."[278] The AAT concluded that "there could be a real chance that prejudice to the conduct of legal proceedings might result were this Administrative Tribunal to direct that disclosure should be made of documents many of which could well be refused to [sic] discovery in the Supreme Court."[279] The AAT found the additional fact that release under the FOIA is release to the world to support exemption under sections 37(1)(a) and 40(1)(d)[280] in that release would show the extent and nature of the

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276. *Id.*

277. *Id.* at N39-N40.

278. *Id.* at N39, *citing Re* Lane and Conservator of Wildlife, 5 Admin. L. Notes N429, N430 (Admin. App. Trib. 1984). The AAT also made reference to comments by Deputy President Todd in *Re* Lander and Aust'l Taxation Office, A83/111 (1985) (summarized at 9 Admin. L. Notes N25 (1985)). 10 Admin. L. Notes at N40. In that case an appeal was lodged with the Supreme Court from an adverse decision of the Taxation Board of Review while a FOI dispute was progressing towards an AAT hearing. The Supreme Court hearing was disposed of before the AAT hearing, but Deputy President Todd said, "the material here in question would clearly have been exempt prior to the disposal of the proceedings before the Board of Review and the Supreme Court under s.37(1)(a), which it is conceded does not now apply." *Lander, supra*, at 8-9.

279. *Re* Kingston Thoroughbred Horse Stud and Aust'l Tax Office, 10 Admin. L. Notes N38, N40 (Admin. App. Trib. 1986). The Victorian AAT expressed similar sentiments in Soo Lin Seng and Vict. Police, 17 FREEDOM INFO. REV. 9 (Admin. App. Trib. 1988) (Rowlands, J., President).

280. [1982] 1 Austl. Acts No. 3, §§ 37(1)(a), 40(1)(d). This provision exempts documents whose disclosure would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency. Bayne has described the provision as "something of a fall-back or a 'standby' [exemption] to be invoked in every case" and notes that the Senate Standing Committee on Legal and Constitutional Affairs has recommended its repeal. Bayne, *Freedom of Information: Democracy and the Protection of the Processes and Decisions of Government*, 62 AUSTL. L.J. 538, 541 (1988).

Commissioner's investigations and alert others suspected of tax evasion.

The AAT's evident desire in this case to avoid potential conflict with the courts is understandable,[281] particularly given the peculiar position of the AAT on the federal adjudicatory landscape. For constitutional reasons, the AAT had to be established as a nonjudicial body, but it has a Federal Court Judge as President and is subject to the appellate supervision of the Federal Court.[282]

While this may explain the AAT's reticence in the face of court proceedings, it cannot justify in law the position taken in the *Kingston* case. To interpret and apply the exemptions so as to exclude those engaged in litigation as a class from the benefits of the FOIA, as this panel of the AAT appears to do, is to ignore the statutory directive to focus on prejudice in the particular case. The AAT made no visible attempt to consider prejudice in its decision. Nor did it explain how disclosure under the FOIA could be greater than that through civil discovery. The AAT appeared simply to assume that disclosure under the FOIA might be broader than by way of civil discovery and that this would prejudice the administration of justice. The AAT's position would be justifiable if it had found that a document privileged from discovery would be disclosable under the FOIA but for section 37(1)(a), but the reasons for the decision do not support that conclusion.[283] Rather, the AAT appeared to assume prejudice simply because the FOIA provides an alternative disclosure mechanism to that in the Supreme Court Rules. That is not only simplistic but also legally wrong.

While both the FOI and civil discovery regimes permit disclosure of information, it is important to understand that each has a different function. The FOIA provides for disclosure of information about the workings of government to the general public in order to further democratic ideals.[284] Civil discovery, on the other hand, is designed to narrow and clarify the issues in litigation and to ascertain the facts relevant to those

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281. The Ombudsmen employ similar avoidance techniques on occasion. *See* Taggart, *Courts, Ombudsmen and Freedom of Information: The Empire Strikes Back*, 20 VICT. U. WELLINGTON L.R. MONOGRAPH 2 1, 33 (1990).

282. *See generally* Flick, *Commentary*, 12 FED. L. REV. 65 (1981); Campbell, *The Choice Between Judicial and Administrative Tribunals and the Separation of Powers*, 12 FED. L. REV. 64 (1981).

283. *Contra* Forgie, *Freedom of Information Act 1982: An Introduction to the Act, Its Relevance and Effectiveness and the Role of the Administrative Appeals Tribunal*, 1988 QUEENSL. L. SOC'Y J. 199, 214, 217.

284. *See* [1982] 1 Austl. Acts No. 3, § 3 ("The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government . . . .").

issues, thereby avoiding surprise at trial and facilitating speedy resolution of disputes. As Tomlinson has remarked, civil discovery "is not designed to provide the parties with the . . . minimum access to government records that is available under the FOIA, and even the most generous rules of discovery do not always provide that level of access."[285] Thus "fishing" is not permitted in a discovery regime bounded by need and relevance requirements, but "fishing" is no ground for objection to an FOI request.[286]

The FOIA requires the AAT to look for real prejudice (actual or reasonably expected) to the administration of justice by disclosure in the particular case and not to assume prejudice because the FOIA appears to cut across the settled civil discovery regime established by the 'superior' courts. Furthermore, to apply the exemptions in section 37 in the way the AAT appeared to in the *Kingston* case is to do something the Senate Standing Committee on Legal and Constitutional Affairs refused to do, namely to limit use of the FOIA by litigants as a class.[287]

The *Kingston* case concerned civil discovery, which is governed by detailed provisions in the State Supreme Court Rules. This is not the case with criminal discovery, where, by and large, the rules and discretions derive from the common law and the customs and practices of the profession over time. They do not form a "code" susceptible to subversion in the same way that Supreme Court Rules for civil discovery supposedly are subverted. Civil discovery developed out of chancery practice and has evolved into a sophisticated code of practice.[288] The development of criminal discovery is severely retarded in comparison, and, as Sallman and Willis note, "[t]he whole subject has received only cursory, and almost derisory, attention in Australia."[289] But despite these important differences between criminal and civil discovery, the reasoning and approaches in the case law on section 37(1)(a) involving civil and administrative discovery point towards criminal discovery being treated no differently.

Other exemptions in the FOIA may also frustrate attempts to use it as a criminal discovery tool. The protection of documents subject to legal professional privilege in section 42 may operate on occasion as a significant barrier to criminal discovery-motivated FOI requests.[290] In *Austin*

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285. Tomlinson, *supra* note 44, at 121 (discussing freedom of information and civil discovery in the United States).

286. *Infra* note 307.

287. *See infra* note 308 and accompanying text.

288. *See generally* Goldstein, *A Short History of Discovery*, 10 ANGLO-AM. L. REV. 257 (1981).

289. P. SALLMAN & J. WILLIS, *supra* note 227, at 80.

290. [1982] 1 Aust. Acts. No. 3, § 42.

v. Deputy Secretary, Attorney-General's Dept., Austin, who had been charged with sending an explosive substance through the mail contrary to the postal legislation, sought access under the FOIA to the file of the Australian Government Solicitor, who had carriage of the prosecution.[291] The Government Solicitor withheld several documents, most on the ground of legal professional privilege, and the AAT upheld that decision.[292] Upon further appeal, the Federal Court found no error of law on the AAT's part.[293]

In another case, the AAT upheld a claim for exemption under section 42, protecting from disclosure the statements of potential witnesses taken by police officers in the course of a criminal investigation and procured for the sole purpose of obtaining legal advice.[294]

Of the other exemptions, particularly relevant are sections 40(a) (substantial adverse effect on proper and efficient conduct of agency operations), 41(1) (protection of personal privacy of others against unreasonable disclosure), and 36(1) (protection of deliberative policy-forming processes).[295] Unlike the law enforcement and legal professional privilege exemptions, all of these sections provide for some sort of public interest balancing to determine disclosure or withholding. Under section 40 an applicant can override the exemption simply if disclosure would, on balance, be in the public interest,[296] whereas in section 36 the exemption will apply only if the decision-maker shows that disclosure would be contrary to the public interest.[297] In the personal privacy exemption, the words "unreasonable disclosure" demand consideration of the public interest.[298]

In considering the public interest in these exemptions, of what relevance is a requester's litigation-generated need for the documents? The better view is that a litigant-requester has no better claim under the FOIA than any other member of the public and that litigation-generated need should count neither for nor against disclosure in weighing the public interest factors.[299] This approach is at odds with a considerable

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291. 67 A.L.R. 585 (Fed. Ct. 1986).

292. *Id.* at 586.

293. *Id.* at 586, 590.

294. John and Secretary, Attorney-General's Department, 4 FREEDOM INFO. REV. 54 (Admin. App. Trib. 1986) (Deputy President R.C. Jennings Q.C.).

295. [1982] 1 Austl. Acts. No. 3, §§ 40(1)(a), 41(1), 36(1).

296. *Id.* at § 40.

297. *Id.* § 36(1)(b).

298. *Id.* § 41(1).

299. *See* P. BAYNE, *supra* note 228, at 158; *Re* Colonial Mutual Life Assurance Soc'y Ltd. and Dep't of Resources and Energy, 12 Admin. L. Dec. 251, 253 (Admin.

amount of AAT jurisprudence that has focused on the personal interest of the requester as an aspect of the public interest, but there are recent signs of a change in approach.[300]

The Commonwealth Ombudsman noted in 1985 that some lawyers have used the FOIA to complement the "well trodden 'legal' paths to discovery."[301] While the reaction of the agencies was to expect FOI access "to take second place to traditional 'legal' procedures," the Ombudsman pointed out:

> In fact there is no statute, judgment or rule which says this should be so. While the release of documents may be denied under the FOI Act for reasons such as adverse effect upon enforcement of the law or the existence of legal professional privilege, the FOI Act does not authorise deferral of an FOI access decision pending a litigation outcome, nor is it possible to deny access simply because the applicant in a separate capacity as a litigant is elsewhere following another set of rules governing access.[302]

The Ombudsman spoke of discovery-motivated FOI requests as a "tactical ploy,"[303] but others have labeled them an abuse of the FOIA. For instance, in his personal submissions to the Senate Standing Committee on Constitutional and Legal Affairs reviewing the FOIA, Dr. Gavan Griffith, Solicitor General of Australia, argued that the use of the FOIA as an aid to discovery created serious delay and enabled litigants to engage in wide-ranging fishing expeditions contrary to the Court Rules.[304] Dr. Griffith urged the Senate Standing Committee to recommend amendment of the FOIA so that it would not trespass upon the course of

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App. Trib. 1987); *Re* Anderson and Austl. Fed'l Police, 11 Admin. L. Dec. 355 (Admin. App. Trib. 1986); News Corp. v. National Co. and Securities Comm'n, 57 A.L.R. 550, 559 (Fed. Ct. 1984). In contrast, in civil discovery, very generally speaking, the greater the need of the litigant for the document, the more likely that the other side will be obliged to disclose it.

300. *See* Bayne, *supra* note 280, at 542 (citing cases).

301. COMMONWEALTH OMBUDSMAN AND DEFENCE FORCE OMBUDSMAN, ANNUAL REPORTS 1984-85, PARL. PAP. NO. 485/1985, at 173 [hereinafter OMBUDSMAN 84-85]. A nearly identical statement can be found in the Ombudsman's submission to the Senate Standing Committee on Constitutional and Legal Affairs review of the FOIA. *See* COMMONWEALTH OMBUDSMAN AND DEFENCE FORCE OMBUDSMAN, ANNUAL REPORTS 1986-87, PARL. PAP. NO. 427/1987, app. G, at 157.

302. OMBUDSMAN 84-85, *supra* note 301, at 173.

303. *Id.*

304. *See Freedom of Information Act 1982: Report on the Operation and Administration of the Freedom of Information Legislation, by the Senate Standing Comm. on Legal and Constitutional Affairs* 52-53, paras. 3.61-3.63 (Dec. 1987) (statement of Solicitor General Griffith).

anticipated or current legal proceedings.[305] He was not alone in that call.[306] The submission by the Attorney-General's Department summarized the arguments for and against closing FOI access to litigants, saying there is "much to be said" for limiting FOI access.[307] The Senate Standing Committee in its published Report refused to take up these

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305. *Id.*

306. *Id.* at 53 n.48 (reference to evidence and submissions from the Australian Taxation Office, and submissions from the Australian Customs Service and the Aboriginal Development Commission).

307. The submission of the Attorney General's Department to the Senate Standing Committee's Review of the FOIA dated June 1986) said this:

> There are policy arguments for and against the appropriateness of FOI access being permitted in parallel with discovery for those purposes. The main arguments given in favour include:
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> • FOI policy is predicated on a public interest in individuals having access to Government documents, regardless of their reason for wanting access, subject to certain essential exemptions. It follows that, for a greater public good, the Commonwealth may be required under the Act to release information which may be politically or administratively embarrassing, or provide evidence which may be used against it in legal proceedings, or otherwise be inimical to its direct interest. To prevent or postpone that release simply because litigation is contemplated or commenced would undermine that policy.
>
> • To apply the "no fishing" rule of discovery to FOI would run counter to the principle that an FOI applicant need [not] demonstrate interest or standing to justify his or her request and also contrary to the right to unilaterally determine the ambit of relevance by the terms of a request.
>
> • FOI proceedings need not interfere with proper judicial timetabling and management of procedures. If a litigant seeks an extension of time for taking a step in the proceedings because an FOI application is pending, it is a matter for the court whether to grant that extension of time. The court retains control. The court retains its powers to limit the matters in issue and is not bound to delay proceedings while FOI requests are outstanding. Should FOI disclosure prejudice proper administration of the law within the meaning of s.37, then that section provide[s] a remedy. Should FOI disclosure amount to a contempt of court, s.46 is available; if disclosure ought properly to be deferred, s.21(1)(c) is available.
>
> The main arguments given against include:
>
> • Once parties are in litigation their access to relevant documents should fall to be determined by the rules of court.
>
> • Where a litigant engages in concurrent FOI proceedings against an agency in respect of documents relevant to the litigation, there is a practical difficulty for the agency of dealing with the litigant on two separate fronts. To permit concurrent FOI and discovery proceedings in respect of the same documents can lead to confusing and parallel actions in the AAT and the court in which the litigation is pending. There is therefore much to be said for the view that a litigant ought not to be permitted to use the FOI Act to seek access to documents which are the subject of procedures available in the litigation.

Id. at 58-60, paras. 3.12-3.12.17.

invitations for reasons of both principle and practicality:

> The Committee does not recommend that any amendments be made to the FOI Act to prevent FOI access being used to supplement the discovery process. In principle, the Committee does not regard this use of FOI as inappropriate. The fact that a court or tribunal is not the exclusive arbiter of the disclosure of documents by one or other of the parties does not mean that it necessarily loses control over the litigation process. It retains complete control over the use of documents, however obtained, as well as over its time-tabling and the management of its procedures. A court or tribunal is not obliged to delay proceedings in a matter because an FOI request is outstanding . . . . Apart from the question of principle, the Committee sees insurmountable difficulties inherent in any attempt to devise a provision to prevent litigants, or people acting on behalf of litigants, obtaining documents relevant to that litigation under the FOI Act.[308]

B. *State Legislation*

The only Australian state to enact FOI legislation to date is Victoria.[309] The Freedom of Information Act 1982 resembles closely the Commonwealth legislation, upon which it was modeled, although some of its exemptions are more restrictive.[310] The Victorian Act covers the state police force[311] and until recently all the prosecuting authorities as well.[312] Several cases have involved attempted access to police records. On October 13, 1987, the Victorian Government promulgated the Freedom of Information (Exempt Offices) Regulations 1987, which exempted from the operation of the Victorian Act the offices of the Solicitor General, the Director of Public Prosecutions, the Victorian Government Solicitor, and the Police Complaints Authority.[313]

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308. *Id.* at 53, paras. 3.64-3.65. The practical difficulties outlined by the Senate Standing Committee, *id.* at 53-54, paras. 3.64-3.65, echo the conclusions in Tomlinson's study in the United States context. *See supra* note 44.

309. Freedom of Information Act 1982, Vict. Acts No. 9859. At the time of writing, a Freedom of Information Bill had been introduced into the New South Wales legislature. *See* 16 FREEDOM INFO. REV. 40 (1988).

310. *See generally* Proust, *Exemptions Under the Victorian Freedom of Information Act 1982*, 14 FED. L. REV. 143 (1983-1984).

311. Vict. Acts No. 9859, § 5(4). Note, however, that documents created by the Bureau of Criminal Investigation are exempt from disclosure. *Id.* § 31(3).

312. The Director of Public Prosecutions was covered, as were police prosecutors. *See infra* note 313. On criminal prosecutions by police in Australia, see generally P. SALLMAN & J. WILLIS, *supra* note 227, at 49-53, 71-74.

313. Freedom of Information (Exempt Offices) Regulations 1987, Stat. Regs 1987, No. 266, reg. 5.

In the early days of the operation of the Victorian Act, when the appeals jurisdiction was temporarily reposed in the Victorian County Court pending establishment of the Victorian Administrative Appeals Tribunal (AAT), that court reportedly upheld a refusal by the Ministry of Police and Emergency Services to release a "police brief" relating to a charge against the requester under section 31 (which corresponds broadly to section 37 of the Commonwealth Act).[314] Confirmation of this approach is found in a recent decision of the Victorian AAT in *Stewart and Victoria Police*.[315] Then President Judge Rowlands, himself a County Court Judge, presided over this panel of the AAT.

The applicants in *Stewart* were arrested following a demonstration and were subsequently charged and committed for trial. Following their arrest, they lodged complaints alleging assault against the police officers. After an internal police investigation the complaints were rejected. The applicants sought access to the evidence gathered in the course of the internal investigation. The police refused to disclose this information on several grounds, all of which the AAT upheld on appeal.[316]

The AAT was satisfied that the police gathered the evidence on the basis that in the event charges of assault were not laid against police officers the statements would remain confidential. Disclosure of this confidential information was held to be "contrary to the public interest,"[317] as witnesses would likely be less full and frank in providing information in the future if it were disclosed.[318] The possibility of harassment of civilian witnesses if the statements were released also influenced the AAT.[319] Furthermore, the AAT felt that the content of the witness statements related to the personal affairs of the witnesses, and disclosure would be "unreasonable" in terms of the personal privacy exemption.[320] Finally, the Victorian AAT upheld reliance on the law enforcement exemption,[321] which is similar to section 37(1)(a) of the Commonwealth FOIA.[322] The AAT observed:

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314. Gordon v. Ministry of Police and Emergency Services, (Vict. County Ct., Oct. 17, 1984, *noted by* Paterson, *All Care and No Responsibility—The County Court's Interim Custody of FOI*, 59 LAW INST. J. 439, 441 (1985)).

315. *See* 15 FREEDOM INFO. REV. 27 (Vict. Admin. App. Trib. 1988). The facts and quote in the text are taken from this report.

316. *Id.* at 27.

317. Vict. Acts No. 9859, § 35(1) (b).

318. 15 FREEDOM INFO. REV. at 27.

319. *Id.*

320. *Id.*; *see* Vict. Acts No. 9859, § 33.

321. 15 FREEDOM INFO. REV. at 27; *see* Vict. Acts No. 9859, § 31(1)(a).

322. Quoted *supra* in text at note 233. *See also* Soo Lin Seng and Victoria Police, 17

> Insofar as material is sought which may be relevant to the future court hearing against the applicants we are of the view that the whole area of "criminal discovery" should, as a matter of policy remain with the criminal courts. The concept itself is poorly developed and its relationship with the Freedom of Information Act is ill defined.[323]

This is essentially an assertion that it is contrary to the public interest to apply the FOIA according to its terms. But, as Deputy President Todd of the Commonwealth AAT said in response to such a claim in a different context, "[i]t is a *cri de coeur* which, however understandable, runs completely contrary to the spirit and intendment of the FOI Act . . . ."[324]

Page and Metropolitan Transit Authority[325] shows the potential of other exemptions in the Victorian Act to deflect discovery-motivated FOI requests. Page, who was involved in an accident with a train, sought access under the FOIA to an accident report prepared by transit employees and submitted to the Authority's legal advisor. The Authority disclosed most of the report but refused to release the section giving the names and addresses of witnesses to the accident.[326] The Victorian AAT found that a person's name and address related to his personal affairs, and so the question was whether disclosure of this information would be "unreasonable."[327] After considering a number of factors, including the interest the requester had in the information and the likelihood that the witnesses would not wish to be identified, the AAT found disclosure would not be unreasonable under section 33.[328] But the AAT upheld the claim of legal professional privilege under section 32.[329] Unlike the Commonwealth AAT, the Victorian AAT has the power (subject to certain exemptions) to order the release of exempt documents.[330] The applicant argued under this provision, section 50(4), that disclosure would facilitate a speedy and just resolution of the civil litigation arising from

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FREEDOM INFO. REV. 9 (Admin. App. Trib. 1988).

323. 15 FREEDOM INFO. REV. at 27.

324. *Re* Bartlett and Dep't of Prime Minister and Cabinet, 12 Admin. L. Dec. 659, 663 (Admin. App. Trib. 1987).

325. 15 FREEDOM INFO. REV. at 28. The facts are taken from this report.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. Vict. Acts No. 9859, § 50(4). For an instance in which the Victorian AAT exercised its discretion under section 50(4) to release documents properly the subject of legal professional privilege, see Chadwick and Dep't of Property and Services, 10 FREEDOM INFO. REV. 40 (Vict. Admin. App. Trib. 1987)(Rowlands, J., President).

the accident.[331] The AAT did not accept this as justifying release, pointing out that the FOI request was essentially an attempt to extract privileged documents from a governmental litigant that would not otherwise have to be disclosed by a nongovernmental litigant.[332] Thus, the use of the Victorian Act in *Page* as a prelitigation civil discovery tool was unsuccessful.

The Commonwealth and Victorian experience with FOI legislation in the criminal discovery context parallels to a remarkable degree the United States experience. But in spurning FOIA-driven discovery, the United States courts at least have available the limited but specific provision for criminal discovery in the Federal Rules of Criminal Procedure, whereas in Australia the courts, by rejecting discovery-motivated FOI access, are thrown back onto the discretion-ridden and uncertain common law and practice. Whether or not this suits the judiciary, who thereby retain the last discretionary say on discovery matters, it is hardly in the public interest.[333]

V. THE NEW ZEALAND EXPERIMENT

The common law backdrop to criminal discovery in New Zealand is identical to that in Australia and Canada.[334] Long on prosecutorial discretion and short on legally enforceable rights of access, New Zealand common law allows for considerable variation in disclosure practices, which frequently depend on relations between the prosecutor and defense counsel involved.[335] As in Canada, the issue of criminal discovery has been the subject of a recent law reform study in New Zealand,[336] and there seemed every prospect of legislative action on the subject.[337] Before that came to pass, however, a case before the New Zealand Court of Appeal raised for decision the impact of New Zealand's FOI statute on the practice of criminal discovery.[338]

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331. 15 FREEDOM INFO. REV. at 28.

332. *Id.*

333. *See* Louisell, *supra* note 13, at 98.

334. *See* Penlington, *Our Criminal Procedure—A Plea for Reform*, 6 OTAGO L. REV. 1 (1985); Doyle, *Criminal Discovery in New Zealand*, 7 N.Z. U. L. REV. 23 (1976).

335. *See* M. STACE, DISCLOSURE AND CRIMINAL DISCOVERY (1985).

336. CRIMINAL LAW REFORM COMM., *supra* note 128.

337. *See* 1986 N.Z. PARL. DEB. 2168-69 (1986) (Rt. Hon. Geoffrey Palmer, Minister of Justice); 1986 N.Z. PARL. DEB. 5893 (1986) (Mr. Bill Dillon); Rt. Hon. Geoffrey Palmer, The Official Information Amendment Bill: Disclosure in Criminal Cases and the Ministerial Veto, Speech Given Before the Rotary Club of Hutt (Nov. 5, 1986).

338. Commissioner of Police v. Ombudsman, [1988] 1 N.Z.L.R. 385 (C.A.).

Before analysing that decision, a few introductory points need to be made. First, New Zealand's freedom of information statute, the Official Information Act 1982 (OIA),[339] differs in some respects from the federal Canadian and Australian FOI legislation, which are based more squarely on the United States FOIA model.[340] Most relevantly, the OIA distinguishes between "official" and "personal" information,[341] the latter being "information" held by a subject agency "about" the requester and to which that person has a legal right of access.[342] In the *Ombudsman* case, the requester sought access to "personal" information held by the police. Second, as far as coverage is concerned, the OIA applies to the police and the Crown Law Office.[343] The latter is independent of the Department of Justice and undertakes the legal work of the Crown. The Office is situated only in the capital city, Wellington, and outside that region the legal business of the Crown (mainly criminal prosecutions) is contracted out to senior lawyers in various parts of the country. Crown counsel employed by the Crown Law Office who conduct criminal prosecutions will be subject to pretrial OIA requests. But the OIA does not make clear whether it covers those local prosecutors, known as Crown Solicitors, to whom the criminal prosecution work is contracted out. Crown Solicitors hold warrants of appointment from the Governor-General, who according to constitutional convention follows the advice of his Ministers.[344] One cannot easily say that a Crown Solicitor is "engaged by any Department or Minister," as the appointment is by the Crown.[345] Of course this would be highly anomalous given the inclusion of the Crown Law Office under the OIA, but as noted above a similar problem exists in Ontario.[346] In New Zealand the OIA expressly covers the police force, and so at worst the consequence of not covering Crown Solicitors will be the inconvenience of addressing criminal discovery-mo-

339. 1982 N.Z. Stat. No. 156.

340. *See generally* Taggart, *Freedom of Information in New Zealand*, in PUBLIC ACCESS TO GOVERNMENT-HELD INFORMATION: A COMPARATIVE SYMPOSIUM 211 (N.S. Marsh ed. 1987). *Compare* the contributions in that volume on the federal Australian, Canadian, and United States legislation.

341. It is not necessary here to detail the significance of the distinction in the statutory scheme as a whole. On this, see Taggart, *Freedom of Information and the University*, 6 OTAGO L. REV. 638, 654-56 (1988).

342. 1982 N.Z. Stat. No. 156, § 24. *Id.* § 2 (definition of "personal information"). The OIA is unique in making "information," rather than documents, the subject matter of access. This raises its own problems, see Taggart, *supra* note 341, at 639-41.

343. 1982 N.Z. Stat. No. 156, § 2 (definitions of "department" and "organisation").

344. The Crown Solicitors Regulations 1987, Stat. Rules 1987, No. 58, reg. 2.

345. 1982 N.Z. Stat. No. 156, § 2(5).

346. *Supra* notes 185-90.

tivated OIA requests to the police rather than the Crown Solicitor in some types of trials.[347]

Finally, New Zealand's law of criminal procedure—in common with practice in Australia, Canada, and to some extent the United States—draws a distinction between offenses tried summarily and those tried on indictment. The former are tried by a District Court judge alone without a jury. The latter offenses are tried before a District or High Court judge and jury after a preliminary or depositions hearing before a District Court judge designed to determine whether a prima facie case has been made out to commit the accused to trial by jury. At the preliminary hearing the prosecution presents its case by calling intended trial witnesses, their statements (called depositions) are recorded in open court, and the witnesses are available for cross-examination by the defense.[348] If the District Court judge decides the prosecution has made out a prima facie case, the accused is committed for jury trial, and the defense has available the depositions in order to prepare for trial. In this way the preliminary or depositions hearing operates as an avenue of criminal discovery for the defense. But the preliminary hearing is available only in a tiny fraction of cases because the vast majority of offenses are proceeded with summarily. The New Zealand Department of Justice figures for the year ending March 1989 show the number of jury trials as 1,606, compared with 189, 648 summary trials[349]—less than one percent of the latter.

In *Commissioner of Police v Ombudsman*,[350] one Pearce, involved in a gang-related altercation with the police, was charged with the summary offenses of obstructing the police, drunk driving, refusing to accompany a police officer, and driving without a license. Before trial defense counsel

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347. In New Zealand a specially trained corps of police officers prosecutes all summary offenses and usually conducts the preliminary hearing of offenses charged indictably. Crown prosecutors usually only appear at jury trial.

348. For discussion of the preliminary hearing in New Zealand criminal procedure, see Savage, *Criminal Procedure: The Effect of Procedure Upon Justice*, in ESSAYS ON CRIMINAL LAW IN NEW ZEALAND 94 (R.S. Clark ed. 1971).

349. REPORT OF THE DEPARTMENT OF JUSTICE FOR THE YEAR ENDED 31 MARCH 1989, at 20-21. This figure for summary cases excludes traffic offenses, which in the relevant period numbered 228, 265. *Id.* at 20.

350. [1985] 1 N.Z.L.R. 578 (H.C.). The police also relied on section 9(2)(k) (which prevents the disclosure of official information for improper gain or advantage), but the Chief Ombudsman, the High Court, and the Court of Appeal were unanimous in holding that exemption inapplicable to "personal" information. *Id.* at 581. *See also* FIFTH COMPENDIUM OF CASE NOTES OF THE OMBUDSMEN 12, 15 (1984) [hereinafter FIFTH COMPENDIUM] (G.R. Laking, Chief Ombudsman); *Ombudsman*, [1988] 1 N.Z.L.R. 286, 396 (Cooke, P.), 402-3 (McMullin, J.). *See also* 1982 N.Z. Stat. No. 156, § 27(1A)

sought access under the OIA to briefs of evidence of witnesses proposed to be called at trial and held by the police. The police refused to disclose this information, arguing that it was exempt from disclosure by virtue of section 6(c) of the OIA.[351] That exemption provides:

> Good reason for withholding official information exists . . . if the making available of that information would be likely-
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> . . . .
>
> (c) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial . . . .[352]

Under the OIA, the dissatisfied requester of personal information can complain to the Ombudsman, who will investigate under the Ombudsmen legislation, or the requester can go directly to court to have the claimed legal right determined.[353] Pearce elected to complain to the Ombudsman. The police raised before the Ombudsman the following objections to supplying the requested information:

> (i) "fair" [trial] means fair to both parties.
> (ii) The basic rule of justice is that both parties to litigation should be in the same position as regards the trial. The Crown is under various disabilities in criminal prosecutions: it has the onus of proof and there are various statutory provisions which are designed to assist the defendant, but in the absence of clear statutory authority, no further forensic disadvantage is justified.
> (iii) The proposition being considered lacks reciprocity and thus is plainly unfair.
> (iv) If the Crown is placed in a position of further forensic disadvantage, the guilty are more likely than ever to be acquitted.
> (v) If briefs of evidence in summary cases are to be released to the defence, then it is likely that more resources than are strictly justified will be expended in the preparation of such documents, thus diverting Police resources from more direct maintenance of the law.
> (vi) The Police may be forced into some other procedure for appraising prosecutors of the evidence to be given, thus rendering less effective their prosecutions and making the acquittal of those who have committed offences more likely.
> (vii) The very nature of summary prosecution is that it is without interlocutory steps; to take away this defining characteristic will be to impede the enforcement of law and the administration of justice will be made

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as amended 1987 N.Z. Stat. No. 8, § 15.

351. *Ombudsman*, [1985] 1 N.Z.L.R. at 579.

352. 1982 N.Z. Stat. No. 156, § 6(c).

353. *See id.* § 35; Commissioner of Police v. Ombudsman, [1988] 1 N.Z.L.R. at 389-90 (Cooke, P.).

more burdensome.
(viii) In certain circumstances the provision to the defence of a brief of evidence by a civilian witness may encourage a defendant (or his associates) to try and interfere with that witness; this is not so likely in the case of a deposition since on making the deposition the witness becomes committed to the evidence which he has given. (Indeed it will generally be admissible at trial if he becomes unavailable to give evidence). In the case of a mere brief, job sheet or statement, the witness may be more amenable to pressure.
(ix) Certain defendants may be tempted to manufacture evidence to meet the prosecution evidence.[354]

The then Chief Ombudsman, Mr. (now Sir) George Laking, rejected these objections and concluded the police had not established that disclosing the briefs of evidence in this particular case would likely prejudice the interests in section 6(c).[355] The Chief Ombudsman formally recommended that the police disclose the briefs of evidence. This is the extent of the Ombudsman's power under part IV of the OIA, which confers a legal right of access to "personal" information.[356] Although departments follow formal recommendations in the vast majority of cases—one figure put the observance rate at 95%[357]—a department may decline to accept the Ombudsman's recommendation, as the police did in this instance. In that event the only sanction available to the Ombudsman is to report the matter to the Prime Minister and, ultimately, to the House of Representatives.[358]

Not content simply to decline to follow the recommendation, the police went on the offensive and brought judicial review proceedings in the High Court to have the Ombudsman's recommendation declared invalid. In the *Ombudsman* case[359] at first instance Mr. Justice Jeffries found the Chief Ombudsman to have committed several serious errors of law[360] and held that disclosure of witnesses' briefs of evidence *in any circumstances* would likely prejudice the investigation of offenses, the right to a

354. *See* FIFTH COMPENDIUM, *supra* note 350, at 17-18; *Ombudsman*, [1985] 1 N.Z.L.R. at 582. *See also* the arguments of the Solicitor-General on behalf of the police quoted in Commissioner of Police v. Ombudsman, [1988] 1 N.Z.L.R. at 392-93.

355. *See* FIFTH COMPENDIUM, *supra* note 350, at 21-25.

356. 1982 N.Z. Stat. No. 156, § 35(4).

357. *Ombudsman*, [1985] 1 N.Z.L.R. at 409, (Casey, J.) (quoting W.D. Baragwanath Q.C.).

358. Ombudsmen Act 1975, N.Z. Stat. No. 9, § 22(4).

359. [1985] 1 N.Z.L.R. 578.

360. For a full discussion of this aspect of the case, see Taggart, *supra* note 281, at 5-10.

fair trial, and, more generally, the maintenance of law. The judge reasoned that written briefs of evidence could not satisfactorily be isolated from the police investigation itself, and their disclosure would uncover to a great extent the background investigatory and detection processes, and thereby likely prejudice investigation of crime.[361] Moreover, Mr. Justice Jeffries held that disclosure would prejudice the right to a fair trial by making possible the coercion and intimidation of police witnesses and discouraging some people from assisting the police, as well as by excluding the court from the discovery process and thereby weakening the judge's control over the adjudicative process.[362]

The police argued before the Ombudsman and the courts that fair trial means fair both to the prosecution and the defense and that, as the disclosure recommended by the Ombudsman lacked reciprocity, it was plainly unfair.[363] The Chief Ombudsman had countered this objection by referring to the practice of disclosure in criminal jury trials referred to above.[364] While not referring to this exchange specifically, Mr. Justice Jeffries rejected emphatically any equation of summary proceedings with trials on indictment:

> [T]his is a summary prosecution and [I] reject as unsound analogous argument that disclosure of briefs is akin to deposition hearings before trial on indictment. I merely state . . . [that] a brief of evidence . . . [is] distinct from deposition or statement, both signed, and available to all involved in the trial, including the Court itself.[365]

The decision amounted to a blanket exclusion of briefs of evidence from the reach of the OIA. The threshold of harm—defined as a distinct possibility of prejudice to the interests stated in section 6(c)[366]—would be crossed in every instance of attempted access under the OIA to this material.

Pearce appealed this decision, but, through no fault of the court, it did not come on for hearing for three years. In the interim the Criminal Law Reform Committee's *Report on Discovery in Criminal Cases*[367] ap-

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361. [1985] 1 N.Z.L.R. at 590.

362. *Id.* at 590-91.

363. *Supra* note 354 and accompanying text.

364. FIFTH COMPENDIUM, *supra* note 350, at 21.

365. [1985] 1 N.Z.L.R. at 590. Later Mr. Justice Jeffries hinted acceptance of the police reciprocity argument, referring to "the right to a fair trial summarily, which is bilateral." *Id.* at 591. *Cf.* Commissioner of Police v. Ombudsman, [1988] 1 N.Z.L.R. 385, 391 (Cooke, P.).

366. [1985] 1 N.Z.L.R. at 589. *See generally* Taggart, *supra* note 281, at 8-9.

367. CRIMINAL LAW REFORM COMM., *supra* note 128. For a discussion of other

peared. It is a substantial and compelling report proposing the enactment of a comprehensive legislative code of criminal discovery applying to all criminal cases, both summary and on indictment.[368]

> The committee accepted unreservedly that the interests of justice require accused persons to be fully informed of the case against them and of other information relevant to their defence prior to trial. The traditional arguments against criminal discovery—perjury, witness tampering, and intimidation—while real concerns in some cases, did not justify the Common Law approach of non-disclosure and could be dealt with by exceptions to a general statutory rule of disclosure.[369]

The government appeared to be well disposed towards the proposals, and implementation awaited a larger review of criminal law being conducted by the Department of Justice.[370]

Meanwhile, the Court of Appeal heard the appeal and overturned the decision at first instance, holding that the police should have made the briefs of evidence available under the OIA. The five judges were unanimous that the briefs of evidence requested from the police were "personal information" to which the requester had a legal right under the OIA and that section 6(c) did not justify withholding in this case.[371] The critical differences from the trial court's approach were that, whereas Mr. Justice Jeffries had dismissed as "unsound" the analogy to the practice of disclosure at trials on indictment and found briefs of evidence to be inextricably intertwined with the investigative process, the majority of the Court of Appeal (President Cooke and Mr. Justices Somers, Casey, and Bisson) found the analogy compelling[372] and drew a sharp distinction between investigation and commencement of criminal proceedings.[373] This laid the foundation for their holding that once summary criminal proceedings commence, advance disclosure of prosecution evidence under the OIA similar to that in trials on indictment would not be likely to prejudice investigation of offenses or the right to a fair trial *as a general rule.* The judges allowed that exceptional cases would arise in which a real risk of prejudice to the interests protected by section 6(c) would arise, but these would be very much the exception and could be

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developments in the interim, see Taggart, *supra* note 281, at 11-15.

368. Taggart, *supra* note 281, at 3-4.

369. *Id.* at 35-39.

370. *See supra* note 337 and accompanying text.

371. *See e.g.* [1988] 1 N.Z.L.R. *id.* at 393.

372. *Id.* at 393-94 (Cooke, P.), 412 (Casey, J.), 415 (Bisson, J.).

373. *Id.* at 397 (Cooke, P.). *See also id.* at 415 (Bisson, J.).

accommodated.[374] The fifth member of the court, Mr. Justice McMullin, was impressed by the analogy to disclosure in trials on indictment to the extent that he agreed section 6(c) did not justify a blanket exclusion of briefs of evidence in all summary prosecutions.[375] Nonetheless Mr. Justice McMullin expressed agreement "in principle with the approach taken by Jeffries J." and placed more emphasis than the other judges on the danger of witness intimidation and coercion.[376] Mr. Justice McMullin stood alone in rejecting any rule of general application, preferring a case-by-case approach to each request.[377] In the circumstances of this case the judge concurred in the result because the witnesses were police officers and not likely to be intimidated.[378]

The majority thought that before criminal charges are laid, investigations by the police will be protected from disclosure by section 6(c).[379] But once criminal proceedings are commenced, the balance aimed at by section 6(c) will usually shift in favor of disclosure.[380] At that point the right to a fair trial prevails over the interest in investigative secrecy.[381] President Cooke summed up the situation in this way:

> [O]nce a case has progressed beyond the investigatory stage to the point where criminal proceedings are actually under way, I think that the Act gives the person who happens to be the defendant a prima facie right to all the information held by the police which can truly be said to be personal information about that person and which contains or bears on the evidence of the offence charged.[382]

Furthermore, the majority found the practice of disclosure in trials on indictment to be "so elementary and deep-rooted" that it could not imagine any serious suggestion that such disclosure could prejudice the investigation of offenses or the right to a fair trial.[383] Rather, it viewed such disclosure as essential to a fair trial.[384] Even the judge most opposed to liberalizing criminal discovery via the OIA, Mr. Justice McMullin, accepted that allowing "the defence in summary cases to see the police briefs of evidence is . . . not likely to introduce a new terror into the

374. *Id.* at 397-98, 400 (Cooke, P.), 412 (Casey, J.), 416 (Bisson, J.).
375. *Id.* at 406.
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.* at 397 (Cooke, P.).
380. *Id.*
381. *Id.* at 412 (Casey, J.), 415 (Bisson, J.).
382. *Id.* at 397.
383. *Id.* at 394 (Cooke, P.).
384. *Id.* at 412 (Casey, J.), 415 (Bisson, J.).

administration of the criminal law."[385]

The majority found that none of the objections the police raised, either singly or in combination, justified the general practice of withholding briefs of evidence containing information about the accused in summary proceedings.[386] President Cooke said:

> Briefs of the evidence to be called are no more likely to reveal investigation and detection methods in a damaging way than depositions. In deciding whether to come forward to help the police people are hardly likely to be crucially influenced by whether or not the offence is indictable; it is a legal distinction which might well not even occur to the ordinary citizen in such circumstances. Certainly there might be less readiness to retreat from a sworn deposition or even a signed police statement than from the contents of a brief which the witness may not even have seen, but it seems difficult to place major weight on that difference. There will be opportunities for the defence to fabricate evidence or put pressure on witnesses in both classes of proceedings, but in summary proceedings there will usually be less time for such attempts to defeat justice. Disclosure of briefs in summary cases may add somewhat to the administrative work of police prosecutors and may also cause more care and time to be devoted to the preparation of briefs, but those can hardly be viewed as unacceptable evils.[387]

Similarly, Mr. Justice Bisson dismissed the police concern that OIA disclosure would result in a more detailed and formal approach to preparing briefs of evidence, saying that if this means "the taking of greater care . . . that is not prejudicial to but in the interests of a fair trial."[388]

President Cooke delivered the leading opinion, with which Mr. Justice Somers simply agreed.[389] Mr. Justice Bisson wrote a short concurring judgment in which he expressed agreement with President Cooke.[390] Together, these judgments represent the majority view of the court. Mr. Justice Casey agreed with the majority in holding that disclosure would be the general rule, but his judgment is more tentative in other respects and is openly critical of the OIA as an instrument of criminal discovery.[391] This sets his judgment apart and places him somewhere between the majority and Mr. Justice McMullin.

What distinguishes the majority's approach from that of Mr. Justices

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385. *Id.* at 406.
386. *Id.* at 393 (Cooke, P.).
387. *Id.* at 394.
388. *Id.* at 416.
389. *Id.* at 387, 407.
390. *Id.* at 414.
391. *Id.* at 407.

Casey and McMullin is the zeal with which it wielded the OIA to fashion an entire system of criminal discovery. President Cooke laid down general rules with a view to exhaustiveness much like legislation, covering material and proceedings not in dispute before the court. He held briefs of evidence, witness statements, police job sheets, notes of interviews, and the like to be available upon request under the OIA both in summary proceedings and in trials on indictment.[392] The President said gaps, if any, in this scheme were to be filled by "judicial resource."[393] Along the way President Cooke made extensive reference to the report of the Criminal Law Reform Committee, which had recommended legislation along broadly similar lines. Obviously emboldened by the work of that Committee, President Cooke did not see the need for the court to wait upon the legislature to reform the law of criminal procedure when suitable tools were ready at hand.

In contrast, Mr. Justices McMullin and Casey did not think the OIA a suitable mechanism for criminal discovery. They concluded reluctantly that that was the effect of the clear wording of the OIA, "however unsuitable an instrument [of criminal discovery] it may be" and whatever the "practical difficulties."[394] To Mr. Justice Casey the OIA appeared "an unwieldy instrument of pre-trial criminal discovery" and "a poor substitute for rules of discovery properly developed for use in criminal proceedings" as proposed by the Criminal Law Reform Committee.[395] Mr. Justice McMullin also clearly preferred a legislative solution.[396]

The Criminal Law Reform Committee viewed criminal discovery as serving the ends of the adversary process and held to the view that discovery should be governed by materiality and relevance to the central issues at trial.[397] The goal was to acquaint the accused with the prosecution's case, thereby avoiding surprise at trial and facilitating speedy resolution of the proceeding. As observed above, OIA access proceeds on a fundamentally different premise.[398] It provides for disclosure of information about the workings of government to the general public in order to further democratic ideals, and for access by individuals to personal information to ensure fairness and information accountability.[399] Generally speaking, a showing of need, reasonableness, or relevance is not re-

392. *Id.* at 396, 400.
393. *Id.* at 400.
394. *Id.* at 407 (McMullin, J.).
395. *Id.* at 413-14.
396. *Id.* at 407.
397. CRIMINAL LAW REFORM COMM., *supra* note 128, at 16-23.
398. *See supra* notes 284-86 and accompanying text.
399. *See* 1982 N.Z. Stat. No. 156, § 4 and long title.

quired;[400] consequently, "fishing" is no objection to an OIA request.[401] This troubled a minority on the Criminal Law Reform Committee,[402] and also Mr. Justice Casey in the Court of Appeal, who said:

> It is . . . by no means certain that widespread attempts to fish for information could be prevented, notwithstanding their generally oppressive or vexatious character. In civil actions, on the other hand, appropriate discovery procedures have been developed by the Courts, enabling them to exercise firm control over the exchange of all relevant information designed to secure a fair and expeditious trial.[403]

Mr. Justice Casey was concerned also that the restriction of the legal right of access under the OIA to "personal" information might deny the requester access to information that he most needed to prepare for trial. He instanced a sexual violation case in which under the OIA the accused would have a right to the complainant's statement about him as personal information but no right to see a medical report on the complainant.[404] Mr. Justice Casey gave this as a further reason for thinking the OIA an unwieldly instrument for pre-trial criminal discovery.[405]

President Cooke and Mr. Justice Somers did not share that view.[406] President Cooke concluded his opinion by suggesting that the legislature stay its hand in implementing the Criminal Law Reform Committee's proposals in order to give the OIA scheme of criminal discovery established by the court a chance to prove itself.[407] He called the Law Reform Committee proposals "elaborate" and presumed they "would . . . add quite considerably to the administrative burden and cost falling on the

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400. *See* SIXTH COMPENDIUM OF CASE NOTES OF THE OMBUDSMEN 82, 85 (1985) (G.R. Laking, Chief Ombudsman); *id.* at 89, 93. *Cf.* 1982 N.Z. Stat. No. 156, §§ 9(1), 9(2)(k), 18(h), 27(1)(h), 28(1)(a). *But see* Ombudsmen Act 1975, 1975 N.Z. Stat. No. 9, 17(2)(a), (b) (trival or frivolous requests need not be pursued by Ombudsmen).

401. *See supra* note 286 and accompanying text.

402. CRIMINAL LAW REFORM COMM., *supra* note 128, para. 150, at 30-31 (Mr. Neazor, Q.C., Chief Inspector Trendle).

403. Commissioner of Police v. Ombudsman, [1988] 1 N.Z.L.R. 385, 413. Unlike the United States FOIA, however, the OIA does provide protection from vexatious requests. *See* 1982 N.Z. Stat. No. 156, §§ 18(h), 27(1) (h).

404. [1988] 1 N.Z.L.R. at 413. *See also id.* at 396 (Cooke, P.).

405. *Id.* at 413.

406. The third member of the majority, Mr. Justice Bisson, was more cautious. He said, "[u]ntil such time as discovery in criminal cases is expressly provided for in legislation, the provisions of the Official Information Act go some way in overcoming inconsistencies in current practice when applied in the manner described by the President, with whose views I entirely agree." *Id. at* 415.

407. *Id.* at 400-01. The approaches of the Law Reform Committee and the Court are compared in Taggart, *supra* note 281, at 18-24.

police."[408] The President suggested that "a less sweeping change" by application of the law he had laid down in this case might produce "much the same result or go as far as is reasonable at the present stage."[409]

The cautious approach of the courts in the United States and Australia described above highlights the boldness of the majority in *Commissioner of Police v. Ombudsman.* Counsel for the police cited to the Court of Appeal two cases discussed above—*National Labor Relations Board v. Robbins Tire & Rubber Co.*[410] and *News Corporation Ltd. v. National Co. and Securities Commission*[411]—which contain dicta throwing doubt on criminal discovery-motivated FOI requests. President Cooke confined these cases to the context in which they arose, however, and did not explore the dicta.[412] This is surprising because at another point President Cooke quoted a lengthy extract from the United States district court decision in *United States v. Wahlin*[413] to support a point he was making.[414] Ironically, *Wahlin* was almost certainly wrongly decided on its facts, and a United States appellate court has declined to follow it.[415] At another point, President Cooke referred to the "widespread international trend" towards greater freedom of information, but rather than look at the law in the United States and Australia on the topic, he quizzically referred only to liberalization of criminal discovery by specific legislation in England, a country that does not have general FOI legislation.[416] All of this shows perhaps that poor and selective comparativism is worse than none at all, as Mr. Justice McMullin espoused. Referring expressly to Australia, Mr. Justice McMullin thought cases from other FOI legislation jurisdictions offered little help. The judge gave three reasons for this: the statutes are differently worded; the Committee that had proposed the New Zealand legislation considered the matter with special reference to the New Zealand situation; and the overseas legislation may

408. *Id.* at 401. For critical comment on this aspect of the decision, see Taggart, *supra* note 281, at 20.

409. [1988] 1 N.Z.L.R. at 401.

410. 437 U.S. 214, 242 (1978). Discussed *supra* notes 86-102 and accompanying text.

411. 57 A.L.R. 550 (Fed. Ct. 1984). Discussed *supra* at notes 235-62 and accompanying text.

412. [1988] 1 N.Z.L.R. at 398.

413. 384 F. Supp. 43 (W.D. Wis. 1974).

414. [1988] 1 N.Z.L.R. at 399.

415. *See supra* notes 47, 51 and accompanying text. United States v. District Court, 717 F.2d 478 (9th Cir. 1983).

416. [1988] 1 N.Z.L.R. at 397.

be influenced by local conditions.[417] But one of the purposes of comparative study is to gain perspective in critically appraising developments in one's own legal system.[418] A study of the United States, Canadian, and Australian experience would have been particularly useful to Mr. Justice McMullin, who opposed the judicial legislation of the majority.

VI. CONCLUSION

New Zealand has the advantage in matters of law reform—be it legislative, judicial, or, as in this instance, a little of both—of being a small, unitary state in which "experiments" can be carried out in more or less controlled conditions.[419] It is not blessed with or cursed by, depending on one's point of view, the diversity of federalism and all it entails. Being remote "tight" islands at the bottom of the world with one police force obviously made it easier for the New Zealand Court of Appeals to proceed on the assumption that a police investigation will be complete or nearly so by the time charges are laid, than it would be in a country of many jurisdictions and police forces.[420] Moreover, one should not assume that the preliminary hearing in the United States operates as effectively as a disclosure mechanism as it does in New Zealand.[421]

In addition, one must consider the differences between the legislation, criminal justice systems, and societies in the four countries surveyed here. What, for instance, explains the law enforcement mindedness of much of the Canadian FOI legislation? But even when the wording of the legislation leaves open an approach similar to that in *Commissioner of Police v. Ombudsman*, as the United States and Australian legislation does, the temper of the judiciary varies in each state. The New Zealand court is in the midst of an activist period,[422] in contrast to the generally more restrained Australian judiciary.[423] As we have seen, judges in the

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417. *Id.* at 402.

418. *See* Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFFALO L. REV. 361, 362 (1977).

419. *See* Reynolds, *Contractual Mistakes Bill 1977*, 1977 N.Z. RECENT L. 239, 240, (Making a similar point in a different context.)

420. *See* Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U. L. REV. 749, 770 (1964).

421. *See* Goldstein, *supra* note 2, at 1183; D. KARLEN, G. SAWER & E.M. WISE, ANGLO-AMERICAN CRIMINAL JUSTICE 143-166 (1967).

422. Much of this activism springs from Sir Robin Cooke, President of the Court of Appeal. For camera shots of his legal philosophy, see Cooke, *Divergences—England, Australia and New Zealand*, 1983 N.Z.L.J. 297; Cooke, *Fundamentals*, 1988 N.Z.L.J. 158.

423. It is difficult to prove that this is so, but compare the approaches of Sir Robin

United States and Australia do not share the New Zealand judiciary's enthusiasm for the task of modeling a scheme of criminal discovery out of FOI clay. Moreover, one should not underestimate the impact of the Criminal Law Reform Committee's report on the reasoning and result in the New Zealand case, nor the fact that nothing in New Zealand, Canada, or Australia then approximated the partial code of discovery provided in the United States Federal Rules of Criminal Procedure. By comparison those jurisdictions are, or were in the case of New Zealand, in the "Neanderthal" stage of development.[424]

In recent years there has been much soul-searching about the purposes and utility of comparative law.[425] This Article's purpose has been to survey the impact of FOI legislation on criminal discovery in four countries that share the common law tradition. As the long-time Chief Justice of the Supreme Court of California, Roger Traynor, observed when comparing criminal discovery in the United States and England in the mid-1960s:

> Such differences do more than elucidate the stuff of comparative law. They also serve to remind us, in any advance upon its dusky areas, how apt are the uses of diversity. It is no flat world, this world of law, and we need many views as we envisage how much of it still awaits discovery.[426]

Cooke and Sir Gerard Brennan toward administrative law. *Compare* Cooke, *The Struggle for Simplicitly in Administrative Law*, in JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE 1980S: PROBLEMS AND PROSPECTS 1 (M. Taggart ed. 1987) *with* Brennan, *The Purpose and Scope of Judicial Review* in *id.* at 18. *See also* Mullan, *Substantive Fairness Review: Heed the Amber Light!*, 18 VICT. U. WELLINGTON L.R. 293 (1988).

On the reluctance on the United States Supreme Court to benefit from the criminal law reform experience of other countries, see R. SCHLESINGER, H. BAADE, M. DAMASKA & P. HERZOG, COMPARATIVE LAW: CASES, TEXT, MATERIALS 482-83 (5th ed. 1988) [hereinafter SCHLESINGER].

424. SCHLESINGER, *supra* note 423, at 483.

425. *See generally* Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Watson, *Legal Transplants and Law Reform*, 92 LAW Q. REV. 79 (1976); Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 NW. U.L. REV. 198 (1977); Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEGAL STUD. 101 (1989).

426. Traynor, *supra* note 420, at 770.