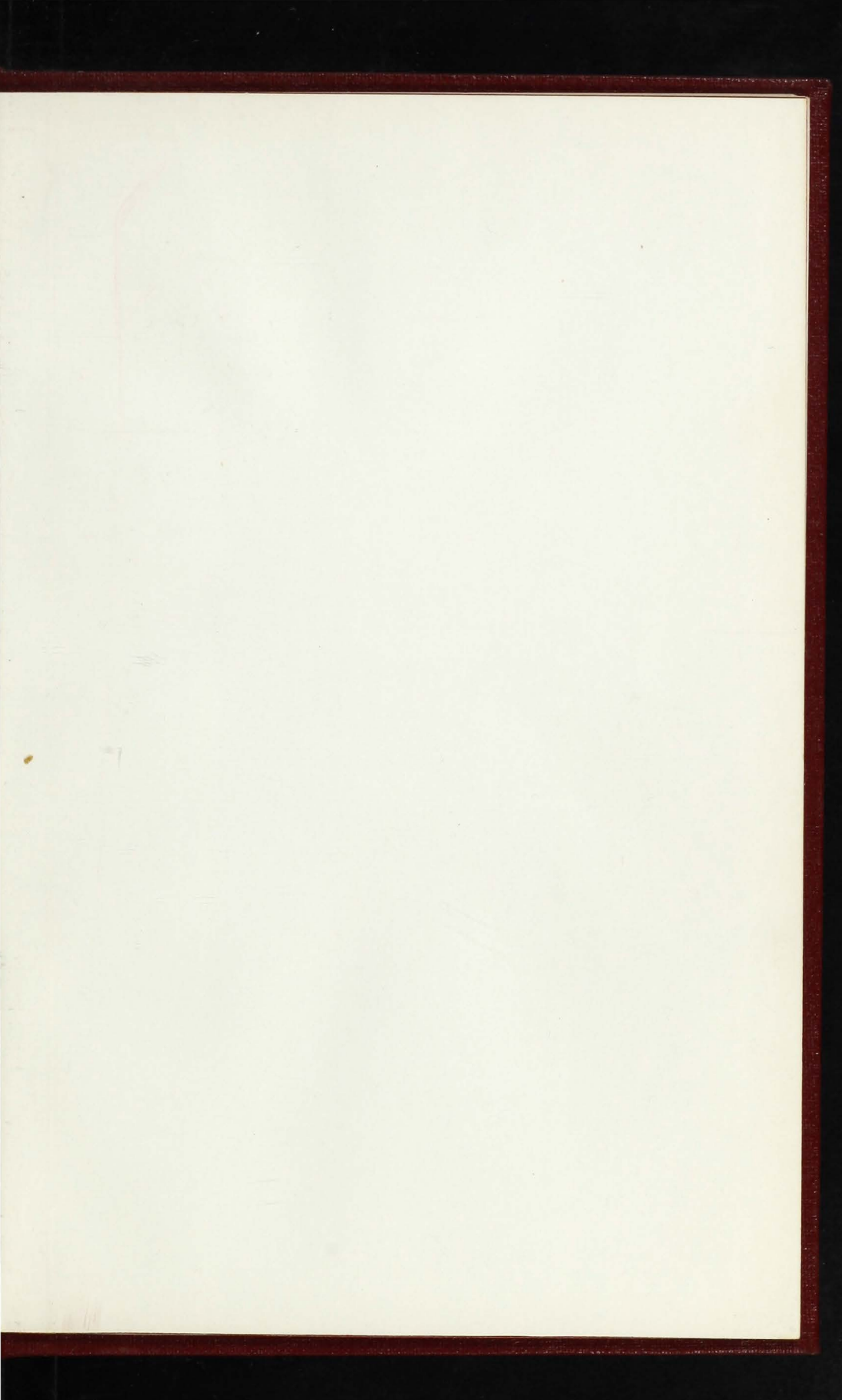


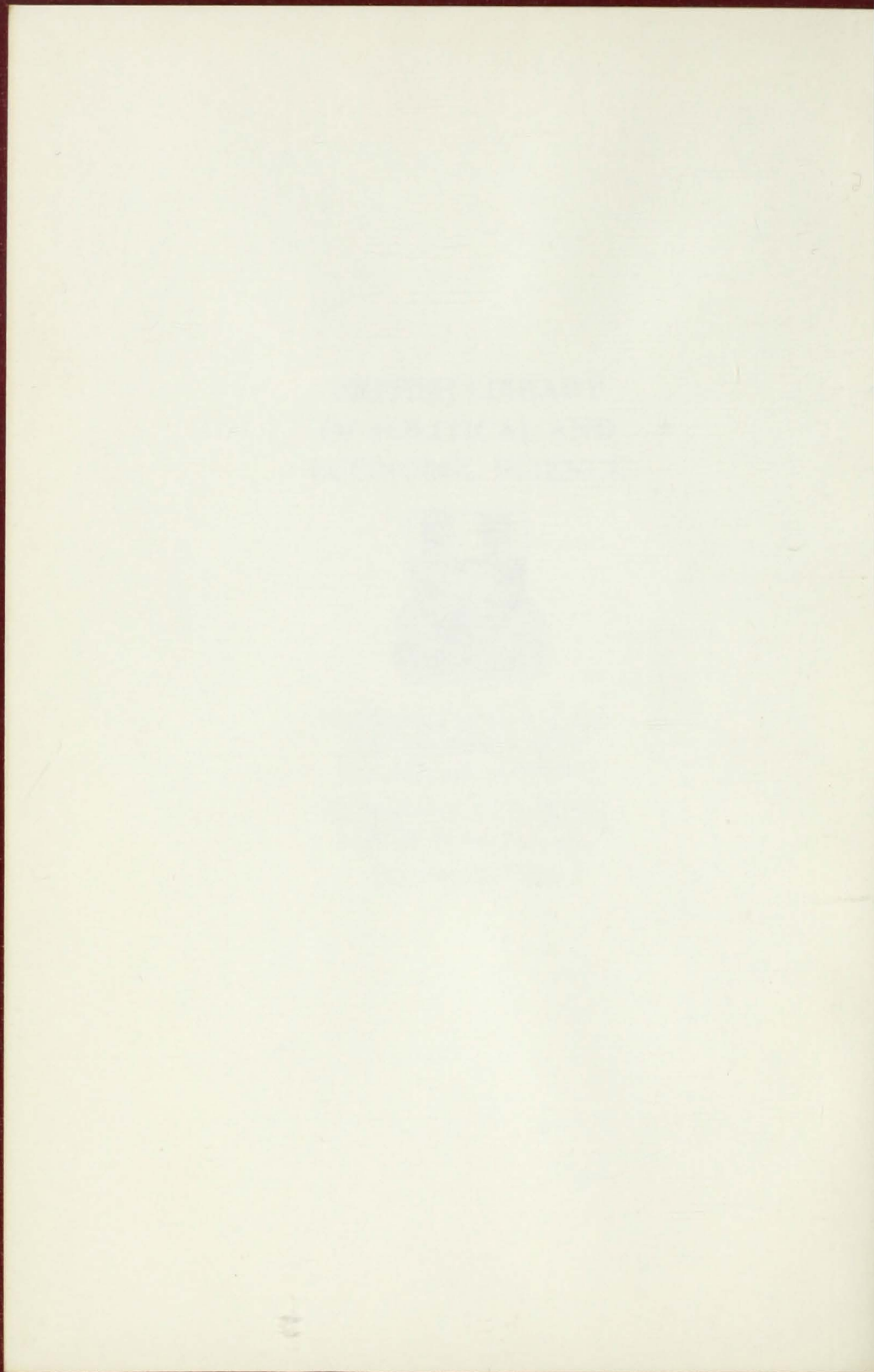
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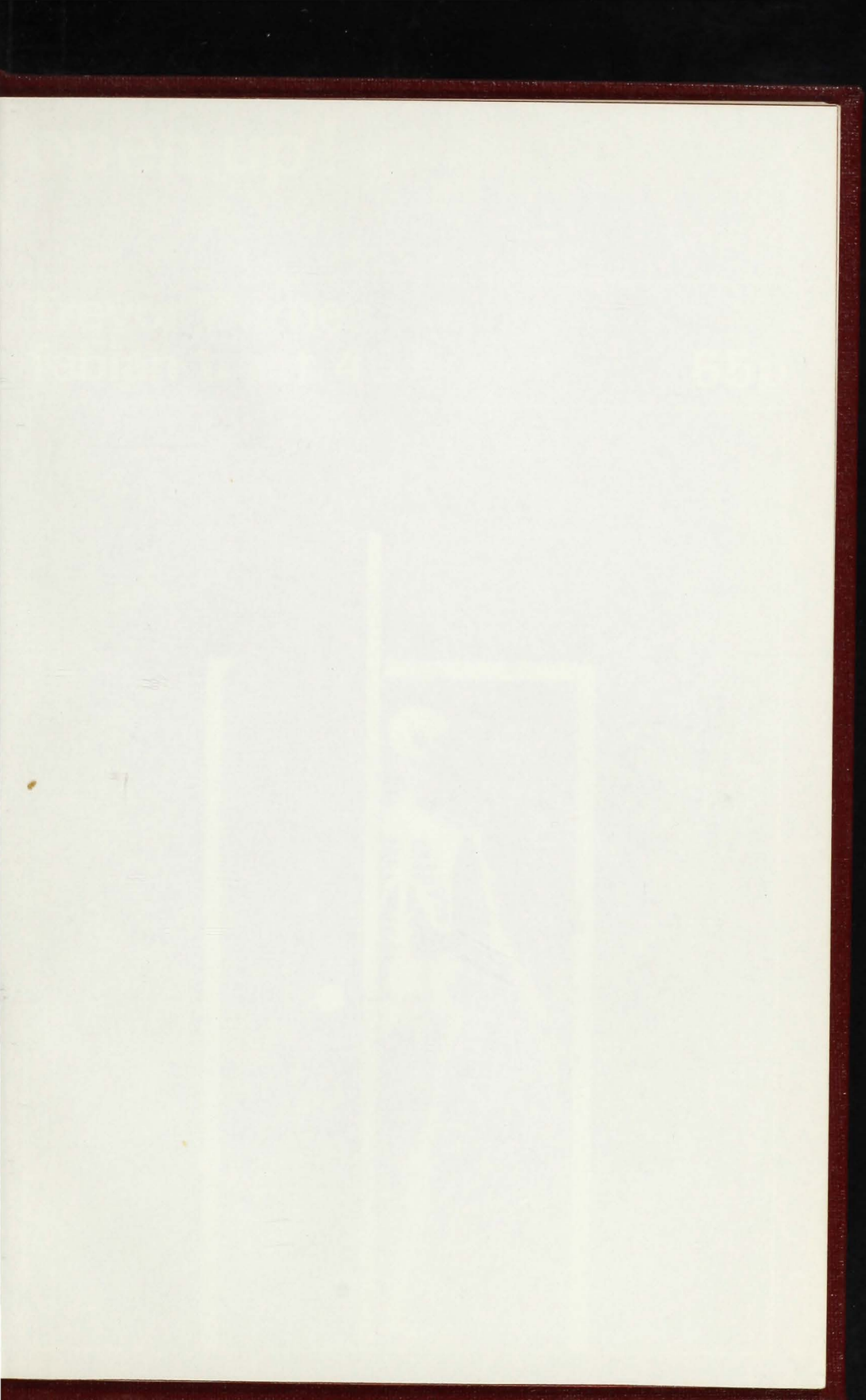


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open up!

Trevor Barnes
fabian tract 467

65p

**Britain and freedom
of information in
the 1980s**



fabian tract 467

open up!

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1. the background

The 1980s will be the decisive decade in Britain for freedom of information. For the first time there is a highly motivated coalition of interests determined not only to reform the Official Secrets Act but also to introduce a statutory "right to know". This coalition has supported MPs of the Labour and Liberal Parties who have introduced private members' bills to restrict government secrecy, and has produced a number of proposals to encourage a freer flow of information.

After the Blunt affair and the defeat of the Tory government's Protection of Official Information Bill, the moment has come to assess how far the margins of secrecy in Britain have receded. It is time for socialists and others to look closely at what they mean by "freedom of information" and above all to formulate practical policies to achieve it. With a few exceptions the British Labour movement has ignored the overwhelming importance of freedom of information. Many give it their bored, automatic support in principle without considering the subject in detail and without realising that more open government must be fought for.

While in opposition, the Labour Party must develop coherent policies on the issues of unauthorised disclosures and the right to know. These proposals must be based on a clear analysis of the opposition to more open government—and how this can be overcome. On such a foundation the Labour Party can develop a commitment to freedom of information which will mean that it can be fully exploited as an electoral issue.

the movement against secrecy in Britain

Many Swedes like to trace back their public access law to 1766 when an Act underpinning the freedom of the press was promulgated. The discontent with government censorship in Britain is similarly not new. John Wilkes and William Cobbett, in seeking to protect the liberty of the press to report freely, helped expose government to public view and the whole sweep towards democracy

in the nineteenth century encouraged this tendency. But the eighteenth and nineteenth centuries were also the period when some political institutions protecting secrecy were built, cabinet and ministerial responsibility for example, while the Official Secrets Act appeared on the Statute Book in 1889 and was sharpened in 1911. As so much of the present debate has its historic roots in reaction to the Official Secrets Act, it is unwise to trace a direct line of descent from Wilkes to the present proposals for reform, even if one should never forget the resilient tradition of press freedom Wilkes and his followers represent.

The movement against government secrecy is essentially a post-war phenomenon and the freedom of information lobby emerged only in the late seventies. During the first half of the twentieth century no one seemed deeply concerned about secrecy and there were few changes to undermine it, other than the establishment of departmental information and press offices in the 1930s and the emergence of lobby correspondents. A series of uncoordinated changes in government from the 50s have led to slightly more openness, often as an indirect and unintentional result. These developments did not result from public debate about government secrecy. What little concern there was focussed narrowly on the Official Secrets Act.

Concern about the Act, expressed periodically during the fifties, deepened after the Wilson government in 1967 began a heated argument with *The Daily Express* about a D-notice relating to an article on the government reading overseas cables. This was followed by the prosecution of the journalist, Jonathan Aitken, and the editor of *The Sunday Telegraph* after the newspaper published an official appreciation of the federal Nigerian prospects during the Biafran War. The defendants were all acquitted and the Franks Committee was set up as a result. Its report was published in 1972.

Franks was a landmark, though now a crumbling one due to governmental neglect. Franks announced the truth.

Section two of the Official Secrets Act was a "mess" and a "catch-all provision". It should be replaced by an Official Information Act under which it would be an offence to reveal information only in certain categories: cabinet documents, information given in confidence to the government, details of currency and reserves, defence, national security and foreign policy. Receiving information, subject to certain defences, would still be a crime and all prosecutions would have to be approved by the Director of Public Prosecutions (DPP) rather than the Attorney General.

Franks was a landmark in another way. Following the lone testimony to Franks of Professor Wade in favour of public access legislation, recognition began to dawn that reform of the Official Secrets Act was of itself insufficient to ensure more open and accountable government. This awareness was encouraged by limited reductions in secrecy as a result of events in the 1960s. Some cracks in the constitutional edifice of collective cabinet responsibility appeared when Frank Cousins and James Callaghan publicly disagreed with their colleagues. These cracks widened during the debate preceding the referendum on the Common Market, although Mrs Thatcher reestablished the principle firmly when she took power in May 1979. Beginning seriously with the 1964 Wilson government, temporary civil servants were employed more and more in policy making. Academics became members of the Central Policy Review Staff under Edward Heath. Knowledge of government was no longer confined to the career bureaucrats, a few of whom decided to tread hesitatingly on the boards of the public stage—some were interviewed in the sixties for the first time about departmental reports for example.

Pressures against secrecy began to be felt in Parliament. Select committees were created from 1966 onwards. They collect much useful information but wield little real power—and this is as true of the new, departmental select committees as of their predecessors as Whitehall has admitted (*Guardian*, 19

June 1979). More information came to light after the introduction of Green Papers and the Ombudsman, appointed in 1967.

Wider consultation, analagous to the Scandinavian model, has assisted this tendency towards openness. The CBI, the TUC, BMA (British Medical Association) and NFU (National Farmers' Union) are more deeply involved in decision making than before. The same is not true of British newspapers but, with the development of investigative journalism, they scrutinised it more thoroughly, reflecting a general and growing anti-government feeling in the press. The growth of broadcasting journalism has produced a plethora of programmes focussing on political issues. Groups springing from concern about social issues, the consumer or the environment have in turn meshed with the media by forming their own magazines, so providing a forum where alternative viewpoints can be aired.

Largely as a reaction to events in America, the debate began to broaden out from the Official Secrets Act to freedom of information. The concentration on Section two had taken its toll, however, and the public still associates official secrecy with national security. Although public interest in more open government began to increase steadily after the Franks Committee and found expression in the 1974 Labour manifesto which declared the need "to put the burden on the public authorities to justify withholding information", it only received serious attention within the Labour cabinet after Roy Jenkins' Granada Lecture in 1975. A cabinet committee on open government was established in April 1976 after James Callaghan became Prime Minister, largely as a result of backbench pressure. When Merlyn Rees became Home Secretary in September the same year, he replaced Jenkins on the committee. The cabinet committee split over the necessary reforms. Callaghan and Rees, supported by the barons of Whitehall, urged extreme caution (Jenkins had been almost as tentative) while Benn, and to a lesser extent Owen, supported a more liberal approach. In

cabinet, Shirley Williams also pressed for less government secrecy.

There was no doubt about Rees' and Callaghan's surprise at the strength of support for public access legislation—displayed in November 1976 during the debate on the Labour government's plans to reform the Official Secrets Act. An attempt to defuse this support was therefore made by the head of the home civil service, Sir Douglas Allen (now Lord Croham). He sent out a letter to all departments on 6 July 1977 asking them to separate policy and fact during policy making and release the latter wherever possible. Symbolically this letter only became known to the public through a leak to *The Times* in early August. Allen's letter has been a well intentioned failure. According to *The Times* (the Civil Service Department refused to monitor the directive and has not forgiven Croham for introducing it), between May and October 1978, 29 departments published about 211 items. The Civil Service Department and the Department of Education and Science (DES) performed better than the Home Office, which published nothing that would not have been made public anyway.

While the cabinet committee deliberated, a number of groups were set up to lobby for less government secrecy. The All Party Committee on Freedom of Information united MPs; the Liberal Party produced proposals on the subject, published in June 1978. Private members also tabled Bills—Tom Litterick in 1977, Robin Cook in 1978, and Clement Freud and Michael Meacher in 1979. Freud's Bill received a second reading but it fell with the Labour government. The NEC (National Executive Committee) of the Labour Party were dissatisfied with the Labour cabinet's attitude to government secrecy and its Machinery of Government Committee suggested a full Freedom of Information Act. In 1978 Parliament also showed the heartening tendency to question the executive's privilege to keep information from the public: action over the British Steel Corporation and the demand for what

was to become the Bingham Report were good examples of this growing assertiveness.

Simultaneously, outside Parliament, organisations began to lobby for less secrecy in a way that had never happened before. The Outer Circle Policy Unit was the first on the scene and, followed by Justice, launched proposals for reform based on a public, enforceable right to know. A valuable media campaign was spearheaded by *The Times* and *The New Statesman* and the pressure became so intense that some civil servants felt obliged to express doubts about the present level of secrecy. Lord Croham argued cogently in a BBC radio talk in 1978 that greater consistency and stability in policy would flow from more openness, and the Society of Civil and Public Servants and the Institute of Professional Civil Servants, representing almost all grades, support a reduction in secrecy (*The Times*, 6 October 1978; *Daily Telegraph*, 16 May 1979). Unfortunately, the new head of the civil service, Sir Ian Bancroft, is a covert bureaucrat of the old school. The last few years have revealed that the opposition of the civil service to less secrecy is concentrated at the very highest echelons.

The labour of the Cabinet Committee was in vain. It produced only a miscarriage of a White Paper in July 1978. This was a hotch potch of Franks' proposals for criminal sanctions, differing from Franks however in making "security and intelligence" information a criminally punishable category. The test for possible danger was to be altered from "prejudicial to the nation" to "causing serious injury". Before a prosecution, the Attorney General would still need to give his consent but this would only be provided if he had obtained from the relevant departmental minister a certificate stating the document had been correctly classified. It was obvious that the Committee had paid no serious attention whatsoever to the need for a legislated right to know. The parliamentary debate was stormy and Merlyn Rees, in a retort to Robert Kilroy Silk, revealed publicly why the govern-

ment was unconcerned about government secrecy: at election time no constituent would worry over it.

Alarmed by the extent of the criticism, Callaghan set up a second Cabinet Committee. The criticism was sharpened by the result of the Aubrey, Berry, Campbell case, demonstrating anew how clumsily governments invoke the Official Secrets Act. The second Committee's work came to fruition in the form of an innocuous Green Paper, *Open Government and Disclosure of Official Information: A Report on Overseas Practice*, published in April 1979. The Committee also commissioned a series of departmental studies on how the Freud Bill would have been implemented had it been passed. At last Whitehall was being forced to come to grips with freedom of information. The Ministry of Defence has since released sections of its contingency plan (*The Times*, 22 January 1980).

In their election manifestoes, the Labour and Liberal Parties made a specific commitment to a Freedom of Information Act, although the Labour promise had to be pressed on Mr Callaghan. The Conservative Party made no mention whatsoever in its manifesto of open government, despite the growing support at grass roots level for such a move: the National Union of Conservative Associations having called for less secrecy in April 1979.

Labour ministers could not exploit the question of open government during the election campaign because of their own lack of commitment on the issue. The subject was perhaps unlikely to influence the average constituent but, if stressed, would have shown the more deep thinking voter that Labour stood for greater democracy and more accountable decision making than the Tories. Now in opposition, the Labour Party lacks a valuable tool to find out what is going on in government, a tool lost through the indecision and cowardice of the last Labour cabinet.

Things moved into reverse gear as soon as the Conservatives took office on 4

May. Mrs Thatcher rescinded the Croham Directive and told the Civil Service Department to stop wasting its time keeping records of what material was released (the only teeth—or rather dentures—the Directive possessed). The Prime Minister preferred open government on her own terms and issued her equivalent of the Croham Letter through her private secretary, Clive Whitmore, on 20 June 1979. The Whitmore Letter tells us much about the present government's views on open government. It was marked CONFIDENTIAL and so has not been published although a part simply repeats a statement made by the Civil Service Minister, Paul Channon, on the same day. He said the government would "make as much information as possible available . . . relevant to major policy decisions". The Defence Minister, Francis Pym, acting on rather than talking about the government's intentions on open government, amplified the Whitmore Letter by stating that it "will be for ministers to decide what material can be released in each specific case, and I would be grateful if you (that is, the civil servant) would bear this consideration in mind". Decisions to release information would therefore be extraordinary not ordinary, and without accountability rather than with it. In another section of the letter, Mrs Thatcher confirmed that she had no intention whatsoever to introduce public access legislation.

Further evidence of the government's direction was their Bill to reform Section two of the Official Secrets Act: the Protection of Official Information Bill. Criticism was slow to begin (Labour backbenchers, Lord Wigoder and Duncan Campbell of *The New Statesman* were some of the first to spot its repressive potential), but then grew to a shrill climax. If passed, the Bill would have substituted a number of broad offences for the old, universal one without any assurance of greater accountability: the courts could not have questioned the ministerial certificate of correct classification as SECRET, even if the information was already public. Subjects such as civil defence, conditions in prisons, telephone tapping and the intelligence ser-

vices would have become forbidden territory to journalists and so unknown to the public.

The intelligence services are cocooned in the greatest secrecy of all and the campaign to scrap the Protection of Official Information Bill received a valuable boost when Mrs Thatcher unmasked Anthony Blunt in the Commons. Had the Bill been law, Andrew Boyle could not have published *The Climate of Treason*. Her statement in the Commons was a courageous one, made against the advice of senior civil servants. She made it because she was outraged by Blunt's treachery. This exercise in open government stopped however where it should have begun, with an informed debate on the accountability of the secret services.

Ministers complained that the Bill was the fault of civil servants who had interpreted the guidelines for legislation too strictly. This excuse was pathetic, pointing to the emptiness of ministerial responsibility (ministers are either responsible for all the acts of their bureaucrats or not) and to the innate tendency of our civil servants to err in favour of secrecy. The excuse was a smokescreen to cover the desire to make the Official Secrets Act a usable instrument over what would still have been a wide area of information. The government wished even greater control over the flow of information to the public.

No new attempt to reform Section two of the Official Secrets Act will be made in 1980. Mrs Thatcher will have many more pressing problems on her mind. If legislation on this subject is brought before the Commons later, all interested parties must narrow the range of information to the absolute minimum, ensure adequate defences, check that any certificate of correct classification depends on more than the relevant minister and press for reform of Section one of the Act at the same time.

The defeat of the Bill was another triumph for the Freedom of Information lobby. Its expansion had continued un-

abated after the May 1979 election. The most important addition was the traditionally conservative Law Society whose July 1979 memorandum called for a legally enforceable right to know, so symbolising how respectable freedom of information had become. The Law Society is just one of many organisations which have come to realise the relevance of open government to their activities. Another is the National Consumer Council. Its chairman, Michael Shanks, repeated a call for a Freedom of Information Act in November 1979. Inevitably more groups will follow. A formidable lobby has emerged in favour of a right to know in Britain, a coalition of those who lack information (backbenchers and more aware citizens) against those who manipulate official information to avoid greater accountability (frontbenchers and top level bureaucrats). This lobby is all the more remarkable because it has sprung up since 1976. In the long run it will be seen as among the most significant political developments of the 1970s.

2. secrecy in Britain

On almost any day, in any week, in any year, one can open a British newspaper and find an inexcusable example of government secrecy. Some random examples from early December 1979 are as follows: (a) Warnings and information about epidemics of infectious disease and food contamination are not passed on to the public. They are published weekly in a confidential bulletin, the *Communicable Disease Report*, sent only to public health specialists; (b) An official report with full details of the damage juggernauts cause to our roads is suppressed by the Department of Transport (*The Sunday Times*, 2 December 1979); (c) Eminent academics tell the Social Science Research Council that the right decisions about energy may not be taken in the future without public access legislation in Britain. Successive governments are attacked for not giving the public sufficient information about technological issues; (d) Frank Field (Labour MP for Birkenhead) repeats a call for the rules governing rights to welfare benefit to be published (*The Times*, 3 December 1979).

Health, transport and the environment, energy and welfare benefits—a random selection of items affecting every single one of us. There are very many examples.

Health. The Gas Board refuses to publish reports on major explosions caused by gas leaks. The full details of how children are affected by lead pollution and smokers by the carbon monoxide content of cigarettes are kept secret by the Department of Health. The Alkali Inspectorate keeps quiet findings about fluoride poisoning. Many accident reports for mines and quarries are not published.

The consumer. In Britain harbour masters and ships' health officers do not publish their reports on food poisoning aboard passenger liners. It is also impossible to find out which meat packing plants in this country fail inspections. Massive sections of the last Price Commission report on the car spare parts industry in Britain were censored.

Transport. Background papers for public enquiries on road plans are kept secret

as are details of the different safety records of cars or the inspection results for MOT testing centres.

The average citizen is not even aware that this information exists and certainly ignorant of the fact that it is cloistered in a bureaucrat's file. As protagonists of open government never tire of repeating, the greatest secret of all is the extent of government secrecy. These examples however demonstrate the universality of official secrecy in Britain and undermine the misconception that it is exclusively about national security.

The benefits that would flow from publishing this material are obvious. The health of the public would be less at risk or, at least, if placed at risk, would stand a chance of compensation if lost; at the moment findings of many inquiries are secret so that liability cannot be proved.

Of course not only the government is secretive. The extent of secrecy in business has become a cause of ever-growing concern in the past few years. It was perhaps permissible in the Victorian days of private companies which were truly "private"—that is, owned and run by individuals. But old habits die hard and even now few employers set out to inform their share holders, employees and the public as fully as possible. Public relations departments are often used to obfuscate communication rather than encourage it and employees are not openly given information which they acquire anyway during their duties, so increasing the suspicion and resentment which plagues British industry. Such secrecy is the less excusable in companies with a public holding or whose activities have such a significant effect on the public that it should be kept informed of them whenever possible.

The oil companies fit into this category and the saga of sanctions busting by BP, Shell, Mobil, Total and others provides all the evidence necessary to prove the width of business secrecy. Oilgate underlined how business con-

spired with politicians to keep the news of sanctions busting from the public. From 1965, successive British governments stated their support for sanctions yet privately connived with the oil companies to supply Rhodesia with oil. To some extent, therefore, these governments and companies must be responsible for the death and destruction caused in that country by the prolonged existence of Smith's illegal regime. Some civil servants certainly colluded with the oil companies and for a time prevented politicians from breaking through the facade of respectability. When some ministers finally knew the facts they then produced misleading answers to parliamentary and other questions on the subject and were unwilling to make those facts public. The Bingham Inquiry was not set up until Tom Jackson threatened to resign his post on the BP Board and President Kaunda became irate. The inquiry was able to tell most of the story only because two sets of documents (the "Sandford File" and the "Memorandum Submitted by BP Ltd on 27 September 1977") were leaked; the Bingham Report itself was published only as a result of widespread outrage among backbenchers and journalists. (Its Annex III, *Evidence of Criminal Charges*, was placed in the Commons Vote Office just before Christmas 1979. MPs were not informed.)

The House of Lords' decision to reject a special commission on oil sanctions, already approved by the Commons, in February 1979 was overshadowed by the industrial discontent of the time. The present Conservative administration has no intention to rake over the still smouldering embers of British links with Rhodesia during UDI. The Attorney General, Sir Michael Havers, told the Commons on 19 December 1979 that a special commission will not be established and that none of the oil companies or their employees will be prosecuted. Corporate and government secrecy wins another victory.

The oil companies appear in as baleful a light as government. They consistently misinformed civil servants and the public

(as late as September 1978, BP called a *Sunday Times* article describing its sanctions breaking activities as "offensive and defamatory"). Through secrecy, these multinational companies were able to avoid implementing the policies of elected governments.

Oilgate provides a convenient and frightening case history of how secrecy operates in government and business.

One basic reason for business secrecy is the division of labour. The father of "scientific management", F. W. Taylor, was determined even in the 1870s that "all possible brainwork would be removed from the shop and centred in the planning and layout department". Management would control events by a monopoly of knowledge. The potential for that control has broadened of course with the advance of mechanisation, although balanced by the emergence of trade unions and, in some areas of industry, a much better educated workforce. Management also encourages secrecy to prevent information reaching government, especially its dreaded representative, the tax inspector.

In some measure, management is a microcosm of government. Like top politicians who try and use "national security" as an umbrella term to justify secrecy, managers employ the term "competition". Businesses do naturally have their real secrets—technical expertise, for example—but "competition" is too frequently used to conceal profits or managerial inefficiency from employees, shareholders and the public.

The situation has improved due to some enlightened companies understanding the importance of an informed workforce but, above all, due to legislation. The Employment Protection Act of 1975 laid a duty on employers to reveal certain information necessary for collective bargaining to union representatives. ACAS issued a Code of Practice on Information Disclosure to supplement the Act.

There are a number of exceptions to publication. Some are valid, such as

information communicated in confidence to a company or information relating to a specific individual. Some are less so, for example details of costs and profits for individual plants where disclosure might encourage workers to raise wage demands or cause undue alarm or resentment. Governments have, however, recognised that legislation can successfully stimulate the flow of information for the benefit of the community. The same strategy can be used to open up government itself. Yet the situation in industry can and must be improved further by reconsidering the 1975 statute. A recent CBI survey of industrial companies showed that half spent nothing at all on informing their employees.

Britain needs nothing less than a complete reappraisal of the distribution and flow of information within it.

the case against secrecy

The case against unnecessary government secrecy has to some extent already been made in this pamphlet. Disclosure would help to protect the public, benefit the consumer and make multinational companies more accountable.

In the long term, secrecy has had unpleasant results for Britain. At the heart of the election debate in 1979 was the issue of Britain's relative economic decline. The conservatives blamed "socialism"—union power, egalitarian policies, high taxation, excessive public spending and erosion of profit. Senior members of the Labour Party either ignored the decline or suggested that Tory governments, union unwillingness to abide by pay policies or lack of investment were responsible. Neither party placed *any* of the blame on excessive secrecy in government or business. Secrecy in Britain further fragments a society already culturally shriven along class lines. Those who have knowledge dominate or have more rights than those who do not. Suspicion and distrust are compounded when government is cocooned by secrecy. Government must not only be done but must be seen to

be done fairly and impartially. Without freedom of information legislation, this is impossible.

Another possible cause of our economic problems has been the regular swings in government policy since the war. No sooner was one policy implemented and millions of pounds expended than it has been reversed. Such swinging movements may power a clock but not a nation's manufacturing industry. With a freer flow of information about education, industry (British Leyland and the British Steel Corporation are typical examples), transport, energy (think of Tony Benn's fight for a public enquiry about leaks at Windscale) and foreign affairs (consider our decision to enter the Common Market under certain terms), more successful policies, which commanded a wider body of public support, might have been chosen.

The other main arguments for more open government are that it is more efficient and more democratic.

Open government is more efficient in that its policy making and policy makers are subject to informed public scrutiny. One wonders if the Crown Agents or the civil servants who mistakenly distributed largesse to oil companies in the North Sea would have acted as they did if there had been freedom of information legislation. This increased efficiency is balanced however to some extent by the necessity to consult a wider range of interests and to employ extra staff (but not many) to administer the public access legislation.

If the argument for greater efficiency is powerful but not overwhelming, the argument for improved democracy is unanswerable. Open government distinguishes a democracy from a dictatorship. Participation and accountability should not be hackneyed, empty slogans of the seventies but vibrant challenges to socialists who believe government involves every member of a society.

The case for access to personal files is not the same as that for disclosure of

information relevant to policy making. People should be allowed to look at them for reasons of civil liberty, made all the more pressing by the growth of computers. Privacy also enters into play because, with certain limited exceptions, the individual should be able to find out whether an organisation has collected information on him and whether it is accurate. An illustration was recently provided during the so called "anarchists' trial". Evidence presented by the police to the defence in connection with jury vetting suggested that some of the material on police files was inaccurate and irrelevant. Access to personal files held by most government departments is necessary to allow the individual to control the bureaucracy in one specific area, the collection of information, rather than in general, and is not intended to increase participation in government decision making.

the case for secrecy

In 1978 Tony Benn gave a lecture to the British Association for the Advancement of Science entitled "The Right to Know". He examined the various arguments put forward by the defenders of secrecy (national security, finance, commerce, protection of the individual, administrative convenience) but concluded that the real reason why open government is so strongly resisted is that: "disclosure weakens the prerogative of ministers and the role of officials who enjoy their greatest power when they alone know what is up for decision, what the choices are and what are the relevant facts. Then their advice is hard to challenge."

Cynicism did not provoke this remark but a calm appraisal, founded on ministerial experience dating back to 1964, of the motives of his cabinet and civil service colleagues. James Callaghan and Merlyn Rees hardly ever revealed the depth of their opposition to open government. Publicly, as in the 1978 White Paper or 1979 consultative documents, great stress was laid on the expense (exaggerated), the administrative difficulties (surmountable) and the irrelevance

of open government legislation because we have ministerial responsibility (even Whitehall now recognises that this provides only a facade of accountability). Their unvarnished views can however be pieced together from leaked documents and asides.

While Prime Minister, James Callaghan circulated a memorandum which summarised his (private) arguments against releasing details of cabinet committees. It was leaked to a London law lecturer who passed it on to *The New Statesman* (10 November 1978). By extension, the paper also set out the Prime Minister's arguments against a public access statute.

First, the argument from tradition: "The present convention is long established and provides a basis on which we can stand". Blackstone followed the same line in his *Commentaries* in support of no change in English law and Bentham demolished it triumphantly in his *Fragment on Government*. Convention and tradition are not sufficient in themselves to defend something against a strong case for change. The defence must be founded on reasoned argument.

Second, the "open the floodgates" argument: "Any departure from it (that is, the convention of keeping details of the committees secret) would be more likely to whet appetites than to satisfy them". In other words, if one document were released then this would fuel the heat of those pressing for more disclosure. Callaghan was of course correct because there will always be pressure for more openness until government retains only a minimum of information.

Third, government is a matter for the governors, not the governed. There is a feeling among some cabinet politicians that only they have the knowledge and experience to be keepers of the public interest. If there were freedom of information, the ignorant public might misinterpret (that is, judge in a way unfavourable to the administration) policy. ". . . the way in which we coordinate our decisions is a matter internal for government"; ". . . publishing details

of the committees would be . . . both misleading and counterproductive . . . (and) would give a partial picture only”.

Fourth, the political convenience argument. Callaghan suggested that pressure for more details might lead to publishing the names of the committee chairmen. “This would make it harder for me to make changes”.

The tone of the minute is in marked contrast to that of the bland official documents on the subject.

Merlyn Rees was as revealing in an aside in the Commons during the debate on Labour's White Paper to reform the Official Secrets Act. Replying to Robert Kilroy Silk, who was indignant at the narrow range of the proposals, he asked where the concerned voters would be at election time. The electorate is indeed not inspired by the issue of open government. But the voters are also not set afire by government support for the arts and museums or by much legislation to protect the environment. The fact that only a politicised, vocal minority presses for such action does not mean it is unimportant.

Another frequently used argument against a Freedom of Information Act is the cost. From 1975 onwards Whitehall exaggerated the expense in America and implied that the cost of public access legislation in Britain would be similarly prohibitive. When estimates were prepared in early 1979 however matters were put in perspective. The Ministry of Defence, Whitehall's biggest department with five million files in regular use, judged that Freud's Bill would cost £25 million to implement in the Ministry's headquarters if only a year's grace were granted. The Ministry did not think this exercise was practicable. It would have cost another £30 million (and take about ten years) to sort through all the files held back under the Thirty Year Rule.

The Act would obviously cost much less to run once implemented and these official figures should be examined critically. They may have been inflated in

an attempt to stiffen government resistance to the Freud Bill. The Defence Ministry estimate proves that a legislated right to know in Britain would not be cheap but neither is it ridiculously expensive. It is a price any self-respecting democracy must be prepared to pay.

The public views of the present Tory cabinet are equally disingenuous. On the one hand, Mrs Thatcher and Paul Channon have declared their intention to release as much information as possible. On the other hand the Prime Minister summed up a cabinet committee discussion on Britain's nuclear programme like this: “They (the committee) recognised the great importance of appropriate presentation for achieving the government's objective; and generally favoured a low profile approach” (quoted in *The Guardian*, 6 December 1979). The implication is clear: the Tory cabinet, like its Labour predecessor, would be open only when it chose. (A point the Labour NEC should have borne in mind when they refused to publish the full “Underhill Report” on the extreme left in the Party.)

Ministers were concerned to avoid “pulling the government into a position of confrontation with the protesters”. But even more revealing was the minute on “tactics for inquiries” which talked of: “. . . a danger that a broad ranging inquiry (into the pressurised water reactor) would arouse prolonged technical debate between representatives of different facets of scientific opinion”.

Such a “danger” would perhaps be a benefit in the long run. The government has still not made public the Nuclear Inspectorate's general safety analysis of the pressurised water reactor. The Energy Minister, David Howell, confirmed the decision embodied in the committee's minutes on 18 December (although not the remarks on public relations) and demonstrated a true commitment to openness by refusing to name the possible nuclear reactor sites!

Much of the argument used to sustain the present level of government secrecy

is misleading and self-serving, yet not all. Britain's internal and external security must be protected adequately, for example, and there would be a number of practical problems about implementing public access legislation.

Our security must not be secured, however, at the expense of not allowing adequate public discussion of the underlying policies. The public should know the existence, function and budget of all our military and intelligence services, although not details of their operations and equipment. At the moment, the intelligence services are shrouded by a ridiculously high level of secrecy.

A polite Whitehall fiction exists that they disappeared in 1945. All references to them are erased from documents released under the Thirty Year Rule and ministers refuse to answer questions on the secret services in Parliament. Historians meanwhile are coming across documents in the United States which include details of the intelligence services and their activities in the 50s: liaison meetings with the CIA, alterations to code machines, exchanges of reports. The public is kept in ignorance while a charmed Whitehall circle (and the KGB) jealously guard any information on these subjects. To some extent, such strict secrecy is necessary but in Britain it is so overwhelming as to conflict with accountability with Parliament. The British secret services do not need a Church Committee to expose any dubious activities, but official recognition of their existence, the naming of their heads and publication of their general aims and budget would not weaken them appreciably. A former director of the CIA, William Colby, told the author in Washington in March 1979 that they would not suffer by being made accountable to a parliamentary committee.

Public concern, aroused at the time of the Blunt affair, was not quietened by Mrs Thatcher's statement in the Commons. More openness is required to calm those apprehensions. It would also help the intelligence services in the long run by convincing the public of their valuable

role in an imperfect world and by scotching a number of far fetched conspiracy theories held about them in many quarters.

classification

One of the most important mechanisms used by government to avoid disclosure is classification. Its origins and how it works in Britain are naturally secret apart from the fact that there are four levels (RESTRICTED, CONFIDENTIAL, SECRET and TOP SECRET). Civil servants have outlined the basic points in private however. It seems that all civil servants with any degree of responsibility are given a sheet of instructions about classification, defining the categories and setting out the guidelines. They are requested not to overclassify. In practice this precept is ignored and the practice is to classify the whole of any document at the level of the most sensitive material in it, even if this is only two sentences (let us say SECRET). If material is then extracted for a second document that also is automatically classified as at least SECRET, even if the details actually used are innocuous and do not merit classification at all.

Secrecy thus burgeons and feeds on itself. The excesses of classification in Britain must be controlled as soon as possible.

3. foreign experience

Britain is a citadel of secrecy in a Western world which has tried to open up government to the public gaze. Norway, Denmark, Sweden, France and the United States now all have public access legislation of one sort or another, and Australia, New Zealand and Canada will probably soon follow suit. (For a more detailed treatment of freedom of information abroad, see *An Official Information Act, The Outer Circle Policy Unit, 1977* and *Disclosure of Official Information: a Report on Overseas Practice*, HMSO, 1979.)

the United States

Few remember the long struggle to introduce a Freedom of Information Act (FOIA) in the US. Congressional hearings on the subject began in the 1950s and catalogued the manifold ways government controls information for its own rather than the public's benefit. When the successful Bill was introduced, the executive temporised with the same arguments used by the supporters of the *status quo* in Britain: the efficiency of the bureaucracy would be sapped and the public would not use the Act sagely. The Act however was passed in 1966 and for the first time the American public had a legal right of access to the executive's files. But dissatisfaction with the Act grew. Documents had to be specifically identified in a request; the public was discouraged from placing requests by inflated costs for finding, reviewing and copying material; no time limit had been set by which the agency had to respond to the request. As the public became increasingly distrustful of government in the wake of the Pentagon Papers and Watergate, the pressure for reform became irresistible.

Amendments to the 1966 Act were passed in 1974: (a) agencies are now required to set and make public reasonable fees for searching and photocopying; (b) an initial response to the request must be made within ten working days; (c) documents need be only "reasonably described" in a request; (d) the national security exemption was restricted to

documents that are in fact "properly classified pursuant to . . . Executive Order". Previously the courts had no power to question the propriety of a particular classification however unreasonable; (e) the American citizen was granted the right of access to any investigatory files kept on him.

Coincident with this Federal legislation a vast number of states (48 by January 1978) passed Access to Information laws giving citizens the right to look at the records of executive departments.

Recognition has grown of one of the fundamental mechanisms of government secrecy—classification. Important American reforms in this area are often overshadowed by the FOIA. Classification in peace time pursuant to executive order began in America after World War II with EO 10290, issued in 1951. In the middle and late fifties, concern was expressed about the extent of over classification but sufficient momentum for change built up only after the Pentagon Papers case. Nixon's EO 11652 was promulgated in 1972 and an Interagency Review Committee was set up to monitor progress and reported confidently in 1973 that the number of authorised classifiers had dropped by 63 per cent. But over classification continued and flourished. The General Accounting Office has published a report showing how millions of documents are classified unnecessarily by the Pentagon each year (*The Washington Post*, 12 March 1979). President Carter issued EO 12065 to stem such over classification. It will be a very positive step if enforced, reducing the initial period of classification from 10 to 6 years, requiring reasons for an extension to be stated in detail and instituting a new "balancing test" for a senior official engaged in a classification review. Section 3-303 demands that he set the public's interest in disclosure against the importance of keeping the material secret. A draft of the new Order was significantly released for public comments in September 1977.

Hidden amongst this plethora of legislative and executive activity is the artisti-

cally named Government in the Sunshine Act, 1976, designed to open up 49 government agencies' meetings to the public.

British governments have consistently harped on the "unexpectedly high" cost of the American legislation (1978 White Paper). Figures of £150 million were regularly bandied about in Whitehall a couple of years ago. A study of 13 agencies by the General Accounting Office in 1978 showed this total was vastly exaggerated; the cost to these departments in 1975-7 was actually \$35.9 million. 80 per cent of this figure was salaries. The CIA, FBI and the State Department were not included in this study. The most accurate figures available now suggest the annual cost of FOIA legislation in America is about \$30 million a year.

The American experience with the FOIA has obvious lessons for Britain. Those with political power will always object to more open government, which can in turn only be ensured by a statutory right to know enforced by an independent body able to review a government's decision to withhold information. The right to know is not cheap but neither are the costs prohibitive. It is a price any self-respecting democracy must pay.

The move towards open government must consist of more than a right to know however. Measures to liberalise classification are imperative and all progress must be carefully monitored. Successive administrations have been able to keep any necessary secrets despite the FOIA. Another point must be emphasised. Legislation was introduced over an extended period, 13 years. Attitudes were allowed gradually to adjust.

Some sceptics in Britain argue that freedom of information has been a major factor in the American public's declining confidence in government, and so has weakened the country. There has certainly been a link between the two, following revelations about Watergate, Vietnam and, more recently, Kissinger's policies in Cambodia and it was to have been expected. Yet only the cynical, pro-

fessional politician could believe that the American public would have been better off not knowing such facts. Rather, more open government has led Americans to reassess their aims and goals in a changing world—something destined to happen after the thaw of the Cold War and the emergence of the developing nations. The crisis over the American hostages in Iran showed that the US was not omnipotent and President Carter's handling of the problems caused by the Russian invasion of Afghanistan underlined that United States is not ready to plunge into a new Vietnam. Americans lost confidence because some of their top politicians were mean, machinatory men, not because of freedom of information.

Canada

All the discussion papers produced by the last Labour government rejected analogies with foreign experience because of our constitutional uniqueness. We have, they said, the unassailable principle of ministerial responsibility. The Canadian political parties are no longer worried by this objection. They have come to recognise that no minister can hope to survey all the activities of his department and that therefore the convention must be amended to ensure accountability. Outsiders should be able to watch over the bureaucracy through public access legislation.

After many years of opposition, the Canadian Liberal Party supported the then premier, Joe Clark, when he introduced a Freedom of Information Bill. The Bill fell with Clark's government at the end of 1979 but as the legislation is now in the manifestoes of both major parties, it will soon be on the statute book. The main features of the Bill were: (a) the principle that everything would be public unless specifically excepted by parliament; (b) the courts would be able to order disclosures of information and ministers will have no defence of "Crown privilege"; an Information Commissioner would investigate any disputes but the courts would be the final arbiter; (c) a mechanism for permanent review;

(d) a number of exemptions: policy advice by civil servants, defence, international relations, personal information, commercial information, law enforcement; (e) a right of access to personal files held by government departments.

Canada's experience demonstrates that freedom of information and a Westminster style parliamentary democracy are not incompatible. (As if to underline the point, New Zealand has established an official commission to study FOI and the present Australian government has promised an Act along American lines.)

The present situation in Canada did not simply occur. It was brought about after a period of hard campaigning by a nationwide lobby group, Access, to which individuals and organisations can affiliate and which publishes a newsletter. Other groups have been set up in a number of states and in parliament there is an All-Party Committee of MPs. When legislation has been in the offing, all these disparate organisations have united to give it support and the maximum publicity. Canada's lesson for Britain is tactical: supporters of open government legislation must form a coherent, forceful lobby group.

4. a programme for Britain

Proposals of the NEC of the Labour Party, the Liberal Party, the Outer Circle Policy Unit (which broadly formed the basis of Clement Freud's Bill in 1979) and Law Society for more open government have revolved around a legislated Right to Know, subject to certain exceptions. There is much agreement between these proposals. Criminal penalties for the release of information would be drawn as tightly as possible; criminal sanctions for espionage should be embodied in a separate Act. The courts would be involved at some stage during appeals against refusals to disclose information and a Select Committee on Information would play an integral role in parliamentary scrutiny of the Act.

None of these valuable proposals take sufficient account of the change in bureaucratic attitudes needed if any Official Information Act is to be successful nor do they give enough attention to another major problem—classification.

These plans also fail to question the inevitability of the courts as the best appeals mechanism.

Justice, the British Section of the International Commission of Jurists, has suggested a second line of approach, one dominated "by practical considerations". These include front bench and civil service antipathy to a legislated right to know. Justice proposes a Code of Practice on Official Information, policed by the Ombudsman who would treat the refusal to provide information without good cause as a case of maladministration. The Code of Practice could be developed over a period of years with experience and this could be taken into account if a later government decided to legislate on the subject. There is much merit in this approach. On the other hand, as only a statutory instrument enforced by the Ombudsman, the Code of Practice could be ignored by civil servants and ministers with comparative impunity. One wonders if a satisfactory Code could be introduced any more easily than legislation anyway, even if a government might be tempted to introduce it to head off more substantial

change (see appendix for Justice's proposals).

All these plans are concerned with policy, ideas in an ideal world. None address the problem of strategy: how to turn the policy into legislation.

The present Conservative government has rejected the idea of a formal right to know and there is no prospect of a change of heart. Some MPs may follow Michael Meacher's example and introduce private members' Bills. Significantly his Bill was unopposed on the first reading because the Tory cabinet understood the wide backbench support, but it was doomed to failure. Similar action by other MPs would also be unsuccessful although it would help to keep the issue in the public eye. After the debacle concerning the Protection of Official Information Bill, however, it would be interesting for an MP to introduce a liberal Bill to reform Sections one and two of the Official Secrets Act (the need to confine Section one to spying is not widely realised). Such a Bill would put the Tory cabinet, and Labour's front bench, in a tricky position since both are officially committed to reform. If passed, such legislation would be a useful first step towards open government. Nothing more can be expected.

Meanwhile backbenchers must keep pressing the government for more information and newspapers should maintain the momentum for greater openness. It is heartening to see *The Times*, *Guardian* and *New Statesman* keeping up the pressure in 1980. More editors and their journalists should try and use Mrs Thatcher's letter of 20 June 1979 to prise information from government. They must not falter in their willingness to ignore unnecessary D notices and, to circumvent the present level of secrecy, they must have no compunction about publishing leaked documents (within reason—a list of secret service agents in the field would only help other nations' intelligence services).

MPs, journalists and others must continue to emphasise the relevance of

government secrecy to ordinary people so that the deplorable lack of public interest in freedom of information is overcome. Concrete examples of how this secrecy affects the citizen's safety, pocket and environment must be underlined to get the message across.

A more unified and powerful freedom of information movement is also needed. At the moment there is a plethora of groups pressing for greater access but they are not effectively coordinated. The National Freedom of Information Campaign, chaired by Sir Bernard Braine, must become far more dynamic. It should try and form the nucleus of a unified lobby to which individuals and organisations can affiliate, publish a regular newsletter and lead a massive publicity drive for more overt government. The new organisation should also be the clearing house for a massive collection of details and information about government secrecy in Britain in order that a detailed, practical policy can be put together agreed to by all the interested parties. The new select committee on Home Affairs should become closely linked with the freedom of information lobby and monitor the Tory government's verbal commitment to more openness and compliance with Mrs Thatcher's letter of 20 June 1979.

No serious attempt to prise open government will be made until there is another Labour administration. And the fate of freedom of information is closely tied up with the prickly debate about democracy now taking place in the Party, for if conference decisions become binding on a cabinet elected by MPs, rather than chosen by the leader, there is no doubt that the 1979 manifesto policy of a Freedom of Information Act would be implemented. If, on the other hand, the present system prevails, there will be a replay of the events between 1976 and 1979 when the party as a whole, and Labour backbenchers in particular, clearly wanted a legislated right to know while most Labour ministers fought a rearguard action to prevent it. In true Labour party tradition, the outcome will probably be a compromise which will

strengthen the so called left of the party—although not as much as many seem to believe. This will make a Freedom of Information Act a far more likely prospect and now is the time to formulate its contents and a strategy to ensure that opposition to the measure on the front benches will be defeated.

The Machinery of Government Committee of Labour's NEC has proposed a single Act but a more evolutionary approach would probably be more effective.

Many fear that a staged introduction of open government would not work because the programme might be stopped half way. The opposition to the measures would be too strong. There is of course always the possibility that any programme of reform may be interrupted but critics should consider the following: (a) if open government legislation were staged it would be easier to get on the statute book and, once the public has a "right to know", the flow of information can only generate more interest and support for tougher measures; (b) gradual reform is far more likely to ensure a smooth flow of information and the necessary change in the attitudes of civil servants. The great advantage of a staged introduction is that it is experimental. Legislation can be amended and honed to provide the optimal open government policy for Britain—one that balances efficient administration and the right to know. Those who believe a single, tough Act will bring about a nirvana of open government are over optimistic. Also, such an Act would face obstructionism by many civil servants and some politicians, and many administrative problems. This might lead to a drastic curtailment of the Act in the heat of the moment or even its repeal (quite conceivably by an incoming Conservative government). In the end reform would be delayed even further and the critics of open government would have a field day; (c) only a future Labour government will contemplate introducing freedom of information legislation, and because it would probably be in power for a full term an uninterrupted pro-

gramme of reform would be possible. The following scheme for reform is put forward for the next Labour government.

1. Immediate issue of the Allen Directive as a statutory instrument, ordering that each department should monitor its compliance.
2. The passing of a Preliminary Official Information Act.

The first part of this Act would reform the present Official Secrets Act. Section one of the old Act should be separated from Section two and the former become the basis of a new Espionage Act. Section one should be limited to spying. Espionage and the release of official information are different in nature, despite public misconceptions to the contrary, and should be treated as such by the criminal law. Aubrey, Berry and Campbell were charged under this section although not engaged in spying.

Section two would be abolished and replaced by a clause which defines the exceptions to the public right to know, which would be backed up by criminal sanctions. The Labour government's White Paper and the Conservatives' Protection of Official Information Bill set out the basic areas to be covered: defence, internal security, foreign relations, currency and reserves, law enforcement and confidences of the citizen. Cabinet papers, information used for private gain and "security and intelligence" (as a separate category from defence) should not be added to the list. An offence would be committed only if documents in one of these six groups were correctly classified at the time of disclosures as SECRET. The decision as to correct classification would be made by the responsible minister, his opposite number in the shadow cabinet and a High Court judge. No trial could go ahead until this committee agreed the document was appropriately classified and given reasons for their judgment. The prosecution would need to prove: (a) that the defendant did know or had reasonable grounds to believe the information was classified as SECRET or TOP SECRET; (b) that the

defendant acted contrary to his duty; (c) that disclosure was contrary to the public interest and had done sufficient damage to warrant criminal punishment; (d) there should be a maximum prison term of six months and maximum fine of £750.

By suggesting criminal sanctions these proposals follow the widely held opinion in Westminster. But the alternative is worth serious consideration: confining the criminal law to the Espionage Act. Governments have their own effective methods of controlling information, for example by classification. British government would not collapse if civil servants leaked a few more documents because they were not subject to the criminal law. On balance, however, the case for criminal penalties (and as few as possible) is made out. With a Freedom of Information Act there is a stronger need to protect that information which is essential to the state and a necessity to ensure that a few corrupt civil servants do not betray the trust placed in them for profit.

Part two of the Preliminary Official Information Act would declare the citizen's right to know, a right thus directly recognised by Parliament. As a preliminary method of enforcing this right, a Code of Practice would then be introduced along the lines of Justice's proposals, with essential amendments to their Code and to the Parliamentary Commissioner Act 1967. Using the terms of this Act, an additional Ombudsman would be appointed—the Parliamentary Information Commissioner—specifically to investigate complaints that information had not been disclosed; he must be allowed to accept complaints directly from members of the public. At the moment they have to be channelled through an MP, so increasing his workload and discouraging direct links between the citizen and the Ombudsman.

Further amendments must be made to allow the Information Ombudsman to investigate complaints against local authorities, public corporations (other than instruments of the Crown) and the police. The basis of the Commissioner's investi-

gation, maladministration, has hitherto been too narrowly defined: if the set procedures have been followed and there is no evidence of administrative turpitude, he is extremely reluctant to consider even whether the decision was manifestly unreasonable. This reluctance, fostered by a desire to maintain warm relations with heads of the civil service departments and his inability to rectify decisions, will hardly make the Information Commissioner a dynamic champion of the public's right to know but he would have sufficient influence to ensure a steady flow of information during the life of the Preliminary Act.

Justice's Code of Practice is well drafted yet section 4, which allows a refusal to disclose "if there are reasonable grounds for believing that the public interest would be adversely affected by disclosure", is too vague and would be exploited by government departments to keep documents secret. The same is true of the proposed exemption on the grounds of interference with negotiation or consultation. One of the lessons to be learnt from foreign experience is that exemptions must be clearly and narrowly drafted if open government legislation is to work. These two parts of section 4 should therefore be omitted, as should section 9(f), which excludes material whose disclosure would reasonably expose the person revealing it to an action for defamation. The Code of Practice must also lay the foundation of a right of access to personal files. A general right of access for the individual alone should be declared and enforced by the Information Ombudsman subject to the exemptions set out in section 9 (see appendix). There should be no retrospection under the Preliminary Act because of the gigantic task of sorting out the documents. The Ministry of Defence estimated in 1979 that it would have taken two years to examine five years of back files if the Freud Bill had been implemented.

The Preliminary Act should also include a clear recognition of its temporary nature and establish a Parliamentary Committee on Official Information. This

would last as long as the first Act, be directed to monitor its success, publish jointly with the Information Ombudsman an annual report and automatically propose new legislation or simply amendments after three years.

The next section of the Act would initiate the move towards automatic declassification. The Preliminary Act should state that only documents in the following categories should be capable of classification at all: (a) defence, internal security, foreign relations; (b) law enforcement; (c) cabinet documents; (d) information privileged against compulsory disclosure in litigation; (e) confidences of the citizen; (f) confidences of concerns or companies where disclosure would seriously affect their competitive position; (g) advice or comment given by servants of the Crown; (h) information about the currency or reserves.

All departments should be put under an obligation to present for approval to the Parliamentary Committee on Official Information their detailed procedures for classification within three months of the Act being passed. In the event of a conflict, the parliamentary committee would have the final say and should immediately make the classification guidelines public. The Ministry of Defence set a very limited precedent in this area by publishing a minute on the indexing of key decisions (*The Times*, 29 August 1978). All departmental guidelines should be required to contain a section making all unclassified documents freely and immediately available to the public. Five years after classification as RESTRICTED or CONFIDENTIAL, documents would be automatically declassified unless a review board, set up in every department, considered the same conditions making the papers so classified still applied.

The Preliminary Act must also amend the Public Records Act 1967, by reducing the embargo on official papers from 30 to 15 years. Unfortunately the Wilson Committee on government documents has been precluded from considering this

matter. One can only hope that they will make some recommendations about the practice of "weeding" and the retention of documents beyond the legal limit. Papers relating to the 1930s Hunger Marches, the activities of the British secret service and post-war discussions about Britain's atomic weapons have all been unnecessarily withheld. The amendment should state that no official document may be retained longer than 15 years unless its publication would constitute a serious risk to national security and the relevant department would have to provide reasons for the document being withdrawn. A further clause should declare that a minister or former minister is free to write his memoirs whenever he wishes subject only to the criminal sanctions set out in the Preliminary Official Information Act.

In this way the civil service could organise a smooth transition to a broader Act—smooth in two senses. Bureaucrats accustomed to secrecy as a habit would have an opportunity to adjust their attitudes. This should be encouraged in their training: at the moment, informing the public is seen as secondary rather than central to decision making. Second, the Code of Practice would help a smooth administrative shift to the final Act. Indexes of available documents could be prepared, staff trained to deal with information requests and more accurate estimates as to cost obtained.

This was recognised by the Ministry of Defence in its departmental study of Freud's Bill. A year in which to implement the statute was seen as insufficient because of the mass of documentation to be sifted. Staged implementation would be essential to make any Act work properly.

Opposition to open government within the civil service might decrease and even its cooperation gained in implementing a second Act.

The preliminary statute thus aims to attack most of the major causes of government secrecy: classification, the Official Secrets Act, the Thirty Year Rule

and the (largely unenforced) limits on ministerial memoirs. Others, especially collective cabinet responsibility and patronage, are best not tackled by legislation.

3. The Preliminary Act would be in operation for three or four years. With the experience gained by the Ombudsman, perhaps the most prickly question of all could be answered—the best authority to review departmental decisions not to disclose. A new Ombudsman was suggested for the first piece of legislation because he would be a known quantity, for better or worse, on the administrative landscape. He would however be continually hampered by his inability to overturn decisions taken by government departments. Foreign experience also underlines the need for an independent reviewing body and the Information Ombudsman by himself would not have sufficient authority to fulfil this role. His decisions anyway should be subject to appeal in some form. The obvious answer seems the courts—the solution put forward in most of the proposals for open government in Britain. Many lawyers point to the growing willingness of judges to question the executive, citing *Conway v Rimmer* (1968) and the *Burmah oil case* (ruling given on 1 November 1979) as examples. But this trend is by no means universal as the *Agee and Hosenball* proceedings made clear. Developments are still fuzzy. The courts would probably be adequate to interpret tightly drafted legislation but a statute which required "the public interest" to be taken into account would be interpreted hesitantly with the judges accepting the word of the relevant minister too freely. Litigation is also costly and subject to delays, as many in the United States have discovered when using the FOIA.

A cheap, fast, efficient and impartial body is needed to adjudicate between the Information Ombudsman and government departments and to review the decisions of the Ombudsman. A special committee, attached to the Parliamentary Committee on Official Information, is probably the best solution. It would have five members: two High Court judges and three

MPS (one from each of the three major parties). There would thus be both judicial and political expertise. This committee would have the right to order the disclosure of information and would be accountable to Parliament. Its procedure would be as close as possible to that of a court of law. The committee would be required to give reasons for all decisions. This Information Appeals Committee would be incorporated in the final Official Information Act to be passed a few years after the first legislation, and the Act would make the Parliamentary Information Commissioner permanent. The legislation would also codify the Code of Practice as it had developed since its introduction, probably enlarging the powers of the Ombudsman and perhaps appointing a second one to suit the workload. Practical time limits should be fixed for a departmental response to an information request—probably 30 days or so.

The second Act should begin the process of sorting out documents which predate the Preliminary Act. Some work would already have been completed because of reducing the Thirty Year Rule to fifteen years, and the second statute would aim to gradually sift through the remaining papers.

A further area of difficulty is advice tendered by civil servants. If they write documents on the understanding that they are to remain secret for a period it is a breach of confidence to then make them public immediately afterwards. Civil servants' advice and comment pre-dating the second Act must therefore remain secret until released under the Public Records Act. In the second statute however the exemption to disclosure for this information (see Justice's Code of Practice) should probably be removed. Bureaucrats have been warned that their comment and advice may be made public and can perhaps be encouraged to make it more responsible as a result.

Legislative guidelines for automatic declassification should then be enacted. There ought to be three categories of documents eventually: (a) those auto-

matically released. These would include all those not capable of classification according to the first Act and those giving details of the following: the existence, function and budget (in general terms) of the intelligence services; concepts and costs of weapons; British forces and weapons abroad; (b) those presumptively classified. Such documents could only be in those groups subject to classification and some of these would be even more narrowly defined to include only, for example, details of present diplomatic negotiations; codes, technology and identity of spies; details of military operations; (c) an area of discretion where however the public interest in the information should be recognised in the decision to classify. These documents would be in categories capable of classification not included in (b).

Public debate should decide on the boundaries between (b) and (c). Five years after classification, all information would be declassified unless the departmental review board made a positive recommendation against release. Category (a) would not be subject to review. Decisions of the departmental review boards would be monitored regularly by a Classification Review sub-committee of the (by now) permanent Committee on Official Information. This sub-committee should be given full powers to call over zealous classifiers to account and civil servants would be required to make public the number of documents they had classified during a particular year. Criminal sanctions for over classification would, however, only antagonise civil servants and make them even more covert than before. Most would obey the new guidelines in good faith. All departments would also have to present policy audits and publish important unclassified documents weekly.

appendix 1: Justice's proposed code of practice

1. It is essential to the effective working of a democratic society that the public should be adequately informed about the actions and decisions taken by the government and other organs of public administration of the United Kingdom. The paramount criterion should be that the public may, by being adequately informed, have the opportunity of understanding and evaluating the nature of, and the reasons and grounds for, such actions and decisions. Accordingly, with certain necessary exceptions, all documents containing information on such matters should, so far as is reasonable and practicable, be disclosed within a reasonable time to any person requesting their disclosure.

2. This Code of Practice applies to all government departments and other authorities to which the Parliamentary Commissioner Act 1967 applies.

3. Servants of the Crown and other officers and persons responsible for disclosing information in accordance with this Code should disclose sufficient information to satisfy the criterion stated in paragraph 1.

4. Documents will not be disclosed if: (a) the case falls within paragraphs 9, 10 or 11 below; or (b) there are reasonable grounds for believing that the public interest would be adversely affected by disclosure. With these exceptions, documents should be disclosed where the information they contain relates to decisions on matters of policy or to other acts or decisions (whether of an executive or quasijudicial character) of any authority to which this Code applies. Information relating to any matter on which a decision has not yet been reached should also be disclosed unless disclosure is likely to prejudice consultation or negotiation with persons or bodies directly affected by the ultimate decision, or to affect the outcome adversely to the public interest: in either of these cases there will be no disclosure until a decision is reached.

5. In determining whether or what disclosure should be made, it is immaterial

that the person requesting disclosure is or is likely to be in dispute with the government department or other authority from which disclosure is sought.

6. No regard shall be had to the nature of the applicant's interest in seeking disclosure.

7. Any complaint of failure to disclose a document or class of documents which ought, in accordance with this Code, to have been disclosed shall be treated as a complaint of maladministration at the instance of the person requesting disclosure and, if he claims to have sustained injustice in consequence thereof, his complaint may be investigated by the Parliamentary Commissioner for Administration.

8. Arrangements shall be made within every government department and other authority to which this Code applies for the preparation and publication of a document giving information about the documents which, or copies of which, will be disclosed in accordance with this Code; as to the persons responsible for dealing with applications for disclosure, and as to the charges, if any, which may be made.

9. There will be no disclosure of information: (a) relating to defence, foreign relations or internal security; (b) relating to law enforcement; (c) which could be privileged against disclosure in litigation; (d) entrusted in confidence to a government department or other authority to which this Code applies whether or not required by or under any enactment to be disclosed to any such department or authority; (e) the disclosure of which would infringe the privacy of an individual; (f) which, if disclosed, could reasonably expose the person disclosing it to a significant risk of proceedings for defamation.

10. Cabinet and cabinet committee documents as a class are exempt from disclosure.

11. There will be no disclosure of any document which comprises advice or

appendix 2: acknowledgements

The author would like to thank: Christopher Andrew, Lecturer in History, and David Williams, author of *Not in the Public Interest* and Lecturer in Law (both at Cambridge) and the Fabian Society readers for looking at an early draft of this pamphlet; Rt Hon Merlyn Rees MP, Michael Meacher MP, Edward Gardner MP, James Michael and Duncan Campbell (of *The New Statesman*) for various conversations on freedom of information; and Rt Hon Tony Benn MP, for permission to quote from his lecture *The Right to Know*.

He would also like to acknowledge the help given by the Kennedy Memorial Trust by the granting of a Kennedy Scholarship at Harvard University.

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open up !

One of the major political trends in recent years has been the increasing demand for more knowledge about what government is doing. No longer can secrecy be justified by the holders of power and the main question has become "when will freedom of information" be on the statute book and "how much" will we be able to know.

This pamphlet traces the history of secrecy in government and points to its costs for the consumer, for democracy and for freedom. It draws on foreign experience to show both the need for a unified lobby and also the best ways to proceed to legislate. Trevor Barnes proposes a staged introduction of freedom of information, firstly hiving off "spying" to a special Espionage Act and backing up the provision for more information, with certain exceptions, with a Code of Practice and an Ombudsman. Later, a second Act could put more teeth on the Code.

This pamphlet is about one of the major developments in a democratic society and is a challenge to Labour to actually implement the promises of its manifesto.

fabian society

The Fabian Society exists to further socialist education and research. It is affiliated to the Labour Party, both nationally and locally, and embraces all shades of socialist opinion within its ranks — left, right and centre. Since 1884 the Fabian Society has enrolled thoughtful socialists who are prepared to discuss the essential questions of democratic socialism and relate them to practical plans for building socialism in a changing world. Beyond this the Society has no collective policy. It puts forward no resolutions of a political character. The Society's members are active in their Labour parties, trade unions and co-operatives. They are representative of the labour movement, practical people concerned to study and discuss problems that matter.

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March 1980

Cover design by Dick Leadbetter
Civic Street, Glasgow G4 9RH

Printed by Civic Press Limited (TU),
ISBN 7163 0467 8 ISSN 0307 7535

