ABSTRACT. At present, the 'freedom of information' concept has particular appeal to various democracies seeking to realize or refine a popular right to government information. The American experience with this construct provides both a significant theoretical model and a legislative realization of this idea. However, drafting imperfections and political tampering with the policy purpose of the Freedom of Information Act are apparent in the legislative history of the Federal statute and, hopefully, can be avoided by other nations pursuing this type of law. In addition, the United States has developed privacy of information and has sought to reconcile it and official secrecy with the 'freedom of information' concept. While the former is regarded as a valuable symbiont, the latter appears to be a dangerous competitor to the effective realization of 'the people's right to know'.

Efforts at realizing or refining a popular right to government information are evident within various nations today. Australia, Canada (including separate undertakings in the provinces of Ontario and British Columbia), and the United States are outstanding examples of such activity. It is interesting that these three great democracies and Sweden have only lately embarked upon the adoption of laws guaranteeing 'the people's right to know' about the operations of the state through access to official records. Yet, while these legislative pursuits have occurred largely within the past decade (the American statute was adopted in 1966 and amended in both 1974 and 1976), they are, nevertheless, pioneering endeavors which seek to overturn the secrecy culture bred by recent world conflict and the subsequent Cold War.

The central concept under consideration is these policymaking efforts is 'freedom of information', a referent which, within the American governmental experience, has both an identifiable theoretical foundation and legal manifestation. Interacting with this concept are two other less well understood information constructs: privacy and official secrecy. While 'freedom of information' appears to be a relatively recent policy rubric in the United States, 'privacy' traces its immediate origins to the opening lines of the Fourth Amendment to the Federal Constitution (though Justice Douglas provides a more generous view in Griswold v. Connecticut, 381 U.S. 479 (1965)),
and the idea of ‘official secrecy’ was receiving expression in military regulations shortly after the Civil War while protective markings for documents were administratively authorized in 1912 and legal sanctions against the disclosure of defense secrets had been statutorily established (36 Stat. 1084) during the previous year. Consideration is given here to the policy ramifications of these concepts in terms of both their individual significance and their impact upon each other.

FREEDOM OF INFORMATION

While it is virtually impossible, and perhaps unnecessary, to determine when the ‘freedom of information’ referent first received public expression, both the phrase and its intellectual foundations trace their origins to the immediate post-World War II period. A secrecy minded bureaucracy, conditioned by recent information restrictions prompted by global hostilities, fearful of Cold War spies, and intimidated by zealous congressional investigators and other fanatically patriotic vigilantes in search of disloyal Americans both within and outside of the government, developed a variety of policy devices for limiting knowledge about the activities and operations of the Federal Executive Branch. Two favorite sources of authority for information control, frequently invoked by almost every department and agency, were the ‘housekeeping’ law and the public information provision of the Administrative Procedure Act.

In existence since 1789, the ‘housekeeping’ law (previously codified as 5 U.S.C. 22 and now found at 5 U.S.C. 301) derives from various early statutes establishing the initial departments and granting them authority to issue regulations regarding the custody, use, and preservation of the records and papers produced by them for their own use. During the late 1940s and 1950s, Executive Branch officials argued that this provision required that documents be restricted from public availability in order that the government’s proprietary interest in such materials might be properly protected and so that files might be maintained in a correct and orderly manner as well. In spite of the legislative history of the ‘housekeeping’ statute, claims of administrative secrecy based upon its authority enjoyed a considerable degree of judicial support. Commenting upon the more formal effects of the section just prior to its amendment, one expert observed that the vast majority of Executive Branch regulations limiting access to