ACCESS TO INFORMATION IN CANADA AND THE UNITED STATES: A COMPARATIVE CASE STUDY

by

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Abstract

This paper compares access to information legislation in the United States and Canada and uses the findings of this comparison to test three theories of policymaking. In particular, the paper uses the comparison to explore the idea that the existence of access to information policies contradicts policymaking theories which stress the autonomy of the state.

The paper begins with a detailed comparison of the Canadian and American legislation as it has been interpreted by the courts. This comparison finds that the two policies are very similar but there are some significant differences in the details of the two regimes and that these differences tend to make the Canadian access policy more restrictive than the American. The paper then examines whether these findings can be explained as being consistent with policymaking theories which explain policy as being the result of a copying process, of interest group pressure or of institutional forces. In order to better understand the forces behind the legislation the legislative comparison is supplemented by reference to relevant policy papers and evidence from the period of the development of the two acts.

The results of the analysis indicate that no one of the three theories is provides an adequate explanation of the two access policies. The legislation was a result of a combination interest group pressure and institutional forces and, in the case of the Canadian legislation, the process of copying also played a key role. The findings also indicate that explanations which stress the role of
the state are not inconsistent with a policy that results in weakened state autonomy.
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Chapter One

Introduction

The current trend in the field of public policy is to "bring the state back in" to policymaking explanations. Policy analysts emphasize the state's autonomy from social forces and the independent influence of the structure of the state on public policy. There is a move away from policymaking explanations which see policy as strictly a reflection of interest group pressure or the state as merely an impartial implementor of the popular will. The state is said to have its own interests and the power to implement those interests in public policy.

Recently, many states have implemented policies aimed at remedying the perceived lack of control of the public over government. One trend has been to implement reforms directed at "opening up" government and giving greater public access to the policymaking process and to government operations generally. These reforms attempt to allow for more effective and informed participation by the public in the governing process and to restrict the government's ability to act in secrecy.

The existence of these reform policies would seem to contradict the idea that the state plays a significant independent role in public policy. Through these policies states are acting to limit their own discretion and their own ability to act independently. Allowing for more effective participation by the public means less independence for government actors and "opening up" means less freedom to act away from public scrutiny. It seems to be unlikely that any
autonomous state would choose to bind itself by rules which have this effect. Such a choice would amount to a state autonomously choosing to limit its own autonomy.

The focus of this paper is one particular area of open government reforms. It looks at access to information policies in the U.S. and Canada. In 1966 the United States implemented a Freedom of Information Act\(^1\) and in 1982 Canada followed with the Access to Information Act.\(^2\) Both of these pieces of legislation seek to establish greater access to government information by providing the public with a general right to records held by the government. The public is to have access to all records held by the government subject only to limited and detailed exemptions. The paper compares these two policies in order to better understand the forces behind their implementation and whether their existence does indeed refute the idea that the state is an autonomous force in the policymaking process.

The first part of the paper will compare these two pieces of legislation to determine the extent to which each provides an effective access requirement and the degree to which they differ. The examination of the legislation will include the interpretation of the legislation by the courts. The courts are an often forgotten part of "the state" when it comes to policymaking, and any description of legislation without this interpretation might give a misleading impression as to the actual degree of access required by the legislation. The findings of this comparison will then be used to

\(^{1}\) 15 U.S.C. 552.
\(^{2}\) S.C. 1980-81-82-83, c.11, Sch. 1.
test state and society centered policymaking explanations to see which can best explain the differences and similarities in the two policy areas. This examination will hopefully reveal whether the initial impression of such policies as running counter to a state centered explanation is a misguided one or whether such explanations are themselves flawed.

An initial observation about this policy area in a comparative context might be that an access act seems to fit much more easily into the American institutional context than it does the Canadian. The American system generally might be said to be more open and adversarial than the Canadian system and legislating a right to access, guaranteed by court review, might be seen as a necessary component of such a system. In some ways it might be said that adopting an access to information act in Canada is an "Americanization" of the Canadian system.

This suggests that perhaps the Canadian legislation might not be an independent product of the Canadian policymaking system but rather the result of some form of copying of the American policy. The first policymaking explanation that will be examined, therefore, will be one that explains policymaking as a process of copying. This explanation will be tested to see if it fits with the results of the legislative comparison and whether it explains adequately the differences and similarities between the two countries' policies.

Secondly, the paper will test the comparison against an explanation which stresses the role of interest groups in the policymaking process. Evidence of interest group pressure for an access to information policy will be examined to see if it such
pressure is consistent with the findings of the policy comparison. Differences and similarities in the Canadian and the American legislation would be expected to be a reflection of differences and similarities in interest group pressure in the two countries. The stronger pro access pressure is in a country, the stronger the access legislation would be expected to be.

Finally, the results will be tested against some of the explanations which stress the state's independent role in policymaking. The American and Canadian institutional context will be examined to see if there is some way in which an institutional analysis can explain why these states would choose to limit their own autonomy and why they might choose to do so to different degrees. Institutional differences and similarities will be examined to see if they can explain the differences and similarities which the policy comparison identifies.
Chapter Two
Access to Information Policy in the U.S. and Canada

I. Legislative History

In the United States and Canada the adoption of access to information legislation was a slow process. In both cases it took over ten years from the time such legislation was initiated to the time it was passed. A brief look at the history of this process is important to understanding the forces that shaped it.

i. United States

The history of access to information legislation in the United States is tied up with the history of other more general administrative reform initiatives. Concern about the proper role of federal agencies began to arise in the 1930's when powerful agencies were established to regulate certain sectors of the economy. The wide rule-making and adjudicative powers of these agencies were seen by some as usurping the proper roles of other branches of the government. Concern was expressed about the lack of coordination among the different administrative entities and the lack of any central control or overall planning. In 1937 the President's Committee on Administrative Management pointed to the haphazard buildup of agencies responsible to the Executive and

warned of the creation of a headless "fourth branch" of the
Government.2

In response to these kinds of concerns the Administrative
Procedure Act (APA) was passed in 1946. The APA was a general
code of procedure for agency activity. Despite resistance from
agencies, included in this general code were some limited
requirements for the release of agency information.3 Along with
limited publishing requirements, Section 3 of the APA required that
matters of official record be made available to "persons properly
and directly concerned." 4

In the years following there was a growing concern about
government secrecy and the general lack of availability of
government information. In 1950 the American Society of
Newspaper Editors commissioned Harold Cross, a prominent retired
newspaper attorney, to carry out a study on access to government
information. His 1953 report "The People's Right to Know."5
documented the lack of availability of government information and
pointed to the shortcomings of Section 3 of the APA as a major
cause for this unavailability. According to Cross, the vague language

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2U.S. President's Committee on Administrative Management, Report of the Committee
with Studies of Administrative Management in the Federal Government 32 (1937); as
quoted in Smith, 235.

3In 1941, a Senate Judiciary sub-committee held hearings regarding various proposals
for administrative procedure bills. The information requirements received little
comment by non-agency witnesses, but the majority of agency witnesses found fault
with the information provisions. See Smith, 245.


5Published as: Harold Cross, The Public's Right to Know (New York: Basic Books,
1953).
of the Section and the broadly defined exemptions were used by agencies as a justification for withholding information rather than as a mandate for its release.

In 1953, a task force of Congress's wide-ranging Commission on Organization of the Executive Branch of the Government (the "Hoover Commission") also targeted Section 3, arguing that the access requirement was too vague and its exemptions too broadly defined for it to be effective. The American Bar Association investigated revision of the APA and also called for Section 3 to be clarified and broadened in order "to effectuate the basic intent" of the Section.6

In 1955 the House Committee on Government Operations, responding at least in part to calls for reform, created a subcommittee on government information. Over the next five years this subcommittee, mainly under the direction of Democrat John Moss, held 173 hearings and investigations into government secrecy. The work of this subcommittee established the foundations for a new information policy. Moves by the subcommittee to amend Section Three, however, were continually frustrated because of a lack of interest by the Judiciary Committee to which the subcommittee reported.7

The reform cause was taken up with more success in the Senate, first by the Subcommittee on Constitutional Rights under the direction of Senator Hennings, and later by the Subcommittee on

6 Blanchard, 3.

7 Director of the Moss Committee staff Samuel Archibald is quoted by Blanchard as saying "We couldn't see any way of amending 5 U.S.C. 1002 [the APA, Section 3] without Judiciary (Committee) support...It wasn't that the committee was against the amendment. It was just that it couldn't have cared less about it." Blanchard, 6.
Administrative Practice and Procedure under the direction of Senator Long. Bills to amend Section 3 were introduced in the Senate during the 85th Congress, the 86th Congress and the 87th Congress. It was not, however, until the 88th Congress, in 1964, that a bill was eventually reported and passed in the Senate. It failed to become law, however, when a companion bill in the House failed to be reported before the end of the 88th Congress.

In the 89th Congress a number of new information bills were introduced in the House and more hearings were held, this time before the House Subcommittee on Foreign Operations and Government Information.8 Progress was halted, however, when the Justice Department redrafted one of the bills to meet with executive concerns about its constitutionality.9 It was only when the Senate re-introduced and passed an information bill and referred it back to the House that progress was finally made towards passage. Aided by a report, which gave it a very different interpretation than the earlier Senate report had, The Freedom of Information Act finally passed in the House on June 20, 1966 by a vote of 308-0 (with 125 not voting). President Johnson, after

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8Moss's sub-committee was re-organized and its jurisdiction widened to all foreign operations and thus it changed names and became responsible to the Committee on Government Operations rather than the Committee on the Judiciary. Through some maneuvering, it was able to keep jurisdiction over the information bill and at the same time get away from the Judiciary roadblock.

9According to Blanchard, the implied threat of Presidential veto convinced the Moss sub-committee to allow redrafting to meet the objections of the administration. The demands were greater than anticipated and this caused the stalling of the Bill in committee. Blanchard, 6.
seriously considering pocket vetoing the bill, signed it on July 4, 1966.\footnote{Added with the signature was a message stating that the bill did not impair the president's constitutional power to provide for confidentiality "when the national interest so requires." James T. O'Reilly, \textit{Federal Information Disclosure: Procedures, Forms and the Law} (New York: McGraw-Hill, 1984): 2-12.}

Since 1966 the Freedom of Information Act has undergone two major sets of amendments. The first and most extensive came in 1974, when significant changes were made to strengthen the Act and make it more effective as a disclosure tool. These were implemented over a presidential veto. The second major set of changes came in 1986. The major thrust of these changes was to strengthen the exemptions of the Act and narrow somewhat its application. Minor changes were also made in 1976, 1978 and 1984.


In Canada, there is no federal administrative procedure act and the push for access reform seems not to have been linked to any calls for such an act. The first stirrings of political interest in an access to information act in Canada seems to have been in the mid-1960's. In 1965, New Democrat M.P. Barry Mather introduced a private member's bill requiring administrative disclosure. Like most private member's bills it was unsuccessful. Mather would go on to introduce a similar bill every year for the next five years and meet with the same result. Two Royal Commisions in the 1960's
briefly addressed the question of government information, but neither felt the need to make any calls for reform.  

The first serious step by the government toward opening access to government information did not come until 1973, when the Liberal government tabled "Notices of Motion for the Production of Papers" in the House of Commons. This document was a cabinet directive requiring all agencies and departments to produce "government papers, documents and consultant reports" on notice of a motion by a member of parliament. The directive included seventeen different exemptions to the general right of production, many of which were very broad and vaguely worded.

In the Fall of 1974 the government referred the directive to the Standing Joint Committee on Regulations and Other Statutory Instruments for consideration. It also took the unusual step of referring a private member's administrative disclosure bill to the same committee. This bill had been introduced by Conservative Member of Parliament Gerald Baldwin, who had taken over Mather's role of championing access to information in the House. He had introduced a disclosure bill in every session of Parliament from

\footnotesize


13For a copy of this directive see J. Roberts, Legislation on Access to Government Documents (the "Green Paper") (Ottawa: Minister of Supply and Services, 1977): Appendix 1.

14Excluded, for example, were papers "the release of which would be detrimental to the security of the state," "that are private and confidential and not of a public or official nature," Roberts, Appendix 1.
1969 onwards and the referral to the committee was the first
government response that he had received.

Over ten months, the Committee held approximately 25 hearings
on the issue of access to information. It heard from a variety of
witnesses and received a number reports concerning access to
information in other countries. As a result of these hearings and
investigations the committee recommended that access to
information legislation be approved in principle. This
recommendation was given unanimous approval in the House of
Commons in December of 1975.

The government's eventual response to this was the tabling of a
policy paper "Legislation on Public Access." (or "Green Paper."\(^{15}\)).
This paper was referred back to the Joint Committee in December of
1977. The Green Paper expressed government support for the ideal
of open government and greater public access to government
information, but warned of creating a law which would offer too
much access. The majority of the paper was spent outlining
necessary exemptions to access and the need to take account of
Canadian's unique constitutional system.\(^{16}\)

During the year following the tabling of the Green Paper the
Committee on Regulations held another series of hearings. Briefs
and presentations were again heard from a wide range of groups.\(^{17}\)

\(^{15}\)Roberts.

\(^{16}\)Roberts, 5.

After consideration of these various representations the Committee tabled a report with its recommendations in June of 1978. The Committee agreed with the basic scheme put forward by the Green Paper but found the exemptions listed in the Green Paper to be generally too broad and vaguely worded. The Committee suggested its own list of more narrow exemptions and recommended a system of outside review of non-disclosure decisions.¹⁸

Despite these various developments and recommendations there was still no sign of legislation. In the Spring of 1979 the Liberals did promise that a freedom of information bill would be passed "in the near future," but before any moves were made to fulfill this promise they were defeated in the election of May 1979. Freedom of information was made an issue during this campaign and shortly after being elected Joe Clarke's Conservatives tabled a new access bill. The fall of the Conservatives, however, came before this bill could be enacted. The re-elected Liberals, who had been critical of the Tory bill for being too narrow, tabled a slightly modified version of it in July of 1980 and referred it to the Standing Committee on Justice and Legal Affairs in March of the following year. After over a year of hearings a slightly revised version of this bill was finally enacted in June of 1982 and given Royal Assent in July of the same year.

II. THE LEGISLATION

The legislation that eventually emerges in Canada and the U.S. turns out to be remarkably similar. Both establish a similar general right of access to government information and circumscribes that right in relatively similar ways. The basic framework of the legislation, who and what the access right applies to, the areas covered by the exemptions and the method of review are all generally the same. The detailed comparison of the legislation that follows, however, tends to show that despite this overall similarity there are some important differences in the details of the two act and these differences tend to make the Canadian act more restrictive than the American.

i. Basic Framework

The American and Canadian acts share the same basic framework. Both require that government agencies or departments disclose a certain minimum of information and then set out a general right of access to all remaining government documents. Persons are given

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the right to request documents from an agency or department and the department or agency is required by the legislation to supply it. This general right of access is qualified by a list of exemptions and guaranteed by a final right of appeal to the courts. The agencies or departments must respond to requests within certain time limits and are limited in the fees which they can charge for answering such requests.

ii. The Affirmative Disclosure Requirements

Although the main thrust of both acts is to require disclosure of information only on request, both statutes also place some positive obligations on government to make public certain information regardless of whether there is a request for it. In the Canadian act, the affirmative disclosure requirements are very limited and are simply aimed at facilitating exercise of the right to disclosure. Under the American act they are slightly more extensive. American agencies, for example, are required to publish all substantive rules, interpretations of general applicability and statements of general policy.

iii. The Right to Access

The general right of access applies to all government documents not explicitly excluded or exempted by the act. Along with the exemptions and exclusions there are also some limits built into the general right regarding what information may be requested, where it may be requested from, and who may request it.

*What may be requested: records*
Contrary to the names of both acts it is not "information" that must be disclosed by the agencies or institutions, but simply "records." The FOIA does not give a definition of records, but in Forsham v. Harris, the U.S. Supreme Court found that the proper definition included books, papers, maps, photographs, machine readable materials "or other documentary materials regardless of physical form or characteristics..." The Canadian act explicitly defines the term "record" in almost identical terms as the court did in Forsham, listing a number of similar specific items and including "any other documentary material, regardless of physical form or characteristics." Under both acts, material must also be under the control of the institution or agency in order to be covered.

To whom requests can be made: agencies and government institutions

Under both acts, only certain government entities are subject to disclosure requirements. In the American act the disclosure requirements apply only to "agencies" and in the Canadian act only to "government institutions." A key exclusion from both definitions is the legislative and judicial branches of government. The FOIA

20 This means that information that has not been reduced to documentary form is not included (e.g. knowledge of information, but no record) nor information that is not in documentary form (e.g. physical evidence).


22 This definition is drawn from the Federal Records Disposal Act.

23 AIA s.3.

24 In the U.S. this was decided in Department of Justice v. Tax Analysts 109 S.Ct. 2841 (1989). In Canada it is set out in the statute, AIA, s.4.
defines agency very broadly to include "any executive department, military department, Government Corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President) or any independent regulatory agency." In contrast, the Canadian act defines institutions to include only those listed in a schedule accompanying the act. A fairly extensive list was included in the original schedule, but not so extensive as to cover all executive entities. For example, some crown corporations, like the Canadian National Railway, were not included nor were certain government institutions like the Canadian Wheat Board or the National Arts Centre Corporation. Under the U.S. scheme such entities would be included unless explicitly excluded by their authorizing statues.

Who can make requests: persons

Both acts allow for information requests to be made by any "person." The definition that is applied under the FOIA includes individuals (including foreign citizens), partnerships, corporations, associations and foreign or domestic governments. The only significant exceptions seem to be federal agencies and persons who flout the law. Originally, the Canadian definition of "persons"

25There is provision for the list in the Schedule to be expanded, but since 1985 there have only been 13 completely new entities added and none of those listed above have been among them.

excluded corporations, associations, partnerships and non-residents. In 1989, however, an order in Council extended the definition to include all individuals and corporations present in Canada.27

This "any person" standard is in direct contrast to the old Section 3 of the APA, where information was only to be released to those properly and directly concerned. Under the FOIA the courts have consistently held that release of information should not be dependent on the identity of the requestor or their interest in disclosure. Disclosure is either required to everyone or no one.28 Although the Canadian courts have yet to address this issue, the situation in Canada would appear to be similar.

How records must be requested: reasonable descriptions

Both the acts have requirements as to the proper form a request for records must take. As amended, the FOIA requires that the request "reasonably describe" the records. The House report described the amendment as requiring that an identification be sufficient to enable "a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort."29 Section 6 of the Canadian act repeats this description almost verbatim.

27SOR/89-207.


iv. Exemptions and Exclusions to the Right of Disclosure

Once a request meets all of the formal requirements of the two acts an agency or institution generally must disclose the requested information to the requestor. This general duty is, however, nullified if the records requested contain information which the acts classify as exempt.30 The Canadian and American acts both set out a number of similar areas of exempt information.

National Defence and Foreign Relations

a. the United States

As amended, section (b)(1), or Exemption One of the FOIA exempts all information "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy"31 and "in fact properly classified pursuant to such Executive Order."32 The currently applicable Executive Order establishes ten categories of classifiable information.33 Information which falls into one of these categories is to be classified if its disclosure "reasonably could be expected to cause damage to national security."34 Included in the ten categories

30Even, however if the material falls under an exemption, the agency or institution is required under both acts to sever and release those portions that are not covered.

31FOIA s.(b)(1)(A).

32FOIA s. (b)(1)(B).


34Exec. Order No. 12,356 : s. 1.3(b). The level of classification (top secret, secret or confidential) depends on the degree of potential threat to national security.
is foreign government information, information about intelligence activities, military plans or defence systems and "other categories of information related to national security" as determined by designated individuals.

The courts have been wary of reviewing agency decisions claiming this exemption. In *EPA v. Mink*\(^{35}\) the Supreme Court refused to engage in *de novo* review of an agency decision to withhold documents under this exemption.\(^{36}\) One year later Congress changed the FOIA to strengthen and clarify the court's review mandate under this exemption and the act generally. Even with these revisions, however, the courts rarely challenge an agency's claim under this exemption.\(^{37}\)

\(b. \) **Canada**

Instead of relying on the executive's classification of material, the Canadian legislation establishes its own independent criteria for exempting material in this area. Section 15 states that the head of a government institution may refuse to disclose any record that contains information "the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the

\(^{35}\)410 U.S. 73 (1973).

\(^{36}\)De novo review means to review the decision as if the court was the original decision maker.

\(^{37}\)See, *Halperin v. CIA* 629 F. 2d. 144 (D.C. Cir., 1980) Substantial weight is given to agency affidavits giving their reasons for exemption and in camera review of the actual documents will only be ordered if the affidavits are suspect for some reason or if there is evidence of bad faith. Prior to 1986, no appellate court had ever upheld on substantive merits a lower court decision which rejected an agency's classification under this exemption.
defence of Canada.." or "the detection, prevention or suppression of subversive or hostile activities." This general injury test is followed by a list of classes of information that are included in the exemption. Many of the categories are similar to those listed in the U.S. Executive Order, but the different relationship of the injury test and categories tends to make the Canadian exemption broader.

In Re Information Commissioner and the Minister of National Defence 38 the federal court addressed the combination injury-class test used in this exemption and stated that the classes listed after the general injury test were illustrative only. This means that, unlike under the U.S. test, material need not first fall under one of these listed classes to be exempt. Under the Canadian test, material satisfying the injury test will be exempt regardless of whether it falls under one of the listed classes. As under the U.S. test, however, material falling under one of the listed classes is probably only exempt if it also satisfies the general injury test.39

In addition to the Section 15 exemption the Canadian Act also includes an exemption for "any record..that was obtained in confidence...from the government of a foreign state...or an


39The case is not very clear on these points. An alternate reading of the section is that everything that falls under the listed classes satisfies the harms test. Material would be exempt if it threatened one of the harms or fell under one of these classes. As some of the classes are very broad this would potentially make the exemption much wider. Other exemptions in the Canadian act use this same confusing blend of class and injury test. Under the American exemption the courts have developed a presumption that material falling under the classes established in the E.O. satisfies the harms test. This presumption can be rebutted.
international organization of states.\textsuperscript{40} Unlike Section 15, this exemption is not discretionary. If it is determined that material falls under this exemption, the institution head "shall" refuse to disclose it. According to the Section, disclosure is only allowed if the other party consents to it, or has made it public.\textsuperscript{41} The courts have ruled that no continuing confidential relationship need be shown.\textsuperscript{42} Similar information is covered under the U.S. Executive Order, but under the E.O. it must still satisfy a harms test to be exempt and withholding of the material is not mandatory.

\textit{Government Operations}

\textit{a. the United States}

Exemption two of the American act exempts matters "related solely to the internal personnel rules and practices of an agency."\textsuperscript{43} This was one of the areas in the act where the House and Senate reports differed somewhat in their interpretations of exemptions.\textsuperscript{44} The Senate report said that internal personnel rules were simply matters such as rules governing parking facilities, lunch hours, sick

\footnote{\textsuperscript{40}S.13(a) and (b), also included is such information from a provincial or municipal government or institution.}

\footnote{\textsuperscript{41}The foreign government information exclusion in E.O. 12,356 would seem to concern the same area as this exemption. "Unauthorized disclosure of foreign government information or the identity of a confidential foreign source is presumed to cause damage to national security."}

\footnote{\textsuperscript{42}See \textit{X. v. Canada}: the material need only be "obtained" in confidence.}

\footnote{\textsuperscript{43}FOIA (b)(2).}

\footnote{\textsuperscript{44}See the section on legislative history. One commentator suggests that the House report really amounted to a covert attempt by the House to unilaterally amend the act. Generally the courts appear to agree with this. See Davis, 26.
leave and the like. The House report said the exemption was much wider, including "operating rules, guidelines and manuals of procedure for Government investigators or examiners."

In *Department of the Air Force v. Rose* 45 the Supreme Court followed the Senate interpretation of Exemption Two. Subsequent to *Rose*, however, the lower courts have used the House report and a phrase taken from *Rose* to expand the exemption beyond simply employee-employer concerns. Now included is a special category of documents which are predominantly internal and disclosure of which significantly risks circumvention of agency regulations or statutes.46

Exemption Five of the American act exempts from disclosure "inter agency or intra agency memorandums or letters which would not be available by law to a private party other than an agency in litigation with the agency."47 Material that would not be available in litigation is material covered by civil law discovery privileges.48 The most frequently invoked of the discovery privileges are the deliberative process privilege, the attorney work product privilege


46The second part of the test was drawn from a D.C. Circuit decision *Crocker v. the Bureau of Alcohol and Tobacco* 670 F. 2d 1051 (1981), where the court said that the House had clearly intended such matters to be covered while the Senate had been silent. Materials covered by this wider definition are called "High Two." Originally they were restricted to law enforcement concerns but recently computer codes and agency vulnerability studies have also been found exempt under this "High Two" definition. See generally, *Case List* 401 ff.

47FOIA (b)(5).

48The Supreme Court has stated that both statutory privileges and these mentioned in the case law are included: *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984).
and the attorney client privilege. The deliberative process privilege is the broadest of the three and the Supreme Court has said that the documents encompassed by this privilege include "advisory opinions, recommendations, and deliberations comprising part of the process by which governmental decisions and policies are formulated." All opinions and interpretations which embody effective law and policy must be disclosed, but papers which represent the agency's group thinking in the process of working out its policies are exempted. Factual material is not generally included in the exemption.

Other privileges which have been allowed in the FOIA context include a privilege covering trade secrets and information which has been generated in the awarding of government contract. The general trend seems to be to allow more privileges to apply in this context.

b. Canada

The Canadian act exempts any record that contains "advice or recommendations developed by or for a government institution or minister of the Crown," or an account of deliberations or consultations involving employees or officers of an institution or a

49Case List, 441.


51NLRB, 147.


53For example, it was recently decided that a privilege covering accident investigations was included. See U.S. v. Weber Aircraft.
Minister, or a Minister's staff. This seems to cover the same ground as the deliberative process privilege does in the American context and the Canadian courts seem to have drawn the same distinction as the U.S. courts between pre and post decisional documents.54

The Canadian act also goes on to add more detailed exemptions covering the negotiating positions or plans of the Canadian government and future personnel or management plans of government institutions. Also exempted are certain testing and auditing records and records containing information subject to the solicitor-client privilege. The only limit on these exemptions is that the documents must be less than twenty years old to qualify.

More importantly, Section 69 of the Canadian act excludes all cabinet confidences from application of the act. Cabinet confidences are stated to include memoranda of proposals, discussion papers, agendas and minutes, briefs, draft legislation and any record which contains information about any of the above.55 The only exception is for documents over twenty years old and discussion papers concerning decisions which have been made public or are more than four years old.56 Because the Section completely excludes cabinet confidences from the act an institution's claim under this section cannot be challenged under the act's review.

54 See Canada(Information Commissioner) v. C.R.T.C.[1986] 3 F.C. 413. This decision was overruled in part but its comments regarding the substantive requirements of the section are still valid.

55 AIA s.69(1)(a)-(f).

56 AIA s.69(3). Note that these exceptions do not mean that such documents must be disclosed, but simply that the act applies to them. They may still fall under one of the other exemptions.
process. All that can be required is a written statement from a Minister, or the Clerk of the Privy Council stating that the material falls under the Section. Unlike under the American exemption there is no need for the document to be deliberative, no requirement for the factual portions, or portions that embody effective policy to be released and no way to challenge the claim that it falls under one of the broad classes listed. This makes the Canadian coverage in this area much more comprehensive.

Financial Information

a. the United States

Exemption Four of the FOIA protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The first drafts of the FOIA did not have such an exemption and it was only added in 1964 versions, apparently under the primary sponsorship of federal agencies. As originally formulated it exempted all confidential material and it was only at a much later stage that it was restricted to confidential commercial information.

In order for material to be considered confidential under this exemption the courts have said that disclosure of the material must

57 This power comes from the Canada Evidence Act. It applies to anyone with the power to compel disclosure of information. The Information Commissioner has made it a practice to require such statements.

58 FOIA (b)(4).

59 The final House and Senate Reports both still referred to the exemption as covering information which would not customarily be released to the public. Senator Long may have been behind the addition of "commercial and financial, as he had earlier expressed fears about the breadth of the exemption.
be likely to either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained.\footnote{National Parks and Conservation Assoc. v. Morton 498 F.2d. 765 (D.C. Cir.,1974).} Executive Order 12,600 requires all agencies to allow the party from whom the information was obtained to submit their views concerning competitive harm, but the test is an objective one and the final decision as to competitive harm rests with the courts. The courts have also refused to allow third parties to bring suits under this exemption in order to force any agency to withhold confidential material.\footnote{The "reverse FOIA" issue was decided in Chrysler v. Brown. 441 U.S. 281(1979). Because all exemptions are discretionary, agencies are free to disclose any information, even if it is exempt.}

c. Canada

Section 20(1) of the Canadian Act exempts two types of "third party" information.\footnote{Third party" is defined in Section 3 as any person, group of persons or organization other than the requestor or a government institution.} Similar to the U.S. exemption it exempts trade secrets and confidential financial, commercial and scientific or technical information. It also, however, exempts any information the disclosure of which "could reasonably be expected to" result in financial loss or gain to a third party, prejudice their competitive position or interfere with the contractual or other negotiations of a third party. Unlike under the U.S. exemption, to be covered under this part of the Canadian exemption material does not have to be confidential, does not have to have been submitted by a third party.
and does not have to harm specifically the person from whom it was obtained.

Also unlike the American exemption, the Canadian exemption is mandatory. All material under this exemption must be withheld unless it concerns government product testing, environmental testing or there has been third party consent to its release. Except for trade secrets, an institution also may release exempt material if disclosure would be in the public interest "as it relates to public health, public safety or protection of the environment." but only if such interest outweighs the financial harm to the third party.63

Because the Canadian act explicitly includes a harms test the courts have refused to follow the U.S. courts and read a harm component into the section covering confidential material. The Canadian act makes clear that confidential information is to be exempt regardless of whether its release would cause injury. In defining confidential, the Canadian courts have stated that the relationship involved between the government and the third party must be a fiduciary one, that the relationship not be contrary to the public interest, and that it be a relationship which would be "fostered for the public benefit by the confidential communication."64 So while no harms test applies, the Canadian courts do appear to be trying to limit the type of relationships to which the confidential exemption will apply. It is unlikely, however,

63 All of these exceptions to the mandatory rule are discretionary except for the product testing exception. If the document concerns such testing it must be released.

64 Air Atonabee Ltd. v. Canada(Minister of Transport) 37 Admin. L.R. 245, 272 (FCTD, 1989).
that this will reduce the coverage of the exemption to the extent which the harms test limits the American.

As under the U.S. regime, third parties are given a chance under the Canadian act to make a case for non-disclosure of information concerning them. Unlike the American act, however, third parties have the right to appeal an institution's decision not to withhold. A third party can ask the information commissioner or, if necessary, the courts to enforce the section's mandatory exemption.

The Canadian act also goes on to include a special exemption for financial, commercial or scientific information belonging to the government that is "reasonably likely to have substantial value." Also exempted is information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution, be materially injurious to the Canadian government or its ability to manage the economy, or result in an undue benefit to any person. These additional details, along with the more extensive third party coverage and third party appeal rights, make the Canadian act significantly more restrictive in the area of financial information.

*Personal information*

*a. the United States*

Exemption Six of the FOIA allows the withholding of "personnel and medical files and similar files" where disclosure would

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65 There has been little litigation concerning under this exemption, but it seems to be potentially a very wide exception. Although the American Act has no equivalent to this Section some similar information may be protected under Exemption Five.
constitute a "clearly unwarranted invasion of personal privacy."\textsuperscript{66} Exemption Seven which exempts certain law enforcement records, includes a provision exempting such records to the extent that production could reasonably be expected to constitute "an unwarranted invasion of personal privacy."\textsuperscript{67}

The U.S. \textbf{Privacy Act}, which regulates access to personal information held by the government, does not independently protect personal information from an FOIA request.\textsuperscript{68} If personal information held by an agency does not fall under an FOIA exemption then it must be released. The Privacy Act was amended to make this clear. If, however, material falls under both the Privacy Act and an exemption then it \textbf{must} not be released.

The Supreme Court has ruled that a medical, personnel or similar file includes any file which "applies to an individual." \textsuperscript{69} Under Exemption Seven the material must have been "compiled for law enforcement purposes." In determining whether disclosure of a file would constitute an "unwarranted" invasion of privacy the basic approach under both exemptions is similar.\textsuperscript{70} The public's interest

\begin{footnotesize}
\textsuperscript{66}FOIA (b)(6).

\textsuperscript{67}FOIA (b)(7)(c).

\textsuperscript{68}5 U.S.C 552a.


\textsuperscript{70}There are slightly different standards for the two. Under Exemption Six the standard is whether disclosure "would" constitute a "clearly" unwarranted invasion of privacy. Seven (c) only requires that disclosure be "reasonably be expected to" constitute an unwarranted invasion of privacy.
\end{footnotesize}
in disclosure is balanced against the individual's interest in privacy. The Supreme Court has recently ruled that when weighing the public interest under these exemptions the only relevant question is whether the information directly reveals the operations of government. Anything else "falls outside the ambit of the public interest that the FOIA was enacted to serve," and is not relevant to the weighing process.

b. Canada

Section 19(1) of the Canadian act states that a government institution "shall" refuse to disclose any record that contains personal information as it is defined in section 3 of the Privacy Act. A government institution "may" disclose such records only if the individual to whom the record relates consents, the information involved is publicly available, or the disclosure is in accordance with Section 8 of the Privacy Act. Section 8 allows disclosure, most importantly, for "any purpose," when, in the opinion of the head of the institution, "the public interest in disclosure clearly

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71 This balancing test was established in Air Force v. Rose 425 U.S. 372 (1976).


73 Reporter's, 1482. The court said that public interest is to be defined in terms of the core purpose of the FOIA which is to "shed light on an agencies performance of its statutory duties." at 1481 In another cases it was held that, aiding in effective lobbying for change of laws does not serve the public interest in this way. National Ass'n of Retired Federal Employees v. Horner 879 F.2d. 873 at 875 (D.C. Cir.,1989).

74 S.C. 1980-81-82-83, c.111. Section 3 of the Privacy Act sets out thirteen different categories of personal information, most of which concern identifying details about an individual, such as race, marital status or national origin.
outweighs any invasion of privacy that could result from the disclosure."\textsuperscript{75}

In a recent case it was decided that an institution was required to consider whether the public interest exception applied when considering the exemption of personal material and that, although disclosure under Section 8 was discretionary, a decision by an institution to withhold must be "taken within proper limits and on proper principles, in deference to the general intent and purpose of the Act."\textsuperscript{76} Under the Access Act the public interest in disclosure was declared to be "a paramount value which is to be suppressed only when and if it clearly does not outweigh any invasion of privacy." As a result " 'any invasion of privacy' must be a weighty matter indeed or else it will be outweighed by the public interest in disclosure."\textsuperscript{77} This effectively seems to reverse the onus in the exemption, by requiring an institution to release personal information unless the privacy interest outweighs the interest in disclosure. Such a shift brings the Canadian exemption much closer to the more narrow American exemption. If the U.S. and Canadian courts continue on their respective courses the two exemptions seem likely to become very similar. This despite the fact that the Canadian exemption is, on its face, much broader than the American exemption.

\textsuperscript{75}If there is disclosure here only the Privacy Commissioner must be notified, not the individual. There is, however, a right of appeal to the Privacy Commissioner.

\textsuperscript{76}\textbf{Bland v. National Capital Commission}, 36.

\textsuperscript{77}\textbf{Bland}, 46.
Law enforcement information

a. the United States

Exemption Seven of the FOIA now exempts from required disclosure "records or information compiled for law enforcement purposes."78 Such records, however, are only exempt if their production meets one of six harms tests. One of these, as discussed above, concerns personal privacy. Of the other five, the courts have given the broadest scope to the one which protects the identity of confidential sources of information.79 This exemption has undergone a number of transformations since it was first enacted. Originally the exemption was very broad, it was later narrowed in the 1974 amendments and then broadened again in 1986. The courts have generally given this test a broad reading, especially since the 1986 changes.

b. Canada

The Canadian act allows an institution to refuse to disclose any records obtained or prepared by an "investigative body" in the course of a lawful investigation or which relate to investigative techniques or plans for specific investigations. Unlike under the American exemption, there is no harms test to be satisfied. Also exempted are records which contain information disclosure of which could reasonably be expected to be injurious to the enforcement of any law

78Law enforcement has been held to include enforcement of both civil and criminal statutes, as well as those authorizing administrative proceedings.

79Case List, 500.
or the conduct of any lawful investigation or facilitate the commission of an offence. Finally, an institution also must refuse to disclose information obtained or prepared by the RCMP while performing its policing duties for a province or municipality. The combination of this detailed coverage of RCMP material, the blanket exemption of all investigatory material and a broad injury test makes this exemption much more comprehensive than six American harms tests, even as they have been expanded under the 1986 amendments.

Information Covered by Other Statutes

a. the United States

Exemption Three of the FOIA originally simply exempted material "specifically exempted from disclosure by statute." After the Supreme Court found this to include a statute which gave officials the discretion to withhold documents "in the interest of the public" the exemption was amended by adding "...provided that such statute (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." A key determination is often whether the legislation sets out with sufficient clarity the type of matters to be exempted. The courts have recently held that any Congressional purpose to exempt a statute must be found in the actual words of the

80 As yet there have been no cases which have addressed this particular exemption directly.

81 The Supreme Court case was F.A.A. v. Robertson 422 U.S. 255 (1975).
statute or in the legislative history of the FOIA and that the history of the particular act is irrelevant.82

b. Canada

The Canadian Act takes a different approach in this area. Section 24 states that an institution shall refuse to disclose any record which is restricted according to a provision listed in a Schedule to the Act. Unless the other statute is listed in this Schedule it cannot be the basis for a denial of an access request. The Schedule lists both the law and the applicable withholding provision. Under this method new withholding laws are not automatically included and the ones chosen to be included do not have to meet any standard criteria for specificity. This means that the Canadian act could be more or less restrictive than the American in this area, depending on how the government wishes to exercise its discretion.

Additional Exemptions

The American and Canadian Acts both have some additional exemptions. Some of these exempt documents not covered elsewhere, but others simply explicitly exempt documents which would be covered under other more general exemptions.

a. the United States

After listing seven fairly general exemptions, the FOIA adds two more quite specific ones. Exemption Eight exempts matters contained in certain reports "prepared by, on behalf of, or for the use

82Case List 414.
of an agency responsible for the regulation or supervision of financial institutions." Exemption Nine exempts "geological or geophysical information and data, including maps, concerning wells." These two exemptions are fairly straightforward and neither has attracted much litigation.

b. Canada

In Section 14, the Canadian Act exempts records that "could reasonably be expected to be injurious" to the conduct by the federal government of federal-provincial affairs. Section 13 of the Act, along with exempting material obtained in confidence from foreign governments, exempts material obtained in confidence from provincial governments and municipal governments. Much of the same material would seem to be covered under the more general exemptions covering government operations and confidential government information. The relevant harm under Section 13 is to the conduct of federal-provincial relations by the "Government of Canada."

Under Section 17 the Canadian Act also sets out a general exemption for records which contain information "the disclosure of which could reasonably be expected to threaten the safety of individuals." The Section gives no definition of "safety" and does not set out any examples of categories of records which would fall

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83 FOIA s.(b)(8).

84 FOIA s.(b)(9).
under the definition. Like the other additional exemptions in the Canadian act Section 17 gives

special exclusions: the United States

In the 1986 series of amendments a new section (c) was added to the FOIA which set out three situations in which certain records could be treated as if the Act did not apply to them.\(^85\) These three exclusions all cover certain law enforcement and intelligence material already exempt under other sections of the act. The main importance of excluding records is that agencies can affirmatively deny their existence. This is not the case when the material is simply exempt.\(^86\)

v. Denial, Time Limits and Judicial Review

notice of denial

Both the American and Canadian acts set out certain procedures which the agencies or institutions must follow when they receive an access request. The American act states that an agency must make a determination as to whether it will comply with a request within ten working days, while the Canadian act requires a response within thirty days. Both allow for the extension of the time limits in certain circumstances, but the American act limits this extension to a maximum of ten working days.

\(^85\)FOIA s. (c) (1)-(3).

\(^86\)If material is exempt, but not excluded, an agency may withhold it, but it cannot deny that it exists. If the material is excluded than an agency can simply say that it does not exist (whether it actually does or not). Excluded material is material which is seen as being too sensitive for an agency to even admit to the possibility that it exists.
appeal of the denial

Once an agency or institution has denied a request, there is provision in both acts for the requestor to appeal the decision. Under the FOIA, the requestor must first appeal the decision within the agency from whom the request was made. Only when the requestor has exhausted all available administrative appeal remedies can an appeal then be made to the court system. Under the Canadian Act, the requestor must first appeal to an information commissioner. The Information Commissioner is a government appointed officer, which has certain powers to investigate a refusal of an access request and make recommendations as to whether the refusal was appropriate. If an institution refuses to follow the Information Commissioner's request of disclosure, or the requestor is unsatisfied with the Commissioner's response, then the matter can be appealed to the courts by the requestor or the Commissioner on the requestor's behalf.

court review

Once an appeal makes it to the level of the courts, both legislative schemes give some indication of the type of review which the courts are to carry out. Both acts explicitly state that that the burden of showing that a refusal was authorized is to be on the government institution. The FOIA also states that the courts are to review an agencies decision de novo.87 The Canadian act does not

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87In de novo review the court proceeds as if it was the original decision maker. This is in contrast to the more usual level of administrative review in which a court is limited to reviewing an agency decision for procedural defects.
explicitly state this but have courts interpreted it as having a similar requirement. Both acts give courts jurisdiction to order the production of any documents improperly withheld and the power to examine any records in camera.

vi. Fees

Under both the American and Canadian schemes there is provision for an agency or institution to charge fees for information requests. The FOIA requires agencies set regulations which establish reasonable standard charges for document search, duplication and review. When the requested information is for commercial use then all three can be charged for. When the request is made for a non-commercial use, by a educational or non-commercial scientific institution whose purpose is research, then only document duplication can be charged for. The same is true for a request by a representative of the news media. If the request is made by anyone else, for any other purpose, the charges are to be limited to search and duplication. Fees are required to be reduced or eliminated if disclosure of the requested records 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 requestor."

The Canadian Act states that an institution may require an application fee of twenty five dollars or less and a fee representing the cost of reproduction. The act also allows an institution to charge an hourly fee for every hour over five that is reasonably required to search for and prepare the requested document and the
institution may require a deposit of a "reasonable proportion." An institution may waive the requirement to pay a fee, but there is no requirement that it do so and no guidelines as to when it should do so.

III. Conclusions: Policy Convergence or Divergence?

After this fairly detailed comparison of these two access acts some basic observations can be made about policy convergence or divergence. As noted at the outset, the two acts are remarkably similar in their overall structure and general approach. The contours of the general right to access and the exemptions to it are very much the same under both acts. The closer examination of the two acts also reveals that some of the details, such as the definition of records and the form a request must take, are virtually identical.

Despite this convergence however, there are some important details which make the Canadian act different from the American one, and which generally make it more restrictive. While the majority of the Canadian exemptions cover the same general ground as the American, they tend to cast a wider and more detailed net than their American counterparts. The Canadian act, for example, tends to use class tests and combination class and injury tests in its exemptions, while the American act makes more extensive use of injury tests. This means the Canadian exemptions tend to blanket a certain area of material instead of being tailored to protect a certain interest. The difference between the two law enforcement exemptions is a good example of this. Both the Canadian and American exemptions cover material compiled for law enforcement
purposes, but while the American act restricts the exemption to material which satisfies one of six fairly specific harms tests the Canadian act exempts all material compiled during a lawful investigation regardless of what harm it might cause. The Canadian exemption then also includes a general harms test to cover all material not covered under the blanket exemption and a more specific exemption for R.C.M.P. material.

The injury tests that the Canadian act use also tend to be broader than their American counterparts and any classes set out with much greater detail than their American counterparts. Documents, for example, concerning federal-provincial relations and cabinet documents are definitely exempted under the Canadian act, while under the American act the only government documents exempted are those that fall under the more general memorandum exemption. While many similar documents will be exempt under both regimes, there will be documents concerning nation-state relations that will not, for example, satisfy the memorandum "deliberative" requirements. The Canadian act includes both a memorandum type exclusion and the more detailed federal-provincial exemption, so it will capture all those documents the American act does, plus the federal-provincial documents that do not satisfy the more general test.

It also can be noted that while the American exemptions are discretionary, at least five of the Canadian exemptions are mandatory. In these five areas Canadian institutions are required to withhold information. This means the act may actually force the government to withhold documents which it might not otherwise
withhold. Third parties are also given the right to have the courts enforce the withholding. The American act, in contrast, never requires that any document be withheld.

The addition of an information commissioner in the Canadian scheme is another key difference between the two acts. It is unclear whether this makes the Canadian scheme more or less restrictive. It might be argued that by mediating more disputes the commissioner will allow more documents to be released than if there was only court review. It could also be argued, however, that such mediation means that the rights guaranteed by the act will not be pushed to their limit. An information commissioner would seem to have a large informal power to discourage litigation.

the role of the courts.

In general it might be concluded that in both countries the courts have tended to interpret the access acts in a way which broadens rather than narrows the right to access. In the American context the trend seems to have been to move from a more liberal interpretation in the early years of the act, to a more conservative approach recently. Recent interpretations of the personal privacy and law enforcement exemptions illustrate this more conservative trend. The American courts also seem to have played a role in forcing the legislature to amend and clarify the act. The E.P.A. v. Mink decision, for example, seems to have pushed the legislature to clarify the courts' role under the act. There has still been relatively little litigation in the Canadian context, especially at the appellate level, but the courts appear to be taking a fairly activist stance in
promoting access. It also can be noted that the courts in both countries seem to vary in their activism depending on the area. They seem especially wary of second guessing decisions in the area of foreign affairs and intelligence. No appellate court in Canada or the U.S. has overruled to any significant extent an executive classification in this area.
There is a group of policy making theories which emphasize the international connections in policy making. These theories suggest that often international developments can influence the content of domestic policies. There are a wide range of ways in which this is identified as taking place. Of particular interest in the case of access to information are those theories which suggest that the sequential adoption of similar programs in different states can be explained as the result of international copying. The sequential adoption in Canada and the U.S. of very similar access to information policies would seem to suggest that the Canadian policy at least, might simply be explained as a case of Canada copying the U.S..

There are a number of different ideas as to how and why states copy one another. One suggestion is that a state's economic development influences its policies. States at similar levels of development, it is argued, will have similar programs. In a sense, international economic conditions force them to "copy" one another. Another suggestion that is more relevant in this context is that powerful states export costs or knowledge to their less powerful neighbors. These exports can influence policy in the receiving country and result in the receiving country copying the program of the dominant neighbor.¹ Finally, there is the suggestion that copying

is simply based on the transnational communication of program evidence.²

The idea that access to information policy might be a product of a country's development level does not seem to be very persuasive. Canada and the U.S. both might be considered to be "developed" countries, yet Canada adopted an access act much later than the U.S. Even a quick glance at the rest of the world also suggests that there is no relationship between economic development and the existence of an access act.³

The argument that the Canadian act is the result of costs or knowledge exported from the more dominant U.S. seems to be more viable. The adoption of the Canadian access program does not seem to have been triggered by costs imposed by the American adoption of an access program or by costs related to any other American program or policy. There would, however, seem to be a good argument to be made that it was triggered by the export of American knowledge. In this argument, knowledge is said to generally be transferred into policy via a process of emulation. Elites or activists in the receiving country emulate or draw lessons from the dominant country and this emulation is reflected in policy. The receiving country is not forced into reacting to externalities imposed by the dominant country, but rather chooses to follow its leadership.


³England, for example, still does not have an access act and Sweden has had one for well over 100 years.
A similar argument is developed by Colin Bennett, who suggests that copying is the result of the transnational communication of program evidence. His general argument is that policymakers, and those who influence policy makers, often look to examples from other countries and utilize the evidence from those examples in their own policies or policy proposals. Bennett identifies five different ways in which evidence from other programs is utilized in policy debates. Such evidence, he says, can be used as an indicator of a fad, as a ready made solution, as a good exemplar, as one alternative among many, or as a way to legitimate action or inaction.

Unlike the export thesis, Bennett does not link this process of evidence transfer to any relationship of dominance between states, nor does he develop the distinction between evidence transfer taking place via elites or activists. As to when evidence transfer will take place and which of the five ways it will be utilized, Bennett argues that this depends on whether there is a consensus of values, the nature of the policy area and the stage at which the evidence enters the policy process.

*access to information and information transfer*

Looking at the access policies of the U.S. and Canada there would seem to be some evidence supporting these information or knowledge transfer explanations. Bennett actually uses this area as an example of his theory at work. He argues that the American FOIA was used as the main exemplar for the Canadian act. Canadian policy makers looked at the U.S. act as the best starting point for the
development of a Canadian act, drew lessons from the American experience and created a program which improved upon the American act and made it suitable for the Canadian context.

Looking at the evidence, there would seem to be no question that information about the American act was transferred to Canadian policy makers. The hearings of the Standing Joint Committee on Regulations and Other Statutory Instruments and of the Justice and Legal Affairs Committee are full of references to the American Freedom of Information Act. Policy papers like the Green Paper frequently mention the American act, and references are made to the FOIA in the parliamentary debates concerning the Canadian policy. Interest group documents of the period also draw parallels to the American act, and the academic community frequently focused its attention on the American experience. Using the export thesis distinction, information seems to have been transferred both via elites and activists.

In looking at these various sources it would also seem that the information was utilized mainly as an example; as a model from which lessons might be drawn. The Green Paper, for example, suggests that a U.S. system of court review should not be adopted in the Canadian system because of evidence of high costs under the U.S. scheme and because of the incompatibility of court review and the Canadian tradition of ministerial responsibility.4 In addressing the Green Paper, the Standing Joint Committee on Regulations and Other Statutory Instruments also points to U.S. exemptions as better

models than those suggested by the Green Paper. The law enforcement and the commercial information exemptions are pointed to as examples of how such exemptions in such areas could be drawn with greater specificity than the Green Paper's. Evidence gathered on the committee's fact finding mission to the U.S. is also frequently drawn on in the committee's debates.

*information transfer and the courts*

In addition to this evidence of Canadian utilization of American information, there also seems to be international transfer of information via a route that is not often recognized in the copying literature.\(^5\) The evidence indicates that Canadian courts often turn to evidence from the American act and to the interpretations of that act by their American counterparts. Frequent mention is made in Canadian cases of American precedents in this area.

The process by which this information is used in Canadian cases might also be characterized as a special kind of lesson-drawing or emulation. Courts are bound by institutional rules regarding the use of precedent and, therefore, they theoretically do not have the same latitude as other policymakers.\(^6\) The evidence, however, suggests that these rules still allow them a degree of freedom as to which American precedents they will follow. Sometimes American precedents will be examined, but then discarded because the American provision they are dealing with is different from the

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\(^6\) Canadian courts are not, of course, bound by American precedents.
Canadian one. The rejection of the National Parks test for confidentiality might be taken as an example of this. The similarity of the legislation, however, is not a good predictor of when American precedents will be utilized and when they will not. The Canadian courts interpretation of the privacy exemption, for example, seems to reflect the American privacy exemption approach, even though the Canadian legislation is quite different from its American counterpart. In other situations, the legislation will appear to be quite similar, but either no mention is made of American jurisprudence, or the American approach is explicitly rejected. To a large extent, the courts seem to be able to look at information from the American act and draw what lessons they choose.

_transfer of information and legislation_

Looking at the legislation itself, there would seem to be a good argument to be made that the information transfer from the U.S. was translated into the final policy. The general scheme of the two pieces of legislation are similar and many of the areas exempted are similar. The differences between the two programs are relatively small and tend to be ones which make the Canadian act more restrictive. This could all be viewed as being consistent with the idea that Canada followed the American lead. The Canadian act rarely reflects a direct copying of the American act, but it is very similar, and the ways in which it differs often could be characterized as the result of Canadian policy makers "drawing lessons" from the American act.
An exemption which Bennett identifies as being the product of lesson-drawing is the Canadian exemption for personal information. Canadian policy makers, it is argues, looked at the American exemption in this area, decided that they wanted an exemption to cover the same general area, but concluded that the American exemption placed too much of an emphasis on disclosure at the expense of privacy. The Canadian exemption, therefore, makes withholding of personal information mandatory and only allows release in circumstances where the public interest in disclosure clearly outweighs the privacy interest. This is in contrast to the American act where the rule is disclosure and non-mandatory exemption is for documents release of which would be a clearly unwarranted invasion of personal privacy.

This seems to be a fairly plausible view of the difference in these two exemptions. A similar kind of an explanation might also be given for the addition in the Canadian scheme of an information commissioner. As noted above, in many of the Canadian policy documents concern was expressed about the high cost and delays of the American system of review and the incompatibility of judicial review with the Canadian traditions of ministerial responsibility and parliamentary supremacy. At the same time, many references were also made, in both the policy papers and the interest group literature, to the need for an access scheme to have a system of independent review in order to be effective. The choice of an information commissioner might, therefore, be seen as a compromise which gives the benefits of the American style system
without all of the costs and without conflicting with the traditions of the Canadian system.

Many other examples might also be found where the same kind of an explanation can be given. The longer time limits in the Canadian act might be seen as an attempt to learn from problems which the time limits in the American act have caused. The inclusion of an explicit schedule of other withholding statutes rather than a general reference to "other statutes" might similarly be explained as an attempt to avoid the problems which the later provision has caused in the U.S. courts. Even the overall pattern of the Canadian act being more restrictive than the American one might be seen as an attempt to learn from the American experience regarding the problems caused by too much openness. Canadian policymakers may have seen the American act as restricting the executive's ability to effectively implement policy.

the limitation of the information transfer analysis

All of this evidence suggests that Canada did utilize evidence from the American act and that generally the U.S. act was used as an exemplar for the Canadian one. The problem, however, is that even if the analysis is accurate it still leaves much to be explained. To say that the American act was used as an exemplar and that Canadian policy makers drew lessons from the American act is only to explain one small part of how the two programs came to be the way they did.

The attractiveness of the information transfer analysis is that it does not give a deterministic explanation of policy making. It recognizes the independent role of policy makers in different
countries and affirms that their actions are not completely determined by outside forces. Even in the export thesis, the small state has room to draw lessons from its dominant neighbour. This approach recognizes that information about a program can be transferred between countries and utilized in different ways without the automatic wholesale transfer of a program. As a result, it can effectively accommodate and explain both divergence and convergence in a policy area.

The reasons, however, for its attractiveness are also the reasons behind its limitations. By leaving so much room for policy makers and for the different uses to which they might put information, it also leaves room for many questions. Why, for example, do policy makers draw the lessons that they do from other programs? Why are some programs adopted wholeheartedly and others significantly modified? Why do policy makers look to some countries for information and not others? Why does information have a significant impact in some situations and not others? Perhaps most importantly, why does the original country make the choices it does? In some ways, the theory is able to account for both convergences and divergences in policy because it does not attempt to answer these kinds of questions.

The theory, for example, explains the differences in the American and Canadian privacy exemptions as a case of lesson-drawing by the Canadians. It does not explain, however, why Canadians chose to interpret the American evidence as indicating that the U.S. act gave too much access to personal information and not that it gave too little or just enough. Clearly there was not one objective lesson that
had to be drawn from the American evidence and Canadian policymakers were guided by their own priorities regarding personal privacy. The lesson-drawing theory does not explain why Canadian policymakers had priorities different from those expressed in the American act or why the American's themselves chose the initial balance that they did between privacy and access.7

The same kinds of questions arise concerning the differences in the two countries review processes. The Canadian policy makers may have tried to improve on the American approach by choosing to have an information commissioner, but why was this considered by them to be an improvement? In some policy areas the high cost and delays involved in litigation are accepted as necessary tradeoffs for the procedural guarantees of direct court review. The theory gives no explanation as to why such a tradeoff was seen as only partially necessary in this policy area or why it was seen as more necessary in the United States than in Canada. Similarly, it does not explain why, if the Canadian tradition of ministerial responsibility really does clash with the idea of court review, the clash was chosen to be resolved in the way it was and in the form it was. Why does adapting to the Canadian context require recognizing ministerial responsibility and why is an information commissioner the appropriate compromise?

'learning' from lesson-drawing

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7The same questions apply to the courts as policymakers. Why, for example, are the Canadian courts interpreting the privacy exemption in a similar way to the American exemption despite the textual differences? Why do the American courts seem to be narrowing that same exemption, pulling it closer to the Canadian?
The value of this model of evidence utilization is not that it provides a comprehensive explanation of how policy is made. At best, it points out a particular dynamic of the policymaking process that, as Bennett argues, has often been ignored. Policymakers often utilize evidence from other countries, and often the process of utilization might be called lesson-drawing. It might be added that this process can take place via policymakers or activists, and that often the direction of transfer is from dominant countries to their smaller neighbors. In order to explain policy, however, it would seem that this dynamic has to be "filled in" a bit more. Something has to be added to answer all of the questions that it leaves unanswered. This would seem to require turning to other theories of policy making.
Chapter Four

Group Theories of Policymaking

Another set of policymaking theories focuses on the influence of groups in the political process. These theories came into prominence in 1950's as part of a general attempt in the social studies to move towards a more "scientific" approach. Group theories of politics tried to explain in scientific terms how the political system worked. Drawing on advances in the other social sciences, such theories went beyond the traditional, narrow institutional explanations of policy making and attempted to describe how policy was shaped by underlying societal forces.

The writings of Earl Latham are perhaps the best expression of this approach.¹ Latham focused on the propensity of individuals to form groups. Groups, he said, form for the self-expression and security which they provide their members. Shared goals are achieved through groups and groups naturally tend to ensure their own survival. Competition ensues between these groups and groups struggle to have their aims recognized above others. The struggle is mediated by government which is a group that by social consensus is accorded official status. The legislature "referees the group struggle, ratifies the victories of the successful coalitions and records the terms of the surrenders, compromises and conquests in

terms of statutes. Public policy is the equilibrium that exists in this struggle at any given moment.

Despite subsequent developments in the social sciences this general idea expressed by Latham is still the basis of most group theories of politics. Groups with diverse interests compete and the more powerful or influential have there interests reflected in policy. While Latham tries to develop a sweeping social theory of groups and their influences on politics most subsequent literature seems to be more narrowly focused on the ways in which groups with specific political interests influence policy outcomes. Also, while Latham seemingly views the state as being a neutral umpire or cash register ringing up the wins and losses of group battles, some subsequent theorists have come to identify policy makers themselves as being a group with interests in influencing policy outcomes. The main thrust, however, of all of these arguments is that policy is determined by demands of societal groups and that the state as an entity plays a relatively minor role, reflecting more or less accurately the demands of society.

a group explanation of access to information

According to this type of theory any policy program should mirror the relative strength of groups interested in that policy area. American and Canadian access to information policy should, therefore, be able to be explained by looking at the organization of

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2Latham, 390.

3For a good general discussion of this area see: G. David Garson, Group Theories of Politics (Beverly Hills: Sage Publications, 1978).
groups interested in access in the respective countries. The existence of legislation forcing access to government information would be expected to reflect the existence of a number of powerful groups with an interest in gaining more access to government information. Any restrictions or exemptions included in this legislation would be expected to reflect the existence of less powerful groups with an interest in keeping information in the hands of the government. The more restrictive the legislation, the greater the power of anti-access groups relative to the pro-access groups.

Such an explanation, would answer many of the questions that the copying theories left unanswered. Why the acts were formed; why policy makers choose the balance they did between secrecy and disclosure; and even why Canadian policy makers used the American act as an exemplar; all could be explained by looking at interest groups and their relative power. A group theory has the potential to provide a comprehensive policy making explanation.

testing the group theory: group participation

There is no question that interest groups were active participants in the making of the access programs in both Canada and the United States. In the United States, for example, the American Society of Newspaper Editors (ASNE) and other press groups played a crucial role in pushing the issue of access onto the policy agenda. As discussed earlier, the Cross study commissioned by the ASNE was a major factor in bringing the issue of access into public view. Subsequent to that study the press continued to document the many instances of excessive government secrecy and
keep the issue of access alive. Once the issue was on the agenda the press also pushed for the passing of an effective access act. ASNE members wrote editorials in the districts of key members of Congress running for re-election. Many of the advisors and staff of the Moss committee had close ties to the press. Pressure from the press is even cited by some as one of the reasons that President Johnson did not exercise his veto on the final version of the FOIA. 4

Other groups were also heavily involved throughout the American process. The American Bar Association, through its administrative wing, pushed for reform to the APA and drafted many model bills for a new Section 3. The ABA worked very closely with the Moss Committee during the development of a new act. In the many hearing before the Moss committee and the other House and Senate committees a wide variety of groups made representations. Other legal groups like the ALCU presented their views, along with business groups, environmental groups, consumer groups and almost every other interest group imaginable. Groups like Ralph Nader's not only appeared during the initial hearings to push for a new law but also continued to monitor the progress of the law after it passed and push for reform when they felt that it was not operating properly.5

In Canada the situation was very similar. A wide variety of groups were interested in access to information as a policy issue. The press does not appear to have played as major a role in pushing

4For this, and a general account of the press's involvement see James T. O'Reilly, Federal Information Disclosure (McGraw-Hill, 1984), 2-12.

access to information onto the Canadian agenda as it did in the
United States, but other groups brought the issue into the public eye.
A study by Murray Rankin, sponsored by the Canadian Bar
Association, pointed out the government's penchant for secrecy.
Rankin's study, provocatively titled "Will the Doors Stay Shut?" was
specifically praised in the House of Commons for playing a role in
bringing about a Canadian access act.⁶

As in the United States, a wide variety of different interest
groups also made presentations at committee hearings. One
coalition group, ACCESS, was formed specifically to present its
members views concerning access to information. A group of M.P's
also formed an all party committee strictly concerned with access
to information. The CBA, like the ABA, was heavily involved in the
process and developed a model access bill.

the nature of group participation

The way in which these groups participated, however, is not at
first glance quite what would be expected given the resulting
legislation. Virtually all of the interest groups involved pushed for
the creation of an access law. For example, all of the interest group
witnesses appearing before the two Canadian parliamentary
committees (the Standing Joint Committee on Regulations and Other
Statutory Instruments and the Standing House of Commons
Committee on Justice and Legal Affairs) expressed support for an

⁶T. Murray Rankin, Freedom of Information in Canada: Will the Doors Stay Shut?: A
Research Study Prepared for the C.B.A. (Ottawa: CBA, 1977). It was praised in the House
of Commons on June 28, 1982, see Hansard, 18858.
access law. The situation was much the same in the various Congressional hearings. Contrary to what a group theory would predict there does not appear to be evidence of any ongoing battle between pro and anti access interest groups in Canada or in the United States. Pro-access groups were strong in both countries, but there was no anti-access opposition.

On closer examination, however, a slightly different dynamic can be observed which might still be consistent with a group explanation of policymaking. Although most interest groups were generally in favour of an access law, many had reservations about allowing access in particular areas. Many pro-access groups were only pro-access to a point. In the U.S., for example, the National Association of Broadcasters, along with other media groups, pushed for a new access law but at the same time also pushed for an exemption to cover applications made to the F.C.C.. Similarly, the Civil Liberties Unions in both countries were strongly in favour of a new law, but also pushed for adequate protection of personal documents. Instead of a division between pro-access and anti-access groups there appears to have been a division between pro-access groups on the basis of different ideas about the particular limitations the act should have.

Looking at the nature of the issue, it is not difficult to see how this dynamic between groups arises. Government information is a powerful tool for any interest group. Any group interested in influencing public policy would seem to benefit from having more

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7 O'Reilly, 2-8.
access to government records and many groups have goals which will be served by increased access to particular government information. The value of information to these groups, however, is in the way in which it helps them achieve other goals. Very few groups value access as a goal in itself. Most groups, therefore, will be committed generally to access, but that commitment will vary in strength depending on how access serves or conflicts with their primary goals.

Access to information is also a policy area which can be easily tailored to protect specific interests. If a group objects to access to a particular area of information this area can be exempted without putting the whole scheme at risk. There is no downside, therefore, for groups to be generally in favour of access legislation. They can be generally in favour of access and still fight to have the general right qualified in order to protect their special interest.

*a revised group explanation of access to information*

A slightly revised group explanation, therefore, might be offered to take into account this more complex group dynamic. The existence of the access legislation might be said to be the result of a consensus among all interest groups as to the need for such legislation. The limitations on the general right of access are explained as the result of particular interest groups fighting against this general consensus in a specific area where access clashes with their other goals or interests. The exemptions included will reflect an interest group's ability to push its particular interest in an exemption over the general interest of all the other groups in access
and the particular interest of any other group in access to the same records. The differences and similarities between the U.S. and Canadian programs can be explained as a reflection of the relative balance between these groups and not simply between pro and anti-access groups.

*group participation and the exemptions*

According to this revised explanation the exemptions and limitations in the two programs should link up with the interests of particular pro-access groups. Looking at the American and Canadian programs, one of the exemptions which is most obviously linked to the interests of a particular group is the exemption for confidential financial information.

The confidential financial information exemption could easily be described as reflecting the interests of the business lobby. The government collects a large amount of information from corporations and other business entities as a part of its regulating role and release of this information would often be contrary to the interests of the corporations from whom it is collected. It would be expected, therefore, that corporations, and any groups of which they are a member, would push for such information to be exempted from any access law.

It should be noted, however, that business might not be universal in this interest. Often the reason that the release of business information is harmful to a corporation is that such information is helpful to its competitor. To the competitor release of financial information held by the government may be very much in their
interest. Business interest groups, therefore, may face difficulties in keeping a unified front as their members can be both victims and beneficiaries of release in this area.\footnote{It is interesting to note that business groups appear to be among the heaviest users of the access acts and as well as the heaviest litigators under it. In Canada in 1989-90, for example, business made 54.6\% of the requests under the act (the highest percentage of any group): see Access to Information Commissioner, \textit{Annual Report} 1990-91 (Ottawa: Queen's Printer, 1992): 5; Meanwhile from 1983-89 there were over twice as many court review intiations under the third party section of the act (that section where third parties can appeal decisions to release financial information) as there were under any other section. See Access to Information Commissioner, \textit{Annual Report} 1988-89 (Ottawa: Queen's Printer, 1990): 72. Although many of the third party appeals may have been to fight release to non-business requestors it would seem likely that at least some were business third parties fighting release to business requestors. Source: Information Commissioner, \textit{Annual Report} 1988-89 and 1990-91.}

Examining the history of the Canadian and American exemptions and the way in which they differ, it is not clear that they can be explained as simply a reflection of business lobby pressure. As noted earlier, the American exemption was a late addition to the drafts of the American act and was, according to some sources, added not at the request of the business lobby, but at the request of certain federal agencies. The business push for this exemption does not initially appear to have been very strong. This partly may be due to the conflicting interests of business, but a major factor also seems to have been that many business groups did not expect the access act to be very effective in regard to business information. They believed that information submitted by corporations would be adequately protected by other statutes.\footnote{O'Reilly, 14-4ff.} Whatever the reason, the exemption does not appear to have been the result of a heavy, direct, business lobby.
It might be argued, however, that the exemption was the result of indirect pressure from business. Government agencies may have pushed for its inclusion because of their need for co-operation from the business community. Voluntary collection of corporate information would become very difficult if agencies could not ensure its confidentiality. Indirectly agencies were forced, because of the power of business as a group, to push for legislation which reflected business interests. The fact that the exemption seems to be an effective protection of business interests despite their lack of direct pressure for it could be seen as consistent with this view.

After passage of the FOIA, U.S. business groups became more involved with the exemption. Businesses fought in the courts to ensure the exemption's effectiveness and attempted to have the courts establish a right to bring reverse FOIA suits. Although this ultimately was unsuccessful, the executive order setting out third party procedures might be seen as being a result of this pressure. It also, however, must be noted that often the court fights involved corporations going to court to prevent release of information to other corporations. Business was not a monolithic force pushing to have the courts protect financial information.

The Canadian exemption is perhaps more easily explained as a result of direct group pressure. Unlike their American counterparts, Canadian business groups were heavily involved in directly pushing for an exemption for business information. The Canadian Manufactures Association made presentations before both of the parliamentary committees and, although they expressed their general support for access legislation, they made a point of
stressing the need for an adequate exemption for business information and for effective third party procedures. In what might be termed a case of lesson drawing from the American exemption, the Canadian groups seemed to have recognized from the start that their interests were at stake. The Canadian groups were aware of the use which had been made of the American act to gain access to corporate information and wanted an exemption that would provide even more comprehensive protection. They pushed for explicit recognition of third party procedures and the right of third parties to prevent the release of material properly falling under the business information exemption.

The final form of the exemption was not as comprehensive as business groups wished. This might be explained as the result of a push from other groups for more access in this area. Other interest groups were in agreement with the CMA that an exemption in this area was necessary, but some disagreed with the breadth of the CMA proposals. The CBA, in particular, wanted the exemption to be based solely on a test of whether disclosure would injure the competitive position of the submitter. The Joint Committee on Regulations advocated this approach in their recommendations. The final form which the exemption took, however, was closer to that advocated by the CMA and could be characterized as a compromise between the CBA and CMA view. Similarly, the inclusion of an exemption for safety and health test data might be characterized as a compromise won by environmental and consumer groups.

The more aggressive and direct stance taken by Canadian business groups might be credited for the more comprehensive and
effective protection which the Canadian exemption gives business information. Drawing on evidence from the American act, it might be argued they had a clear picture of the interests involved and the kinds of things to push for and were able, therefore, to have a more effective influence on policy than their American counterparts.

other exemptions

The exemptions for business information might be read in a way consistent with the revised group explanation. The other exemptions in the acts, however, do not seem to fit quite as well. The areas which the other exemptions cover do not seem to be linked to any particular group's interests or goals. Rather, most of the remaining exemptions seem linked to the goal of allowing the government to operate in a smooth and efficient manner. It might be said to be in the best interests of all groups that the government operate smoothly, but it seems unlikely that any group would actively battle for exemptions on this basis. Exemptions in areas like law enforcement, government policy discussions, and government proprietary information, do not seem to cover areas in which access would run contrary to the goals of any particular groups.

The evidence of interest group pressure, or lack of it, seems to support this assessment. There is little evidence of groups fighting for the inclusion of the majority of the remaining exemptions. Some groups accept the need for certain exemptions, like law enforcement, but none seemed to be willing to fight actively for them and most seemed intent on trying to limit their scope. A battle between the pro-access interest groups over the exact limits or
scope of access would not seem likely to have produced nearly the list of exemptions that was produced. Even accounting for the fact that some groups may have pushed for exemptions behind the scenes or that exemptions might reflect the interests of groups indirectly, there seems to be no connection between the list of groups involved and the list of exemptions.

other program differences

The revised group explanation should also be able account for some of the other program characteristics. One of the most significant differences between the Canadian and American programs was the time of their development. The Canadian act did not come into effect until almost twenty years after the American one. It would seem that if the group explanation is correct this slower development in Canada should be a reflection of large differences in interest group activity. Looking at the evidence, one difference which might account for the slower development is the role played by the press.

the press and access to information

As discussed above, the American press is identified as playing a large role in exposing government secrecy, putting the issue of access onto the policy agenda and pushing for the passage of a new law. In Canada the press is identified as playing a comparatively minor role. Relatively few press groups appeared before either of the parliamentary committees and very little was written by the press in support of the bill. A number of newspaper editorials condemning delays on the bill appeared in the early 1980's, but there
was nowhere near the same level of pressure mounted by the press in Canada as there was in the U.S..\textsuperscript{10} The press in Canada seem to have supported the bill, but done little to push it onto the agenda or to push it forward once it was on the agenda.

The reasons for the more limited push by the Canadian press are not clear. One argument might be that the press in the U.S. had a different view of the value of the access act. An access act, arguably, is of limited practical, day-to-day value to the press. For most journalists, the process of requesting access through the act is too slow to be of value for daily news stories. In those cases where it might be worth the time, the public nature of the request and appeal process often means that the exclusivity of a story will be lost. It is only very rarely where the value of the story is worth the wait, the risk of non-exclusivity and the price of an appeal to the courts. The statistics suggest that the media make relatively small use of the act.\textsuperscript{11}

The difference between the American and Canadian press, therefore, might be that the American press was motivated by more than the practical gains offered by the act. One American commentator suggests that the U.S. press realized that the practical gains of an act would be minimal, but were driven by journalistic

\footnote{See Rosemary Knees, "Where were the Journalists?", in \textit{The Making of the Federal Access Act} Donald C. Rowat ed. (Ottawa: Carleton U., 1985).}

\footnote{In 1989-90, for example, only 8.4\% of the requests made under the Canadian act were from the media. Information Commissioner, \textit{Annual Report} 1990. For the American situation see Tom Bezanson "Why the American Press Makes Little Use of the Freedom of Information Act," in \textit{The Right to Know} Donald C. Rowat, ed. (Ottawa: Carleton U., 1980).}
pride and a view of the act that saw it as part of a more general fight against the government and its secretive practices. The press, it is argued, fought for the act as part of a more general campaign to assert their role as the "defenders of democracy." The Canadian press in contrast, might be suggested to have been less concerned with this larger picture and been involved in a less combative relationship with government. Concerned only with the practical gains, they were not motivated to push for the act in the same way.

It also might be argued that the Canadian press, and media generally, do not have the same tradition of investigative journalism as has the U.S. press. As this is perhaps the area in which an access act is of most value to the press, it is not surprising that the push in the U.S. would be stronger.

This analysis would seem to be consistent with a more general trend identified by Donald Smiley. He argued that the debate over access in Canada in the late 1970's was mainly over "political accountability and the availability of information to relatively privileged groups." These privileged groups, however, have a much closer relationship with the government than do their American

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12 O'Reilly, 2-12.

13 It is interesting to note that of the three groups that appeared before the Justice and Legal Affairs Committee was the newly formed Center for Investigative Journalism. A body according to one commentator... "tending towards a young, intellectual membership given to a spirit of investigative journalism that was perhaps more at home in the United States." Knees, 65.

counterparts. In Canada, these groups, among which he numbers the media, exist in a "symbiotic" relationship with the government and in a relationship that is more collaborative than adversarial.\textsuperscript{15} Given this relationship, they are less likely than their American counterparts to either want, or need, to push as hard for an access act.

Conclusions about group theories

The evidence seems to show that there was significant pressure from interest groups for access legislation in both the U.S. and Canada. It also suggests this pressure may have been stronger in some ways in the United States than it was in Canada. This might explain why the acts were adopted and why the American act came more quickly than did the Canadian act.

The problem, however, is that there does not seem to be a way for the evidence to be explained in a way that will account for the significant restrictions on access in both the acts. Even accounting for the fact that groups have varying interests, the acts in question seem to be much more restrictive than would be expected from looking at the groups. All of what are commonly identified as the major interest groups- the press, business groups, the bar associations, and so on- were behind more access and yet in both the U.S. and Canada it took well over ten years for an access act to move from initiation to passage and the final product. Furthermore, none of the significant exemptions and restrictions seem to be linked to

\textsuperscript{15}Smiley, 63.
these groups' interests. Group theory alone, therefore, does not seem to explain adequately the policy outcome.

It also should be added that the group explanation ignores the independent role played by many individuals in the policymaking process. The evidence in both countries seems to indicate that a strong role was played by policy entrepreneurs in both pushing access onto the agenda and keeping it there. Many of these individuals were independent of any particular social group or interest. Individuals like Moss, in the U.S., and Baldwin and Mather in Canada, pushed for access legislation and kept it on the agenda even though public support for their actions was limited. Even individuals which might be seen as connected with specific interest groups like Murray Rankin and D.C. Rowat in Canada or Harold Cross in the U.S. seem to have played roles pushing for access that cannot be explained simply in terms of them fighting for the interests of their group. These individuals and their motivations do not seem to fit into a group analysis, yet they seem to be a crucial part of the policy process.
Chapter Five
Institutional Theories

Relatively recently, some theorists have challenged the idea that policy is a reflection of contending social forces and that the state is simply a cash register ringing up the wins and losses of interest group battles. These theorists have argued that the state should be "brought back in" to policymaking theories.¹ The state, it is argued, is "more than a mere arena in which social groups make demands and engage in political struggles or compromises."² The state and its institutions have an independent influence on public policy. Government actors have independent interests which influence their policy choices and the structure of state institutions affects policy outcomes. The state does not just reflect society, it also shapes it.

The argument is made that states have a degree of autonomy. That is, that government actors, "may formulate and pursue goals that are not simply reflective of the demands of social groups, classes or society."³ Furthermore, government actors may have the capacity to carry out independently these goals and implement them against the opposition of social groups or classes. Policy, therefore,

¹See, for example, Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in Bringing the State Back In, eds. Peter Evans, et. al. (Cambridge: Cambridge University Press, 1985); and William D. Coleman and Grace Skogstad, "Policy Communities and Policy Networks: A Structural Approach," Policy Communities and Public Policies in Canada (Toronto: Copp Clark Pitman, 1990).

²Skocpol, 8.

³Skocpol, 9.
can reflect not only the interests of social groups but the particular interests of government actors.

The autonomy and capacity of government actors is effected by the institutions of the state. Institutional structures, for example, can insulate government actors from interest group pressure and allow them to ignore, or cause them to be unaware of, the demands of certain groups. Alternatively, structures may formally recognize interest groups and make them a part of the policy process. Different types of "policy networks" in different policy areas effect the degree to which government actors can act independently.4

The institutional organization of the state can also effect the shape of the social groups making demands of the state. Certain institutional organizations will encourage the formation of some groups over others. The state gives legitimacy to some interests over others, allows for more input of some types of groups over others and distributes resources in ways that encourages some interests over others. In the Canadian context the argument is frequently made, for example, that the federal structure of the state emphasizes regional cleavages over other social cleavages. The institutional structure is said not only to effect the organization of groups and their strategies, but to shape the very subject matter over which they will be organizing. As one theorist puts it, institutions effect interest, organizations and even the definition of interest itself.5

4Coleman and Skogstad, 16.

5Skocpol, 23.
The same argument can be applied to the interests of government actors. Not only will the institutional structure shape their autonomy, but also the ways in which they exercise this autonomy. The part of an institutional organization an actor is a member of will affect their resources, the kinds of interests which they are likely to want to defend and the kinds of strategies which they might pursue to defend them. Their decisions may in turn shape the institutions they are a part of, which will effect their autonomy, their interests and the shape and interests of social groups.⁶

_institutional explanations and access to information_

An institutional explanation of access to information policy would likely begin by focusing on the interests of government actors in this policy area. An access policy would be expected to be a reflection of these interests, and those of the social groups involved, as they are shaped by the institutions of the state. The less autonomous the state, the more closely a policy area should reflect the interests of social groups, the more autonomous the state, the more closely a policy should reflect the interests of government actors. Policies will differ between countries on the basis of differences between the interests of government actors and their autonomy, and as the institutions which shape these interests and autonomy differ.

_government actors as an interest group_

There is a fairly convincing argument to be made that government actors will generally have an interest in resisting disclosure of government information. This may be true of government actors generally, but it would seem especially true of the executive agencies and institutions at which the access to information act is directed. Max Weber, for example, makes the argument that bureaucracies use secrecy to maintain power and superiority. Information gives power to those who hold it over those who do not and access requirements destroy the power which secrecy gives bureaucrats over the public. With more information, the public is better able to scrutinize executive operations, criticize them and become more effectively involved in shaping policy. Increased openness, therefore, is likely to be seen by the executive as a threat to their prestige and their autonomy.

It is also likely an access act will be seen as an added, unnecessary burden which threatens government efficiency. Answering requests for information, and dealing with the criticisms that result, is not likely to be seen as a productive use of time by the bureaucracy. Public involvement is also likely to be seen as interference in areas best left to government experts. Secrecy may be seen as an essential element of the effective operation of government institutions, especially those involved in law enforcement. As a part of a status quo that favours secrecy, government actors are likely to see openness not only as a threat to

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their positions, but as a threat to a system which they are likely believe is working well.

participation of government actors

The evidence of government involvement seems to be consistent with the idea that the executive will resist disclosure. In both the U.S. and Canada there is evidence of strong opposition from some government actors to increasing access. In the United States, as the legislative history shows, there was opposition from government agencies at almost every step of the process. The Moss committee, for example, heard from 105 agency witnesses, all of whom voiced opposition to a new access act. Throughout all of the hearings on the FOIA this same pattern of agency opposition was repeated. Agencies even resisted implementation of the original Section 3 of the A.P.A. which the FOIA was to replace. After passage of the FOIA the resistance continued and agencies pushed for a narrowing of the scope of the act and opposed amendments making it more effective.

In Canada, government opposition to an access act was less overt, but seemingly as strong. In the Canadian tradition the bureaucracy does not generally express its' opinion on policy publicly, but there does, however, seem to be evidence that resistance to an access act among the bureaucracy was fairly widespread. In public, resistance to the act was often expressed by senior bureaucrats and government ministers in terms of protecting the political neutrality of civil servants and the tradition of ministerial responsibility.9

8O'Reilly, 2-13.
9Kernaghan, 382.
Government resistance was also apparent more generally in the various policy papers on access to information. The first policy response, the Motions for Production of Papers, was full of huge exemptions and was very limited in its application. Subsequent proposals allowed for more access, but none ever came close to allowing the access for which interest groups called. More directly, government resistance was evidenced by the fact that calls for reform were ignored for almost ten years before any of these policy papers were initiated.

It also might be noted that in both the U.S. and Canada the history of executive agency practice shows their resistance to openness. Even after the adoption of legislation they continued to fight in the courts to reduce the impact of the legislation on their secrecy.10 Nothing in the American act and little in the Canadian act, requires agencies to keep documents secret. Yet they continue to withhold as much information as possible.

government actors and the legislation

Aspects of the Canadian and American legislation would seem to be consistent with an explanation focusing on the interests of government actors. The delay in legislation being implemented and the significant restrictions on access which they both have can be

10An interesting example is the Bland v. National Capital Commission case discussed earlier which concerned a fight for access to documents showing the rent of properties in Ottawa owned by the National Capital Commission (NCC), a federal agency. One of the persons who originally fought for access in this case later became an NCC official and wound up arguing in court that the documents which she had originally said should properly be released should be exempt. There was no evidence that the records contained information different from that which she expected. This perhaps illustrates the way in which the interest in secrecy comes with the government office.
seen as reflections of the anti-access interests of government actors. Exemptions, for example, covering foreign affairs documents, policy discussions, and law enforcement records all seem to be consistent with this analysis. Even the exemption for confidential business documents can be seen as reflecting the interest of government actors in protecting their ability to collect financial information. The interpretation of this exemption by the courts in both countries emphasizes this purpose of the exemption.\(^1\)\(^1\)

The interests of government actors in secrecy does not, however, explain why the Canadian and American acts diverge in the ways they do, or why either country has a legislated right to access. Given the unanimous resistance of government actors to more access, it would seem unlikely that any completely autonomous state would legislate such a general right. If such legislation was adopted, perhaps because of a less than fully autonomous state, neither would it be expected that the resistance of government actors would vary depending on the institution or the country of which they were a part. If the interest in secrecy is universal then government actors would be expected to have the same impact on any access legislation. To be consistent with our finding an institutional explanation would have to show why the interest of government actors might vary, or why their ability to affect legislation might change

\(^1\)See Chapter Two: The first prong of the Parks test, says that if disclosure would impair the government's ability to collect information then it is confidential. The Canadian test says that the relationship between the government must be one that it is in the public interest to foster.
institutional incentives for change: separation of powers

One argument is that the institutions of which government actors are a part will make it in their interest to push for access legislation despite their general interest in secrecy. Differences between countries could then be explained as differences in the way in which institutions provide this incentive for change. Some states may be organized in such a way that the incentive is more limited and the anti-access interest of actors will prevail while others will be organized in a way which will make change more likely.

In the United States, the separation of powers system would seem to be organized in such a way that it is in the interest of some government actors to pass access legislation. In this system, the executive and the legislature have separate but overlapping spheres of power. This means that their relationship is often adversarial. Congress may wish to push policy in a certain direction and the Executive in another and each has significant power to thwart the other. In this adversarial relationship, it is in the interest of Congress to have more access to information about the executive and its operations. Congress wants to know whether its legislation is being implemented properly and wants to ensure that the executive agencies are not usurping the power of the legislature. Legislating access to information is a way in which Congress can use its power to gain an advantage over the executive.  

12 An example of how interests change according to an actor's office comes from the debates over the FOIA. Gerald Ford as a Republican member of Congress was critical of the slow movement of the FOIA and blamed it on the Democrats siding with the Democrat President, Johnson. A few years later, Ford as President vetoed the 1974 amendments to strengthen the FOIA.
The Canadian, Westminster parliamentary style system does not seem to have these same built-in incentives for change. There is not the same separation between the executive and the legislature in this system. The majority party in the House of Commons forms the government and takes over the executive functions. Because the government is dependent on the confidence of the House, strict party discipline prevails and the cabinet controls the legislature. Unless there is a breakdown in party discipline, which is unlikely given that the member's fortunes generally ride with the party, then the cabinet or executive is supreme. Any increased access to executive institutions, therefore, has to have the approval of the heads of these institutions. The legislature has very little independent power, or incentive, to force the executive to open up.\textsuperscript{13}

This contrast is nicely illustrated by the different fortunes of the initial proposals for the two acts. Moss, as a member of the legislature, was able to bring his proposal before a legislative committee, hold hearings, and pilot the legislation through until its final passage. In contrast, Baldwin and Mather as members of the opposition could only propose private member's bills which would receive token recognition in the House of Commons but only proceed to serious discussion and legislation if the ruling party, or more particularly the cabinet, deigned to recognize it. Both proposals, of course, met with a long delay before legislation, but in Moss's case

\textsuperscript{13}See George Hoberg, "Representation and Governance in Canadian Environmental Policy." Paper delivered at Annual Meeting of the CPSA, 1991, Photocopy. Hoberg describes the way in the U.S. separation of powers system creates incentives for "legalism" as a policy style in the context of environmental regulation. The Canadian system, he argues, lacks these incentives, and this may slow a current trend in Canada towards this legalism.
the obstacles forcing the delay were within the legislature, while in Baldwin and Mather's case the obstacles were the executive itself. Moss and company also had the option of moving their proposal through another committee or through the other House, but for Baldwin and Mather, the only road to legislation was through the executive.

Looking at the rest of the Canadian institutional structure there seems to be little else that would provide an incentive for change. One argument which might be made is that the executive see opening up the bureaucracy as an opportunity to shift political responsibility from themselves to the bureaucracy. The access act would be seen as a chance to break down the lines of ministerial responsibility and expose policy mistakes as being the mistakes of the bureaucracy and not of their minister.

Another argument which might be put forward is that control of the legislature and the executive by one party provides an incentive for opposition parties to call for more access. In calling for more openness an opposition party faces no immediate threat to its own interests, gains possible political points for its criticism and, if the call is actually successful, will benefit from more information about the actions of their opponents. The system, therefore, encourages opposition parties to make access a political issue and to make a commitment to passing legislation which they would have to fulfill should they ever be elected.

Neither of these two incentives, however, would seem to be adequate on its own to cause the adoption of legislation. Until the actual demise of the tradition of ministerial responsibility the
executive still pays a political cost for the mistakes of the bureaucracy and they would seem likely not to want to risk exposure of these mistakes, or of their own lack of ability to control the bureaucracy. Demand by the opposition party for such an access policy would also seem unlikely to sway the executive absent of other pressures. Similarly, a promise while in opposition would seem insufficient on its own to push a party into passing legislation that is contrary to its interests once it has moved from the opposition benches and into power.

Along with a lack of adequate incentives for change the institutional structure of the Canadian state also seemingly provides some actual dis-incentives. In the Westminster scheme, parliament is held to be supreme over the courts. Initiating a scheme whereby executive decisions to withhold documents are subject to court review would seem to be a surrendering of this power. The tradition of parliamentary supremacy, even in pre-Charter days, can be exaggerated, but even to surrender symbolically a part of this nominal power would seem to be contrary to the interests of the executive. Unlike in the American system, where courts have always been held to have a certain level of independent power over the legislature and executive, the traditional position of the courts in the Canadian system gives the executive one more reason not to want to have a legislated access right.

More generally, access to information legislation would seem to be a more radical institutional change in the Canadian context. The traditional policymaking style of the Canadian system has arguably been a closed and informal one where policy is made behind closed
doors. The tradition, as the Green Paper says, is one of "public decisions, privately made." The American separation of powers system, meanwhile, operates on the assumption that the best policy is made in an open and adversarial context. Legislating access in the American system, and thereby limiting secrecy in the bureaucracy, could be characterized as simply enforcing the norms of this system. Legislating access in the Canadian system is perhaps enforcing a new set of norms on the system and, thereby, changing the system itself. This more radical change is likely to be resisted more fiercely by government actors.

institutional incentives for change and the legislation

The differences between the Canadian and American institutional structure would seem to be consistent with the different development of the two acts and differences in the final legislation.

The history of the American act's development fits with the idea that it was the result of an executive-legislative battle. Resistance to an access act did not come from all government actors but came almost exclusively from members of the executive. The only resistance in the legislature seems to have been from members of the President's party expressing the concerns of the executive. The final legislation was passed under the threat of a presidential veto and a later amendment was actually passed despite a presidential veto. The executive seems to have tried as hard as it could to thwart the Congress in passing the bill.

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14Roberts, 7.
The final legislation reflects the overlapping nature of powers in the American system. Congress made sure to include in the legislation that the access requirements applied only to the executive and not to Congress or any of its bodies. The existence of the various exemptions and restrictions on access can be attributed to the considerable power which the executive has to force the legislature to make concessions. The power of the threat of a presidential veto, for example, is reflected in the final House report which described the exemptions of the act in their broadest possible terms in order to try and placate the executive and avoid the veto. Certain of the exemptions, in particular the national security exemption, also seem to be a reflection of Congress's lack of constitutional power to regulate the executive. The legislation would also seem to be more likely to be effective with the approval of those to whom it will apply and those whom will administer it. More concessions may have been made to secure this approval.

The slower development of the Canadian act and its more extensive restrictions and exemptions can, in turn, be explained as a reflection of the greater control of the executive over the process and the lack of the same separation of powers dynamic. Calls from the legislature by members Baldwin and Mather could be completely ignored because of the exclusive powers of the executive. The executive also could ensure that cabinet documents and ministerial communications received sweeping and detailed protection from disclosure. Documents, such as those involving provincial-federal negotiations, which might embarrass the executive or threaten its negotiating positions, are all exempt from disclosure.
The tradition of parliamentary supremacy also would seem to explain why the Canadian system of review differs from the American system. The information commissioner provides an additional stage of review between executive agencies and the courts, thus reducing the degree of direct court review of executive activity.

Institutional structure and differences in detail

One difference which might not seem to reflect the different institutional structure of the two states is the more detailed nature of the Canadian legislation. Generally it would be expected that with the control which the executive holds over both the legislature and the bureaucracy most Canadian legislation will be less detailed than its American counterpart. The executive, it is argued, will want to put as little restriction on itself as possible and so will leave legislation concerning its own powers very vague. In the U.S., however, the battle between the legislature and the executive means that the legislature will use its power to limit the discretion of the executive as much as possible and, therefore, try to pass very detailed legislation. The legislation here contradicts these traditions.

In the Canadian case, however, the more detailed nature of the legislation might be explained as reflecting a desire of the executive to limit not its own discretion, but the discretion of the courts. The executive is able to use its powers to make the exemptions broad enough so that they do not need to be concerned

\[15\] See Hoberg, 29.
about their ability to withhold documents. The main threat to them is that the court might narrow the exemptions. They, therefore, make the exemptions both broad and detailed.

In contrast, Congress, it might be argued, is likely to see the courts more as an ally in this situation. Detail is sacrificed in order to ensure passage of the bill and avoid a presidential veto. Leaving the bill fairly vague allows the bill to be interpreted in a way which will satisfy the executive, but also leaves room for an alternate interpretation by the courts. The vagueness of the bill, therefore, might be seen as a strategy to try and avoid further delay in passage of the bill without compromising its content. It also might be argued that entering into a completely new policy territory, Congress may have worried about the exact ramifications of granting a general right to access. Using broad language, allowed courts to be left with a large amount of leeway to tailor the legislation to fit whatever consequences might arise.

**the electoral incentive and the Canadian legislation**

The institutional structure of the Canadian and American state seems to be able to account for both the existence of the American act and for the significant differences between the American and Canadian acts. It seems less able, however, to account for the existence of the Canadian act.

One of the explanations for this was that the system is organized in such a way as to make it in the interests of an opposition party to push for access legislation. The evidence, to some extent, would seem to fit with this explanation. Before the
act was adopted, the ruling Liberal party was pushed to enact an
access act by the opposition Conservatives and the Conservatives
made access an election issue. Despite promises from the Liberals,
and some token moves towards such a policy by them, it was only
after the Conservatives were elected that an access bill was
introduced. While in opposition the Liberals attacked the
Conservative bill as being too limited and promised in the
subsequent election to enact their own bill. It was only after a
prolonged period of rapid turnover and competing promise- making
that an access act was finally passed. Arguably, without this
dynamic the legislation might still be stuck in cabinet and be the
subject of vague promises for future action.

It is difficult, however, to assess how much of a true impact this
characteristic of the system actually had. It can be argued that
calls for legislation would not have been made by the opposition
unless the issue was likely to gain political support. To some
degree their calls may have created public awareness and support
and it is difficult to say whether the demand of the public or the
calls of the legislature came first. Baldwin and Mather were among
the first to bring up the issue in the legislature but groups outside
the legislature were also picking up on the issue at the same time.
It might also be pointed out the opposition parties did not pick up on
Baldwin and Mather's lead until it became obvious that access was a
popular issue outside of the legislature.
Conclusions

Each of these three different groups of explanations seem to give some valuable insight into how the access policies came to be formed in Canada and the U.S.. As noted at the outset, access to information is, in some ways a unique policy area because the state is being asked to modify its own institutions in a way which would seem to be against its own interests. The mere existence of access legislation would seem, in some ways, to refute the idea that a state has any significant autonomy. As the subsequent analysis has found, however, the state cannot be simply written out of the explanation for access to information legislation.

In regard to the American legislation, the existence of the legislation seems best explained by fact that the separation of powers gives one group of government actors both the incentive and the power to pass access legislation. Further incentive was provided by strong interest group pressure. The group of government actors to which the policy was applied did resist implementation of the policy and did seem to have significant success in this resistance, but the institutional power of their opponents backed by the group pressure were too much for them to be completely successful.

It is not clear what would have happened if one of these elements had been missing. The indifference met by the Moss Committee's initial attempts at reform suggest that in the absence of pressure for change from interest groups, and the push of particular individuals, the institutional incentives might not have been enough
to result in legislation. The separation of powers, as well as providing an incentive for change for one group, also ensure resistance from the other and Congress may not have been as willing to fight executive resistance if it had not been pushed to do so.

Canada makes an interesting contrast because its institutional organization seems to lack the same incentives for change. The institutions would seem, in fact, to give government actors both greater incentive and greater power to resist an access act. However, the evidence seems to show that interest group pressure was not as strong in Canada as the U.S. Interest group pressure would only seem to have been enough to produce legislation in a state with very limited autonomy. The significant exemptions in the act do not suggest a state with such a limited autonomy.

These conclusions indicate that the phenomenon of copying played an important role in explaining the existence of the Canadian act. The flood of information from the U.S. about its program showed that such a program could work without debilitating the executive or significantly harming its interests. This combined with the pressure from various groups and the unique electoral conditions seems to have made the legislation possible.

It also would seem to be important to place access legislation in the context of other similar changes in Canadian institutions at the time. Canada adopted the Charter of Rights and Freedoms during approximately the same period. In a similar way to the access act the Charter might be said to represent a new kind of relationship between government and society: a shift to a more adversarial relationship where groups fight to be participants in the policy
process, government is treated with suspicion and the best policy is seen to be produced by open conflict rather than elite accommodation. The access act might be seen as part of a more general shift in power from "government" to "citizens."

In many senses this is an Americanization of the Canadian system and a move away from the traditional Westminster system which concentrates both power and responsibility in the executive. The copying thesis, therefore, is a helpful way to explain the shift. By the time the debate over access reached Canada, it seems to have been an accepted fact that access to information was an essential part of any true democratic state and that an access to information statute similar to the American was the only way to achieve effective access. The debate over access was Americanized through the activist literature and the dominance of the U.S. as an example for Canadian policymakers. Canadian academic literature at the time, for example, explained how openness could be adopted in a Canadian parliamentary system, but very little of it questioned whether this openness was itself consistent with Canadian institutional traditions. The desirability of increased access was taken as a given and little account was taken of the fact that most information about the issue came from American sources and was based on the norms of American institutions.

To recognize this aspect of the process, however, is not to ignore the fact that interest groups were attracted to the American

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16 Alan Cairns makes this argument regarding the Charter, for example, in A. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake," in Disruptions, ed. Douglas Williams (Toronto: McClelland-Stewart, 1991), 108.
example because the policy change appealed to their self-interest and not simply because it was American. Similarly, the "Americanization" of the Canadian system was not complete and the Canadian institutions themselves played an independent role in shaping the Canadian act and giving it a unique Canadian shape. The relative weakness of Canadian interest groups, for example, can be related to the nature of the closed nature of the Canadian institutional system. Their lack of influence in this closed system gave them little incentive to organize and left them unprepared to seize the opportunity to push for a policy which offered them the potential of increased future influence. To understand the Canadian act, then, it is necessary to go beyond the fact that information was transferred from the U.S, and to recognize the domestic forces that shaped the use of that American example. As in the United States, the institutional structure and the interests of state actors played an important role in the shaping of the access act.
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