Access to Environmental Information in the United States and the United Kingdom

William A. Wilcox Jr.

Follow this and additional works at: https://digitalcommons.lmu.edu/ilr

Part of the Law Commons

Recommended Citation
Available at: https://digitalcommons.lmu.edu/ilr/vol23/iss2/1

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.
Access to Environmental Information in the United States and the United Kingdom

WILLIAM A. WILCOX, JR.*

I. INTRODUCTION

A. The Case for Information Access

Citizens of the United States and the United Kingdom have had two different experiences regarding public access to government-held information and, more specifically, environmental information.¹ While the tradition of easy and free access to information in the United States is deeply rooted,² the

* Legal Advisor/General Counsel for the United States Section, International Boundary and Water Commission, United States and Mexico. B.A., Knox College (1983); M.A., University of Illinois at Springfield (1984); J.D., University of Wyoming (1990); LL.M., University of Kent at Canterbury, England (2000). This Article was prepared in pursuit of the LL.M. degree from the University of Kent. I would like to thank my children, Victoria Mae Wilcox and William Samuel Wilcox, for their patience and love.


² The tradition of freedom of access to public information was in place prior to passage of any of the modern environmental acts. See Laura Schenck, Freedom of Information Statutes: The Unfulfilled Legacy, 48 FED. COMM. L.J. 371, 374 (1995).
practice in the United Kingdom has been quite the opposite. Nevertheless, there has been an international trend toward the increased availability of environmental information. The United Kingdom and the entire European Community have made great strides in recent years and have surpassed the United States by providing increased access to some types of environmental information. This is a result of the belief that governments must allow greater public access to environmental information.

B. Public Access for Its Own Sake

Dealing with environmental matters in an "open society" requires public access to environmental information, as well as public participation in environmental decisions.3 The United States and the United Kingdom are "open societies."4 The state of public access to environmental information within the European Community, however, is lamentable.5

It is frightening to see how much expert opinion, research results, data and facts are withheld from the interested public in environmental matters. Numerous data are stored and monitored by administrations, without being made public—just as if the environment were the private property of these administrations and not the environment of us all. Administrative inertia, professional or commercial secrets, the power which is given to superior knowledge, all these contribute to the present "mafia of silence."6

The recent trend towards greater public access to environmental information is the result of a consensus among Western nations that an informed public plays an important role in environmental protection and enhancement.7 This consensus results from assumptions that are both philosophical and pragmatic. For instance, in promoting public access to

3. Ludwig Krämer, The Open Society, Its Lawyers and Its Environment, 1 J. ENVTL. L. 1, 4 (1989). An "open society" is defined as a place where "governments derive their right to govern from the consent of the governed and where the setting of standards does not consist of transforming shadows of the Platonic idea of Justice into a piece of legislation, but are conceived, scheduled and accepted by way of democratic procedure." Id.
4. See id.
5. Id.
6. Id.
environmental information, the U.S. Congress has considered it in the context of its pragmatic function of enforcement by the public, in addition to considering any role it may have regarding "environmental rights."

On a philosophical level, supporters of environmental reform profess a kind of environmental "right-to-know" as part of a "right-to-participate." Environmental rights are "often related to the concept of instilling some form of legal identity in the environment." The premise is that everyone has a right to information regarding the "unowned" environment. "The general public has an interest in all elements of the environment, which competes with other interests, including industrial operations. Where there are such competing interests, access to information on the impacts of those interests allows decisions to be made taking into account of all the relevant factors."

International agreements, such as the World Charter for Nature, reflect a growing consensus that this view is well-founded. The United Nations General Assembly, under the World Charter for Nature, adopted a resolution that, "[a]ll persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation." These "right-to-know" or "right-to-participate" philosophies can perhaps be viewed as a natural continuation of the trend toward increased democratization across the globe, particularly in Western nations.


9. BELL, supra note 7, at 161.
10. Id.
11. Id.
13. Id. at 18 (referencing principle 23); Popovic, supra note 8, at 687.
Janeiro exemplified additional support of increased access to environmental information. The Declaration states that:

[environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available.]

Sierra Club attorney, Neil A. F. Popovic, describes access to environmental information as a critical element for effective public participation in environmental decision-making. He wrote, "[w]ithout such information, public participation in environmental decision-making would seldom advance beyond shots in the dark." He further declared that a "government’s reactive duty to produce information complements its proactive duty to disseminate information." Government agencies have an affirmative duty to provide certain types of information to the public, even if the public has not sought the information. This is especially true for information regarding the potential dangers of hazardous substances. Such provisions "perform an indispensable educational role by letting people know what is happening in and to their environment, paving the way for the public to participate in related decision-making."

The United States has generally subscribed to the notion that public information and participation are requirements for a representative democracy. The First Amendment to the U.S. Constitution, which establishes freedom of the press and speech,
supports this line of thinking.\textsuperscript{21} The First Amendment reflects the Framers' belief that public participation in government is inherently positive.\textsuperscript{22} Congress applied this principle more concretely to governmental information with the passage of the Freedom of Information Act of 1966 (FOIA).\textsuperscript{23} The FOIA establishes a presumption that information should be available to the public unless specific, well-defined reasons exist to withhold it.\textsuperscript{24}

Another provision reflecting the public's "right-to-know" is the Emergency Planning and Community Right-to-Know Act of 1986.\textsuperscript{25} This Act regulates industries that handle significant amounts of hazardous materials by requiring individual companies to keep a list of those materials and to advertise that the list is available to the public.\textsuperscript{26}

The values of public participation and open government also exist in the United Kingdom. For example, in 1989, the United Kingdom amended the Official Secrets Act of 1911\textsuperscript{27} to curb its rather severe policy of avoiding the release of information to the public.\textsuperscript{28} Another example is in the government White Paper, \textit{This Common Inheritance}.\textsuperscript{29} The White Paper emphasizes the importance of public access to environmental information by asserting that, "[i]f people are given the facts, they are best placed to make their own consumer decisions and to exert pressure for change as consumers, investors, lobbyists and electors."\textsuperscript{30}

A more recent example of the trend towards access to information in the United Kingdom is the adoption of the United Kingdom's Environmental Information Regulations, which enacted a European Directive on access to environmental information.\textsuperscript{31} Finally, the trend is evidenced by the United

\textsuperscript{21} U.S. CONST. amend. I.
\textsuperscript{22} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001–11050 (Supp. IV 1994). This Act will be discussed in greater detail in Part IV.B.
\textsuperscript{26} Id. §§ 11021, 11023.
\textsuperscript{27} Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28, § 2 (Eng.).
\textsuperscript{28} Official Secrets Act, 1989, ch. 6, § 2 (Eng.) (providing provisions that protect more limited classes of official information).
\textsuperscript{29} THIS COMMON INHERITANCE, Cm. 1200, HMSO, 1990.
\textsuperscript{30} Id. at 12; see also Rowan-Robinson et al., supra note 1, at 19 (discussing the White Paper).
\textsuperscript{31} Environmental Information Regulations, (1992) SI 1992/3240 (Eng.).
Kingdom's new administration's willingness to enact freedom of information legislation. For instance, according to the government White Paper on freedom of information, *Your Right to Know*, now is the time to introduce an extensive right to freedom of information in the United Kingdom. In his foreword to the White Paper, the Chancellor of the Duchy of Lancaster pronounced that "[o]penness is fundamental to the political health of a modern state." The White Paper itself furthers this sentiment, and states that

> [u]nnecessary secrecy in government leads to arrogance in governance and defective decision-making. The perception of excessive secrecy has become a corrosive influence in the decline of public confidence in government. Moreover, the climate of public opinion has changed: people expect much greater openness and accountability from government than they used to.

### C. Public Access for Enforcement Purposes

In addition to the philosophical notion that public access to information and participation in environmental decisions is a matter of public right, it is also a pragmatic means to ensure that environmental problems are addressed.

The United States' environmental regulatory regime includes numerous provisions for "citizen suits" to enforce various environmental statutes. Citizen suit provisions allow individual citizens, or groups of citizens, to take private or public entities to

---


33. *Your Right to Know*, supra note 32, at 1.


35. *Your Right to Know*, supra note 32, at 1.

court for violations of environmental law.\textsuperscript{37} Citizen suits inherently require access to certain environmental information. An example is the citizen suit provision of the U.S. Clean Water Act.\textsuperscript{38} It creates an integrated enforcement system by placing enforcement powers in the hands of citizens to supplement the powers of federal or state enforcement agencies.\textsuperscript{39} The Clean Water Act citizen suit provision requires the citizen or citizen group to provide sixty days notice to the administrator of the U.S. Environmental Protection Agency (EPA), the state concerned, and the company alleged to be in violation of emissions limits.\textsuperscript{40} The provision also provides citizens with a cause of action against the EPA administrator "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."\textsuperscript{41} In addition to civil penalties under the provision, citizen-plaintiffs can seek injunctive relief to force the administrator to perform an act or duty or to enforce an effluent limitation.\textsuperscript{42}

By creating a private right of action for citizen-plaintiffs, the U.S. Congress has empowered the public to play a positive role in the enforcement of pollution standards. Thus, citizens are "watchdogs" over federal and state regulators based on their ability to bring a suit to control or compel regulator action.\textsuperscript{43}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{37} Harold Feld, \textit{Saving the Citizen Suit: The Effect of Lujan v. Defenders of Wildlife and the Role of Citizen Suits in Environmental Enforcement}, 19 \textsc{Colum. J. Envtl. L.} 141, 143-45 (1994).
\item\textsuperscript{38} Id. at 144 n.16; 33 U.S.C. § 1365.
\item\textsuperscript{39} \textit{E.g., Middlesex County Sewerage Auth.}, 453 U.S. at 14.
\item\textsuperscript{40} 33 U.S.C. § 1365(b)(1)(A). Actions by citizens are barred if the EPA or a state is already actively pursuing enforcement. \textit{Id.} § 1365(b)(1)(B).
\item\textsuperscript{41} \textit{Id.} § 1365(a)(2).
\item\textsuperscript{42} \textit{Id.} § 1365(a). These prosecutions are considered to be "civil" under American law and therefore citizen groups may seek civil penalties (fines) and attorney fees. 33 U.S.C. § 1365(a), (d). In the United States, "criminal prosecutions" normally involve those cases in which an individual is put on trial "for the purpose of securing the conviction and punishment of one accused of a crime." \textsc{Black's Law Dictionary} 197 (5th ed. 1983). Likewise, civil cases normally involve actions to "protect private rights." \textit{Id.} at 127. In environmental law, however, not all violations are considered criminal. \textit{See} 33 U.S.C. § 1365(a) (allowing the award of an injunction or civil penalties for the violation of environmental law). The U.S. Congress established fines, or "civil penalties," under some pollution control statutes that can be assessed against polluters for exceeding established standards. 42 U.S.C. § 6928(a) (1994). For "knowing" violations of environmental law, however, Congress provided for criminal prosecutions, for which penalties may include not only fines but imprisonment. \textit{E.g.}, \textit{id.} § 6928(d).
\item\textsuperscript{43} \textit{See} 33 U.S.C. § 1365(a).
\end{enumerate}
\end{footnotesize}
Citizens are also "private attorneys general" because they supplement the enforcement power of government when inadequate personnel, funding, or motivation result in a shortfall of governmental information. Almost every major environmental statute has a citizen suit provision. In some instances, courts have found a right for citizens to sue to guarantee enforcement, even where Congress has not explicitly created a citizen suit provision.

Some environmentalists believe that recent U.S. court decisions have diminished the effectiveness of citizen suit enforcement. In *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, the U.S. Supreme Court held that jurisdiction under the Clean Water Act for citizen suits against past permit violators does not attach unless the citizen-plaintiff makes a good faith allegation that continuing violations are likely. Critics of the Court's decision argue that this ruling damages the deterrent effect of a potential suit because potential defendants may not be penalized if they wait until notice of a lawsuit to install pollution control equipment. The U.S. Supreme Court again reduced the

44. Feld, supra note 37, at 144; see Middlesex City Sewerage Auth., 453 U.S. at 13–15.
46. See Sierra Club v. Morton, 405 U.S. 727, 731–34 (1972) (finding that citizens may invoke the judicial process without relying on specific statutory authorization, if they have a personal stake or interest in the outcome of the action).
48. 108 S. Ct. at 386. The citizen suit provision of the Clean Water Act provides jurisdiction for suits when a permit holder is "alleged to be in violation." 33 U.S.C. § 1365(a)(1). The Court interpreted this to mean that the provision for citizen suits is prospective in orientation and that cases would become moot if, during the course of the litigation, a defendant could show that there was no continuing likelihood of violation. 108 S. Ct. at 386. The Foundation argued that the phrase "to be in violation" should not be interpreted strictly and that "[i]t would ill serve the framers of the law to ignore their intent because we were constrained to pretend they were always punctilious grammarians." Brief for Respondents at 8, Gwaltney of Smithfield, Ltd v. Chesapeake Bay Found., Inc., 108 S. Ct. 376 (1987) (No. 86-473).
enforcement potential of the citizen suit in 1992 with its decision in *Lujan v. Defenders of Wildlife.* The Court held that the citizen suit provision of the Endangered Species Act did not confer standing on its own, and therefore, citizen-plaintiffs still had to establish standing to sue under the provision. Despite the setbacks in *Gwaltney* and *Lujan,* the citizen suit remains a powerful tool in the environmentalist’s arsenal, which was Congress’ intent in including citizen suits in its overall environmental enforcement scheme.

The United Kingdom also provides civil remedies for private rights of action that are independent of regulatory provisions.

government regulators as the only effective deterrent force against polluters, and if government regulators in a state or region are ineffective or inefficient, potential defendants have little to fear. See id. Although *Gwaltney* placed a greater burden on citizen-plaintiffs and foreclosed suits against permit violators when those violators are able to cure the cause of violations prior to suit, citizen suits nevertheless remain a powerful tool for citizens groups even after *Gwaltney.* See id. at 160. In fact, when *Gwaltney* itself was remanded to the district court, the judge found against the defendant again, on the basis of expert testimony that showed there was some likelihood of continuing violations during winter months. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 688 F. Supp. 1078, 1079 (E.D. Va. 1988).

52. *Lujan,* 504 U.S. at 558–62. Prior to *Lujan,* a plaintiff, under authority of one of the citizen suit provisions, could simply establish standing by alleging a violation of the pertinent statute and asserting that it affected him in some way. Feld, *supra* note 37, at 141. In *Lujan v. Defenders of Wildlife,* however, Justice Scalia explained that a plaintiff must show three elements to establish standing.

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’ . . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”

*Lujan,* 504 U.S. at 560–61. Finally, Scalia wrote, “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Id.* Although the plaintiffs in *Lujan v. Defenders of Wildlife* alleged that the defendant agency violated the Endangered Species Act by failing to require consultation with the U.S. Fish and Wildlife Service for U.S. projects overseas and that its members had visited habitats of several endangered species overseas and planned to do so again, Justice Scalia determined that they had not shown that they would suffer an “actual or imminent injury” sufficient to warrant standing. *Id.* at 564. He further held that the citizen suit provision of the Endangered Species Act, to the extent that it granted standing to “any citizen” not directly injured, was unconstitutional. *Id.* at 566. Critics of the decision have called it “a severe blow to environmental activism.” Feld, *supra* note 37, at 141.

53. See *Feld,* *supra* note 37, at 144, 147, 182.
54. See *BELL,* *supra* note 7, at 151.
Although the United Kingdom has not explicitly established a right of action under its environmental statutes, the United Kingdom's system of "residual powers" allows the public to take direct enforcement action. Generally, private citizens have a constitutional right to prosecute statutory offenses. This constitutional right, however, has often been explicitly limited by environmental statutes. This right has been successfully exploited under a number of environmental statutes, but such powers are often overlooked. Nevertheless, for this type of enforcement to be effective, the public must have access to environmental data to proceed with a case.

In addition to statutory violations, private citizens can also bring cases concerning environmental protection under the common law of England and Wales. Common law cases, however, focus on the protection of private interests rather than the public right to a safe environment. Liability in tort is the most common form of common law causes of action. On both sides of the Atlantic, Rylands v. Fletcher is cited as the classic case on environmental law application. Under Rylands, a party

55. Id.
56. Id.
57. Id; see, e.g., Water Industry Act, 1991, c. 56, § 211 (Eng.).
58. BELL, supra note 7, at 151.
59. Id.
60. See ROSALIND MALCOLM, A GUIDEBOOK TO ENVIRONMENTAL LAW 37 (1994). There are some significant shortcomings, however, in relying on common law proceedings. Id. at 38. For instance, many of the "environmental" cases on common law nuisance arose during the early years of the industrial revolution, thus limiting plaintiffs' rights according to the standards of that time. See id. (indicating that a degree of environmental pollution might be unacceptable in one region and acceptable in another). This is exemplified by the doctrine in Sturges v. Bridgman that "[w]hat would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey." Sturges v. Bridgman, 11 Ch. 852, 865 (Eng. C.A. 1879). In addition, for an action in nuisance, the damage must be "reasonably foreseeable." Cambridge Water Co. v. Eastern Counties Leather plc, 1 All E.R. 53 (C.A. 1993) (dismissing negligence and nuisance claims because defendants could not have reasonably foreseen the damages). In Cambridge Water Co. v. Eastern Counties Leather plc, the House of Lords determined that, although the defendant had accidentally contaminated groundwater with a solvent used for degreasing leather, called perchloroethene (PCE), the damage to plaintiffs' well, which was 1.3 miles away, was not reasonably foreseeable. Id. They did, however, accept the notion that a private nuisance action to protect one's property rights in clean groundwater could succeed, provided the damage was reasonably foreseeable. Id. at 77.
61. MALCOLM, supra note 60, at 38.
62. Id. at 37.
64. See generally Cambridge Water Co., 1 All E.R. at 53-79 (applying the rule in
responsible for allowing an abnormally dangerous substance to escape that causes harm to another party may be held liable for the damage, even absent a specific showing of negligence.\textsuperscript{65} Similarly, nuisance law may allow an injured party to recover if another party causes a continuous or repetitious interference with the use and enjoyment of one's own property through environmental or some other damage.\textsuperscript{66}

Although common law proceedings are an imperfect means of regulating polluters, they may be appropriate when pollution from an identifiable source damages one's property through some form of contamination.\textsuperscript{67} A potential plaintiff in the United States or the United Kingdom must therefore have access to certain environmental information in order to determine whether a proceeding might succeed. Although litigation rules require parties to exchange information during the course of an active proceeding, a potential plaintiff should have access to some basic information that indicates that environmental damage occurred before a suit is filed.\textsuperscript{68} For instance, in the \textit{Cambridge Water} case, the plaintiffs heavily relied upon information provided by the British Geological Survey to pursue their case.\textsuperscript{69} Another example is the Environmental Protection Act of 1990 (EPA 1990), which established a statutory nuisance provision to supplement the common law.\textsuperscript{70} Normally, these statutory nuisance offenses would be prosecuted by local authorities.\textsuperscript{71} If local authorities fail to act, however, it is possible under the EPA 1990 to bring private proceedings against an alleged offender.\textsuperscript{72} Enforcement of statutory nuisance cases by private citizens also requires some

\textit{Rylands v. Fletcher}; Ruggeri v. Minnesota Mining & Mfg. Co., 380 N.E.2d 445, 528 (Ill. App. Ct. 1978) ("More jurisdictions in this country have adopted the principle of \textit{Rylands v. Fletcher} . . . and impose strict liability on owners and users of land for harm resulting from abnormally dangerous conditions and activities."); C. Conrad Claus, \textit{Oregon's Development of Absolute Liability Under the Rylands Doctrine: A Case Study}, 53 WASH. U. J. URB. & CONTEMP. L. 171, 179–83 (1998).\textsuperscript{65} See id.\textsuperscript{66} MALCOLM, supra note 60, at 37.\textsuperscript{67} See id. at 37–42\textsuperscript{68} Id. at 37–47.\textsuperscript{69} Id. at 40–41.\textsuperscript{70} Environmental Protection Act, 1990, c. 43 (Eng.); see also MALCOLM, supra note 60, at 47.\textsuperscript{71} See MALCOLM, supra note 60, at 48.\textsuperscript{72} Id. at 51.
degree of access to environmental information.\textsuperscript{73} To assess the viability of one's case, a potential litigant must have access to some information about the party that allegedly damaged the property.\textsuperscript{74} Without such information, it would be impossible to determine whether to pursue a case against the offending party.

\textbf{D. Making Public Access Meet the Challenges}

There are convincing reasons, both philosophical and pragmatic, for providing free public access to environmental information. Now that there is a consensus that environmental information should be accessible within the United States and the United Kingdom,\textsuperscript{75} as well as worldwide,\textsuperscript{76} a greater challenge still exists: how to determine the best means for providing access and how, if at all, that access should be limited. By examining the systems of these two Western nations it may be possible to determine the most productive methods to provide information to the public, and what limits on public access to information should be considered.

This Article will examine access to environmental information in the United States and the United Kingdom. Parts I–IV will address specific measures that the nations have taken or are taking to increase the availability of information on the environment. Part II will focus on the influence of European Community law on the U.K. system and other sources of progress toward environmental openness in the United Kingdom. Part IV will discuss the availability of environmental information in the United States. Parts II–IV will address the specific requirements of various environmental statutes. In both countries, certain information must be maintained by regulatory bodies and be made available to the public. Some statutes require regulators not only to maintain environmental information, but to publicize it as well. Included in such statutes are environmental impact assessment

\textsuperscript{73} See id. at 37–47.

\textsuperscript{74} See id. at 41.


\textsuperscript{76} See, e.g., Popovic, \textit{supra} note 8, at 687–88 (citing World Charter for Nature; the International Union for the Conservation of Nature and Natural Resources; and the Rio Declaration—all demanding access to information).
requirements in both nations. As a major source of public environmental information comes through the environmental planning process, the differences between the U.S. National Environmental Policy Act (NEPA) and environmental planning pursuant to European Community directives in the United Kingdom will be discussed. Both systems require governments to make considerable amounts of environmental information available to the public, although fundamental differences exist in the structure of the programs. Part V will compare and contrast the two systems of dealing with environmental information, including environmental impact assessment, by employing the Rowan-Robinson et al. framework.

This Article will also examine the means chosen by the United States and the United Kingdom to make general governmental information available to the public. To that end, Parts VI and VII of this Article will examine the general availability of governmental information in both countries. This will include a discussion in Part VI on the Freedom of Information Act77 in the United States as well the United Kingdom’s historical treatment of government information and efforts to establish new government-wide standards for public access to information, which is discussed in Part VII. In Part VIII, the discussion will again revisit the Rowan-Robinson et al. criteria in comparing and contrasting the effectiveness of the two systems.

Parts VI–VIII will examine the general climate toward mechanisms allowing access to government information in the United States and the United Kingdom. General information access regimes can be an excellent tool for members of the public to gain access to government-held information, including environmental information. Both nations, however, have specific requirements regarding environmental information that do not apply generally.

Finally, Part IX will make recommendations as to how both nations may improve public access, in light of the Rowan-Robinson et al. criteria, to environmental information in order to maximize its effectiveness in the overall scheme of environmental protection.

II. ENVIRONMENTAL INFORMATION REQUIREMENTS IN THE EUROPEAN COMMUNITY

Understanding environmental law in the United Kingdom necessitates a brief discussion of European Community law. Because European Community law can be incorporated into the law of the United Kingdom through the doctrine of direct effect, it has had a significant influence on access to information in the United Kingdom.

A. Background

1. The Doctrine of Direct Effect

The laws of the United Kingdom must be interpreted in light of European Directives, and specifically, the doctrine of direct effect.79 The doctrine of direct effect says that, "an individual can rely directly on a European law even if it has not been implemented in the United Kingdom."80 The doctrine of direct effect allows an individual to bring an action for damages against a nation before the European Court of Justice if the individual shows that a Directive has conferred identifiable individual rights, that he or she has suffered a loss as a result of a member nation's failure to implement that Directive, and that the individual has failed to gain redress in national courts.81 Thus, European law influences the laws of the United Kingdom through this doctrine.

2. Authority for European Economic Community Law

The authority for European Community law is derived from the European Economic Community Treaty of 1957 (Treaty of Rome).82 Although this particular treaty did not specifically address environmental issues, the European Community nevertheless adopted the first of five environmental "Action Programmes" in 1973 pursuant to Articles 100 and 235 of the

---

78. For a more comprehensive discussion of the effect of European Community law on U.K. law, see LUDWIG KRÄMER, FOCUS ON EUROPEAN ENVIRONMENTAL LAW (1992).
79. MALCOLM, supra note 60, at 37.
Treaty. The Treaty of Rome was ultimately amended in 1986 by the European Parliament to include a chapter on environmental protection.

In 1992, the Treaty on European Union, or the "Maastricht Treaty," further enhanced the competence of the European Community to influence member nations' environmental law regimes. According to the Treaty, "[t]he Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples." Article 2 of the Treaty calls for "a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, . . . " The Treaty's environmental policy includes the following objectives: "preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilization of natural resources; [and] promoting measures at international level to deal with regional or worldwide environmental problems."


European Union legislation, including Directives, gives effect to European policy in accordance with the five successive "Action Programmes." In 1985, a draft resolution to the European

84. European Communities (Amendment) Act of 1986, art. 100a(3), available in BUTTERWORTH'S GUIDE TO THE EUROPEAN COMMUNITIES 160 (1989) (indicating that the Commission will adopt a base with "a high level of protection" for environmental provisions).
85. TREATY ON EUROPEAN UNION (MAASTRICHT TREATY), Feb. 7, 1992, 1992 O.J. (C 191) 3 [hereinafter MAASTRICHT TREATY].
86. Id. pmbll., art. A.
87. Id. art. 2.
88. Id. art. 130r(1).
89. MALCOLM, supra note 60, at 53. Some scholars believe that the 1986 Chernobyl accident in the Soviet Union was partly responsible for the widespread realization that "fatal consequences" could result from lack of information on pollution of the environment. KRÄMER, supra note 78, at 291. "The whole world agreed that measures against radioactive fall-out in Western and Central Europe could have been better
Parliament, tabled at that time, "requested the Commission to draw up proposals for formulating the right of the public to have access to information on the environment." Concern over devising ways to improve public access to environmental information was considered a priority in the Fourth Environmental Action Program, which lasted from 1987 to 1992.

The Council Directive of June 7, 1990, on the Freedom of Access to Information on the Environment (Directive 90/313) was adopted to address this concern over freedom of access to environmental information. "The object of this Directive is to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available." The Directive provides for access to any information in "written, visual, aural or data-base form" that addresses "the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting... or measures designed to protect these" resources. Public authorities at the national, regional, and local levels are required under the Directive to provide this information to any person requesting it for a organised if adequate information had been provided from the beginning." The Chernobyl disaster and other events, including the Royal Commission on Environmental Pollution's tenth report in 1984 on freedom of access to environmental information, led to Europe's realization that it should adopt a European standard for freedom of access to information on the environment. See id.

90. KRÄMER, supra note 78, at 290. For a discussion of the "direct effect" of European Community environmental law, see LUDWIG KRÄMER, FOCUS ON EUROPEAN ENVIRONMENTAL LAW 78-112 (2nd ed. 1997).

91. See MALCOLM, supra note 60, at 91.


reasonable charge. The Directive permits authorities to withhold environmental information only when it concerns "the confidentiality of the proceedings of public authorities, international relations, . . . national defence [and] public security," or when "the request is manifestly unreasonable or formulated in too general a manner." If it is possible to separate information that may be released from information that must be withheld, authorities are required to provide the information that is capable of being segregated. Public authorities must respond to an individual requesting information within two months and must provide reasons for withholding information. A request for information may be judicially or administratively reviewed when a public official refuses to provide information or ignores a request for information.

The Freedom of Access to Information on the Environment Directive has varying objectives within the member nations. The object of the French, English, and Danish Directives is to ensure freedom of access to information, but the Italian, Spanish, Dutch, and German versions guarantee freedom of access. Although the semantic difference is subtle, to guarantee freedom of access to information arguably carries more weight than to ensure freedom of access. One scholar explains:

In effect, the public authorities are required . . . to make information relating to the environment available, and it may be refused only in clearly defined circumstances. A refusal may be the subject of a judicial or administrative review. These provisions show clearly that individuals are granted a right and not merely a possibility and that the authorities' discretion to allow or refuse access is very limited . . . .

It follows that the right of access to information is guaranteed rather than ensured and that, if there is doubt as to the effect of the Directive, it is necessary to proceed from the fact that assurer [French] is used in the sense of a guarantee.

95. Id. art. 3.
96. Id. art. 3(2).
97. Id. art. 3(3).
98. Id. art. 3(2).
99. Id. art. 3(4).
100. Id. art. 4.
101. See KRAMER, supra note 78, at 298.
102. Id.
In the *Mecklenburg* case, the Court of Justice considered the implications of specific language in Council Directive 90/313. Mecklenberg, a German citizen, sought information from Kreis Pinneberg-Der Landrat (Kreis Pinneberg); he requested a statement of views by the countryside protection authority to acquire planning approval for the construction of a road known as the "western bypass." Kreis Pinneberg refused Mecklenberg's request for information, however, because the authority's statement of views was not information relating to the environment within the meaning of Article 2(a) of the Directive. Rather, it was merely an assessment of information already available, and the consent procedure was a "preliminary investigation proceeding" within the meaning of Article 3(2). In its decision, the court noted that the wording of the Directive "makes it clear that the Community legislature intended to make that concept ['information relating to the environment'] a broad one, embracing both information and activities relating to the state of those aspects." The court also emphasized that "the acts governed by the directive included all forms of administrative activity." Therefore, the court held that the statement of views regarding the consent by the countryside protection authority was "information relating to the environment" within the meaning of the Directive. The court also determined that the statement of views did not constitute "preliminary investigation proceedings" so as to exempt the statement of views from disclosure. The court also held that the applicable portion of Article 3(2) "must be interpreted as including an administrative procedure... which merely prepares the way for an administrative measure, only if it immediately precedes a contentious or quasi-contentious procedure and arises from the need to obtain proof or to investigate a matter prior to the opening of the actual procedure."

104. *Id.* at I-3826.
105. *Id*.
106. *Id.* at I-3830.
107. *Id.* at I-3833.
108. *Id*.
109. *Id*.
110. *Id.* at I-3836.
111. *Id*.
Ironically, the Directive’s call for transparency by governments did not apply to the institutions of the European Community itself. Commentators argue that the mere fact that the Community institutions themselves are not included in the Directive “does not imply that citizens are denied access to environmental information held by the Council and the Commission.” In fact, the Council’s and Commission’s own procedures allow “individuals to obtain access to, inter alia, environmental information of both the Council and the Commission. Furthermore, in complying with the Ombudsman’s decision, the other institutions and bodies have adopted rules on public access to their documents, which are similar to those [of the Council and Commission].”

A 1995 decision by the European Court of Justice in *John Carvel and Guardian Newspapers Ltd. v. E.U. Council*, considered the transparency of European Community institutions. In this case, the *Guardian* newspaper contacted the Secretary-General of the Council of the European Union to request access to a number of documents. The requested documents included preparatory committee reports, minutes, attendance and voting records, decisions of both the Councils of Ministers for Social Affairs and of the Council of Ministers for Justice, and the minutes of the Council of Ministers for Agriculture. The Council determined that the minutes, attendance, and voting records of the Justice Council were not to be disclosed because they “directly refer to the deliberations of the Council and cannot, under its Rules of Procedure, be disclosed.” The Court upheld the Council’s right to withhold information on that basis. The Court reversed the Council’s decision, however, because the Council had failed to

---

112. *Janssen, supra* note 75, at 269.
balance the public's interest against its own confidentiality interest, as required under the Council's own rules.\textsuperscript{120}

Another 1995 case also addressed the issue of the transparency of the European Commission. In \textit{WWF UK (World Wide Fund for Nature) v. E.C. Commission},\textsuperscript{121} the Commission denied access to some documents pertaining to a project to build a visitors' center at Mullaghmore in Ireland.\textsuperscript{122} The WWF contended that the use of certain public funds for the center was improper.\textsuperscript{123} Like the Council, the Commission relied on its interest in protecting the confidentiality of its own proceedings. Again, the European Court of Justice held that the Commission had failed to balance its interest in confidentiality with the public's interest in disclosure, as required under the Commission's Code of Practice.\textsuperscript{124} The \textit{WWF} decision has been hailed because it ensures that the European Commission does not rely on blanket or general refusals to requests for information concerning environmental law decision-making.\textsuperscript{125} Thus, while European Community institutions have somewhat more latitude in denying access to information than Directive 90/313 would allow, the European Court of Justice showed that it will hold those institutions to a rather high standard for analyzing and justifying the need for confidentiality.

The Freedom of Access to Information on the Environment Directive reflects a reasonable approach to access to environmental information and a step toward a more open society in the European Community: "[g]enerally speaking, the Directive permits access to information on the environment to be obtained very freely and very widely. Furthermore, the potential exceptions set out in Article 3(2) are, in the final analysis, reasonable. Unlimited access to all information can only have consequences which are more unfavourable than favourable."\textsuperscript{126}

\begin{itemize}
\item[120.] \textit{Id.}
\item[122.] \textit{Id.} at 56.
\item[123.] \textit{Id.}
\item[124.] \textit{Id.} at 58.
\item[126.] KRAMER, \textit{supra} note 78, at 308.
\end{itemize}
In 1985, the European Economic Community adopted the Environmental Impact Assessment Directive.\textsuperscript{127} It took the Council five years to adopt this Directive, which established broad requirements for environmental planning.\textsuperscript{128} \"[T]he best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects.\"\textsuperscript{129} Thus, this Directive required member states to adopt measures necessary to ensure that major projects likely to have significant environmental effects, referred to as Annex I projects, were assessed with regard to their environmental effects prior to approval.\textsuperscript{130} Such projects include oil refineries; large power plants; radioactive waste disposal sites; iron and steel smelters; asbestos production; chemical plants; highway construction; establishment of trading ports and inland waterways for large vessels; and toxic and hazardous waste disposal facilities.\textsuperscript{131} Projects which were deemed likely to have less serious environmental impacts, or Annex II projects, including smaller power plants; mining; urban development; and glass, rubber, and textile manufacturing, required an environmental impact assessment only \textquotedblright where Member States consider that their characteristics so require.\textquotedblright\textsuperscript{132} This distinction between Annex I and Annex II projects was criticized for creating \textquoteleft\textquoteleft considerable variation throughout the EC in the extent to which the Directive is implemented and its effectiveness in requiring EIA \textquoteleft\textquoteleft for any project likely to have significant effects on the environment.\textquoteright\textquoteright\textsuperscript{133} The Directive does not apply to national defense projects.\textsuperscript{134}

Under the Directive, each environmental impact assessment must \textquoteleft\textquoteleft identify, describe and assess\textquoteright\textquoteright effects of the project on


\textsuperscript{128} KRAMER, supra note 90, at 240.


\textsuperscript{130} Id. art. 2(1).

\textsuperscript{131} Id. Annex I.

\textsuperscript{132} Id. Annex II, art. 4(2).


\textsuperscript{134} Council Directive 85/337, supra note 127, art. 1(4), at 41. This contrasts with the National Environmental Policy Act in the United States, which does include national defense projects. 42 U.S.C. § 4332 (providing that the Act applies to \textquoteleft\textquoteleft all agencies of the Federal Government\textquoteright\textquoteright); see infra Part IV.C.
people, flora, and fauna; "soil, water, air, climate and the landscape[;]" "the interaction between" each of the study items; and "material assets and the cultural heritage." The proponent of a project is required to provide sufficient information to "assess the main effects which the project is likely to have on the environment." The governments of the member states are required to ensure that all such information is made available to the public, and that the "public concerned" has an "opportunity to express an opinion before the project is initiated."

Governments of Member States have considerable influence in determining where, when, and how the information will be made available, how the public must submit its views, and what constitutes the "public concerned." For instance, a member state could allow public information by bill-posting within a certain radius or publication in a local newspaper. Public comments could be in the form of written submissions or public oral comments. The public input was required to be considered in the development consent procedure. The government authority is required to inform the public of any decision made, including the content of the decision and any conditions attached.

In 1997, the European Community expanded the environmental impact assessment requirements by amending the Directive. The 1997 amendment significantly restructured the Annex I and Annex II distinctions for projects proposed after March 14, 1999. It also created in Annex III "screening criteria" that must be used in determining whether a project requires an environmental assessment. Any such determination must be made available to the public. Most important, the amended Directive required that the public be allowed to comment on the

136. Id. art. 5(2).
137. Id. art. 6(2).
138. Id.
139. Id.
140. Id. art. 6(3).
141. Id. art. 8.
142. Id. art. 9.
144. Id. art. 4(2)–(3).
145. Id. art. 4(4).
published information relating to the project planning application prior to permission being granted.\textsuperscript{146}

In the future, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, established by the United Nations in Aarhus, Denmark, in 1998, may also play a significant role in increasing access to environmental information in European Member States.\textsuperscript{147} Along with the signing of the Convention, the Conference adopted a Resolution on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which called for the Convention to be implemented as soon as possible and “to seek to apply the Convention to the maximum extent possible pending its entry into force.”\textsuperscript{148}

In Article 4, the Convention mandates that requesters of information may not be required to show an interest in the information demanded and that the information must be provided in the form requested except in certain circumstances.\textsuperscript{149} The information must be provided within a month\textsuperscript{150} and may be denied in circumstances in which: (1) the “public authority” considering the request does not have the information; (2) the request is “manifestly unreasonable or formulated in too general a manner[;]” or (3) the request concerns internal communication over matters still in progress where national law or customary practice would prohibit its disclosure, “taking into account the public interest served by disclosure.”\textsuperscript{151} Those exemptions,

\begin{flushright}\textsuperscript{146} \textit{Id.} art. 6(2). The earlier version required only that public comment be required prior to a project being “initiated.” Council Directive 85/377, \textit{supra} note 127, art 6(2).\textsuperscript{147} U.N. ECONOMIC COMM’N FOR EUROPE, \textsc{CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS}, U.N. Sales No. E/F/R.98.II.E.27 (1998) (indicating that its adoption was aimed at strengthening the results of the Fourth Ministerial Conference at Aarhus, Denmark, in June 1998, and the “Environment for Europe” process) [hereinafter \textsc{CONVENTION ON ACCESS TO INFORMATION}].\textsuperscript{148} U.N. ECONOMIC COMM’N FOR EUROPE, \textsc{RESOLUTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS} (1998) [hereinafter \textsc{RESOLUTION ON ACCESS TO INFORMATION}].\textsuperscript{149} \textsc{CONVENTION ON ACCESS TO INFORMATION}, \textit{supra} note 147, art 4(1).\textsuperscript{150} \textit{Id.} art. 4(2).\textsuperscript{151} \textit{Id.} art. 4(3). The Convention also includes a number of disclosure exemptions similar to the exemptions that exist in the United Kingdom’s Freedom of Information legislation and the United States’ Freedom of Information Act. \textit{Id.} art. 4(4). The United Kingdom’s FOI legislation and the United States’ Freedom of Information Act are
however, "shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment."\textsuperscript{152} A refusal to provide information must be in writing if the request for the information was in writing or the requestor asks for a writing. In addition, the refusal must provide reasons for the refusal and must inform the requester of his right to appeal.\textsuperscript{153}

In a departure from most previous directives or agreements, Article 5 of the Convention requires each party to affirmatively disseminate certain environmental information.\textsuperscript{154} Each signatory nation must ensure that the public has adequate information regarding potential environmental hazards resulting from proposed and existing activities.\textsuperscript{155} The public, in the case of an imminent threat, may then possess "all information which could enable the public to take measures to prevent or mitigate harm arising from the threat."\textsuperscript{156} Article 5 requires that "environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks."\textsuperscript{157} Additionally, signatories must "publish and disseminate a national report on the state of the environment" every three or four years.\textsuperscript{158} Each nation must also "develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices."\textsuperscript{159} The Article also requires the parties to "take steps to establish...a coherent, nationwide system of pollution inventories or registers" such as those already employed in the United Kingdom.\textsuperscript{160}

Articles 6 and 7 of the 1998 Convention address public participation in decisions, plans, programs, and policies.\textsuperscript{161} Article

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{152} Id. art. 4(4).
\item \textsuperscript{153} Id. art. 4(7).
\item \textsuperscript{154} Id. art. 5.
\item \textsuperscript{155} See id. art. 5(1)(c).
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id. art. 5(3).
\item \textsuperscript{158} Id. art. 5(4).
\item \textsuperscript{159} Id. art. 5(8).
\item \textsuperscript{160} See id. art. 5(9).
\item \textsuperscript{161} Id. arts. 6–7.
\end{itemize}
\end{footnotesize}
6 specifies notification requirements and procedures for providing opportunities for public input into decision-making.\textsuperscript{162} Article 7 requires public participation in "the preparation of plans and programmes relating to the environment, within a transparent and fair framework."\textsuperscript{163} Article 8 requires public participation in the development of government regulations,\textsuperscript{164} and Article 9 specifies requirements for the public's access to review procedures.\textsuperscript{165} The period for ratification of the Convention began on December 22, 1998.\textsuperscript{166} The Convention will go into force nineteen days after all signatories have ratified it.\textsuperscript{167} Officials from the Department of the Environment, Transport and the Regions have already indicated that "no changes would be required to UK laws on public participation."\textsuperscript{168}

The Convention as a whole seeks "to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being," by requiring the parties to "guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."\textsuperscript{169}

III. ENVIRONMENTAL INFORMATION IN THE UNITED KINGDOM

A. Background

Until relatively recently, access to environmental information in the United Kingdom was severely limited.\textsuperscript{170} Environmental information has often been protected from disclosure by specific statutes that were overly protective of trade secrets.\textsuperscript{171} For

\begin{itemize}
  \item \textsuperscript{162} \textit{Id.} art. 6. Annex I of the Convention contains a list of the types of decisions covered by article 6. \textit{Id.} Annex I.
  \item \textsuperscript{163} \textit{Id.} art. 7.
  \item \textsuperscript{164} \textit{Id.} art. 8.
  \item \textsuperscript{165} \textit{Id.} art. 9.
  \item \textsuperscript{166} \textit{Id.} art. 19(2).
  \item \textsuperscript{167} \textit{Id.} art. 20(1).
  \item \textsuperscript{168} \textit{New Treaty on Access to Justice, Environmental Information, ENDS REPORT 279, Apr. 1998, at 43-44.}
  \item \textsuperscript{169} \textit{Convention on Access to Information, supra} note 147, art. 1.
  \item \textsuperscript{170} \textit{See generally, Gisèle Bakkenist, Environmental Information: Law, Policy & Experience 13-14} (Peter Atherton ed. 1994) (discussing various early U.K. acts that restricted the disclosure of environmental information).
  \item \textsuperscript{171} \textit{See, e.g., Control of Pollution Act, 1974, c.40, § 94 (Eng.)} (providing that any
instance, the Official Secrets Act of 1911 made it a punishable offense to release government information that was not authorized for release.\textsuperscript{172} Additionally, information held by the U.K. government about applicants for discharge permits under the Rivers (Prevention of Pollution) Act of 1961 was protected from disclosure as were test results of samples taken by regulators.\textsuperscript{173} Further, the Health and Safety at Work Act of 1974 required any information obtained by inspectors in carrying out their duties under the Act to be kept confidential.\textsuperscript{174} These and other measures succeeded in retarding the flow of environmental information to the public.\textsuperscript{175}

Nevertheless, over the past two decades, the U.K. government has tremendously increased its openness with regard to environmental information.\textsuperscript{176} "In the environmental field, the introduction of access to information has been one of the significant features in the recent overhaul of all of the major regulatory regimes."\textsuperscript{177} The extent to which increased openness was compelled by European Community law is debatable, because many of the United Kingdom's measures were introduced long before there was any Community obligation requiring implementation.\textsuperscript{178} The turning point for increased governmental openness for environmental information in the United Kingdom might have been the 1972 publication of the second report of the Royal Commission on Environmental Pollution (Report), which recommended that the "needless cloak of secrecy" concerning government-held information be withdrawn.\textsuperscript{179} The Report

\begin{itemize}
\item person who discloses information related to trade secrets under this Act may be subject to liability; BAKKENIST, supra note 170, at 13 (indicating that the Clean Air Act of 1956 provided protection for "trade secrets").
\item 172. Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28, § 1 (Eng.).
\item 173. Rivers (Prevention of Pollution) Act, 1961, 9 & 10 Eliz. 2, c. 50, § 12(1) (Eng.).
\item 174. Health and Safety at Work Act, 1974, c. 37, §§ 14(4)(a), 20, 28(7); BAKKENIST, supra note 170, at 14.
\item 175. See generally BAKKENIST, supra note 170, at 13–16 (discussing legislative measures that contribute to the lack of access to environmental information).
\item 176. Id. at 16–17.
\item 179. ROYAL COMMISSION ON ENVIRONMENTAL POLLUTION, SECOND REPORT, 1972, Cmnd. 4894, at 3.
\end{itemize}
concluded that it was "in the public interest that information about wastes should be available not only to the statutory bodies which have a right to demand it, but to research workers and others who can make use of it to improve the environment." The Report further concluded that the "public must be considered to have a right, analogous to a beneficial interest, in the condition of air and water and to be able to obtain information on how far they are being degraded."

In the Control of Pollution Act of 1974 (COPA), the U.K. government took a small step towards allowing freedom of public access to environmental information. The COPA contains access to information provisions regarding both air and water pollution. Under section 79 of COPA, local authorities were given discretionary powers to investigate and research air pollution problems and publish their data. Each local authority's Register of Information on Air Pollution was to be open at the main office of the authority, free of charge, at all reasonable hours. Local authorities must provide facilities for the public to obtain copies of entries in the registers by paying a reasonable service charge. This has become the standard format for making such information available to the public in the United Kingdom. The COPA, however, continued the tradition of being overly protective of trade secrets. For instance, section 79(5) of COPA forbids local authorities from disclosing any information relating to a trade secret without the written consent of the person authorized to disclose it. A violation of this prohibition is actionable.

The COPA is more forceful in its policy regarding water pollution. In contrast to the discretionary power of local authorities to collect air pollution information and publish it under

---

180. _Id._ at 2–3.
181. _Bakkenist, supra_ note 170, at 14.
183. _Bakkenist, supra_ note 170, at 14.
184. Control of Pollution Act § 79(1).
185. _Bakkenist, supra_ note 170, at 15.
186. _Id._ at 15–16.
187. _Id._ at 16.
188. Control of Pollution Act § 79(5).
189. _Id._ § 79(6).
section 79, section 41 requires water authorities to publish records of effluent discharges to rivers. Commentators have criticized the comparative lack of legal force behind the air pollution information requirements. For instance, one commentator wrote:

[the failure of the local authorities to act on the provisions for air pollution registers, despite the good intentions behind the legislation, demonstrates either the lack of political will to create an information culture and the lobbying power of industrial groups such as the Confederation of British Industry, or the lack of local authority resources, or more likely a combination of the two.]

The Royal Commission on Environmental Pollution concluded that there “should be a presumption in favour of unrestricted access for the public to information which the pollution control authorities obtain or receive by virtue of their statutory powers, with [a] provision for secrecy only in those circumstances where a genuine case for it can be substantiated.”

In 1986, the U.K. government issued its report, Public Access to Environmental Information (Access Report), in which steps to accomplish the Royal Commission’s vision were identified. The Access Report noted that, “[t]he Government is firmly committed to greater openness in environmental matters.”

By the time of the Access Report, “much information was now already available to the public on environmental issues.” For instance, a system of water registers had been established under Part II of COPA, and the Food and Environment Protection Act of 1985 made information about pesticides available to the public. The Access Report recommended that

---

190. Id. §§ 79(1), 49(1)-(2).
191. BAKKENIST, supra note 170, at 15.
192. Id.
193. ROYAL COMMISSION ON ENVIRONMENTAL POLLUTION, TENTH REPORT, 1984, Cmdnd. 9149, at 38.
194. DEP’T OF THE ENV’T CENT. DIRECTORATE OF ENVT. PROT., PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION: REPORT OF AN INTERDEPARTMENTAL WORKING PARTY ON PUBLIC ACCESS TO INFORMATION HELD BY POLLUTION CONTROL AUTHORITIES, Pollution Paper No. 23, at vi–vii (1986) [hereinafter Pollution Paper No. 23].
195. Id. at 2.
196. Id.
197. Id.
198. Id. at 3.
public access to environmental information generally follow the register model established in COPA.\textsuperscript{199} The U.K. government declined to recommend a uniform approach to access public information because of the inherent differences in controlling pollution in various media.\textsuperscript{200} Instead, the government recommended a different approach for each pollution control function.\textsuperscript{201} Furthermore, the Access Report recommended that the public access approaches described in the Report should only apply to "information held by pollution control authorities by virtue of their statutory powers."\textsuperscript{202} Information volunteered to pollution control authorities by industry, however, would not be subject to disclosure requirements.\textsuperscript{203}

Regarding air pollution, the Access Report acknowledged that there was less emphasis placed on the free flow of information compared to water pollution.\textsuperscript{204} The Access Report noted local authorities' powers to establish public registers but stated that "very few local authorities have in fact made use of these powers."\textsuperscript{205} Local authorities claimed that the reason they were not establishing the public registers was because there was little public interest and public registers were too expensive.\textsuperscript{206} The local authorities also stated that information was provided to the public "when needed, using less formal procedures."\textsuperscript{207} The U.K. government, therefore, disagreed with the Royal Commission's recommendation that COPA registers should be made mandatory.\textsuperscript{208} The Access Report, however, recommends keeping simplified registers that include information on industrial discharges, "the nature of raw materials processed or fuel used," "the height and mode of discharge of any emissions," "the carrying out of tests and keeping of records," and "the use and method of operation of control equipment."\textsuperscript{209}

\textsuperscript{199} Id. at 7.
\textsuperscript{200} Id. at 5.
\textsuperscript{201} Id.
\textsuperscript{202} Id. at 6.
\textsuperscript{203} Id.
\textsuperscript{204} Id. at 13.
\textsuperscript{205} Id. at 15.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at 16.
By 1986, information on water quality that was available to the public under the COPA regulations\textsuperscript{210} included all current discharge consents, applications for discharge consent, sampling results, exemptions from the registers, and notices to farmers to abstain from certain agricultural practices.\textsuperscript{211} Additionally, because the reasonably comprehensive COPA regulations were relatively new at the time of the Access Report, the government declined to make any further recommendations regarding public access to water quality information.\textsuperscript{212} Instead, it recommended that water be monitored in registers.\textsuperscript{213} The Access Report did note, however, that there was no COPA equivalent to the public register requirements for drinking water quality.\textsuperscript{214} The report therefore recommended that, rather than establish such a register, the authorities responsible for providing safe drinking water should create a system for “responding to requests for information from the public about potable water quality.”\textsuperscript{215}

Regarding land disposal of waste, the Access Report noted that COPA required waste disposal authorities (WDAs) to maintain registers of issued licenses that could be accessed by the public.\textsuperscript{216} Although COPA made it an offense to disclose any information that would constitute a “trade secret,”\textsuperscript{217} the Access Report required WDAs to “generally adopt an open policy within the scope of present legislation. Therefore, most requests for information would be met as long as they did not involve a disproportionate amount of time or cost.”\textsuperscript{218} The Report recommended that “it should be possible to achieve a standardised ‘register’ of relevant material that would be readily available to public scrutiny. This could follow the model set by Section 41 [of COPA] and could contain the present license register together with details of WDA monitoring of each site.”\textsuperscript{219} The Access

\textsuperscript{210} Control of Pollution (Registers) Regulations, (1985) SI 1985/813 (Eng. and Wales). These Regulations went into effect on July 31, 1985, and were revoked by The Control of Pollution (Revocations) Regulations, (1989) SI 1989/1150 (Eng. and Wales).

\textsuperscript{211} Pollution Paper No. 23, \textit{supra} note 194, at 18–19.

\textsuperscript{212} \textit{Id.} at 20.

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} \textit{See id.} at 21.

\textsuperscript{215} \textit{Id.}

\textsuperscript{216} \textit{Id.} at 29.

\textsuperscript{217} Control of Pollution Act, 1974, c. 40, § 94(1) (Eng.).

\textsuperscript{218} Pollution Paper No. 23, \textit{supra} note 194, at 30.

\textsuperscript{219} \textit{Id.}
Report also addressed concerns about access to information regarding radioactive waste, noise, pollution from ships, pollution from offshore oil and gas installations, and new chemicals and pesticides.220

In 1989, the House of Lords Select Committee on the European Communities issued a report (Select Committee Report) that took into consideration the Action Programmes of the European Community and their resultant Directives.221 Specifically, the Select Committee Report considered the then-proposed Directive on Freedom of Access to Information on the Environment, known as EC Directive 90/313.222 In this report, the Committee acknowledged that the United Kingdom lacked a body of law that gave the public a right of access to environmental information.223 Accordingly, the Select Committee Report stated "[t]here is no provision in United Kingdom law giving a general right of access to information on the environment held by public bodies."224 The Select Committee Report specifically endorsed the proposed Directive by stating that "[t]he proposed Directive both demonstrates the need for and accelerates the trend towards greater openness and accountability in environmental matters which has been evident in recent years. The Committee welcome[s] this trend."225 In addition, the Report recommended extending the principle of the Directive "beyond pollution control authorities to all public agencies concerned with the environment. Whilst pollution is obviously a matter of grave concern, it is clear that many activities which do not involve polluting emissions or discharges can nonetheless have a very serious effect on the environment."226

The Select Committee Report also concisely restated the underlying commonly understood policy reasons behind allowing greater public access to information relating to the environment.227 These reasons are stated as follows:

220. Id. at 17–44.
221. HOUSE OF LORDS SELECT COMM. ON THE EUROPEAN COMMUNITIES, FREEDOM OF ACCESS TO INFORMATION ON THE ENVIRONMENT (FIRST REPORT), 1989–90, HL Paper 2, at 5–6.
222. See id. at 5.
223. Id. at 6.
224. Id.
225. Id. at 13.
226. Id.
227. Id.
(i) the environment is a common resource of value to all citizens and affecting all citizens;

(ii) as a general principle, government and public authorities should be servants of the public and accountable accordingly;

(iii) non-governmental organisations are playing an increasingly prominent role in safeguarding and improving the environment and need information in order to do so effectively;

(iv) members of the public and non-governmental organisations should be the natural allies of the Department of the Environment and other public bodies in working towards the protection and improvement of the environment.228

The Select Committee Report concluded that the public’s increased expectations for environmental standards are, “to a large degree... dependent upon the free flow of information between those involved, public authorities, industry and the public. The proposed Directive is therefore timely and significant.”229

The Government White Paper, This Common Inheritance, also emphasized the importance of public access to environmental information.230 The Paper concluded that, if given the facts, the public could make intelligent consumer decisions, and thereby exert pressure for change on industry and government.231 The new environmental consciousness and desire for increased openness with environmental information that was expressed in the White Paper is likely to have a profound impact on real estate practitioners, among others.232 One commentator stated:

The scope of the projects in respect of which environmental assessment is required is likely to increase in future years, and the property practitioner will need to take account of these matters at an early stage, in terms of assessing and selecting sites, and investigating the ecological and environmental aspects

228. Id.
229. Id. at 18.
230. THIS COMMON INHERITANCE, supra note 29, at 12.
231. Id. at 12, 221.
relating to them and the impact which any development is likely
to have in terms of the environment.\textsuperscript{233}

The United Kingdom's 1992 Environmental Information
Regulations (1992 Regulations), which gave the public a right to
information beyond what is held in public registers, were
promulgated in response to EC Directive 90/313.\textsuperscript{234} The 1992
Regulations state that any "relevant person who holds any
information to which these Regulations apply shall make that
information available to every person who requests it."\textsuperscript{235}
"Relevant persons" include "all such Ministers of the Crown,
Government departments, local authorities and other persons
carrying out functions of public administration at a national,
regional or local level as, for the purposes of or in connection with
their functions, have responsibilities in relation to the
environment."\textsuperscript{236} In addition, persons or entities that have "public
responsibilities for the environment" that are under the control of
persons or entities falling within the previous definition are also
deemed relevant persons.\textsuperscript{237}

The 1992 Regulations apply to any information that "relates
to the environment."\textsuperscript{238} Information "relates to the environment" if it pertains to:

(a) the state of any water or air, the state of any flora or fauna,
the state of any soil or the state of any natural site or other land;

(b) any activities or measures (including activities giving rise to
noise or any other nuisance) which adversely affect anything
mentioned in sub-paragraph (a) above or are likely adversely to
affect anything so mentioned;

(c) any activities or administrative or other measures (including
any environmental management programmes) which are
designed to protect anything so mentioned.\textsuperscript{239}

\textsuperscript{233} \textit{Id. at} 9.
\textsuperscript{234} Environmental Information Regulations, (1992) SI 1992/3240 (Eng. and Wales);
\textit{see} Council Directive 90/313, supra note 83, at 56 (providing that the European
Community and member states have a responsibility to ensure "better access to
information on the environment").
\textsuperscript{235} Environmental Information Regulations § 3(1).
\textsuperscript{236} \textit{Id.} § 2(3)(a).
\textsuperscript{237} \textit{Id.} § 2(3)(b).
\textsuperscript{238} \textit{Id.} § 2(1)(a).
\textsuperscript{239} \textit{Id.} § 2(2).
Officials may apply a reasonable service charge for supplying information.240

Authorities are required to respond to requests for environmental information within two months and must specify in writing the reasons for denying the release of any of the information requested.241 There do exist, however, discretionary exceptions to the disclosure requirements. Such exceptions include: information relating to international relations, national defense, or public security; information relating to any legal proceedings; information relating to deliberative communications within an organization; information relating to "matters to which any commercial or industrial confidentiality attaches," or affecting any intellectual property.242

In addition, information must be withheld from disclosure if it would "contravene any statutory provision or rule of law or would involve a breach of any agreement[;]"243 if the requested information is private information "contained in records held in relation to an individual who has not given his consent to disclosure[;]"244 if the information was provided to authorities under circumstances in which it was not required, but volunteered, and the provider has not consented to its release; or if releasing the information to the requester would increase the likelihood of damage to the environment.245 Authorities may also deny release of information if a request is "manifestly unreasonable or is formulated in too general a manner."246 This last provision has been criticized as being ambiguous, overly broad, and therefore subject to abuse.247 As one commentator noted, the exception may undermine the Regulations all together: "[a] literal interpretation of this provision by relevant persons could drive a coach and horses straight through the Regulations."248 Moreover, the 1992 Regulations failed to establish a distinct and efficient

240. Id. § 3(4)(a).
241. Id. § 3(2)(b)–(c).
242. Id. § 4(2).
243. Id. § 4(3)(a).
244. Id. § 4(3)(b).
245. Id. § 4(3)(c)–(d).
246. Id. § 3(3).
247. See Birtles, supra note 92, at 408.
appeals procedure. Persons requesting information that fell within an exception would therefore be required to seek traditional appeals methods, such as judicial or administrative review.

The 1992 Regulations did not have an immediate, profound impact, which may be due to the fact that "neither the Government nor the media appear to have provided any public information about them." The 1992 Regulations were examined in *R. v. British Coal Corp.*, also known as the *Ibstock* case. In this case, the court held that the respondent had improperly refused to disclose information relating to alleged dumping of naval munitions in 1947 beneath the applicant's land. Specifically, the court held that such information “related to” the environment within the meaning of the 1992 Regulations, that the 1947 dumping did not constitute national defense or national security information, that the possibility that the applicant for a license to fill and landscape the premises might appeal the planning decision does not constitute a legal proceeding, and that the name of the informant who revealed information about the munitions was not “personal information.” Thus, information regarding the munitions did not fit within any exemptions to the 1992 Regulations and was therefore required to be released.

The *Omagh Gold Mining* case is a further illustration of the effect of the 1992 Regulations, despite the fact that it was never tried. In this case, Omagh Minerals requested permission to construct a gold mine in Northern Ireland. The company intended to use a process of cyanidation and de-cyanidation and discharge the resulting effluent into rivers that drained into the River Foyle. Following numerous inquiries from the public, the

---

250. *Id.*
251. *Id.* at 408.
253. *Id.* at 277, 284.
254. *Id.* at 278.
255. *Id.* at 284.
257. *Id.*
Department of Environment in Northern Ireland instituted a preliminary inquiry to look into the matter.\textsuperscript{258}

In 1996, the House of Lords Select Committee on the European Communities issued its report, \textit{Freedom of Access to Information on the Environment}.\textsuperscript{259} While the report concluded that the EC Directive and Environmental Information Regulations were generally effective in promoting the notion of freedom of access to environmental information, the report noted a number of deficiencies.\textsuperscript{260} For instance, legal, academic, and environmental commentators argued that the "Directive had been weakened in transposition; [that] the Regulations were in some respects broader and less precise than the Directive, or failed to clarify matters on which the Directive itself lacked precision; and that there was an absence of sufficient guidance from the Government in several contentious areas... leaving it to the Courts to be the final arbiters through judicial proceedings."\textsuperscript{261}

More specifically, the 1992 Regulations failed to precisely define the phrase "information relating to the environment," thus leaving its meaning open to "varying interpretations which can exclude information which common sense would suggest is very

\textsuperscript{258} \textit{Id.} at 17. Those opposing Omagh's project feared whether the company had the financial ability to restore the site to an acceptable level in the event of an accident. \textit{Id.} The nature of the planning inquiry, however, did not include access to such information. \textit{Id.} During the inquiry it became evident that the viability of the project required the assistance of government grants. \textit{Id.} Crown Estates, owners of all gold and silver deposits within the United Kingdom, had originally declined to participate in the inquiry. \textit{Id.} Eventually, however, Crown Estates clarified that it was backing the project as a part of their lease with Omagh but refused to provide a copy of the lease. \textit{Id.} An application was made under the Environmental Information Regulations to obtain a copy of the lease, which Crown Estates initially denied, claiming that it was not a "public body" within the meaning of the regulations and that the lease was commercially confidential. \textit{Id.} When objectors threatened to seek judicial review of Crown Estates' position, Crown Estates eventually relented and disclosed a copy of the lease. \textit{Id.} Not to the opponents' surprise, the lease failed to allocate enough money to a restoration fund that was to be used if Omagh were financially unable to restore the site. \textit{See id.} While repairing a damaged site can typically be very expensive, Crown estates provided a meager bond of 150,000 pounds. \textit{Id.} This case study is evidence that the information regulations do have an effect, sometimes by convincing public bodies to avoid a court fight over whether information must be released by simply releasing the material. \textit{See id.}

\textsuperscript{259} \textsc{House of Lords Select Comm. on the European Communities: Freedom of Access to Information on the Environment (with Evidence), 1996–97, HL Paper 9, at 7.}

\textsuperscript{260} \textit{Id.} at 10.

\textsuperscript{261} \textit{Id.}
much bound up with the environment.” Making this point quite clear, the report cited information on the quality of water supply as well as sewage effluent and information about environmental investment programs by the water industry as examples of the kinds of information that had fallen outside the disclosure requirements because it was not deemed “information relating to the environment.” To solve this problem of interpretation, the report recommended a revision to make the definition “more comprehensive and explicit.”

According to the report, some confusion also arose regarding the interpretation of “relevant persons” as applied to persons having a duty to disclose information. Specifically, some member states that determined certain authorities, such as privatized utilities, did not have the requisite “responsibilities relating to the environment,” while others drew the opposite conclusion. To solve this confusion, the report recommended adopting a “non-exhaustive list” of “relevant persons” to whom the Regulations would apply.

The report also highlighted common criticisms of the exemptions from disclosure that were contained in the 1992 Regulations. The Select Committee’s witnesses “criticized the Regulations for going wider than the Directive, or at least for selecting every item from what was intended to be an à la carte menu.” In response to this problem, the Select Committee recommended that companies bear the burden of establishing “potential harm” as a prerequisite to being eligible for an exemption. Furthermore, the Committee suggested that the Directive “should contain provisions for confidentiality to be overridden where the public interest demands it.”

In addition, commentators criticized the exemptions themselves as being too broad or subject to abuse in public agency interpretations. The exemption for “volunteered information,”

262. Id.
263. Id.
264. Id. at 20.
265. Id. at 11.
266. See id.
267. Id. at 21.
268. Id. at 12.
269. Id.
270. Id. at 22.
271. Id. at 12-13.
for instance, was heavily criticized as being unnecessary, although the Department of Environment responded by explaining that the exemption was necessary to protect "whistle-blowers." 272 Witnesses also severely criticized the "commercial confidentiality," "[l]egal etc. proceedings," "confidential discussions and internal communications," and "incomplete information" exemptions as being ripe for abuse. 273 Regarding the "commercial confidentiality" exemption, one witness argued, "[i]t is actually quite difficult to question that information is not commercially confidential if the provider has said that it is." 274 Critics of the 1992 Regulations also argued that under the "incomplete information" exemption an agency could avoid disclosure by labeling documents "'draft' simply as a device to avoid disclosure." 275

Other criticisms of the 1992 Regulations included arguments that the Directive should have required that information be "in an accessible form," 276 and that the two months allowed for disclosure of information following a request was too long. 277 Moreover, critics argued that the language regarding what constitutes a "reasonable amount" for access charges permitted overly divergent charging practices by government bodies, 278 and that the lack of a special appeals scheme, other than judicial review, made it difficult for members of the public to challenge an agency's determination that some piece of information should not be disclosed. 279

In 1997, the U.K. government responded to the House of Lords Select Committee's criticisms and recommendations regarding access to environmental information. 280 In its response, the government refused to accept a number of the Select Committee's assertions and recommendations. 281 For instance, the

272. See id. at 13.
273. See id. at 12–13.
274. Id. at 13 (quoting the Department of Trade and Industry).
275. Id. at 12.
276. Id. at 14.
277. See id.
278. Id. at 14–15.
279. See id. at 15.
280. GOVERNMENT RESPONSE TO THE HOUSE OF LORDS SELECT COMMITTEE REPORT ON FREEDOM OF ACCESS TO INFORMATION ON THE ENVIRONMENT, Feb. 1997, at 1.
281. Id. at 1–8.
government argued that it was "not in a position to change the
definition of 'environmental information'" but agreed that the
definition "could be made more comprehensive and explicit."282 It
argued that the definition could not be changed at that time
because it was established by the Directive.283 The government
noted, however, that negotiations were underway over the Ärhus
Convention on Access to Information, Public Participation in
decision-Making and Access to Justice in Environmental Matters
that could prompt change in the Directive and Regulations.284
The U.K. government did, however, explain its policy that
"environmental information" should be interpreted "broadly in
line with the Committee's recommendations."285

Regarding the Select Committee's recommendation that the
government adopt a list of organizations covered by the 1992
Environmental Information Regulations, the U.K. government's
response noted that among EU member nations, only Greece had
published a list of organizations covered under the Directive.286
to provide a non-exhaustive list for two main reasons."287 First,
only organizations that clearly fell within the Directive's eligibility
criteria could be included in such a list.288 Thus, "[s]uch a list
would serve no useful purpose since those organisations likely to
be on it already accept that they are covered by the Regulations,"
the government claimed.289 Second, any organization that was
excluded from the list would likely argue that its exclusion was an
admission that they are not covered by the Regulations, thus will
decline to respond to requests for environmental information.290
"On balance, the Government believes that more organisations
are likely to provide access to environmental information in the
absence of such a list than would be the case if such a list
existed."291

282. Id. at 2.
283. See id.
284. Id.
285. Id.
286. Id. at 3.
287. Id.
288. Id.
289. Id. at 3–4.
290. Id. at 4.
291. Id.
The government's response also disagreed with the Select Committee's criticism of the exemptions to disclosure.\textsuperscript{292} For instance, the U.K. government agreed, in principle, to include a harm test and public interest override.\textsuperscript{293} It reasoned that such provisions should be in the Directive and Regulations as "they already existed in the Open Government Code of Practice on Access to Government Information."\textsuperscript{294} Yet the government, insisting that this was not a "serious weakness in the present arrangements," argued that such provisions need not be incorporated because organization officials were already required to consider potential "harm" of disclosure as well as the "public interest" under the discretionary exemptions.\textsuperscript{295}

With regard to the Select Committee's recommendations as to the specific exemptions, the government stated that it would change the Regulation to follow the Select Committee's recommendation to make "volunteered information" about the environment accessible to the public "in due course."\textsuperscript{296} As for the other exemptions, the government declined to take any action regarding the "legal and other proceedings" exemption and the "incomplete information" exemption, and promised only to "consider" the Select Committee's recommendation for "commercially confidential information" in light of the Århus Convention.\textsuperscript{297}

The U.K. government also took issue with a Select Committee recommendation to adopt a uniform, prescriptive approach to organizations' practical arrangements in complying with the Regulations.\textsuperscript{298} The government cited its written evidence, which stated:

\begin{quote}
[O]ver zealous prescription of detailed arrangements could have the effect of inhibiting access if it imposed entirely unsuitable arrangements on particular bodies. A wide range of bodies are caught by the Regulations—from individual persons to large multi-site, multi-function organisations—and only the bodies concerned know how best to make information
\end{quote}

\textsuperscript{292} Id. at 5–6.
\textsuperscript{293} Id. at 5.
\textsuperscript{294} Id.
\textsuperscript{295} Id.
\textsuperscript{296} Id. at 5–6.
\textsuperscript{297} Id. at 5.
\textsuperscript{298} Id. at 6.
available. If the Regulations were to impose uniform practical arrangements which might be inconsistent with local practices, such arrangements might inhibit freedom of access to and dissemination of information contrary to the object of the Directive as set out in Article 1.\textsuperscript{299}

According to the government’s response, “[t]he Government stands by this statement and is not persuaded of the need for change.”\textsuperscript{300}

Overall, the U.K. government’s response seems to resist any change that might be instituted by outside stimulus. One illustration of this reluctance is made clear by the U.K. government’s response to the Committee’s recommendation for clarification on the issue of “whether access to information includes the right of access to documents.”\textsuperscript{301} The U.K. government’s curt response to this valid concern was that “[t]he Regulations and the recently issued second edition of the Code make it clear that there is no [U.K.] commitment to make documents as opposed to information available in response to requests for information.”\textsuperscript{302} Furthermore, while the government agreed to consider several of the Select Committee’s recommendations, it only actually agreed on a few specific recommendations.\textsuperscript{303}

\textbf{B. A System of Registers}

Since COPA’s enactment in 1974, public registers have been the mainstay of the environmental information regime in the United Kingdom.\textsuperscript{304} In addition to COPA, the Environment and Safety Information Act of 1988 (1988 Act) requires that certain authorities maintain public registers of certain enforcement notices regarding violations of health, safety, and environmental standards.\textsuperscript{305} The authorities covered under the 1988 Act include both national and local enforcement authorities.\textsuperscript{306} The covered

\begin{itemize}
\item \textsuperscript{299} Id.
\item \textsuperscript{300} Id.
\item \textsuperscript{301} Id.
\item \textsuperscript{302} Id. at 6–7.
\item \textsuperscript{303} See id. at 1–8.
\item \textsuperscript{304} See Environment and Safety Information Act, 1988, c. 30 (Eng.); BAKKENIST, \textit{supra} note 170, at 17.
\item \textsuperscript{305} Environment and Safety Information Act; BAKKENIST, \textit{supra} note 170, at 24.
\item \textsuperscript{306} Environment and Safety Information Act § (2)(2).
\end{itemize}
statutes are the Fire Precautions Act of 1971, the Health and Safety at Work Act of 1974, the Safety of Sports Grounds Act of 1975, and the Food and Environment Protection Act of 1985.\textsuperscript{307} Like COPA, the 1988 Act granted protection for trade secrets, if required.\textsuperscript{308} In such cases, the information released in the registers was limited to the notice served, the statutory requirement that was violated, and the authority's summary of the situation.\textsuperscript{309} Since the implementation of the 1988 Act in 1989, the use of registers by public enforcement authorities has become more widespread.\textsuperscript{310} Under the 1988 Act, authorities were required to place notices on their registers within fourteen days of service, or, if there was an appeal, details would be added within fourteen days after the end of the appeal period or final decision.\textsuperscript{311} Once disclosed, information would remain on the register for three years.\textsuperscript{312} Authorities were under no obligation to provide information from the registers to anyone who did not inspect the registers in person, regardless of how far that person had to travel to do so.\textsuperscript{313} This barrier to access could be minimized in the case of national authorities by establishing regional registers instead of centralized registers.\textsuperscript{314} 

Subsequent legislation has also altered the way the registers operate. For instance, the Water Resources Act of 1991 reenacted the requirement of maintaining registers under COPA.\textsuperscript{315} The Control of Pollution (Applications, Appeals, and Registers) Regulations of 1996 specifically described the information contained in the registers.\textsuperscript{316} Again in line with COPA, however, all information that is commercially confidential or related to national security issues is excluded from the registers.\textsuperscript{317} For waste

\textsuperscript{307} Id. sched.; BAKKENIST, supra note 170, at 24. 
\textsuperscript{308} BAKKENIST, supra note 170, at 24. 
\textsuperscript{309} Id. at 24–25. 
\textsuperscript{310} Id. at 25. 
\textsuperscript{311} Id. 
\textsuperscript{312} Id. 
\textsuperscript{313} See id. 
\textsuperscript{314} Id. 
\textsuperscript{316} Control of Pollution (Applications, Appeals, and Registers) Regulations § 15. 
management, the Environmental Protection Act of 1990 requires England and Wales’ Environment Agency to maintain a register containing information related to the waste management permitting or licensing systems. In addition, all waste collection authorities must maintain registers of information on current licenses and copies of notices affecting the scope or status of the licenses. Regulation 10 of the Waste Management Licensing Regulations of 1994 established the information that must be included in these registers, which includes: particulars of current or recent waste management licenses and copies of such licenses and working plans; particulars on applications, including a full copy of each application; details of applications for permit modifications; details of notices of violation, enforcement, variation or suspension; details of any convictions for waste management offenses (not just locally) or for other “relevant” offenses; copies of reports produced by the Environment Agency, including information regarding possible groundwater contamination; details of monitoring information; details regarding special waste; and information on any loss or surrender of a waste management license.

Public registers can be a useful tool for citizens to gain access to environmental information. Agencies maintain numerous registers, and countless other registers are maintained by national and local authorities. In 1995, the Department of the Environment identified fifty-four different public registers, ranging in subject matter from information on stray dogs to sewer maps.

318. Environmental Protection Act, 1990, c. 43, § 64 (Eng.). The Environment Agency was established under the Environment Act of 1995 through the consolidation of several enforcement agencies. Environment Act, 1995, c. 25, § 1(1) (Eng.).
319. Environmental Protection Act, c. 43, § 64(1).
321. Normally referred to as “permits” in the United States.
322. Waste Management Licensing Regulations § 10.
323. These include: the Register of Radioactive Substances Information; the Integrated Pollution Control (IPC) Public Register; the Genetically Modified Organisms (GMOs) Public Register of Deliberate Releases and Consents to Market; the Water Abstraction and Impounding Register; the Water Quality and Pollution Control Public Register; the Register of Carriers of Controlled Waste; the Register of Waste Management Licenses; the Register of Exempt Activities; the Register of Professional Collectors and Transporters of Waste, Dealers, and Brokers; the Register of Brokers of Controlled Waste; and the Producer Responsibility Register.
Despite the proliferation of environmental information registers, not all observers are satisfied with their effectiveness in disseminating information on the environment.\textsuperscript{325} Regarding radioactive substance registers, certain commentators feel that the lack of detailed monitoring data in local authority registers is ... inexcusable and reprehensible, as it denies local people the real possibility of making an informed opinion in relation to the nuclear sites with which they must live, and precludes the bringing of users of radioactive substances properly to account.\textsuperscript{326}

Some say that the registers were too easily manipulated by the nuclear industry because the U.K. government believed the raw data concerning the industry was too incomprehensible to the general public to include in the registers.\textsuperscript{327} Some disagree, however:

Common interest groups, who have the expertise to digest the statistical information, will doubtless relay the information to the general public via their channels, in a way which is more comprehensible ... There is no good reason why the nuclear industry should have a monopoly of the interpretation of this information, and thereby influence public opinion one-sidedly. A reasoned public opinion needs to hear both sides of the nuclear story.\textsuperscript{328}

Some argue that the registers were not a panacea for years of government secrecy: "[t]he registers are only a partial answer to openness [because] [t]hey provide only incomplete information."\textsuperscript{329} Commentators argue that authorities' failure to comply with the register requirements, and sometimes a complete lack of knowledge of the requirements, is a major cause of the registers' failure.\textsuperscript{330} "Thus the fact that a system of access to information is provided for in legislation should not be taken as a guarantee of an effective system in practice."\textsuperscript{331}

\textsuperscript{325} See Burton, supra note 182, at 194 (noting that empirical evidence suggests the general public has made little use of water registers).


\textsuperscript{327} See id. at 17.

\textsuperscript{328} Id. at 18.

\textsuperscript{329} BAKKENIST, supra note 170, at 25.

\textsuperscript{330} Id.

\textsuperscript{331} Id.
Critics have blamed the public itself for failing to help increase access to environmental information:

[O]ne of the major difficulties undermining the system of easier access to information within Britain is that research has shown that, even where there is information which can easily be obtained, public participation in the system is said to be low . . . . It is clear . . . that the basis upon which the system is founded is that the public should have a desire to receive information from the register for themselves. The empirical evidence suggests otherwise. 332

Critics have also suggested several possible reasons for the lack of public interest. 333 First, the public was generally unaware of the existence of the public registers, suggesting that lack of advertisement by the government and the gradual implementation of the public register requirements lessened the impact of the legislation in the public’s mind. 334 Additionally, the difficulty of accessing some of the registers contributed to their lack of use. 335 The registers should be located geographically close to those people most likely to wish to use them and the costs of copying from the registers should be kept at reasonable levels. 336 Furthermore, the data should be comprehensible to the public by providing assistance when necessary. 337 The information should be sufficient to reflect the true state of the environment. 338 Environmental conditions should be monitored with sufficient frequency, and those monitoring and publishing results in the registers should provide the public an accurate picture of environmental conditions. 339 The action taken by the enforcement authority when a member of the public discovers a problem in a register is an important and useful tool that can be used to advance the registers. 340 If the authority takes no action, it would force the member of the public to either give up in discouragement or pursue the matter himself, which is substantially more difficult for

332. BELL, supra note 7, at 175.
334. Id. at 195–96.
335. Id. at 197–98.
336. See id. at 197, 199.
337. Id. at 200–01.
338. Id.
339. Id. at 202–03.
340. Id. at 204–06.
Thus, authorities should take care to react appropriately when discrepancies or problems are discovered by the public.

Critics have attributed the low level of use of the registers to two factors. The first factor is a failure of public authorities to properly implement and publicize the register requirements. The second factor is a lack of a "culture of participation" in the United Kingdom. Even if the institutional problems with access to registers were remedied, however, the public might still fail to take a participatory role in environmental decision processes. Thus, critics recommend that agencies "take the issues to [the public]" rather than simply provide them in a passive manner.

C. Environmental Assessment: Town and Country Planning Regulations

European law has influenced U.K. law in the way it approaches public participation in the environmental planning process. The Town and Country Planning (Assessment of Environmental Effects) Regulations of 1988 (1988 Regulations) were enacted, among other reasons, to implement the EC Directive on Environmental Impact Assessment (EC Directive). The 1988 Regulations incorporate environmental impact assessment into the planning process. This gives the public access to an environmental analysis, which includes required environmental information, and is prepared by a project proponent. In 1999, the 1988 Regulations were amended to adopt changes reflected in EC Directive 97/11.

---

341. Id. at 205.
342. Rowan-Robinson et al., supra note 1, at 24–25.
343. Id. at 38 (suggesting that it would be fruitless to improve public access because "the public are [sic] apathetic.").
344. Id. at 39.
345. See, e.g., Purdue, supra note 178, at 232 (noting EC Directives under Articles 100 or 235 have had direct impact on U.K. land use planning).
In England and Wales, all development control procedures or planning are described in a series of Town and Country Planning Acts.\textsuperscript{350} Permission from local planning authorities is required for any "development" of land.\textsuperscript{351} This is defined as the "carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any building or other land."\textsuperscript{352} A project proponent, or developer, must comply with the regulations established under the Town and Country Planning Acts, particularly the Town and Country Planning (Applications) Regulations of 1988,\textsuperscript{353} and must provide specific information and evidence as required under those regulations or directions of the planning authority, which are made pursuant to them.\textsuperscript{354}

An application must be in the prescribed form, and must include specific information.\textsuperscript{355} Additionally, an application may be accompanied by a plan of the project, a map to identify the land concerned, or any other information necessary to describe the project.\textsuperscript{356} The planning authority cannot make a decision until at least twenty-one days have passed, giving the public time to express opposition or support for a project.\textsuperscript{357} Normally, the planning authority cannot take longer than eight weeks to render its decision.\textsuperscript{358}

Section 14(5) of the now-repealed Town and Country Planning Act of 1947 required local planning authorities to maintain registers displaying planning applications and decisions including the conditions attached for pollution control purposes.\textsuperscript{359} The EC Environmental Assessment Directive, however, has

\textsuperscript{350} Scotland has a separate planning law regime, which must also adhere to the European Directives. \textit{See}, e.g., Town and Country Planning Act, 1997, c. 8 (Scot.).
\textsuperscript{351} Purdue, \textit{supra} note 178, at 233.
\textsuperscript{352} The Town and Country Planning Act, 1990, c. 8, § 55(1) (Eng.).
\textsuperscript{354} \textit{Id.} § 4.
\textsuperscript{355} \textit{Id.} § 3.
\textsuperscript{356} \textit{Id.} § 3(b). When the application concerns underground minerals, such information would include a copy of the notice of application, evidence that such a notice has been locally advertised, evidence that such a notice has been posted at the site for seven days, and so on. Town and Country Planning (General Development Procedure) Order, (1995) SI 1995/1419, § 6 (Eng. and Wales).
\textsuperscript{357} Town and Country Planning (General Development Procedure) Order § 20(5)(a).
\textsuperscript{358} \textit{Id.} § 20(2)(a).
\textsuperscript{359} Town and Country Planning Act, 10 & 11 Geo. 6, c.51, §14(5) (1947) (Eng.).
required planning authorities to maintain and make available more environmental information relating to the kinds of projects covered under the EC Directive. Initially, the U.K. government opposed the adoption of the EC Directive. They feared that the release of information had the potential to cause litigation and delay by requiring applicants for planning permission to submit more information and obligating local authorities to publish a review of this and other environmental information. Critics also thought that unproductive procedural disputes, having little or nothing to do with the merits of proposed projects, would arise. In addition, some surmised that implementing the new procedures would cause potentially high monetary and administrative costs. The final draft of the U.K. Town and Country Planning Act requirements, with the incorporation of the environmental assessment into the planning process, closely tracked the EC Directive.

The United Kingdom's policy in implementing the EC Directive was to work the new requirements into the existing planning framework as much as possible, without imposing new burdens on developers or local planning authorities. The U.K. government did not take action to extend the application of the EC Directive beyond its minimum requirements. Under the Town and Country Planning (Assessment of Environmental Effects) Regulations of 1988, the EC Directive only affects those types of major projects identified. If a developer questions whether a new development would require an Environmental Impact Analysis (EIA) for planning permission, the developer may seek an opinion from the planning authority as to whether this is necessary (although an EIA may be submitted voluntarily). The planning authority must respond within three

360. Purdue, supra note 178, at 253 (indicating that the Directive fills in gaps where the public's right to information in the member states falls short).
361. BAKKENIST, supra note 170, at 141.
362. Id. Critics pointed to the American example of litigious over procedural aspects of the National Environmental Policy Act (NEPA). See infra Part IV.C.
363. BAKKENIST, supra note 170, at 141.
364. Id.
365. See id.
366. See id. at 141–42.
367. Id. at 142.
weeks.\textsuperscript{369} Adverse decisions can be appealed to the Secretary of State for the Environment by the developer.\textsuperscript{370} In determining whether to require an EIA, the planning authorities will consult lists of project types, similar to the Annexes to the EC Directive, to determine whether an EIA is required or discretionary, with discretion being retained by the planning authority.\textsuperscript{371} If an EIA is completed in conjunction with a project, the planning authority is allowed sixteen weeks, instead of the usual eight, to consider a planning application.\textsuperscript{372}

Scholars recognized early on that the new environmental analysis requirements changed the way property professionals had to conduct business.\textsuperscript{373} "These [environmental aspects] are issues which the developer has until recently perhaps only reluctantly addressed at the eleventh hour, as a response to objections from pressure groups etc."\textsuperscript{374} But this would no longer be the case:

The balance is changing; government guidance, as well as the legislation, all prompts local planning authorities and other such agencies to undertake early investigation of these matters as they affect development proposals and to consider and deal with such issues in preparing their development plans. The clear message is that matters pertaining to the environment should be given consideration at every level of policy decision-making and decision-taking.\textsuperscript{375}

Scholars also pointed to a potential difficulty with the environmental assessment process in that local planning authorities might, in some cases, have a steep "scientific learning curve" because of a lack of resources to analyze complex scientific information.\textsuperscript{376}

This may become more of a problem at local authority decision-making level. Local authority resources have been trimmed back to a bare minimum. Funds are not likely to be available for them to buy in expertise of a specialist kind and authorities may not be able to afford to employ specialists of the kind

\begin{itemize}
\item[369.] Id. § 5(4).
\item[370.] Id. § 5(6)(b).
\item[371.] Id. § 4(5).
\item[372.] Id. § 16.
\item[373.] DEANESLY ET AL., supra note 232, at 8.
\item[374.] Id. at 9.
\item[375.] Id. at 9–10.
\item[376.] Id. at 10.
\end{itemize}
needed. This means that decisions may be taken by people who have scant knowledge of the relevant specialist area or who are relying on the opinions and hearsay evidence of other specialists working for other organisations or agencies.377

While the United Kingdom has adopted the requirements of the EC Directive, it is argued that "the general framework of English Law is inadequate to secure the aims of the Directive and that English legal culture is hostile to regulation of this kind, and indeed unsympathetic to environmental values."378 Statutory instruments implemented the EC Directive under authority of the European Communities Act of 1972, section 2(2).379 This, some argued, required:

a strict transfer of the provision of the directive without any additional material and has to be interpreted in the light of the Directive. There is therefore the possibility of a clash between the traditional narrow semantic approach of English lawyers to questions of legislative construction and the broader, purposive approach practiced in continental Europe and by the European Court.380

One source of the problem was that the EC Directive was drafted "in broad and vague terms," rather than in the precise kind of language necessary for successful legislation.381 "The [EC] Directive is particularly vague on matters of public participation and also upon the initial issues of scoping and screening which environmentalists regard as central to the enterprise of environmental impact assessment."382 As a result, there was a tendency for challenges to planning authority or central government decisions to improperly survive court challenges: "[t]he handful of cases brought by environmentalists against what they considered to be inadequate implementation of the Directive have all been unsuccessful."383

377. Id.
379. Id. at 204.
380. Id.
381. Id. at 205.
382. Id.
383. Id. at 203. The case of Twyford Parish Council v. Sec’y of State for the Env’t, 1992 J.E.L. 274, illustrates this phenomenon. Id. at 210.
Due to the tension between the EC Directive and its application in the United Kingdom, local authorities and the central government have too much discretion in implementing the EC Directive.\textsuperscript{384}

The courts have remained faithful to traditional concepts of deference to executive discretion, to preference for financial interests and to a literal reading of domestic rules without reference to the objectives of the Directive. They seem to have ignored the obligation to construe implementing measures purposively or at least to have assumed that this obligation does not apply to judicial review.\textsuperscript{385}

The above criticism was given prior to the 1997 amendments to the EC Directive,\textsuperscript{386} and arguably the 1997 amendments clarified and rendered obsolete even the most severe criticism.\textsuperscript{387} The 1997 amendments were required to take effect by March 14, 1999.\textsuperscript{388} In addition, a number of European Court of Justice cases decided subsequent to these criticisms, but prior to the 1997 amendments, had already indicated that the U.K. courts would be forced to follow the EC Directive despite the courts' reading of domestic regulations.\textsuperscript{389} In the \textit{Bavarian Highway} case,\textsuperscript{390} for instance, the European Court ruled that the lack of German regulations did not exempt any project from the requirements of the Environmental Assessment Directive.\textsuperscript{391} This brings into question the assertion that U.K. courts could continue to apply only domestic law without consulting the EC Directive.\textsuperscript{392} Furthermore, in \textit{Commission v. Belgium}, the court found that Belgium had not properly incorporated the EC Directive in

\begin{itemize}
  \item \textsuperscript{384} \textit{Id.} at 205.
  \item \textsuperscript{385} \textit{Id.} at 219.
  \item \textsuperscript{387} Implementation of New EA Rules Begins, ENDS REPORT 289, Feb. 1999, at 47.
  \item \textsuperscript{388} \textit{Id.} at 46.
  \item \textsuperscript{390} Case C-396/92, Bund Naturschutz in Bayern eV v. Freistaat Bayern, 1994 E.C.R. I-3717.
  \item \textsuperscript{391} \textit{Id.} at I-3734.
  \item \textsuperscript{392} See Alder, supra note 378, at 203.
\end{itemize}
several respects. For instance, Belgium failed to require mandatory environmental assessment for nuclear power plants; failed to consider transboundary effects; and failed to establish national thresholds for Annex II projects (allowing exclusion of whole categories of projects).

IV. ENVIRONMENTAL INFORMATION REQUIREMENTS IN THE UNITED STATES

A. Background

In the United States, there is no specific environmental information legislation like that adopted in the United Kingdom with the Environmental Information Regulations of 1992. This is largely because there is no need. The environmental community, including environmental interest groups, makes liberal use of the Freedom of Information Act of 1966 (FOIA) to obtain federal environmental information from the federal government, and state environmental information from similar state counterparts. In addition, the Sunshine Act requires that meetings of all federal "commissions or other formal agencies headed by more than one person . . . be open to the public." The Sunshine Act has limited application, however, because it only applies to agencies headed by more than one person. This excludes some major U.S. agencies that have environmental protection roles or environmental impacts, such as the Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service, the military services, and the Department of Energy, all of which are headed by single individuals. Nevertheless, there are numerous boards and commissions that do

394. Id. at *8, *15, *21-22.
396. 5 U.S.C. § 552 (1994). The Freedom of Information Act will be discussed in greater detail in Part V.A. In general, however, the Act creates a presumption that government documents are available to the public unless certain exemptions or exceptions apply. See discussion infra Part V.A.
399. See id.
have some impact on the environment. For example, there are several federally approved river compact commissions in the western United States.\(^{401}\) With few exceptions, covered agencies must provide the public with notice of the time, place, and subject of any such meeting at least one week in advance.\(^{402}\) Arguably, the general satisfaction with the statutes and practices governing the release of environmental information in the United States is the reason for the lack of recent scholarly literature available criticizing the accessibility of environmental information in the United States.

Specific environmental statutes impose duties on governmental bodies to provide environmental information to the public that goes beyond simply answering FOIA requests.\(^{403}\) Government agencies must maintain databases of information that are analogous to the United Kingdom's experience with pollution registers.\(^{404}\) Under the FOIA, individual states must meet the record-keeping and public access requirements of the federal statutes and must be in compliance with federal environmental law.\(^{405}\) Many of the major U.S. environmental statutes have their own industry reporting requirements.\(^{406}\) The laws themselves require holders of environmental permits to collect certain types of environmental information pertaining to monitoring compliance with, and identifying and enforcing violations of, environmental laws.\(^{407}\) Permit holders must submit this information to the government for public disclosure.\(^{408}\) Such records are maintained by state regulating offices and are accessible on demand by

---

402. N. AM. COMM'N FOR ENVTL. COOPERATION, supra note 398, § 5.1.
403. Id.
404. See id. § 5.2 (discussing the requirements for the reporting of environmental information for industry).
406. For examples of such requirements, see 42 U.S.C. §§ 7414, 7542, 7651(k), 7671(b); 33 U.S.C. § 1318; and Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9604(b) (1994). It should be also noted that the Administrative Procedures Act, 5 U.S.C. §§ 551–59, 701–06, gives the public an opportunity to participate in the federal agency rule-making process. 5 U.S.C. § 553 (1994). Therefore, the public has an opportunity to comment or contest any regulation a federal environmental regulator may adopt prior to its adoption. Id.
408. 33 U.S.C. § 1318(a); Robbins, supra note 75, at 29.
members of the public.\textsuperscript{409} The EPA, in turn, maintains a national database by compiling all the environmental data provided by the states.\textsuperscript{410} Under the Clean Water Act of 1977 (CWA), for instance, discharge monitoring reports and other information submitted to environmental regulators “shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that...[the information]... (other than effluent data),... if made public would divulge methods or processes entitled to protection as trade secrets of such person ... .”\textsuperscript{411} Thus, the burden of proof is on the person submitting the information to show that it constitutes a trade secret. Otherwise, under no circumstances may the public be denied the actual effluent data for a plant or facility.\textsuperscript{412} Much of the information on environmental quality in local communities is available on the EPA’s Internet Web site, which, according to the EPA, receives over forty million contacts from members of the public per month.\textsuperscript{413}

In addition, similar to many U.K. environmental statutes, most U.S. statutes require that the public be notified before environmental regulators take certain actions, such as granting or denying an environmental permit.\textsuperscript{414} The Resource Conservation and Recovery Act of 1976 (RCRA), for instance, requires that notice of any proposed permit be published in a local newspaper of general circulation, and further requires that the public be allowed to comment and attend a public hearing.\textsuperscript{415} Under such procedures, the public is more than a mere spectator. The EPA or state regulatory body must take into account the comments of the public in rendering its decision to grant or deny a permit.\textsuperscript{416} Members of the public may also appeal initial decisions of the

\textsuperscript{409} 33 U.S.C. § 1318(b); Robbins, supra note 75, at 29. Many such records are available electronically through the Internet. A simple computer search can now reveal, for instance, the names of every Clean Water Act permit holder in a locality and its compliance status.

\textsuperscript{410} This database may be accessed at EPA regional libraries or via the EPA Web site at http://www.epa.gov.

\textsuperscript{411} 33 U.S.C. § 1318(b)(2).

\textsuperscript{412} Id.

\textsuperscript{413} Id.

\textsuperscript{414} See, e.g., 42 U.S.C. § 6974(b) (1994).

\textsuperscript{415} Id.

\textsuperscript{416} Id.
permitting authorities. Under the CWA, for instance, any “interested person,” including members of the public, may appeal the terms of a proposed permit under that statute's National Pollutant Discharge Elimination System.

As a result of the constant reporting of environmental information under environmental statutes and the openness of permitting processes, the United States has a system that is available for public access and participation. Regarding property contamination (or “brown fields”) cases, for instance, real estate lawyers have found that “much of the work to be done in establishing both liability and damages can be derived from public records.” In 1990, “[i]n most cases [involving contaminated land], the information is available for inspection and copying with a telephone call or an over-the-counter request.” Information from government agencies can include such information as geology and groundwater hydrology for a locality; local groundwater conditions; existing site evaluation and spill reports for a specific property and nearby properties; chemical inventories of previous owners; environmental permits of present and previous landowners and compliance histories; and building use permits of previous owners or occupiers. Such information can provide a potential buyer with an excellent profile of a property’s potential for contamination, without requiring the buyer to proceed with an expensive site investigation or environmental audit of the property.

---

419. Robert C. Thompson, Public Records in Property Contamination Cases, THE PRAC. REAL EST. LAW., Nov. 1990, at 77. Real estate lawyers are particularly interested in accessing information on contaminated properties because of strict joint and several liability imposed by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), under which an unwitting landowner who has contributed nothing to contamination at a site, may be held responsible for the contamination caused by previous owners. Id. at 78–79.
420. Id. at 78.
421. Id. at 79–82.
422. See id. at 77–78, 84. For example, if a shopping mall previously housed a dry cleaning business, the buyer could anticipate that an environmental audit would most likely reveal some contamination due to solvents used in the operation of the business.
B. The Emergency Planning and Community Right-to-Know Act

In addition to the information that environmental regulators are required to make available under individual environmental statutes, the U.S. government has also enacted broad "right-to-know" laws that require the disclosure of certain routine information not necessarily related to monitoring, enforcing or obtaining permits. The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) is at the forefront of this genre of legislation. The EPCRA's basic purpose is comparable to that of the European Community's "Seveso Directive" and its U.K. counterparts.

Under EPCRA, facilities with significant quantities of "extremely hazardous substances" on site are required to notify local emergency planning officials (Local Emergency Planning Committees or LEPCs) and must designate a representative to

---

424. N. AM. COMM’N FOR ENVTL. COOPERATION, supra note 398, § 5.52.
425. 42 U.S.C. §§ 11001–11050. The EPCRA is also known as Title III of the Superfund Amendment and Reauthorization Act of 1986 (SARA) because of its codification within the code sections applying to what is commonly known as the "Superfund Act of 1980." See 42 U.S.C. §§ 11046, 9607, references in text.
426. N. AM. COMM’N FOR ENVTL. COOPERATION, supra note 398, § 5.52 (stating that the toxic release inventory is "foremost" among the enactments). The toxic release inventory (TRI) is a portion of the EPCRA. 42 U.S.C. §§ 11021–11023.
427. Council Directive 96/82/EC of 9 December 1996 on the Control of Major-Accident Hazard Involving Dangerous Substances, 1997 O.J. (L10) 13 (superseding Council Directive 82/501/EEC of June 1982); 42 U.S.C. §§ 11001–11050. One notable difference between the EPCRA and the Seveso Directive is that the EPCRA requires compliance by military installations and establishments while the Seveso Directive specifically exempts military establishments. See 42 U.S.C. §§ 11002(b), 11049(4) (describing the facilities covered by the Act); Council Directive 96/82/EC, at 15. Another difference is that the EPCRA is more limiting than the Seveso Directive as to what information must be provided to the public. The EPCRA exempts only "trade secrets," which is narrowly limited to information that has not been disclosed to anyone other than the local emergency planning committee or government employees; that the provider of the information has taken measures to protect the confidentiality of the information; that the information is not otherwise required to be disclosed under other law; that disclosure of the information would cause substantial competitive harm to the provider of the information; and that the chemical identity involved in the information is "not readily discoverable through reverse engineering." 42 U.S.C. § 11042(a)–(b). The exemptions to disclosure under the Seveso Directive are broader and include confidentiality for international relations and national defense, public security, and commercial and industrial secrets. Council Directive 96/82/EC, at 21–22. Commercial and industrial secrets are not specifically defined. Council Directive 96/82/EC, at 22.
participate in local emergency planning activities as an emergency response coordinator. Facilities that have more than 10,000 pounds of any "hazardous chemical" on site must submit copies of material safety data sheets (MSDSs) for each chemical, or a listing of all MSDSs on site to the LEPC and to state emergency response officials (State Emergency Response Commissions or SERCs). Many large industrial facilities must also submit an annual inventory of hazardous chemicals. Once this data is submitted to the LEPCs, the LEPCs must make available to the public both the data and the emergency response plans that are supposed to incorporate and address the potential hazards posed by the hazardous chemical data collected. Under EPCRA, each LEPC "shall annually publish a notice in local newspapers that the emergency response plan, material safety data sheets, and inventory forms have been submitted... [and]... that members of the public who wish to review any such plan, sheet, form, or followup notice may do so at the location designated... ."

In addition to the routine planning requirements of EPCRA, a facility must report information about certain spills or releases to government authorities, which will be maintained as part of a register. Such information must be reported if a facility: (1) is involved in manufacturing; (2) employs more than ten workers; (3) manufactures or processes more than 25,000 pounds of the chemical or uses more than 10,000 pounds during the year; and (4) the chemical is listed among some 350 specific toxic chemicals or chemical categories. The release forms "are intended to provide information to [f]ederal, [s]tate, and local governments and the public, including citizens of communities surrounding covered facilities." Such information includes types and amounts of pollutants spilled or released, and results of emergency response efforts to clean up the spills or releases. Each state must thereafter maintain a listing, known as the Toxic Release

429. Id. §§ 355.20–355.25.
430. Id. §§ 370.20(d), 370.25.
432. Id. § 11044(b).
433. Id. §§ 11023(a), 11023(h).
434. Id. §§ 11023(b)(1)(A), 11023(c), 11023(f).
435. Id. § 11023(h).
436. Id. § 11023(g).
Inventory (TRI), of all such statewide releases by locality. As with other public information statutes in the United States and the United Kingdom, there are exemptions from TRI reporting. Such exemptions include trade secret information, chemicals used in laboratories, or chemicals present in the structure of a facility or in an article of manufacture.

C. Environmental Impact Assessment

The main environmental planning statute in the United States, and arguably the most significant of all environmental statutes, is the National Environmental Policy Act (NEPA), which dates back to 1969. Public participation is a major component of the statute. The NEPA requires federal agencies to consider the impact of an action on the environment when taking any "major [f]ederal actions significantly affecting the quality of the human environment." The NEPA is the U.S. government's most definitive statement of environmental policy. Among the stated policy objectives of NEPA are "to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment" and to "restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." Another goal of NEPA is to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment."

437. Id. §§ 11023(h), 11044(a).
438. N. AM. COMM. FOR ENVTL. COOPERATION, supra note 398, at § 5.2.
440. See id.
441. Id. §§ 4321–4370(a).
445. Id. § 1500.2(e)–(f).
446. Id. § 1500.2(d).
The implementing regulations for NEPA, which were developed by the Council on Environmental Quality (CEQ), establish an intricate set of rules for conducting the type of environmental analysis that is required for a given action or project. Federal agencies have further elaborated on those requirements in their own regulations. The NEPA does not, however, in contrast to its European or U.K. counterparts, require private interests to undergo the same process unless government action is involved.

Each federal agency must prepare different types of NEPA documentation, depending on the level of environmental impact that is possible due to a proposed action or activity. If an action definitely will not have an effect on the environment, little to no NEPA documentation is required. Each federal agency also has a number of "categorical exclusions," for which NEPA environmental documentation is not required. These "categorical exclusions" consist of routine actions, such as maintenance and road repair, that the participating agencies have determined do not affect the environment either as an individual project, or when considered in light of other projects. Under the CEQ regulations, use of such categorical exclusions is encouraged for proposals that obviously pose no threat to the environment.

If an action or project could potentially cause significant environmental impact, the agency must complete an environmental assessment (EA). An EA will determine whether significant environmental impacts will in fact occur as a result of the action or project. The EA can assist the agency in determining whether to conduct an environmental impact statement (EIS), but an EA is not a prerequisite to an EIS. If

---

447. Id. §§ 1500–1508.
449. See Tilleman, supra note 442, at 372–73.
450. See 40 C.F.R. § 1500.2 (describing the policy that each federal agency shall follow). Subsections (a) through (f) identify several requirements, including required documentation. Id. §§ 1500.2(a)–(f).
451. Id. §§ 1508.9, 1508.13.
452. Id. § 1508.4.
453. Id.
454. Id. § 1500.4(p).
455. Id. § 1501.3(a).
456. Id. § 1508.9(a)(1).
457. Id. § 1501.3.
an EA is completed and it results in a "finding of no significant impact" to the environment, then an EIS is not required.\textsuperscript{458} If an agency action or project will significantly affect the quality of the environment, the agency must conduct an EIS, which is the highest level of environmental analysis.\textsuperscript{459}

Precisely what projects constitute "major federal actions" that will have an affect on the "environment," however, can be a matter of contention.\textsuperscript{460} "Major federal actions" can include rule-making or licensing decisions that can affect the environment indirectly.\textsuperscript{461} Such actions may also include transferring ownership of property, new management and operational concepts, research and development activities, and military material development or acquisition activities.\textsuperscript{462}

Thus, whether a proposed project or action requires an EIS is not always obvious. Projects found to affect the environment have included a proposed low-income housing project on Manhattan's Upper West Side,\textsuperscript{463} and a proposed jail adjacent to the federal courthouse in New York City.\textsuperscript{464} In considering an environmental challenge to the proposed federal jail in New York City, the U.S. Court of Appeals for the Second Circuit determined that a federal agency should consider at least two factors when analyzing the environmental impacts of a proposed project:

\begin{itemize}
  \item (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and
  \item (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.\textsuperscript{465}
\end{itemize}

During the planning and review of an EA or an EIS, the federal agencies must be wary of project proponents who attempt "segmentation" or "piecemealing," which is the practice of dividing a single action "into component parts, each involving

\begin{itemize}
  \item \textsuperscript{458} \textit{Id.} § 1508.13.
  \item \textsuperscript{459} 42 U.S.C. § 4332(2)(C)(i) (1994).
  \item \textsuperscript{460} Tilleman, \textit{supra} note 442, at 421–22; 40 C.F.R. § 1508.18 (1999) (defining "major federal actions").
  \item \textsuperscript{461} \textit{Id.} § 1508.18.
  \item \textsuperscript{462} \textit{See} AR 200–2, 32 C.F.R. § 651.8 (1998).
  \item \textsuperscript{463} Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).
  \item \textsuperscript{464} Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972).
  \item \textsuperscript{465} Hanly v. Kleindienst, 471 F.2d 823, 826, 830–31 (2d Cir. 1972).
\end{itemize}
actions with less significant environmental effects." "Segmentation" or "piecemealing" would occur if an agency analyzed different phases of a single project as separate projects in separate EAs to avoid conducting an EIS on the total project, thus escaping the more stringent environmental review and public scrutiny that the higher level EIS document generally requires.

Each federal agency must apply NEPA during the planning process prior to making any project decisions. If an agency makes a decision prior to applying NEPA and uses an EA or EIS for a post hoc rationalization of its decision, the agency's action is illegal and vulnerable to a lawsuit. Under the CEQ regulations, an agency cannot take action on a project that will "limit the choice of reasonable alternatives." Thus, any action on a project that would predispose an agency toward a particular decision, such as awarding a contract to begin preparation work, is illegal.

Consistent with the public participation goal of NEPA, public consultation is an important part of the NEPA process. At the very beginning of the EIS process, for instance, notice must be given to all other agencies and concerned individuals about the proposal. This is done through an announcement in the Federal Register, and followed up with more specifically targeted invitations to agencies and individuals, including project opponents. After the public is invited to participate in "scoping" procedures by providing its input on the nature of the proposed action or activity, the EIS will go through two stages. First, the agency releases a public draft on which the public may comment about the environmental consequences of the proposal. In issuing a final EIS, the agency must "assess and consider comments both individually and collectively."

467. Id.
469. See id.
471. See id.
472. Id. § 1501.7.
473. Id.
474. Id. §1501.7.
475. Id. §§ 1503.1(a)(4), 1503.4(a).
476. Id. § 1503.1(a)(4).
477. Id. § 1503.4(a).
The CEQ regulations require a high degree of public involvement. Agencies must, for instance, "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." Agencies must also "[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected." Thus, agencies must make public the notice of availability of an EA, even when the agency determines that there would be no significant impact to the environment. Agencies must also sponsor or hold public hearings "whenever appropriate or in accordance with statutory requirements applicable to the agency."

The NEPA does not apply to the private sector. It does not apply to separate states either, although at least twenty-seven states now have environmental impact assessment programs for analyzing state projects. Some states hold more faithfully to NEPA than others. Although NEPA does not apply to states and private entities, it does apply when some federal decision-making is involved, such as the granting of a lease, license, or right-of-way, or allowing the issuance of a permit under one of the environmental statutes. For example, constructing a dock or pier adjacent to a river or a lake would require a permit from the U.S. Army Corps of Engineers to be in compliance with the Rivers and Harbors Act of 1910. The Corps would require that an EIS be done prior to making its permit decision. Additionally, projects that include some portion of the project on federal land, such as a long distance pipeline, would require NEPA documentation, because location of the federal pipeline on federal property would require a federal decision, "which may have an impact on man's environment."

478. Id. § 1506.6(a).
479. Id. § 1506.6(b).
480. See id. §§ 1506.6(b), 1508.13.
481. Id. § 1506.6(c).
482. See id. § 1500.1(a) (indicating that NEPA involves federal agencies); Tilleman, supra note 442, at 372 (noting that NEPA applies to "federal actions").
483. Tilleman, supra note 442, at 365.
484. Id. at 365–66.
485. Id. at 372–73.
486. Id. at 372.
487. Id.
488. Id.
European Community environmental planning requirements by themselves differ in several ways from U.S. NEPA requirements. The most notable difference is the fact that the EC Directive applies to both public and private undertakings, while the NEPA applies only to "major 'federal actions.'" Non-federal projects in the United States may require NEPA documentation, however, when the projects require federal approval, such as a license or permit.

Another significant difference between the two policies is with regard to the types of actions that require environmental assessment under the European and U.S. regimes. The U.S. NEPA does not make the neat distinctions that the EC Directive does in categorizing projects as "Annex I" and "Annex II." Rather, the U.S. NEPA relies on a determination that an action might cause a significant effect to the environment as the sole trigger for environmental assessment. The 1997 amendment to the EC Directive made it more like its U.S. counterpart by establishing the screening criteria for determining when Annex II projects require environmental assessment.

While the EC Directive excludes national defense activities from its application, the U.S. NEPA does not. The NEPA does, however, make public disclosure of NEPA documents subordinate to the public release rules of the FOIA. While NEPA documentation for classified military projects can be kept secret, the environmental assessment must still be performed. That documentation is subject to in camera review, as provided by the FOIA. While some national defense environmental assessment information can be denied to the public under NEPA, the EC Directive does not provide a blanket exemption.

489. For a discussion of the differences between the European Community's and the United States' requirements, see id. at 372–76.
490. Id. at 372–73.
491. Id. at 372.
492. Id. at 373.
494. See discussion supra Part II.B.
495. Id.
D. State Governments

Most federal environmental laws adopted by U.S. states must be at least as stringent as the federal versions. If not, the EPA retains authority to withdraw approval of such state programs. More than half of the state governments in the United States have attempted to rectify shortcomings in environmental planning by adopting environmental planning statutes at the state level. Massachusetts, for instance, adopted the Massachusetts Environmental Policy Act (MEPA). The law applies to all state agencies, but not to municipal or regional authorities unless they are "a municipal redevelopment agency" under state law. The purpose of the statute is

[T]o provide meaningful opportunities for public review of the potential environmental impacts of Projects for which Agency Action is required, and to assist each Agency in using . . . all feasible means to avoid Damage to the environment or, to the extent Damage to the Environment cannot be avoided, to minimize and mitigate Damage to the Environment to the maximum extent practicable. “Agency actions” include not only projects undertaken by state agencies, but also private undertakings that require some state agency’s authorization or approval.

The MEPA operates similarly to NEPA. It requires proponents of projects to prepare an Environmental Impact Report (EIR) for projects that may cause damage to the environment. For each project, factors such as size of the project, the location, the effects on transportation, and the effects on natural resources such as air and water, will be considered in light of their effects on the environment. If certain thresholds

500. See, e.g., id. § 1342(c). The NEPA is an exception in that it only applies to federal government agencies—it does not apply to state and local governments. See id. § 1500.1(a) (indicating that NEPA involves federal agencies); Tilleman, supra note 442, at 372 (noting that NEPA applies to “federal actions”).
501. See Tilleman, supra note 442, at 365.
503. MASS. REGS. CODE tit. 301, § 11.02(2) (1996).
504. Id. § 11.01(1).
505. Id. § 11.02(2).
506. Id. § 11.03.
507. Id. §§ 11.03(1)–(12).
are surpassed, the project proponent must prepare an EIR.\textsuperscript{508} Such a report must contain basic information including a summary and description of the project, a description of the existing environment and possible alternatives to the project, and an assessment of the impacts of the project on the environment.\textsuperscript{509} The Secretary of Environmental Affairs must then make the EIR available to the public.\textsuperscript{510} The public has thirty days to comment on the proposed project unless an extension is granted.\textsuperscript{511} The agency must then respond to any public comments that are within the scope of the subject matter before making a final decision concerning the proposed project.\textsuperscript{512} In some cases, the Secretary may determine that issuance of a single EIR (analogous to an EA in the federal process) is sufficient to fully consider a project, although ordinarily, both a draft EIR and final EIR (analogous to the federal EIS) are required.\textsuperscript{513}

V. ANALYSIS OF ACCESS TO ENVIRONMENTAL INFORMATION

In some respects, it is not easy to compare the laws regarding freedom of public access to information on the environment in the United States with those laws of the United Kingdom. The United States, for instance, does not have an all-encompassing law requiring access specifically to all types of environmental information. Rather, interested members of the public in the United States must generally rely on the broad provisions of the Freedom of Information Act.\textsuperscript{514} In contrast, the United Kingdom does have the authority to grant public access to specific environmental information.\textsuperscript{515} Nevertheless, by isolating the elements of the various freedom of information regimes in the United States and the United Kingdom, a rough comparison of the laws of the two nations is possible. The major points of departure between the United States’ and United Kingdom’s information regimes pertain to the applicability of pertinent laws and regulations; the relative accessibility to information; and the time

\textsuperscript{508} Id. § 11.07.
\textsuperscript{509} Id. § 11.07(6).
\textsuperscript{510} Id. § 11.08(1).
\textsuperscript{511} Id. § 11.08(4).
\textsuperscript{512} Id. § 11.07(1).
\textsuperscript{513} Id. § 11.07(6)(1).
\textsuperscript{515} Environmental Information Regulations, (1992) SI 1992/3240 (Eng.).
within which the government must reply to requests by the public for environmental information. 516

A. The United Kingdom's Environmental Information Regulations of 1992 and the United States' FOIA

1. Applicability

Although European law has had an impact on laws governing public access to environmental information in the United Kingdom, the United Kingdom has made substantial progress toward increasing government openness on its own. The requirements of Environmental Information Regulations of 1992 (1992 Regulations), 517 however, were a direct response to the adoption of EC Directive 90/313. 518 Several aspects of the 1992 Regulations have been sharply criticized. Criticisms relate to the definitions used within the 1992 Regulations or the wording itself. 519 For instance, to obtain information under the Regulations, the information must "relate to the environment." 520 This definition, as all-inclusive as it appears to be, gives rise to the possibility that information "related to the environment" could be substantially different in the eyes of the public than it is in the eyes of the agencies maintaining the records. Although the court in Ibstock 521 helped clarify this discrepancy, the definition of this term remains a potential problem. 522

In contrast, by relying entirely on the FOIA, U.S. environmentalists are not required to show that information relates to the environment. This is because the FOIA covers all government-held information, regardless of whether it relates to the environment, unless it falls within one of the nine

516. See discussion infra Part VIII.A.
518. Purdue, supra note 178, at 254.
519. See Birtles, supra note 92, at 408.
520. Environmental Information Regulations, reg. 2, § (1)(a). The term "environment" is defined somewhat more precisely as information about "(a) the state of any water or air, the state of any flora or fauna, the state of any soil or the state of any natural site or other land; (b) any activities or measures ... which adversely affect anything mentioned in subparagraph (a) above or are likely adversely affect anything so mentioned" or measures to protect the environment. Id. § 2(2).
522. Id.
exemptions. With stronger freedom of information legislation in place in the United Kingdom, there should be little reason to rely on the 1992 Regulations and the EC Directive. Any request for information, regardless of its substance, requires the government to respond unless certain exemptions apply—a system very similar to that provided for in the United States. Because the FOIA doesn't allow for quibbling over definitions of such words as "environmental information," it provides a distinct advantage to members of the public compared to the 1992 Regulations. The United Kingdom's passage of new freedom of information legislation, however, will decidedly improve the public's access to information, environmental or otherwise.

The FOIA applies only to the federal government of the United States, while the 1992 Regulations apply to multiple levels of government and public authorities, as well as to some private bodies. The limits of the FOIA are largely a product of the Tenth Amendment to the U.S. Constitution, which reserves power not expressly granted to the federal government to the states. Every U.S. state, however, has adopted some form of a freedom of information or public information act that emulates, to varying degrees, the federal statute. In this area, the United Kingdom's Regulations are more advantageous to the public than is the United States' FOIA.

Another issue concerns the exceptions established in the 1992 Regulations. An agency can, for instance, withhold information regarding international relations or national defense at its discretion. In the United States, however, while such information can be withheld under a FOIA exemption, this practice is tightly restricted by the provisions of the FOIA. Such information can only be withheld if it meets very strict requirements for classification as "secret," as mandated by an Executive Order. Information regarding national defense and

---

524. See id.
526. U.S. CONST. amend. X.
international relations in the United States is therefore normally accessible under the FOIA.\textsuperscript{530}

2. Accessibility

In general, commentators believe that the public has not made widespread use of the 1992 Regulations.\textsuperscript{531} Commentators have observed that the U.K. government took little action to publicize the rights created under the 1992 Regulations immediately after their implementation.\textsuperscript{532} With the public relatively unaware of the Regulations, the potential accessibility to information created under the Regulations has been undermined. These critical observations, however, were made only shortly after the provisions were implemented. Public awareness of the 1992 Regulations is likely to increase.\textsuperscript{533}

In the United States, the advent of the FOIA in 1966 brought little initial fanfare.\textsuperscript{534} The FOIA was the result of pressure from within the nation, however, and not a reaction to requirements imposed from the outside, as were the United Kingdom's 1992 Regulations.\textsuperscript{535} Major supporters of FOIA legislation included public interest groups and members of the news media.\textsuperscript{536} It did not, therefore, take long for these entities to spread the word about the new legislation.\textsuperscript{537} Today, the FOIA is a familiar weapon in the arsenal of environmental public interest groups and interested individuals.\textsuperscript{538}

Critics believe that the imprecise language of the 1992 Regulations has detracted from their effectiveness.\textsuperscript{539} Under the 1992 Regulations, for instance, authorities may deny a request for information if it is "manifestly unreasonable or is formulated in

\textsuperscript{531}  Birtles, \textit{supra} note 92, at 408.
\textsuperscript{532}  \textit{Id}.
\textsuperscript{533}  Rowan-Robinson et al., \textit{supra} note 1, at 33–34.
\textsuperscript{534}  \textit{See infra} Part VI.A.
\textsuperscript{535}  \textit{See} Birtles, \textit{supra} note 92, at 408 (discussing the effect of EC law on the application and construction of the Regulations).
\textsuperscript{537}  \textit{See id}.
\textsuperscript{538}  The author, as a government attorney for over nine years, has seen numerous environmental cases built upon evidence obtained from government records through the FOIA process.
\textsuperscript{539}  \textit{See} Birtles, \textit{supra} note 92, at 618.
too general a manner." Critic say that this provision gives too much discretion to authorities to determine what is "manifestly unreasonable." This provision, however, is similar to language contained in the FOIA, under which requesters of information must "reasonably describe the records." With a large number of such requests, it is in the interest of government efficiency that employees not spend "countless numbers of personnel hours seeking needles in bureaucratic haystacks."

3. Time Limits

The amount of time it may take to obtain information from the government relates closely to accessibility. The time limits given under the 1992 Regulations are less stringent than those of the FOIA. In many cases, particularly involving environmental and public health matters, timing may be critical to the ability of members of the public to force the resolution of a problem. While the 1992 Regulations allow authorities two months to respond to a request, the FOIA allows only twenty working days. The FOIA also provides for expedited processing when failure to obtain records quickly will pose an imminent threat to the life or safety of an individual. Regarding time limits, the United States' FOIA clearly provides faster accessibility to environmental information than the United Kingdom's 1992 Regulations.

B. Public Registers and Public Records

1. Applicability

The public registers maintained in the United Kingdom and the public databases established under U.S. environmental laws serve a similar purpose in both nations. Unlike the FOIA, which applies only to federal agencies, the U.S. EPA retains authority
over state and local authorities, which are required to follow the public accessibility mandates of the pertinent federal environmental laws or the federal government will retain primary authority to regulate environmental laws itself.\textsuperscript{549} As a result, information access requirements of particular environmental statutes in the United States are as effective as their counterparts in the United Kingdom in requiring substantial openness at all levels of government.

2. Accessibility

In both the United Kingdom and the United States, the requirement to maintain public registers is derived from various individual environmental statutes, such as the United Kingdom's COPA\textsuperscript{550} and the Environment and Safety Information Act of 1988,\textsuperscript{551} and the United States' Resource Conservation and Recovery Act,\textsuperscript{552} Clean Water Act,\textsuperscript{553} and Clean Air Act.\textsuperscript{554} Both the United Kingdom and the United States do not require industries to report information pertaining to their trade secrets.\textsuperscript{555} Arguably, it is in the national interest to protect the trade secrets of domestic industries from public use, rather than make them accessible to foreign industries, who would have the same access as each nation's own public. For domestic competitors, intellectual property law would deter improper uses of commercial information obtained from the government, but international competitors would not necessarily be under the same restrictions. Thus, this exemption may encourage cooperation with, rather than resistance to, the self-reporting requirements of many of the environmental statutes. While use of the trade secret or commercial confidentiality exemptions in both nations is supposed to be severely limited, denial of access to information under the guise of trade secrets is still a limitation on accessibility. In the United States, the burden of showing that pertinent environmental information constitutes a trade secret is placed firmly on the

\textsuperscript{549} See supra Part I.C.

\textsuperscript{550} Control of Pollution Act (COPA), 1974, c. 40 (Eng.).

\textsuperscript{551} Environment and Safety Information Act, 1988, c. 30 (Eng.).


\textsuperscript{554} Clean Air Act, 42 U.S.C. § 7414 (1994).

\textsuperscript{555} See 33 U.S.C. § 1318(b); 42 U.S.C. § 7414(c); Control of Pollution Act, c. 40, § 94(1); Environmental Safety and Information Act, c. 30 § 4(1) (Eng.).
shoulders of the party providing the information. In the United Kingdom, information is deemed commercially confidential if it "would prejudice to an unreasonable degree the commercial interests of that individual or person." Commentators in the United Kingdom have criticized their nation's public register system because of a perceived lack of use by the public. Some of the criticism leveled against the system of registers, however, is undeserved. The relatively low use of the registers by the public does not necessarily mean that the registers themselves are ineffective—the public may just be uninterested. Furthermore, the public authorities themselves may be the problem. Those who are supposed to maintain the public registers often do not comply with the regulations. An authority's failure to maintain a public register properly could be a significant hindrance to members of the public who would access the register.

Lack of publicity may be another contributing factor to the lack of public awareness of the registers in the United Kingdom. The public register system was initiated over time, with little advertisement or publicity. Therefore, it is possible that the public did not know about the system, as it might have if the registers were created all at one time. In the United States, publicity is less of a problem, and therefore less of an obstacle to accessibility. Under the EPCRA, for instance, local emergency authorities are required to annually publicize the availability of hazardous chemical data. In addition, environmental statutes require authorities to advertise environmental permit applications. This puts the public on notice that some commercial or governmental facility has requested a permit or permit modification, and explains to the public how it can get a copy of the proposed permit for comment, and how to request a public hearing. The United States and the United Kingdom both recognize the need to publicize their environmental information

556. See, e.g., 33 U.S.C. § 1318(b).
557. Environmental Protection Act, 1990, c. 43 § 22(11) (Eng.).
558. See, e.g., Burton, supra note 182, at 193–94.
559. BELL, supra note 7, at 175.
560. BAKKENIST, supra note 170, at 25.
programs, and both countries now use the Internet as a way of so doing.564

C. Public Participation in Environmental Planning

1. Applicability

There are numerous differences between EC Directive 85/337, as incorporated in the Town and Country Planning (Assessment of Environmental Effects) Regulations of 1988 (1988 Regulations),565 and the U.S. NEPA. The most obvious difference is that the EC Directive and the United Kingdom’s regulations apply to private as well as government actions.566 In the United States, however, NEPA only applies to actions related to the federal government.567 Therefore, unless some federal decision or approval is involved, NEPA does not apply.568 One of the various state equivalents of NEPA might apply, however, to projects out of NEPA’s reach. One example of a reasonably effective state environmental planning statute is the Massachusetts Environmental Policy Act.569

Communities in the United States generally have planning and zoning regulations that developers observe.570 Such regulations are enforced by public bodies, so members of the public usually have the ability to observe the proceedings and decisions of the boards or committees involved.571 Depending on the level of interest of the boards or committees that carry out those regulations, environmental impacts might be a consideration in the zoning approval process.572 In addition, if an action requires any kind of approval by environmental regulators, such as granting

564. For examples of Internet sources, see http://www.environment.detr.gov.uk/index.htm (U.K. information), and http://www.epa.gov (U.S. information).
565. See, e.g., supra Part II.B.
568. Tilleman, supra note 442, at 372.
569. MASS. GEN. LAWS ANN. ch. 30, §§ 61-62H (West 2000); see discussion supra Part IV.D.
570. See, e.g., MASS. GEN LAWS ANN. ch. 30, § 61.
572. MASS GEN. LAWS ANN. ch. 30, § 61.
or denying a permit, the process would mandate an open public consideration of the potential environmental effects of the action.\textsuperscript{573} Such proposed actions could include permits for new landfills, air pollution discharges, wastewater treatment, or hazardous waste storage.\textsuperscript{574} If a proposed action does not require one of these permits, however, and it takes place in a jurisdiction without an environmentally-interested and active planning authority, the public may not have an opportunity to review the environmental consequences of the proposed action.\textsuperscript{575} Given the above circumstances, the United Kingdom’s environmental impact assessment provides the public with a clear advantage over its U.S. counterpart because it applies in both the public and private sectors.

Another distinction between the European environmental impact system, as adopted in the United Kingdom, and the U.S. system, is the EC Directive’s categorization of Annex I and Annex II projects.\textsuperscript{576} The U.S. statute does not formally categorize projects by the degree of environmental assessment that they require. Instead, NEPA relies on an agency’s determination as to whether an action might have an impact on the environment.\textsuperscript{577} The U.S. government decision-makers, after being hit with countless NEPA lawsuits, are reluctant to take action without the undertaking of some form of environmental study.\textsuperscript{578} As a result, the U.S. government generates environmental documents and invites public participation on more types of activities than those listed as Annex I or Annex II projects. Even the U.S. military routinely goes through the painstaking environmental impact study process and holds public hearings for such activities as training exercises.\textsuperscript{579} The NEPA has had some problems regarding government efficiency in decision-making. From the standpoint of making government action open and accessible to the public, however, the U.S. system is more desirable than its

\textsuperscript{573} See, e.g., 42 U.S.C. § 6974(b).
\textsuperscript{574} See generally MASS GEN. LAWS ANN. ch. 30, § 61.
\textsuperscript{575} See 42 U.S.C. § 6974(b).
\textsuperscript{577} 42 U.S.C. § 4332(2)(A).
\textsuperscript{578} See Hanley v. Mitchell, 460 F.2d 640 (2d Cir. 1972); see also Hanley v. Kleindienst, 471 F.2d 823 (2d Cir. 1972).
\textsuperscript{579} See Army Regulation 200-2, 32 C.F.R. § 651.8 (1988).
European and U.K. counterparts. The 1997 amendment to the EC Directive strengthened the impact of the Directive by establishing screening criteria to determine when Annex II projects require environmental assessment.\textsuperscript{580}

2. Accessibility

The accessibility of information to the public as a result of the environmental impact assessment process is tied directly to the applicability issues discussed above. By not requiring local planning boards to collect and publicize environmental information, for instance, NEPA fails to make that information accessible to the public.\textsuperscript{581} On the other hand, because the European and U.K. environmental assessment requirements are focused on listed activities, numerous other activities that perhaps should be considered, if only because of secondary or indirect environmental impacts, might escape review.

D. Relative Effectiveness of Environmental Information Regimes

Public access to environmental information in both the United Kingdom and the United States has pragmatic considerations:

The provision of information is not, of course, an end in itself: it is a means to an end. At a general level it may be said that increased opportunities for public access to environmental information are seen as underpinning the objective of encouraging people to take on their responsibilities of stewardship.\textsuperscript{582}

Scholars have identified five pragmatic benefits derived from liberal access to environmental information.\textsuperscript{583} The first benefit is that it will reassure the public and promote confidence in governmental and industrial action, also known as the "public reassurance" role.\textsuperscript{584} This is based on the premise that secrecy fuels fear and that withdrawal of secrecy promotes public confidence.\textsuperscript{585} The second benefit of stewardship is that it will

\textsuperscript{581} See 42 U.S.C. § 4332.
\textsuperscript{582} Rowan-Robinson et al., supra note 1, at 20.
\textsuperscript{583} Id.
\textsuperscript{584} Id.
\textsuperscript{585} Id.
inform consumer choice, both in the demand for and in the consumption of goods: "[f]or example, labelling may encourage consumers to opt for 'green' products; and information about the causes and consequences of pollution may encourage consumers to limit their use of cars and to reduce waste" in the use of natural resources.\textsuperscript{586} This is referred to as the "personal responsibility" role.\textsuperscript{587} The third benefit, known as the "industry responsibility" role,\textsuperscript{588} states that "increased public scrutiny should encourage industries to take environmental protection seriously."\textsuperscript{589} The fourth benefit is that "the knowledge that activities will come under public scrutiny should act as a 'vital discipline' for environmental protection agencies."\textsuperscript{590} This is known as the "agency accountability" role.\textsuperscript{591} The final benefit of stewardship is that "it will enable members of the public to play a role in policy formulation and decision-making on environmental matters," also known as the "public participation" role.\textsuperscript{592}

These roles attempt to articulate concrete reasons for public access to environmental information, which is an alternative to the "right-to-know" type of argument expressed by others.\textsuperscript{593} The principles above were inferred from discussions in the Tenth Report of the Royal Commission on Environmental Pollution\textsuperscript{594} and from the White Paper, \textit{This Common Inheritance}.\textsuperscript{595}

All five of the above principles are important reasons for making environmental information accessible to the public. The first principle, "public reassurance," is vital because it prompts governments to establish a climate of openness, rather than secrecy. This is important because secrecy breeds distrust.\textsuperscript{596}

To encourage consumer choice, the "personal responsibility" principle is also an important role for environmental information.

\textsuperscript{586} \textit{Id.}
\textsuperscript{587} \textit{Id.}
\textsuperscript{588} \textit{Id.}
\textsuperscript{589} \textit{Id.}
\textsuperscript{590} \textit{Id.} at 21.
\textsuperscript{591} \textit{Id.}
\textsuperscript{592} \textit{Id.}
\textsuperscript{593} \textit{Id.} at 20.
\textsuperscript{594} ROYAL COMMISSION ON ENVIRONMENTAL POLLUTION, \textit{supra} note 193, at 24-29.
\textsuperscript{595} Rowan-Robinson et al., \textit{supra} note 1, at 20.
\textsuperscript{596} See, e.g., Statement by the President Upon Signing the "Freedom of Information Act," 316 PUB. PAPERS 699 (July 4, 1966).
According to the 1990 House of Lords Report, *Freedom of Access to Information on the Environment*, "[c]ompletely free access to information held by authorities on the environment would make citizens feel more directly responsible for protecting their environment and tighten controls on activities which could cause pollution." This principle could also provide economic incentives for environmental protection, as product manufacturers have already discovered that advertising "green friendly" products can be a marketing tool. In addition, negative environmental information about a product can either force it off the market or force it to change. For example, "green marketers" in the United States who make false or exaggerated environmental claims can expect scrutiny from the U.S. Federal Trade Commission. In recent years, major "fast food" restaurant chains in the United States were pressured to market their products differently. Additionally, some products that were packaged in aerosol spray cans are now aerosol-free.

The third principle, increasing "industry responsibility," may be important because it forces industries to improve their practices over time. For instance, the citizen suit enforcement provisions in the United States provide an excellent stimulus for industries to ensure environmental compliance. If the industries do not comply with existing air or water permits, industry officials know that they may be subject to a citizen suit, even if government regulators have not shown concern. In addition, environmental information about an industry’s products and production can bring tremendous economic pressure to change a product or production

597. HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, FREEDOM OF ACCESS TO INFORMATION ON THE ENVIRONMENT, *supra* note 221, at 6.


599. See Dennis E. Garrett, *The Effectiveness of Marketing Policy Boycotts: Environmental Opposition to Marketing*, J. MARKETING, Apr. 1987, at 46 (discussing the effectiveness of such "environmental boycotts").


602. See generally id.

603. See Rowan-Robinson et al., *supra* note 1, at 20.

604. See id.

method to be more environmentally sound. Thus, industries have a built-in incentive to recognize their environmental responsibilities.

The "agency accountability" principle puts pressure on the environmental enforcement agencies that are charged with ensuring compliance with environmental law. "Openness in government," agreed U.S. President William J. Clinton, "is essential to accountability." Government agencies are not always models of efficiency. Further, employees are sometimes outright lazy or corrupt. Public scrutiny may place pressure on environmental enforcement agencies to do their jobs and to do them well. In addition, increased availability of information about agencies might have the added benefit of reinforcing public confidence in government actions.

Finally, the "public participation" principle currently plays an integral role in environmental law. This role is pragmatic and an important part of the "right-to-participate." In the environmental decision-making process, members of the public may have relevant facts or information to contribute. A lack of public access may create an information vacuum, which may hinder the availability of relevant information.

These principles make an excellent yardstick with which to compare access to environmental information in different legal systems. If measures to provide public access satisfy the roles established, then arguably, they are successful in their purposes. Further, the extent to which each system satisfies those roles can be compared among information access regimes of other nations. The relative effectiveness of the United States' and the United Kingdom's general freedom of information regimes can be compared in light of the five principles discussed above.

606. See Garrett, supra note 599, at 47.
607. See Rowan-Robinson et al., supra note 1, at 21.
608. Clinton, supra note 18, at 1685.
609. See Rowan-Robinson et al., supra note 1, at 21.
610. For example, Popovic identified enhancing public acceptance of public decisions and building consensus as functions of public participation. Popovic, supra note 8, at 685 (citing ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CITIZEN PARTICIPATION IN THE AMERICAN FEDERAL SYSTEM 30, 61-63 (1979)).
611. See Rowan-Robinson et al., supra note 1, at 21.
612. See Popovic, supra note 8, at 683, 684.
613. Id. at 685.
614. Tilleman, supra note 442, at 343.
As to the "public reassurance" role, the laws of the United States and the United Kingdom both go a long way toward increasing the public's confidence in the work of government officials. Access to public information in the United States dates back to 1966. Therefore, public reassurance of the government's role, at least in taking care of the environment, may be further along than it is in the United Kingdom. Nevertheless, the raw materials are in place to bring the United Kingdom in line with the United States regarding the "public reassurance" role.

The "personal responsibility" role is more difficult to assess, because it entails not only public access to environmental information but also the public's acting on that information in some positive way. Countless public interest groups in the United States have taken government-released information and used it to take action against violators of environmental laws. Such groups are also getting involved in the United Kingdom, although use of public register information and the 1992 Regulations has been disappointing for some commentators. Nevertheless, the environmental information regimes in both countries do appear to allow sufficient public access to foster "personal responsibility."

More assertive approaches, such as the U.S. and U.K. requirements to publicize proposed environmental permits and to advertise the availability of toxic substance inventories, would enhance this "personal responsibility" role.

As to the "industry responsibility" role, no corporation wants to be singled out in public releases by environmental regulators for environmental violations. Corporations are sensitive to consumers' opinions, and the sentiment in most of the western world at this time is generally anti-pollution. Thus, commercial entities are perhaps more concerned about their environmental reputations. Attaining "industry responsibility,"

---

615. Rowan-Robinson et al., supra note 1, at 20.
616. See Schenck, supra note 2, at 375.
617. Rowan-Robinson et al., supra note 1, at 20.
619. BELL, supra note 7, at 175.
620. Id.
621. Robbins, supra note 75, at 29.
622. Rowan-Robinson et al., supra note 1, at 20.
623. Id. at 19.
however, is not that simple. It may require regulatory coercion to provide information; private arrangements for full disclosure in such transactions as the purchase of real estate or liability insurance; and self-regulation to a smaller degree. Both the United States and the United Kingdom do a fair job of holding corporations publicly accountable for environmental problems. Provisions that allow the government to withhold commercially-sensitive information might occasionally cause a problem in holding corporations responsible for their actions by allowing abuse of the trade secrets exemption to withhold pertinent information. Such provisions exist in both countries. Environmentalism, however, must be balanced with common sense. The U.S. Clean Water Act does a good job of this by allowing parties to withhold their trade secrets but not, under any circumstances, their effluent data. To the extent both nations can, without damaging the competitiveness of their industries, they provide for adequate environmental information statutes or regulations.

As to the "agency accountability" role, the transparency of the work of environmental regulators in both the United States and the United Kingdom naturally provides an incentive for those regulators. In both nations, allowing severe environmental abuses to proceed unchecked would bring substantial public and legal pressure on the environmental agencies to act to correct the problems. The environmental information regimes in both nations, with extensive public registers and databases, are adequate to provide this kind of information to the public.

Although the public in the United Kingdom was perhaps a little slow to take advantage of its new rights of public access to

624. Id.
626. In Texas, for instance, information regarding specific violators can be obtained by e-mail at the Texas Natural Resource Conservation Commission's Web site, http://www.tnrrc.state.tx.us. For a discussion of public registers in the United Kingdom, see Part III.B.
627. See supra Part VI.C. (discussing the "trade secrets" exemption under U.S. law).
629. Id. § 1318(b).
630. Rowan-Robinson et al., supra note 1, at 21.
631. Id. at 19–21.
environmental information, the system has been established to foster the "public participation" role. The most clearly developed systems in soliciting public participation in both countries are the environmental information assessment processes (although the two nations' environmental permitting processes come close). Both nations' procedures require decision-making agencies to affirmatively seek public input, rather than to passively make it available. If the public in both countries was to take advantage of the strengths of the other country's environmental planning and reporting statutes, the "public participation" role might be enhanced. Lacking a more interested and active public, however, it is likely that public involvement in environmental issues in both nations will be mixed, with public involvement more intense concerning certain types of issues and regions.

VI. FREEDOM OF INFORMATION IN THE UNITED STATES

The citizens of the United States and the United Kingdom have had very different experiences as to availability of all types of government information. In the United States, the availability of government information has been dictated by the Freedom of Information Act of 1966 (FOIA), which establishes a tone of open government. In contrast, the United Kingdom's Official Secrets Act of 1911 has set the tone for a relatively closed governmental information regime. While the government in the United Kingdom is now considering enacting a more sweeping form of information access legislation, the United States is almost a half century ahead of it.

A. The United States' Experience

When U.S. President Lyndon B. Johnson signed the Freedom of Information Act into law on July 4, 1966 ("Independence Day"), none of the bill's sponsors were invited to witness the signing. They had not been informed that the bill would be signed and, despite the urging of White House staffers and

632. BALL, supra note 7, at 175.
633. See generally Rowan-Robinson et al., supra note 1, at 20.
634. Id.
635. See discussion supra Part III.A.
636. See discussion infra Part VII.A.
members of Congress, there was no bill-signing ceremony. Nevertheless, Johnson's unceremonious signing of the bill culminated more than a decade of efforts to pass the FOIA.

Despite the vision of early Americans such as James Madison, Thomas Jefferson, and Patrick Henry that "a strong democracy depended on an informed electorate," the level of free access that Americans now have over government information was many years in the making. The Administrative Procedure Act of 1946 (APA), in its original form, had attempted, unsuccessfully, to provide easy access to government information. The APA, however, contained language that provided wide discretion to agencies to withhold records if the requester was not "directly or properly concerned," or if the agency determined to keep the records confidential "for good cause shown." In 1958, Congress amended a 1789 "housekeeping" statute that gave federal agencies the authority to keep records. That statute had been used as authority for withholding records, so Congress added the restriction: "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public."

Eventually, Congress acted to provide clear, comprehensive guidance on disclosure of information within the APA by passing the FOIA in 1966, which amended Section 3 of the APA. The FOIA provided clear guidance in establishing a presumption in favor of disclosure of government information and replaced the vague "for good cause shown" premise for denying disclosure with a detailed list of exemptions. It covered the whole executive branch of the federal government, including agencies that held records pertaining to the environment.

638. Id.
639. See id.
641. Feinberg, supra note 637, at 15.
642. Id.
643. Id.
644. H.R. 2767, 85th Cong. (1958); see also Schenck, supra note 2, at 374.
645. H.R. 2767; see also Schenck, supra note 2, at 374.
647. Id. § 3(e).
648. Id. § 3. Because the FOIA covers the entire executive branch, many of the most significant cases interpreting the FOIA have little or nothing to do with environmental information. They are important to any discussion of access to environmental information because the rules established under the case law also apply in cases involving
When President Johnson signed the FOIA, his accompanying statement declared that he did so "with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded." Johnson's statement reflected the belief that freedom of information should only be limited in compelling circumstances. "This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest." Johnson further added that he had "always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted."

As passed in 1966, the original FOIA included weaknesses that detracted from its ideal operation. In response, courts fashioned procedural devices, such as the requirement of a "Vaughn Index," established in Vaughn v. Rosen. The "Vaughn Index" is a thorough index of each "FOIA request" and is compiled by each agency. It lists all of the documents that are withheld from the public and the justification for their exemption. Similarly, the U.S. Supreme Court in EPA v. Mink held that each agency must release to the public any segregable, nonexempt portions of a partially exempt record.

In reaction to the abuses of the "Watergate era," and in an effort to expand the FOIA's disclosure requirements, Congress

---

Environmental access.

650. See id.
651. Id.
652. Id.
654. Id.
658. U.S. DEP'T OF JUSTICE, supra note 653, at 10. This requirement was later adopted into the FOIA and is now codified at 5 U.S.C. § 552(b). "Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. §552(b).
substantially amended the act in 1974. Those amendments considerably narrowed the scope of the FOIA's law enforcement and national security exemptions and expanded many of the agency procedural requirements, such as those regarding fees, time limits, segregability, and in camera inspection by the courts. In 1976, Congress acted to further limit what could be withheld by agencies as exempt from disclosure under the FOIA, by limiting the circumstances under which an agency can rely on other statutes to withhold information.

In 1986, after the FOIA had been in force for just over twenty years, Congress responded to a perceived need for reform of both the substantive and procedural requirements of the statute by enacting the Freedom of Information Reform Act of 1986. The Reform Act of 1986 amended the FOIA "to provide broader exemption protection for law enforcement information, plus special law enforcement record exclusions, and also created a new fee and fee waiver structure." The most recent changes to the FOIA came about with passage of the Electronic Freedom of Information Act Amendments of 1996 (1996 Amendments). The 1996 Amendments addressed electronic records, such as electronic mail retained by agencies, as well as FOIA reading rooms and procedural time limits for agency processing. Under the 1996 Amendments, when responding to FOIA requests, each agency must search electronic databases for the requested records "except when such efforts would significantly interfere with the operation of the agency's automated information system."

B. The Present Law

The FOIA, in general, requires federal agencies to provide the fullest possible disclosure of information to the public. The

660. Id.
666. See id.
667. Id. § 5(4)(c).
668. See generally Freedom of Information Act, Pub. L. No. 89-407, § 3, 80 Stat. 250,
FOIA provides a means for citizens to acquire all types of governmental information, unless a specific exemption applies. While some types of information, particularly environmental information, may also have other disclosure requirements, the FOIA provides a means for accessing information in situations where no other means of access is provided. It does so by establishing a presumption that all agency records and documents are accessible to the public. It sets standards for determining which records must be disclosed by federal agencies and which records can be withheld. The law provides both administrative and judicial remedies for individuals or groups who are denied access to records. The FOIA applies to all agencies of the federal executive branch. This includes each of the government departments and all subordinate agencies. It does not apply to the U.S. Congress or to the federal judiciary. It also does not apply to state or local government entities.

The FOIA also requires each agency to establish "reading rooms" that must be accessible to the public. Three categories of information must be included in an agency's reading room. Those broad categories include, "final opinions . . . rendered in the adjudication of administrative cases, specific agency policy statements, and certain administrative staff manuals." Reading room records must be indexed by the agencies to facilitate public access. In addition to those materials, agencies must make available any records that were sought and obtained through the

669. Id.
670. Id.
671. Id. § 3(a)-(d).
672. Id. § 3(e)-(f).
673. Id. § 3(c).
676. Id. § 551(1)(A)–(B).
FOIA process that the agency determines will likely be requested again. 681 Under the 1996 Amendments, each agency is required to make all records that are created after November 1, 1996, available electronically by December 31, 1999. 682 The rationale for reading rooms is that public access to such records serves to guard against development of "secret agency law," which is known to agency employees but not to the general public. 683 Agencies have also used their FOIA reading rooms to achieve "affirmative" disclosure of records that would otherwise likely be the subject of FOIA requests. 684

The FOIA requires anyone who requests information to ask for existing agency records rather than general information. 685 An "agency record," according to the U.S. Supreme Court, is a document that is (1) either created or obtained by an agency, and (2) under agency control at the time of the request. 686 Thus, an agency is only required to look for existing records in response to a FOIA request. 687 If no record exists, the agency is under no obligation to create one, collect information that it does not possess, perform research, or analyze data for a requester. 688 Any document containing information that is in the control of an agency, including electronic mail, is generally considered to be an agency record. 689 The form of the record maintained by the agency does not affect its availability. 690

To request records from an agency, a requester must "reasonably describe such records" being sought. 691 In other words, the request must be specific enough to permit a government employee to locate the record in a reasonable period of time. 692 "The legislative history of the 1974 FOIA amendments indicates that a description of a requested record is sufficient if it enables a professional agency employee familiar with the subject

681. Id. § 552(a)(2).
682. Id.
683. Id. § 552(a)(1)–(a)(2).
684. Id.
687. See id. at 145–46.
688. See id.
689. Id. at 145.
690. Id.
area to locate the record with a "reasonable amount of effort."" Agency officials are not expected to become "full time investigators" under the FOIA. Thus, a FOIA request will be held invalid if it requires an agency's FOIA staff either to have "clairvoyant capabilities" to infer the requester's desires or to spend "countless numbers of personnel hours seeking needles in bureaucratic haystacks." Nevertheless, an agency "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form than that anticipated by the requester." The fact that the records sought might be voluminous in nature does not absolve the agency of its duty to provide them. The key factor, according to the U.S. Department of Justice, "is the ability of an agency's staff to reasonably ascertain which records are being requested and locate them." If the requestor is not sure how to identify a specific record or records, he may phrase his request more broadly. For example, he or she may request "all records pertaining to" a specific, narrowly limited topic with sufficient detail to allow agency employees to determine what records may be the target of the search.

Each agency has twenty working days after the receipt of a FOIA request to determine whether or not to comply with the request, and then respond to the requester. The initial response may simply indicate that the agency needs an additional ten working days to process the request because of "unusual circumstances," such as having to collect records at a remote location, to pore over voluminous amounts of records, or consult with other agencies. A requester may, however, seek expedited processing by claiming either (1) that failure to obtain records quickly will pose an imminent threat to the life or safety of an individual, or (2) that, for journalist requesters, it can be shown that the request involves urgent matters about government

693. Id.
694. Id.
695. Id.
697. U.S. DEP'T OF JUSTICE, supra note 653, at 34.
698. Id.
699. Id.
700. Id. at 40-41.
702. Id. § 552(a)(6)(B).
activities that must be disseminated to the public as quickly as possible.\textsuperscript{703}

Those requesting agency records under the FOIA may have to pay fees covering some or all of the costs of processing their requests.\textsuperscript{704} Under the FOIA, each agency is required to promulgate FOIA regulations that specify “the schedule of fees applicable to the processing of requests under this section and [establish] procedures and guidelines for determining when such fees should be waived or reduced.”\textsuperscript{705} Those “fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use.”\textsuperscript{706} When a representative of the news media or an educational or noncommercial scientific institution for scholarly or scientific research makes the request, the “fees shall be limited to reasonable standard charges for document duplication,” but search and review charges shall not apply.\textsuperscript{707} When the requester fits into neither of the first two categories—commercial or news media/research—fees are “limited to reasonable standard charges for document search and duplication” but not for review.\textsuperscript{708} Also, the agency has discretion to waive or reduce charges entirely if it determines that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”\textsuperscript{709}

C. Exemptions

There are nine statutory exemptions under which an agency may refuse to disclose agency records, either in whole or in part.\textsuperscript{710} The exemptions address disclosure of information that would harm national defense or foreign policy, privacy of individuals, proprietary interests of business, functioning of the government, law enforcement investigations, and other important interests.\textsuperscript{711}

\begin{footnotes}
\item[704] Id. § 552(a)(4)(I).
\item[705] Id.
\item[706] Id. § 552(a)(4)(A)(ii)(I).
\item[707] Id. § 552(a)(4)(A)(ii)(II).
\item[708] Id. § 552(a)(4)(A)(ii)(III).
\item[709] Id. § 552(a)(4)(A)(iii).
\item[710] Id. § 552(b)(1)–(9).
\item[711] See generally id. § 552(b).
\end{footnotes}
Any "reasonably segregable portion of a record," however, must be provided to the requester after "deletion of the portions which are exempt." 712

Exemption 1 of the FOIA protects classified documents, defined as documents authorized to be kept secret because of their sensitive nature "in the interest of national defense or foreign policy." 713 The documents, however, must be properly classified in accordance with an Executive Order. 714 Under the Executive Order, information may not be classified unless its "disclosure . . . reasonably could be expected to result in damage to the national security . . . ." 715 Information categories that may not be considered as bases for information include:

(a) military plans, weapons systems, or operations;

(b) foreign government information;

(c) intelligence activities (including special activities), intelligence sources or methods, or cryptology;

(d) foreign relations or foreign activities of the United States, including confidential sources;

(e) scientific, technological, or economic matters relating to the national security;

(f) United States Government programs for safeguarding nuclear materials or facilities; or

(g) vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security. 716

Unlike its predecessor, Executive Order 12,958 does not contain a "catch-all" provision for classification of other kinds of information. 717 In addition, Executive Order 12,958 eliminated the presumption that certain kinds of information, such as foreign government information, are classified. 718 As with two prior

---

712. Id.
713. Id. § 552(b)(1)(A).
716. Id. at 337, § 1.5.
717. See U.S. DEP'T OF JUSTICE, supra note 653, at 85.
718. Id.
orders, the current Executive Order also prohibits classification to "conceal violations of law, inefficiency or administrative error, [to] prevent embarrassment to a person or agency," or to classify information for any other reasons not related to the national security. 719 If the agency's affidavits in support of classifying information are "reasonably specific" and there is no evidence of bad faith, the agency's determination will generally be upheld without an in camera review of the documents. 720 If this is not the case, however, courts have authority under the FOIA to review agency documents in camera to determine the propriety of withholding the documents. 721

Exemption 2 addresses internal agency personnel rules and practices. 722 These rules govern internal agency conduct but not public behavior. This exemption encompasses two categories of information: "internal matters of a relatively trivial nature," and "more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement." 723 The "trivial matters" category includes only "internal personnel rules and practices of an agency." 724 "Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." 725 The "more substantial matters" category applies to documents that are "predominantly internal" in nature, the disclosure of which "significantly risks circumvention of agency regulations or statutes." 726 Under this rationale, an agency's decision not to disclose a law enforcement agent's training manual has been upheld. 727

Exemption 3 addresses documents that are exempted from disclosure under other federal statues. 728 These include only documents that are specifically required by another statute to be kept confidential, leaving "no discretion on the issue," or

722. Id. § 552 (b)(2).
724. Id.
727. Id. at 1074.
728. U.S. DEP'T OF JUSTICE, supra note 653, at 120.
documents that meet specific criteria for withholding under another statute.\textsuperscript{729} In the original FOIA, Exemption 3 was phrased so as to broadly exempt information "specifically exempted from disclosure by statute."\textsuperscript{730} The U.S. Supreme Court, in \textit{Federal Aviation Administration v. Robertson},\textsuperscript{731} interpreted this language to allow access to information under statutes that permitted the discretionary withholding of confidential information enacted prior to the FOIA, to remain unaffected by the FOIA's broad requirements.\textsuperscript{732} The Court thus upheld the agency's withholding documents in the "public interest," as permitted by The Federal Aviation Act.\textsuperscript{733} Congress legislatively reversed the Court's decision by amending Exemption 3 in 1976 to prevent agencies from avoiding the FOIA's disclosure intent.\textsuperscript{734} As amended, agencies may now invoke this exemption only if the claimed withholding statute either, "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."\textsuperscript{735} Without conforming to the specific exemption language in the claimed withholding statute, the records must be released.\textsuperscript{736}

Exemption 4 pertains to business information specifically addressing "trade secrets and commercial or financial information obtained from a person and privileged or confidential."\textsuperscript{737} It is "intended to protect the interests of both the government and submitters of information."\textsuperscript{738} It allows submitters of information, such as companies bidding for government contracts, to furnish sensitive commercial or financial information, and it provides assurance to the government that the information provided will be reliable. "The exemption covers two broad categories of information in federal agency records: (1) trade secrets; and (2)

\textsuperscript{731} Federal Aviation Administration v. Robertson, 422 U.S. 255 (1975).
\textsuperscript{732} See id. at 266.
\textsuperscript{733} Id.
\textsuperscript{734} Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976); \textit{see also} U.S. DEP'T OF JUSTICE, \textit{supra} note 653, at 121.
\textsuperscript{736} U.S. DEP'T OF JUSTICE, \textit{supra} note 653, at 121.
\textsuperscript{737} 5 U.S.C. § 552(b)(4).
\textsuperscript{738} U.S. DEP'T OF JUSTICE, \textit{supra} note 653, at 148.
information which is: (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.” The term "trade secret" has been narrowly defined by case law as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." The first two requirements of the second category of records are interpreted according to the "ordinary meanings" of the words. Information is not considered to be "privileged or confidential" under the third requirement, however, unless disclosure of the information would either "(1) ... impair the Government’s ability to obtain necessary information in the future; or (2) ... cause substantial harm to the competitive position of the person from whom the information was obtained." 

Exemption 5 addresses "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." This type of information naturally includes attorney-client communications and information compiled in preparation for litigation. The U.S. Supreme Court has interpreted coverage of Exemption 5 quite broadly, making it clear that the exemption includes "both statutory privileges and those commonly recognized by case law, and that it is not limited to those privileges explicitly mentioned in its legislative history." According to the U.S. Justice Department, the most commonly asserted privilege under this exemption is the "deliberative process privilege." That privilege protects pre-decisional information during the "decision making processes of government agencies." The bases for this privilege are:

(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are

739. Id. (emphasis added).
745. Id.
746. Id. at 216.
finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.\textsuperscript{748}

To qualify for the deliberative process privilege, a communication must be both pre-decisional, i.e., "antecedent to the adoption of an agency policy,"\textsuperscript{749} and deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."\textsuperscript{750}

Exemption 6 pertains to private matters, including "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."\textsuperscript{751} While "personal and medical files" are easily identified, courts initially struggled with the meaning of the term "similar files."\textsuperscript{752} Prior to 1982, judicial interpretations of this term varied widely, but the U.S. Supreme Court settled the issue in its decision in \textit{United States Department of State v. Washington Post Co.}\textsuperscript{753} In this case, the Court held that Congress intended the term to be interpreted broadly.\textsuperscript{754} The Court stressed that all information that "applies to a particular individual" meets the requirement for Exemption 6 protection.\textsuperscript{755} The exemption can apply equally to the "author" and to the "subject" of a file.\textsuperscript{756} The documents sought must still "constitute a clearly unwarranted invasion of personal privacy."\textsuperscript{757} To determine whether an invasion of privacy is "unwarranted" requires a balancing "of the public's right to disclosure against the individual's right to privacy."\textsuperscript{758} The Supreme Court in \textit{United States Department of Justice v. Reporters Committee for Freedom of the Press}\textsuperscript{759} established five principles to govern the process by which determinations are made under both Exemption 6 and Exemption

\textsuperscript{748} U.S. DEP'T OF JUSTICE, \textit{supra} note 653, at 216.
\textsuperscript{749} Jordan v. United States Dep't of Justice, 591 F.2d 753, 772–74 (D.C. Cir. 1978).
\textsuperscript{750} Vaughn v. Rosen, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975).
\textsuperscript{753} Id.
\textsuperscript{754} See \textit{id.} at 602.
\textsuperscript{755} See \textit{id.}
\textsuperscript{757} U.S. DEP'T OF JUSTICE, \textit{supra} note 653, at 257.
\textsuperscript{758} Id. at 259.
First, substantial privacy interests can exist in personal information even if it has been available to the general public at some previous time. Second, the identity of a FOIA requester cannot be considered in determining what is appropriate for release under the FOIA (unless, of course, if an individual is requesting personal information on himself). Third, in determining whether release of a document is in the public interest, the agency's decision "must turn on the nature of the requested document and its relationship" to the public interest. Fourth, the scope of the public interest to be considered is limited to "the kind of public interest for which Congress enacted the FOIA," which is to shed "light on an agency's performance of its statutory duties." Fifth, an agency may determine, "as a categorical matter," that certain types of information can always be protected under one of the privacy exemptions "without regard to individual circumstances."

Next, FOIA Exemption 7 pertains to law enforcement investigations. It permits withholding records compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . ., (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, . . ., or (F) . . ., endanger the life or physical safety of any individual[.]

In addition to this exemption, when a FOIA request involves a criminal investigation for which the subject of the investigation is not aware and disclosure of the existence of records could interfere with enforcement proceedings, an agency may "treat the

760. See id.
761. See id. at 762–64.
762. Id. at 771.
763. Id.
764. Id. at 772.
765. Id. at 773–74.
766. Id. at 780.
768. Id.
records as not subject to the requirements of this section."  

In other words, the agency need neither admit nor deny the existence of the records.

Exemption 8 pertains to sensitive information maintained regarding financial institutions. It permits the withholding of information that is "contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." Courts have identified two major purposes for Exemption 8. They are, first, "to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability," and second, "to promote cooperation and communication between employees and examiners."

Exemption 9 addresses "geological and geophysical information and data, including maps, concerning wells." The purpose and meaning of Exemption 9 is obvious enough that, according to the U.S. Department of Justice, this is a rarely invoked or interpreted exemption, with very few reported cases.

If the agency denies disclosure under one of the exemptions, it must "notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination." The agency then would have twenty days to process any appeal.  

Each year, every federal agency is required to provide a report to the U.S. Attorney General, which includes, among other things, "the number of determinations made by the agency not to comply with requests for records made to such agency... and the reasons for each such determination." The Attorney General must then make those reports available to the public by electronic means and notify Congress of their availability.

769. Id. § 552(c)(1).
770. 5 U.S.C. § 552(b)(8).
771. Id.
776. Id.
777. Id. § 552(e)(1)(A).
778. Id. § 552(e)(3).
If a record qualifies for one of the nine exemptions, however, the agency may not necessarily be required or allowed to withhold it.\textsuperscript{779} Under a memorandum issued in 1993 to the heads of all executive agencies, Attorney General Janet Reno issued policy guidelines for processing FOIA requests.\textsuperscript{780} In her message, she declared that the U.S. Department of Justice would "no longer defend an agency's withholding of information merely because there is 'substantial legal basis' for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure."\textsuperscript{781} She explained that, while the FOIA itself contemplates, through its exemptions, circumstances under which information should not be disclosed to the public because of harm to national and private interests, "I firmly believe that these exemptions are best applied with specific reference to such harm, and only after consideration of the reasonably expected consequences of disclosure in each particular case."\textsuperscript{782} She adopted the policy that the Justice Department would only defend an assertion of a FOIA exemption by agencies "in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be."\textsuperscript{783} She further urged agency FOIA officers to make "discretionary disclosures" whenever possible, rather than withhold.\textsuperscript{784} President Clinton echoed Attorney General Reno's sentiments: "The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation."\textsuperscript{785} President Clinton also emphasized an agency's responsibility "to distribute information on its own initiative, and to enhance public access through the use of electronic information systems. Taking these steps will ensure

\textsuperscript{779} See id. § 552(d) (1994).
\textsuperscript{780} Memorandum from Attorney General Janet Reno on the Freedom of Information Act, to Heads of Departments and Agencies (Oct. 4, 1993) (on file with the Loyola of Los Angeles International and Comparative Law Review) [hereinafter Reno Memorandum].
\textsuperscript{781} Id. at 1.
\textsuperscript{782} Id.
\textsuperscript{783} Id.
\textsuperscript{784} Id.
\textsuperscript{785} Clinton, supra note 18, at 1685.
compliance with both the letter and spirit of the Act."\textsuperscript{786}

\textbf{D. State and Local Governments}

The FOIA only applies to information held by the federal government. Nevertheless, each of the fifty states adopted their own freedom of information statutes.\textsuperscript{787} In the Texas, for instance, any public records held by a state department or agency or a local government entity must be made available to the public "at a minimum during normal business hours of the governmental body."\textsuperscript{788} "Public information" is defined as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business."\textsuperscript{789} Similar to its federal counterpart, the Texas public information laws include a number of exceptions that enable officials to withhold information.\textsuperscript{790} Such exceptions, among others, include information that is "considered to be confidential by law, either constitutional, statutory, or by judicial decision[;]"\textsuperscript{791} information about personnel, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[;]"\textsuperscript{792} and inter-agency or intra-agency memoranda or letters "that would not be available by law to a party in litigation with the agency."\textsuperscript{793} In all, there are twenty-six exceptions to the Texas disclosure requirements, most of which are easily understood.\textsuperscript{794}

Any governmental body wishing to withhold information on the basis of these exceptions must obtain approval to do so from the State Attorney General.\textsuperscript{795} If a governmental entity fails to comply with the disclosure requirements, then the Attorney General or a requestor may file suit for a writ of mandamus to compel the governmental entity to make the information

\begin{thebibliography}{9}
\bibitem{786} \textit{Id.}
\bibitem{787} McMasters, \textit{supra} note 527, at 10.
\bibitem{788} \textsc{ Tex. Gov't Code Ann.} \S 552.021 (Vernon 1994).
\bibitem{789} \textit{Id.} \S 552.002.
\bibitem{790} \textit{See id.} \S\S 552.101-552.123.
\bibitem{791} \textit{Id.} \S 552.101.
\bibitem{792} \textit{Id.} \S 552.102.
\bibitem{793} \textit{Id.} \S 552.111.
\bibitem{794} \textit{Id.} \S\S 552.101-552.123. Rather than adopt broad categories of exemptions, Texas has generally adopted more narrow, specific exemptions, such as "Student Records" and "State Auditor Working Papers." \textit{Id.} \S\S 552.114, 552.116. This accounts for the large number of exemptions under Texas law.
\bibitem{795} \textit{Id.} \S 552.301(a).
\end{thebibliography}
available.\textsuperscript{796} In addition, failure to provide access to public information is a misdemeanor criminal offense, and is punishable by a fine of not more than $1,000, six months in county jail, or both.\textsuperscript{797}

Similarly, the law in Massachusetts also provides both administrative remedies and penal provisions for a state or local government official's refusal to produce a public record.\textsuperscript{798} Administratively, a member of the public who is denied access to public records may appeal that denial to the supervisor of public records, a state officer appointed by the Secretary of State.\textsuperscript{799} If the supervisor of public records is unable to get the records released, then he or she may notify the Attorney General, who may pursue the matter on behalf of the requester in court, or the requester can take the case to court.\textsuperscript{800} The exemptions to disclosure under Massachusetts law, although fewer in number, are similar in nature to Texas'. The Massachusetts laws also exempt records that: are “exempted from disclosure by statute[;]”\textsuperscript{801} oriented to personnel administration;\textsuperscript{802} concern law enforcement investigations;\textsuperscript{803} are kept in the course of public contracting;\textsuperscript{804} include the names of persons who possess or have applied for licenses to possess firearms;\textsuperscript{805} and give questions, answers, and scoring keys for civil service examinations.\textsuperscript{806}

As with the federal counterpart, the state freedom of information statutes generally do not apply to the states' legislative branch.\textsuperscript{807} Although legislators set the tone for public disclosure by promulgating the statutes, only the legislators in the states of Maine and Montana have subjected themselves to the same information disclosure requirements that they impose on executive branch departments and agencies.\textsuperscript{808}

\textsuperscript{796} Id. § 552.321.
\textsuperscript{797} Id. § 552.353(e).
\textsuperscript{798} MASS. ANN. LAWS ch. 66, § 10 (Law. Co-op. 1991).
\textsuperscript{799} Id. § 10(b).
\textsuperscript{800} Id.
\textsuperscript{801} See MASS. ANN. LAWS ch. 4, § 7, cl. 26(a) (Law. Co-op. 1988).
\textsuperscript{802} See id. at cl. 26(b)–(c).
\textsuperscript{803} See id. at cl. 26(f).
\textsuperscript{804} See id. at cl. 26(h).
\textsuperscript{805} See id. at cl. 26(j).
\textsuperscript{806} See id. at cl. 26(l).
\textsuperscript{807} See Schenck, supra note 2, at 372.
\textsuperscript{808} See ME. REV. STAT. ANN. tit. 1, § 301 (West 1964); MONT. CODE ANN. § 2-6-101 (1999).
VII. FREEDOM OF INFORMATION IN THE UNITED KINGDOM

A. Background

A commentator once stated, "it is well to remember that all governments are secretive by nature, the British only more transparently so than most."809 Until 1989, the Official Secrets Act of 1911 set the tone for accessibility to governmental information in the United Kingdom.810 That statute prevented any central government official from releasing any government information unless specifically authorized to do so.811 "If any person having in his possession or control any... document, or information... which has been entrusted in confidence to him by any person holding office under Her Majesty[,]" it was an offense under the Act to communicate "the... document, or information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it."812

With this restrictive statute in effect, and with a complete lack of any kind of national freedom of information law, the presumption in the United Kingdom was that records were not releasable. This contrasts the presumption that has existed in the United States since 1966.813 The Official Secrets Act of 1989, however, repealed the overly restrictive language of its 1911 predecessor and limited its protections only to information related to international diplomacy, information given in confidence by other governments or international agencies, security and intelligence, defense information that might aid criminals, and the interception of communications.814

The trend towards a more open government in the United Kingdom dates back at least to the Local Government (Access to Information) Act of 1985, which allowed access to information about the deliberations of local government.815 Further, in 1994,

811. See Official Secrets Act, 1911, c. 28, § 2(1)(a) (Eng.).
812. Id.
813. Birkinshaw, supra note 809, at 562.
814. See BAKKENIST, supra note 170, at 13.
815. Local Government (Access to Information) Act, 1985, c. 43 (Eng.).
the government adopted the Code of Practice on Access to Information, which provides access to information, but not to specific records or documents.816 The Code is based on three basic themes: "handling information in a way which promotes informed policy-making and debate, and efficient service delivery; providing timely and accessible information to the citizen to explain the Government's policies, actions and decisions; and restricting access to information only where there are good reasons for doing so."817 This Code, however, has been criticized as "unnecessarily secretive because it offers potential scope for 'doctoring' the material; and as cumbersome because in many cases disclosure of actual documents is the simplest and quickest route for both Department and enquirer."818 Also, the Code is merely an administrative direction, not a statute.819 "As anyone who has followed the subject of government and information for any length of time will testify, promises of disclosure conferred by administrative directions can be removed as easily as they are conferred."820

According to the current leadership in the United Kingdom, the 1994 code is also deficient because, among other things, "it contains too many exemptions"—fifteen in all—making it "complex for applicants to use," and subjecting government agencies to the accusation that they "trawl" for "anything that might serve as a reason for non-disclosure."821 The 1994 Code "maintains an ancient tradition that the business of government, i.e., the information which government generates—as distinct from the process of governing itself—is not for the people as of right."822

Following the 1989 amendments to the Official Secrets Act of 1911 and the 1994 Code of Practice on Access to Government Information, the United Kingdom requires one more piece of legislation to equal or surpass the freedom of information standard set by the United States.823 Numerous writers have agreed that the

816. YOUR RIGHT TO KNOW, supra note 32, at 6.
818. YOUR RIGHT TO KNOW, supra note 32, at 6.
819. OPEN GOVERNMENT, supra note 817, at 1, para. 1.2.
820. Birkinshaw, supra note 809, at 557.
821. YOUR RIGHT TO KNOW, supra note 32, at 15.
822. Birkinshaw, supra note 809, at 568.
United Kingdom has long been in need of some form of a "right-to-know" statute. The legislation to rectify the current dilemma, a freedom of information bill for the United Kingdom, is already being discussed. The Freedom of Information White Paper, entitled *Your Right to Know—The Government's Proposals for a Freedom of Information Act*, indicates that the present U.K. government is committed to enacting freedom of information legislation. "The traditional culture of secrecy," wrote Prime Minister Tony Blair, "will only be broken down by giving people in the United Kingdom the legal right to know. This fundamental and vital change in the relationship between government and governed is at the heart of this White Paper." The Chancellor of the Duchy of Lancaster agreed: "[o]penness is fundamental to the political health of a modern state." He explained that "[t]his right is central to a mature democracy." He further postulated that freedom of information legislation should protect such interests as national security, personal privacy, and internal deliberations, but that the proposed legislation "strikes a proper balance" between the need for confidentiality in some circumstances and the public's right of access. "It is a new balance with the scales now weighted decisively in favour of openness."

The Freedom of Information Bill was announced on December 10, 1998, and it echoed the sentiments of the White Paper in declaring that the purposes of the Bill were "to extend progressively the right of the public to have access to official information held by public authorities in order to promote—(i)
better informed discussion of public affairs; (ii) greater accountability of public authorities; and (iii) more effective public participation in the making and administration of laws and policies.”

B. The Law Proposed

The objective of the proposed Freedom of Information (FOI) legislation, as described in the White Paper, “is to help open up public authorities and other organisations which carry out public functions.” It would “empower people, giving everyone a right of access to the information that they want to see.” It will also “place statutory duties on the bodies covered by the Act to make certain information publicly available as a matter of course.” The public’s “right of access” is “at the heart of the Act.” That right would be “exercisable by any individual, company or other body.”

Under the conceptual legislation proposed in the White Paper, the “public interest” would be an important, determining factor in decisions whether to withhold documents. The U.K. government proposes to do this by: (1) “ensuring that any decision on disclosure safeguards the public interest should be a separate, identifiable step in the FOI process;” and (2) attempting in the legislation “to increase the clarity and certainty of individual decisions by defining what constitutes the public interest.”

The proposed freedom of information legislation in the United Kingdom would apply to all levels of government. This is in contrast with the United States’ FOIA, which applies only to the federal government, but not to state and local governments.

---

835. Id. § 1–(1)(a).
836. Your Right to Know, supra note 32, at 5.
837. Id.
838. Id.
839. Id. at 6.
840. Id.
841. Id. at 6.
842. Id.
843. Id. at 4. In Scotland, however, the Scottish Parliament will have the authority “to determine the approach of the Scottish executive and other Scottish public bodies to openness and freedom of information within devolved areas in which it is competent to enact primary legislation.” Id.
The proposed United Kingdom legislation would cover public entities including:

Government Departments, . . . and their Executive Agencies; Nationalised industries; . . . administrative functions of the Courts and tribunals; administrative functions of the Police and Police Authorities; the Armed Forces; Local Authorities; Local Public Bodies, for example Registered Social Landlords and Training and Enterprise Councils; Schools, Further Education Colleges and Universities; the Public Service Broadcasters; private organisations insofar as they carry out statutory functions; [and] the privatised utilities.  

Parliament, like the U.S. Congress under its FOIA legislation, would be excluded from the provisions of the proposed legislation, as outlined by the White Paper.  

In addition, “the Security Service, the Secret Intelligence Service, the Government Communications Headquarters and the Special Forces” would be excluded, because, according to the White Paper, they “could not carry out their duties effectively in the interests of the nation if their operations and activities were subject to freedom of information legislation.”  

The proposed legislation will contain a list of public authorities and other organizations it covers. The list will require updating periodically “as public bodies are created or wound up, or public functions are carried out by different bodies.”  

Under the U.K. proposal for FOI legislation, anybody could request information from the government. Applicants would not be required to explain their requests, and any stated or inferred reasons for requesting the information would not enter into a government agency’s deliberation in determining whether to disclose the information. Applicants could request information that is kept in any form, including electronic records, tape, or film. The right of access to information will apply to records of

845. YOUR RIGHT TO KNOW, supra note 32, at 4.
846. Id. at 5.
847. Id.
848. Id.
849. Id.
850. Id. at 6.
851. Id.
852. Id.
any date, "regardless of whether they were created before or after the Act [came] into force." 853

The proposed FOI legislation would create a new "Information Commissioner" with responsibilities to promote, interpret and enforce the legislation. 854 "The Commissioner's primary role will be to investigate complaints that a public authority has failed to comply with the requirements of the Act either by refusing to disclose information, or by taking an unreasonable time to respond to requests, or by imposing excessive charges for information." 855

C. Proposed "Specified Interests"

Rather than adopt a lengthy list of specific exemptions as the United States did, the current U.K. government proposes to adopt a list of seven "specified interests" that agencies must consider in determining whether to release a document. 856 In light of these "specified interests," agencies would be required to analyze document requests on a "contents basis," and release records "in a partial form, with any necessary deletions," rather than completely withhold them. 857 This is similar to the "reasonably segregable" rule in the United States' FOIA, under which records must be released following deletion of the exempt portions. 858 Determinations of whether to disclose or withhold information under the proposed U.K. FOI legislation "specified interests" would be "based on a presumption of openness." 859

Consistent with the U.S. Attorney General's approach, 860 the underlying basis for determining whether to disclose would be an assessment of "the harm that disclosure might cause, and the need to safeguard the public interest." 861 According to the U.K. government's proposals, the test to determine whether to disclose

853. Id. at 7. "There would be only very limited exceptions to this, for example where the new Freedom of Information Act incorporates and supersedes certain existing statutory access rights which themselves only give access to records after a specified date."

854. Id. at 27.
855. Id. at 28.
856. Id. at 16.
857. Id.
858. See discussion supra Part VI.
859. YOUR RIGHT TO KNOW, supra note 32, at 15.
860. See discussion supra Part VI.B.
861. YOUR RIGHT TO KNOW, supra note 32, at 15.
a record "should normally be set in specific and demanding terms" including a "substantial harm" test for withholding records.\textsuperscript{862} The U.S. Attorney General, however, adopted a "simple harm" test, rather than a "substantial harm" test, as proposed by the U.K. government.\textsuperscript{863} According to the White Paper, "[t]his ensures that the harm test is sensibly and realistically applied to key areas."\textsuperscript{864} Although the distinction between "simple" and "substantial" harm may amount to mere semantics that could be interpreted by public bodies and triers of fact, in the author's opinion the proposed "substantial" harm language for the proposed U.K. bill at least reflects an intention that the standard of harm for not releasing information be as restrictive as possible.\textsuperscript{865}

The first of the seven proposed "specified interests" would protect information regarding national security, defense, and international relations.\textsuperscript{866} The White Paper identifies protection of national and interests as a "key requirement of an FOI Act."\textsuperscript{867} This "specified interest" would protect the "integrity of communications received in confidence from foreign governments, foreign courts or international organisations."\textsuperscript{868} This "specified interest" is analogous to the United States' Exemption 1 under the FOIA.\textsuperscript{869}

The second "specified interest" would be for law enforcement.\textsuperscript{870} Protection of such information, according to the White Paper, "is common to all FOI legislation."\textsuperscript{871} The FOI act, according to the White Paper, "should not undermine the investigation, prosecution or prevention of crime, or the conduct of civil proceedings, and these functions of public authorities will be excluded from the Act."\textsuperscript{872} Further, "there can clearly be no obligation to disclose other information which could substantially

\textsuperscript{862} Id. at 16.
\textsuperscript{863} Compare id., with Reno Memorandum, supra note 780, at 1.
\textsuperscript{864} Id.
\textsuperscript{865} The "substantial harm" test was subsequently abandoned in the May 24, 1999 version of the draft FOI bill in favor of a discretionary disclosure provision similar to the one in the U.S. FOIA, and is still pending. FREEDOM OF INFORMATION: CONSULTATION ON DRAFT LEGISLATION, 1999, Cm. 4355, at 7–8.
\textsuperscript{866} YOUR RIGHT TO KNOW, supra note 32, at 17.
\textsuperscript{867} Id.
\textsuperscript{868} Id.
\textsuperscript{869} See supra Part VI.C.
\textsuperscript{870} YOUR RIGHT TO KNOW, supra note 32, at 17.
\textsuperscript{871} Id.
\textsuperscript{872} Id.
harm the effectiveness of law enforcement or encourage the avoidance or evasion of tax and other financial obligations owed to the State.\textsuperscript{873} This category of information is similar to Exemption 7 of the United States’ FOIA.\textsuperscript{874}

The third “specified interest” concerns personal privacy.\textsuperscript{875} “The right of an individual to personal privacy is a fundamental human right,” the White Paper declares.\textsuperscript{876} “Protection against disclosures which could substantially harm this right is an essential element of an FOI regime.”\textsuperscript{877} This “specified interest” is similar to Exemption 6 of the United States’ FOIA.\textsuperscript{878} The White Paper also points out that, to some extent, the right to privacy is already protected under national and European law.\textsuperscript{879} Personal privacy, however, “cannot be absolute—there may be circumstances where disclosure of personal information may be in the public interest.”\textsuperscript{880} Such cases, according to the White Paper, “could well raise difficult choices between the potentially conflicting interests of the individual, the applicant [for information] and the public authority holding the information.”\textsuperscript{881} The White Paper suggests that the FOI act therefore might need to include a “mechanism to allow third party appeals against impending disclosure.”\textsuperscript{882} This would be similar to a process under the United States’ FOIA commonly referred to as a “reverse FOIA” suit, in which individuals or corporations who provide information can sue to prevent disclosure.\textsuperscript{883}

The fourth “specified interest” under the U.K. FOI legislation proposal concerns commercial confidentiality.\textsuperscript{884} While the relationship between government authorities and the private sector should normally be based on “two-way openness and trust,” according to the White Paper, there are certain types of

\begin{thebibliography}{99}
\bibitem{873} Id.
\bibitem{874} See supra Part VI.C.
\bibitem{875} YOUR RIGHT TO KNOW, supra note 32, at 17.
\bibitem{876} Id.
\bibitem{877} Id.
\bibitem{878} See supra Part VI.C.
\bibitem{879} YOUR RIGHT TO KNOW, supra note 32, at 17.
\bibitem{880} Id.
\bibitem{881} Id.
\bibitem{882} Id.
\bibitem{883} See U.S. DEP’T OF JUSTICE, supra note 653, at 597.
\bibitem{884} YOUR RIGHT TO KNOW, supra note 32, at 18.
\end{thebibliography}
information that should not be released. Such information as “trade secrets, sensitive intellectual property or data which could affect share prices” should be withheld “where disclosure would substantially harm the commercial interests of suppliers and contractors.” Nonetheless, “openness” in dealings between the private and public sectors “should be the guiding principle.” “For example[,] unsuccessful bidders need to know why they were unsuccessful and how they could succeed next time.” Also, according to the White Paper, the public should have access to information concerning costs of government services “no matter who provides them.” “Commercial confidentiality,” the White Paper states, “must not be used as a cloak to deny the public’s right to know.” This “specified interest” is similar to Exemption 4 of the United States’ FOIA. While one might argue that these types of exemptions are superfluous in light of intellectual property law, it is important to note that while the United States and the United Kingdom might have aggressive regimes for patent and copyright law, there might be industrialized nations that would take advantage of these nations’ openness without such an exemption. When an agency receives a request for information, it may not know the true source of the request.

The fifth “specified interest” identified in the White Paper to be considered under the proposed FOI legislation concerns information “whose disclosure could pose a significant threat to the health and/or safety of an individual person, the public more generally, or the environment.” This is unique to the U.K. proposal, having no corresponding exemption in the United States’ FOIA. This type of information would normally be covered under Exemption 3 of the United States’ FOIA, which addresses documents exempted from disclosure under other laws. By way

885. Id.
886. Id.
887. Id.
888. Id.
889. Id.
890. Id.
891. See supra Part VI.C.
893. YOUR RIGHT TO KNOW, supra note 32, at 18.
895. See supra Part VI.C.
of example, the Archaeological Resources Protection Act of 1979\textsuperscript{896} prohibits disclosing the location of archaeological sites so as to protect those sites from potential looters.\textsuperscript{897} No separate FOIA exemptions are required for this type of information, because it has its own statute. Arguably, including the fifth "specified interest" among the de facto exemptions in the U.K. FOI might be unnecessary, and, to the extent that it gives public bodies the authority to determine what information should be withheld for the "protection" of human health and safety or for endangered species, it is subject to abuse.\textsuperscript{898} The United Kingdom might be better advised to simply adopt a "specified interest" similar to the United States' Exemption 3. This would be more consistent with the FOI bill's intent of creating a presumption of openness of information. If the U.K. government wishes to carve out specific types of information that would be unreleasable because of environmental or health and safety interests, then it may do so in the context of those specific statutes.

The sixth "specified interest" concerns information supplied in confidence.\textsuperscript{899} "Many public authorities hold information supplied to them by private individuals, companies or other organisations in the expectation that it will be kept confidential," the White Paper states.\textsuperscript{900} For personal information or commercially sensitive material, the relevant "specified interest" would apply.\textsuperscript{901} "But there may be other circumstances where an obligation of confidentiality exists: for example the views of experts given freely on the understanding of confidentiality, or opinions expressed about an individual in references for appointments or citations for honours."\textsuperscript{902} Because the FOI act would apply to information given prior to the date of its enactment, it will be "particularly important to ensure adequate protection for people or organisations whose communications with public authorities were covered by explicit undertakings of

\begin{footnotes}
\footnote{896}{16 U.S.C. § 470 (1994).}
\footnote{897}{16 U.S.C. § 470hh(a).}
\footnote{898}{YOUR RIGHT TO KNOW, supra note 32, at 18.}
\footnote{899}{id.}
\footnote{900}{id.}
\footnote{901}{id.}
\footnote{902}{id.}
\end{footnotes}
confidentiality, or at least a reasonable expectation that the law of confidentiality applied to them." 903

The final 'specified interest' identified in the White Paper addresses information concerning the integrity of the decision-making and policy advice processes in government. 904 Similar in thrust to the “deliberative process” exemption under the United States’ FOIA, release of such information under the proposed legislation could be denied based on a showing of “simple” harm rather than “substantial” harm required for withholding under the other six “specified interests.” 905 “Now more than ever, government needs space and time in which to assess arguments and conduct its own debates with a degree of privacy,” the White Paper states. 906 “Experience from overseas suggests that the essential government functions of planning ahead, delivering solutions to issues of national importance and determining options on which to base policy decisions while still maintaining collective responsibility, can be damaged by random and premature disclosure of its deliberations under [FOI] legislation.” 907 While the government does not “propose a restrictive approach on these lines,” it does “believe the relevant harm test needs to reflect the points set out above, and in particular the extent and nature of the damage which can be caused in this area. This leads us to propose a modified, straightforward harm test in this area.” 908

Factors to consider in determining potential harm in releasing records or information will include: “the maintenance of collective responsibility in government; the political impartiality of public officials; the importance of internal discussion and advice being able to take place on a free and frank basis; [and] the extent to which the relevant records or information relate to decisions still under consideration, or publicly announced.” 909 These factors, according to the White Paper, would likely apply particularly to high-level government records, such as Cabinet and Cabinet Committee reports and Ministerial Correspondence and advice to

903. Id.
904. Id. at 19-20.
905. Id. at 19.
906. Id.
907. Id.
908. Id.
909. Id. at 20.
Ministers. Protection of such information, however, does not extend to raw data and factual background materials. Covered public entities, therefore, will be "encouraged" to make such information available, even though opinions and advice on which it is based remain confidential.

In addition to the seven "specified interests," the White Paper notes that "[d]isclosure may also be prevented in specific circumstances by other legislation." Although the proposed U.K. FOI legislation does not formally specify such withholding as one of the seven "specified interests," this is the basis of a formal exemption in the United States' FOIA.

The draft FOI bill that was introduced in December 1998, included three more "interests" under which the government would be allowed to withhold information. The draft bill included a new category for "the fairness of legal proceedings." It also created a "specified interest" for potential harm to the public authority's position in any "actual or contemplated legal proceedings." This provision is anathema to the purpose of adopting FOI legislation. There is no similar provision in the United States (although the United States' FOIA does include exemptions for such traditional privileges as attorney-client privilege and attorney work products). The potential for disclosed information to hurt a U.S. agency's posture in possible litigation is irrelevant, so long as the information is public information. The original draft U.K. FOI bill also incorporates a "specified interest" to protect the "competitive position of the public authority" in obtaining confidential information from other parties. Subsequently, the U.K. government has even abandoned the "specified interest" concept in favor of a straight

910. Id.
911. Id.
912. Id.
913. Id. at 21.
914. See supra Part VI.C.
916. Id. § (3)-(2)(c).
917. Id. § 3-(2)(d).
919. Id. § 552(b)(9)(B).
920. Freedom of Information Bill, § 3-2(e).

VIII. ANALYSIS OF FREEDOM OF INFORMATION LAWS

In comparing the current information access regime in the United Kingdom with that in the United States, it is clear that the U.S. system has historically been more open. The current Code of Practice on Access to Information in the United Kingdom is not statutory but administrative.\footnote{See \textit{supra} Part VII.} It also leaves too much to the discretion of public or administrative bodies in determining how to answer queries for information.\footnote{See Birkinshaw, \textit{supra} note 809, at 557.} The United Kingdom’s proposed legislation on governmental information, however, compares much more favorably to the United States’ FOIA. As for access to government information in general, major points of diversion between the United States and the United Kingdom involve applicability of the rules to government units; standards of review in determining what information is available for release; what exceptions apply; what checks and balances are in place under both regimes to ensure that government entities comply with their requirements; how information is defined; and agency delay.

A. The Two Nations’ Information Practices

1. Applicability

The extent of applicability of the United States’ FOIA and the United Kingdom’s proposed FOI legislation are substantially
different. The most apparent difference is in the applicability of the respective legislation to lower levels of government. In the United States, the FOIA applies only to the central, or federal, government.\textsuperscript{925} This is necessitated by the unique form of federalism adopted by the United States in the framework of the U.S. Constitution.\textsuperscript{926} Under the Tenth Amendment, part of the original Bill of Rights, "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."\textsuperscript{927} Thus, the power of the central government of the United States is limited.\textsuperscript{928} Unless Congress can identify constitutional authority to regulate some subject matter, such as under the Commerce Clause of the Constitution,\textsuperscript{929} then the power to regulate that subject matter is deemed reserved to the states.\textsuperscript{930} Without constitutional authority to impose its FOIA requirements on state or local governments, Congress had no choice but to limit the applicability of the FOIA to the federal government.

Every state, however, has its own freedom of information statute with provisions similar to the FOIA.\textsuperscript{931} Still, it must be conceded that the United Kingdom's existing and proposed FOI regime is stronger than the United States' FOIA because of its application to both central and local government. There has been legislation extant for years in the United Kingdom allowing access to information about the deliberations of local government.\textsuperscript{932} That legislation has been critical in making local committee work more accessible to the public. In addition, the United Kingdom's proposed FOI legislation would apply to lower level governments.\textsuperscript{933} If public concern in the United States becomes great enough to correct this apparent weakness of the United

\textsuperscript{926} U.S. CONST. amend. X.
\textsuperscript{927} Id.
\textsuperscript{928} Id.
\textsuperscript{929} U.S. CONST. art. 1, § 8, cl. 3. The interstate Commerce Clause has been used to justify farming regulation. Wickard v. Filburn, 317 U.S. 111 (1942). It has also been used to justify civil rights legislation. Katzenbach v. McClung, 379 U.S. 294 (1964). Additionally, it has been used to justify various environmental statutes. See, e.g., Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978).
\textsuperscript{930} U.S. CONST. amend. X.
\textsuperscript{931} See supra Part IV.D.
\textsuperscript{932} Local Government (Access to Information) Act, 1985, c. 43 (Eng.).
\textsuperscript{933} Id.
States' FOIA, then the only way to change it would be to amend the U.S. Constitution. This is unlikely given the apparent satisfaction with the current FOIA regime, including the state public information laws.

An aspect of the United States' FOIA that has drawn some criticism is its lack of applicability to the legislative branch of government. The United Kingdom's proposed legislation would replicate this limitation.\textsuperscript{934} According to the U.K. government White Paper, \textit{Your Right to Know: The Government's Proposals for a Freedom of Information Act},\textsuperscript{935} Parliament's "deliberations are already open and on the public record," therefore, it need not be subject to the proposed FOI legislation.\textsuperscript{936} This, however, is not a compelling argument. Many papers and reports kept by legislators both in the United Kingdom and the United States are not part of the public record.\textsuperscript{937} While legislators should be afforded the opportunity to protect "deliberative process" information and advice as other agencies do, there is no justification for applying the act differently, or not at all, to legislative bodies.\textsuperscript{938} The purpose of the United States' FOIA was to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."\textsuperscript{939} Others have also argued that excluding the legislative branch from the FOIA is inconsistent with that purpose, and that excluding legislatures from coverage "offends basic democratic ideals."\textsuperscript{940}

In addition to the Parliament, the U.K. proposal as described in the White Paper would also include exemptions for several agencies in their entirety. The White Paper explained:

that the Security Service, the Secret Intelligence Service, the Government Communications Headquarters and the Special Forces (SAS and SBS) could not carry out their duties effectively in the interests of the nation if their operations and activities were subject to freedom of information legislation.

\textsuperscript{934} 5 U.S.C. § 551(1)(A) (1994); \textit{Your Right to Know}, \textit{supra} note 32, at 4-5.
\textsuperscript{935} \textit{See generally} \textit{Your Right to Know}, \textit{supra} note 32.
\textsuperscript{936} \textit{Id.} at 5.
\textsuperscript{937} \textit{Id.}
\textsuperscript{938} \textit{Id.}
\textsuperscript{940} Schenck, \textit{supra} note 2, at 376.
These organisations, and the information that they provide, will be excluded from the Act, as will information about these organisations held by other public authorities.\footnote{\textit{Your Right to Know}, supra note 32, at 5. In later versions of the bill, a schedule is attached that specifically names agencies and authorities to which the legislation would apply. \textit{Freedom of Information: Consultation on Draft Legislation}, supra note 865, at 46.}

Although this blanket exclusion is not included in the draft FOI bill, it would have been a divergence from the United States’ FOIA, which focuses exclusively on the content of the information sought and applies to all agencies.\footnote{See 5 U.S.C. §§ 552(a), 552(f) (1994), \textit{amended by} 5 U.S.C. §§ 552(a), 552(f) (Supp. IV 1994).} Under the U.S. Administrative Procedure Act, only “military authority exercised in the field in time of war or in occupied territory” is excluded from the definition of “agency,” which otherwise includes all national executive departments.\footnote{5 U.S.C. § 551(1) (1994). For a discussion of how the military manages wartime publicity, see Capt. William A. Wilcox, Jr., \textit{Media Coverage of Military Operations: OPLAW Meets the First Amendment}, \textit{The Army Law.}, May 1995, at 42. In addition, however, Congress, the federal courts, the territorial governments, and the government of the District of Columbia are excluded from the definition of “agency.” 5 U.S.C. § 551(1).}

To adopt a blanket exemption for national security agencies, as the United Kingdom’s government originally proposed to do, would have been unwarranted and redundant in light of the national security “specified interest” that all agencies have. It would have precluded public access to information for which release would be harmless. Further, it would have been imaginable that some national defense responsibilities that would otherwise be subject to the FOI legislation in the United Kingdom might be passed by the nonexempt agencies to the exempt ones solely to avoid potential disclosure under the FOI legislation. If, for instance, a particular ministry wished to build an airplane landing strip in an environmentally controversial area, and one of the exempted agencies shared an interest in the landing strip, then the exempt agency could take responsibility for the project and thus avoid potential public opposition. As long as this blanket exemption of agencies is not included in the final legislation, however, this potential disparity between the U.K. and the U.S. FOI laws would be avoided.
2. Standards of Review

By establishing in its original legislation a "substantial harm" test for agencies to use in determining whether information should be disclosed, the United Kingdom's FOI legislation would have avoided one of the greatest weaknesses of the United States' FOIA. 944 Under the proposed legislation as described in the White Paper, a public authority would not be allowed to withhold information unless it determined that release of the information would cause "substantial harm" to the nation's interests, regardless of whether it would fall into one or more of the "specified interests." 945 The United States' FOIA, however, has no such requirement. On its face, the FOIA would allow any agency to withhold any piece of information as long as it fell within one of the exemptions.

In 1978, the U.S. Supreme Court recognized that agencies have discretion to release information that they might legally be able to retain if the agency determines it advisable to do so. 946 The Court stated, "that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford... any right to enjoin agency disclosure." 947 Yet it was not until U.S. Attorney General Janet Reno adopted specific guidelines for withholding information that a determination was made that a release would "harm" some interest became a requirement for withholding information. 948 If an agency cannot articulate a "harm," then the Attorney General will not defend court action against the agency. 949 Only the U.S. Department of Justice is authorized to defend the U.S. government in courts, 950 which means that the agency would be forced to release the contested documents. Thus, the policy expanded the agency's discretion to disclose information that would otherwise fit an exemption from unless some harm would result from the disclosure. This change in policy on the part

944. See generally supra Part VI.C.
945. YOUR RIGHT TO KNOW, supra note 32, at 16.
947. Id. at 294. A party who objects to release of certain information to the public may file a "reverse FOIA" suit to attempt to block the disclosure, but it must be based on some other statute, not the FOIA. See id.
948. Reno Memorandum, supra note 780, at 1.
949. Id.
of the U.S. Department of Justice was long overdue. Because this policy is merely administrative and is not part of the FOIA statute, however, it is subject to change. Janet Reno’s present successor, Attorney General John Ashcroft, could decide to reverse the policy. Nevertheless, the U.S. Congress should adopt a permanent agency standard of review of at least “harm,” as adopted by the former Attorney General, or preferably “substantial harm,” as originally proposed by the U.K. government. On the same note, the United Kingdom should not abandon the “substantial harm” standard, as later drafts of its FOI bill would.951

3. Application of Exceptions

One problem inherent in formulating agency public disclosure rules is drafting exceptions to disclosure requirements that are precise and readily understandable. It has long been recognized that governments control information which, for various reasons, should not be released to the public.952 Yet the stated criteria for withholding or disclosing certain types of information, in both the United Kingdom and the United States, is often imprecise. The “commercial or financial” information (submitted by non-government parties) portion of Exemption 4 of the United States’ FOIA, for instance, was drafted so vaguely that courts had to look at the statute’s legislative history to determine how the exemption should be interpreted.953 As late as 1992, the U.S. Circuit Court of Appeals for the District of Columbia made a significant holding regarding this provision. In Critical Mass Energy Project v. Nuclear Regulatory Commission, the court drew a distinction between information that was “required” by the government to be submitted and encouraged “categorical” protection for information submitted on a “voluntary” basis, if the information “would customarily not be released to the public” by the submitter.954

951. See Freedom of Information: Consultation on Draft Legislation, supra note 865, at 7–8.
952. See, e.g., Statement by the President Upon Signing the “Freedom of Information Act,” supra note 596, at 699.
Arguably, certain exemptions could be used by agencies as a subterfuge for withholding information. Exemption 1 of the United States’ FOIA, one might argue, could allow agencies to classify information as “secret,” or the like, so as to avoid disclosing information.\footnote{955} The potential for a district court to conduct an \textit{in camera} review of classified records and documents, however, should dissuade any agency from taking this approach.\footnote{956} Exemption 7, the law enforcement exemption, could also be abused by withholding information under the guise of a criminal investigation. The potential for embarrassment in a U.S. district court, however, would normally prevent such abuse. In the event of investigation of environmental crimes, however, law enforcement agencies could be faced with some difficult decisions. If an agency is investigating an illegal hazardous waste dump site, for instance, it may wish to conceal its knowledge of the site so as not to alert the owners of the site that they are being investigated. This is comparable to a police detective withholding certain information about crimes from the public. Conversely, the site might cause a health threat to the surrounding community, of which the citizens need to be informed.

4. Checks and Balances

Any system for providing free access to government-held information must rely, to some extent, on the good faith of the agency possessing the information. Under the United States’ FOIA, for instance, an agency must exercise “a reasonable amount of effort” to locate a requested record.\footnote{957} If a record cannot be found as a result of the search, the agency may report that it does not possess such a record.\footnote{958} Agencies are normally conscientious about attempting to locate requested documents. If an individual records custodian did not make a diligent search, however, it is possible that the resulting “no records” determination would go unchallenged. If a challenge is made, however, the onus is on the

\footnote{957. U.S. DEP’T OF JUSTICE, \textit{supra} note 653, at 32.}
\footnote{958. \textit{See id.}}
records custodian to show that he or she made a good faith search for the information.\footnote{See id.}

Regarding an agency's determination to withhold an existing record, however, there are some significant checks and balances under both the United States' FOIA and the proposed United Kingdom's FOI legislation. Under the U.S. system, however, an information requester would likely find it more difficult to appeal an agency's decision to withhold.\footnote{5 U.S.C. § 552(a)(6)(C).} If an agency makes a final determination that a document or record should be withheld, then the requester's only recourse is in federal court.\footnote{See 5 U.S.C. § 552(a)(4)(B).} Unless the requester is a wealthy individual or a well-funded organization, a lawsuit could be prohibitively costly. Under the United Kingdom's proposed legislation, however, a special position, the Information Commissioner, would be created to investigate complaints of agencies' noncompliance with the legislation.\footnote{YOUR RIGHT TO KNOW, supra note 32, at 27--28.} This would provide requesters a more "user friendly" avenue for appealing agency non-disclosure decisions. The Information Commissioner would also act generally as the focal point for studying the legislation's effectiveness and for promoting greater governmental openness toward the public—functions that, in the United States, are generally fulfilled by the Attorney General.\footnote{See id.}

5. Information Versus Records

Although the United States' information statute is known as the Freedom of Information Act, it is really a right of public access to records or documents statute. If no record is kept on an issue, then there is nothing to release. This can be detrimental to the public's interest in two ways. First, while government officials may have substantial "information" on a particular matter, they need not disclose this unless there is some record generated. Second, the documents disclosed might not be distilled in such a way that members of the public can understand the information contained therein without the help of an expert. It is conceivable that the only proof of some government decisions could have been in the form of a verbal order. It is difficult, however, to imagine such an
occurrence without someone reducing it to writing. Regardless, such information should be available to the public. This information could be provided in a simple question and answer format, with government officials acknowledging information without trying to interpret it. Regarding the distillation of information from complex documents for members of the public, however, it is preferable for the government not to attempt to interpret its documents for public requesters. That interpretation in itself would represent the government’s “spin” on the material. Thus, it is better for the government to release raw data, perhaps placing a greater burden on the public, rather than provide all the analysis for the public, thus weakening the public’s ability (and responsibility) to interpret the information itself. In general, to the extent that the proposed U.K. legislation provides access to both government documents and government information, it is superior to the United States’ FOIA.

6. Agency Delay

One problem frequently faced by information requesters under the United States’ FOIA has been delay by agencies in answering their requests. This has been attributed to the sheer number of requests (approximately 600,000 per year), the failure of Congress to adequately fund the agencies to respond to those requests, and the courts’ tolerance of delays when huge backlogs exist. In some instances, delays can result in significant harm to FOIA requesters and may delay the benefits resulting from disclosure. Significant backlogs can also cause a strain on a government agency’s resources. The FOIA has been harshly criticized as wasteful. The FOIA, wrote Justice Scalia several years prior to his U.S. Supreme Court appointment, “is the Taj Mahal of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis ignored.” In recognition of this problem, Congress increased the allowable agency processing time from ten

964. See McMasters, supra note 527, at 10–11.
966. Sinrod, supra note 965, at 119.
967. See, e.g., Scalia, supra note 536, at 14.
968. Id. at 15.
to twenty days in 1966. Backlogs can still present a major problem both to agencies and information requesters. The U.K. government should be aware of this when it finalizes its proposed FOI legislation.

B. Relative Effectiveness of Freedom of Information Regimes

As discussed previously, there are five roles that enhanced access to environmental information plays in encouraging the public's stewardship of the environment. One can compare the relative effectiveness of the United States' and the United Kingdom's general freedom of information regimes using those five benefits as a yardstick. Because the current U.K. FOI regime is merely an administrative code, the proposed FOI legislation compares more favorably with the United States' access to government information requirements. Therefore, this assessment will focus on the contrasts between the United States' FOIA and the United Kingdom's pending FOI Bill.

1. The "Public Reassurance" Role

Both the present FOIA and the proposed U.K. FOI legislation go a long way toward cutting back on government secrecy. "It's fair to criticize the [United States'] FOIA," said Robert Gellman, former chief counsel to the House [of Representatives] committee with FOIA oversight, 'but the act does positive things and it needs to get credit for that." Gellman further explained that "more than 90% of FOIA requesters get everything they want. They don't always get it on time or with the fee waivers they are entitled to, but the law works—fitfully, slowly, but it works." Because of its broader exemption for national security agencies, however, the United Kingdom's proposed FOI legislation lags slightly behind the United States in addressing the "public reassurance" role. Because that exemption goes farther than it has to in protecting national security interests, not incorporating the strict limitations

970. See supra Part I.
971. McMasters, supra note 527, at 11.
972. Id.
placed on "classified information" in the United States, it might be subject to abuse. This would render the United Kingdom's FOI legislation less successful in fulfilling the "public reassurance" role.

2. The "Personal Responsibility" Role

The connection between access to government in general and the "personal responsibility" role of stewardship of the environment is more attenuated, because it involves access to information and the public's acting on that information in some way. Both the United States' FOIA and the proposed United Kingdom FOI legislation should be equally excellent tools in this regard. As discussed in Part V, "green" marketing has appeared in both the United States and the United Kingdom, giving consumers an opportunity to choose more environmentally sound lifestyles, including the products they buy. In promoting the "personal responsibility" role, it is important to emphasize, however, that environmental information should not be simplified or "distilled" for the public to make information sound less significant than it really is, as the United Kingdom's present Code of Practice on Access to Information permits.

3. The "Industry Responsibility" Role

Neither the United States' FOIA nor the proposed U.K. FOI legislation create any exemptions for environmentally sensitive information voluntarily provided by industry. The provisions in both countries allowing for government withholding of certain commercial or financial information are not aimed at environmental information, although the withholding of environmental information might occasionally be a by-product of the commercial exemptions. Industry should assume that any environmental information that it provides the government (such as self-reporting of violations or information provided during inspections by regulators) will be open to the public. This is a strong incentive for industry to ensure that operations are as environmentally sound as possible.

973. See supra Part IV.C.
974. See supra Part V.D.
975. See Silverman, supra note 823, at 471.
4. The “Agency Accountability” Role

Holding government agencies and public authorities responsible for their actions is one of the primary thrusts of both the United States’ FOIA and the proposed U.K. FOI legislation. Because agency decisions, including environmental regulators’ decisions not to prosecute or enforce, can be obtained during the freedom of information processes, the incentive for environmental agencies to aggressively pursue environmental protection to the satisfaction of the public is powerful. Agency officials are aware that, although it may take some time, almost any action they take will be accessible under the two countries’ respective government information regimes.

5. The “Public Participation” Role

The public, if armed with the proper information, can exert its influence on political candidates and legislation to take the environment into account. The governmental information regime in the United States and the proposed U.K. FOI legislation both tend to enhance this function, because they will tend to result in a “well-informed electorate.” Thus, both work to help satisfy the “public participation” role, which is closely related to the “public responsibility” role discussed above. By establishing strong legislation on access to governmental information, both nations appear to be working to enhance the “public participation” role.

IX. ACCOMPLISHING THE GOAL OF FREEDOM OF ENVIRONMENTAL INFORMATION

Both the United States and the United Kingdom have made great progress in assuring that vital environmental information is made available to the public. The United Kingdom could still learn a lot from the United States’ policy of access to environmental information, which includes the FOIA and the EPCRA.976 The United Kingdom, however, continues to make great strides in adopting measures that equal, and in some cases, exceed the public’s access to environmental information in the United States.

As discussed, there are several ways in which the public can access information in the United States and the United Kingdom. Each nation has public access requirements specifically built into many of their environmental laws. In the United Kingdom, for instance, the system of public registers now applies to most permit and enforcement regimes.\textsuperscript{977}

Although the system of registers has had its critics—those who believe the registers can be made more accessible and convenient—they can hardly question the basic fact that the registers have increased the public’s ability to access environmental information to a certain extent. In the United States, similar data regarding permit holders, violations, enforcement actions, and the like are accessible by contacting state environmental regulators.

Environmental planning requirements in the United States and the United Kingdom also contribute to the body of data available to the public. In England and Wales, the Town and Country Planning Regulations of 1999\textsuperscript{978} contain detailed public disclosure requirements for development and consideration by local planning authorities of certain types of proposed projects. In the United States, proposed actions by the federal government that may have impacts on the environment must be publicly considered under the requirements of NEPA.\textsuperscript{979} The NEPA, however, is limited to federal government activities only, and does not apply to private proposals unless some federal government decision is involved. In addition to the federal government, more than half of the states in United States have adopted state environmental impact assessment laws to cover their own state agencies. Still, private activities are less likely to receive the full public scrutiny of a comparable activity in the United Kingdom, unless the activity requires obtaining some form of an environmental permit, or involves a particularly aggressive planning and zoning authority.

In addition, the United Kingdom’s Environmental Information Regulations of 1992\textsuperscript{980} have no counterpart in the United States.

\textsuperscript{977} Control of Pollution Act, 1974, c. 40 (Eng.).
\textsuperscript{980} Environmental Information Regulations, (1992) SI 1992/3240 (Eng.).
United States. In the United States, the Freedom of Information Act\textsuperscript{981} is the major vehicle for accessing government information concerning the environment, civil rights, or the costs of proposed federal civil engineering projects. The United Kingdom's Environmental Information Regulations of 1992 give environmentalists in the United Kingdom the power with which to seek out information on the environment, in addition to the Code of Practice on Access to Information of 1994.

In seeking approaches to make environmental information more available, both the United Kingdom and the United States can learn from one another. Certainly there are other considerations involved, such as national security, commercial competitiveness, and personal privacy. Nevertheless, each nation could make many substantial reforms without impinging on those considerations. Such reforms would make a significant and immediate impact on the accessibility of environmental information in their respective nations.

\textit{A. The United States' Reforms}

1. The FOIA

In 1993, U.S. Attorney General Janet Reno issued an intergovernmental memorandum establishing that the U.S. Department of Justice would no longer defend certain cases attempting to force agencies to disclose information. These were cases in which the defense was based solely on the fact that the information qualified for exemptions under one of the nine FOIA exemptions. Rather, an agency would have to show that actual harm would result from disclosure of the information.\textsuperscript{982} This was a positive step in ensuring that agencies will not simply hide behind the FOIA exemptions to avoid releasing information. Because the current administration could easily reverse Reno's decision, Congress should act to amend the FOIA to make the actual harm standard part of the FOIA itself.

Currently, the FOIA does not apply to lower level governments. Attempting to apply such legislation to state governments would raise difficult constitutional arguments in light

\textsuperscript{982} Reno Memorandum, \textit{supra} note 780, at 1.
of the Tenth Amendment to the U.S. Constitution. The Tenth Amendment requires that powers not specifically delegated to the United States “are reserved to the States respectively, or to the people.” Individual states, therefore, must take steps to ensure that their freedom of information statutes, which every state has adopted in some form, accomplish the same level of openness as their federal counterpart.

2. Environmental Planning

The United States can substantially improve the environmental planning processes it has adopted. The NEPA is an excellent environmental planning statute in terms of including public participation and input. In fact, perhaps it has been too successful in this regard. The NEPA provides a basis for any opponent of any federal project to file a court action claiming that a proponent agency has inadequately analyzed some aspect of the environmental impacts of a project. Thus, NEPA may have discouraged states from adopting similar legislation. Like the FOIA, NEPA applies only to the federal government, and attempting to apply it to states might raise constitutional difficulties. Unlike the FOIA, however, states have been much more reluctant to adopt state NEPA acts. State NEPA statutes could apply to planning and zoning decisions, as do the environmental impact assessment requirements in the United Kingdom. Without state NEPA statutes, however, there is a potential gap in environmental assessment and public participation in environmental planning decisions in the United States. Other environmental statutes may at least partially cover this gap if some permit is required for an operation. Nevertheless, states should be encouraged to adopt their own NEPA laws that would at least approximate the public participation requirements of the federal counterpart.

B. The United Kingdom’s Reforms

1. Freedom of Information

The United Kingdom should have adopted a Freedom of Information bill similar to the draft bill introduced in December
This draft bill was truer to the spirit of the White Paper, *Your Right to Know*, than later versions. Even adoption of a later version of the bill, however, would constitute a marked improvement over the current freedom of information regime in the United Kingdom. The 1994 Code of Practice on Access to Government Information, currently in place, has numerous weaknesses, not the least of which is that it is merely an administrative direction. The new legislation clearly has some defects, such as a national security and defense exemption that is overly broadly, and a retreat from the "substantial harm" test originally contemplated as a requirement for withholding information. Once adopted, however, the U.K. legislation will surpass the United States' FOIA in opening government to the public because it has broader application. The U.K. legislation would apply to all "public authorities," and not just the central government.

2. Environmental Information Regulations of 1992

The U.K. government has followed the European Community in establishing its Environmental Information Regulations of 1992 and has been criticized for including definitions that are too broad. Nevertheless, the 1992 Regulations could become an effective tool if the government committed itself to aggressively redrafting them to apply in the United Kingdom while still meeting the requirements of the EC Directive. In addition, passage of the Freedom of Information bill should render the 1992 Regulations a secondary, rather than a primary, information search tool for the British public.

989. *See* Birtles, *supra* note 92, at 417; *see also* Birtles, *supra* note 93, at 608 (noting that "information relating to the environment" is defined broadly).
990. *See supra* Part V.C.
3. Public Registers

In the United Kingdom, the public has not made widespread use of public registers. Several suggestions have been brought forward to remedy this, but there are two obvious suggestions. The first is for the government to examine the geographic availability of the register information to ensure that people can access it locally. The second suggestion is to better publicize the availability of the information, using Internet resources, for example. In addition, the United Kingdom may wish to consider expanding requirements to publicize certain types of environmental activities, as it has done in its environmental impact assessment process.

X. CONCLUSION

"Unnecessary secrecy in government leads to arrogance in governance and defective decision-making. The perception of excessive secrecy has become a corrosive influence in the decline of public confidence in government." When the government keeps information secret, it fuels the fear that environmental problems are not handled in a fair and equitable manner. This distrust can lead to disregard for the law if members of the public draw conclusions, based on incomplete information, that the government does not enforce the law evenhandedly, or at all.

In 1989, the citizens of Midlothian, Texas, used the FOIA to delve into the burning of hazardous waste at two cement-manufacturing plants nearby. The citizens became aware of this practice when the plants placed advertisements in the local newspaper that they were seeking a hazardous waste storage permit to store hazardous waste. By pursuing information with FOIA requests to the U.S. EPA, town citizens were able to determine what types of toxins were being incinerated at the plants, and what kinds of toxins might be released from the plants’ smokestacks. "A lot of people were surprised that hazardous

991. See supra Part III.
992. Burton, supra note 182, at 207.
993. See supra Part III.
994. YOUR RIGHT TO KNOW, supra note 32, at 1.
996. Id.
997. Id.
waste was being burned. The companies had been calling it fuel recycling," said Jim Schermbeck, a local activist.998 The information gathered through such public notifications and FOIA requests enabled Midlothian's citizens, and others throughout the United States, to make informed arguments in protesting projects or proposals that damage the environment.999 "Mention the FOIA in Texas, and folks ranging from Schermbeck to neighborhood activists in Austin who in 1991 successfully fought to relocate a polluted cluster of gasoline terminals know how to use it."1000

Such positive scenarios should be possible for every citizen in a free country. Although the United States has a longer tradition of such openness in government, the United Kingdom has made tremendous strides in opening up its government in recent years. With the advent of the Freedom of Information bill in the United Kingdom, the United States and the United Kingdom will be virtually equal in terms of affording their citizens access to environmental information.

---

998. Id.
999. See id.
1000. Id.