

Freedom of Information—Why Not?

There is little doubt that some form of Freedom of Information (FOI) legislation is in the developmental stages in Canada. The Joint Committee on Regulations and Other Statutory Instruments at the end of 1974 was charged by the government with hearing evidence and making arrangements concerning such legislation. The Throne Speech of October, 1976 again outlined the intention of the government to introduce an FOI bill. Finally a Green Paper, *Legislation on Public Access to Government Documents*, was produced in 1977¹ and once again the Joint Parliamentary Committee is in the process of hearing evidence on the subject. In spite of this rather circular route, however, the need for such legislation has been accepted in principle.

Will the Canadian legislation go through the same two-stage process to become meaningful as did its American counterpart, or will it have structure and enforceability from the beginning? Ralph Nader warned the Canadian Bar Association in 1976 that “token Freedom of Information can be worse than no legislation. It is more difficult to correct faulty legislation than to write it correctly in the first place.”² The American legislation passed in 1966 was not effective until 1974 when its orientation was changed and its enforcement tightened.³

There are two central elements in effective, efficient access legislation. The first concerns the definition of information denial, the second the right to review when access is denied. In other words, what categories of records are exempt from the operation of the FOI law and what form should the review procedure take when information is withheld?

Freedom of Information legislation should take a positive stance. Intended to give access to information, it should assume that individuals and groups have a basic right of access to government documents. The burden of proof should be with the government to define why not, not why. The Honourable John Roberts, Secretary of State, introduced the Green Paper by stating that “we accept that material prepared at taxpayers’ expense should be available for the public to see unless there are extremely good reasons why it should not be so available.”⁴ Further, as the Honourable John Turner remarked, “Secrecy provokes myths, and creates tension and a lack of trust. Produce the facts and you dispel the myths.”⁵

The legislation should clarify several procedural problems concerning access requests. To deal with the problem of expense, an equitable charging system should be introduced. Indeed, the possibility exists of developing an information-selling business which could even recover some of the expenses involved in the collection of information for government. In Britain the British Broadcasting Corporation’s monitoring service, originally designed for government departments, can be purchased at a rate of £60 per year. It compiles information on other countries from various broadcasts and

1 Canada, Department of the Secretary of State, *Legislation on Public Access to Government Documents* (Ottawa, 1977).

2 Ralph Nader, “Remarks Before the Freedom of Information Program at the Annual Convention of the Canadian Bar Association,” (Winnipeg, 30 August 1976), p. 1.

3 For a list of the principal changes, see ACCESS, *Canadian Legislative Policy Report: Freedom of Information Legislation* (Ottawa, 1977), Appendix 1.

4 Canada, House of Commons, *Debates*, 16 December 1977, p. 1957.

5 Nader, “Remarks,” p. 2.

is used by news agencies, newspapers, and universities.⁶ The legislation should also clearly set a definite time period in which a response must be given to an access request. The requestor should not have to specifically identify the item; reasonable identification should suffice and an index of related documents should exist to expedite information requests. If a document is refused, some legal reason must be provided.

The legislation should specifically outline the why nots, the categories of exempted records. These exemptions to the norm that is free access should be as narrow in scope as possible. In 1973, guidelines were tabled in the House of Commons outlining sixteen reasons why documents should be exempt.⁷ Some of the categories, such as "federal-provincial relations" and "papers of voluminous character," could too easily be used to cover far too wide a range of documents. If these exemptions are in the legislation, they will certainly be used. Exemptions in the areas of law enforcement, current investigatory documents, personnel management, personal and commercial privacy, and trade secrets are fairly widely accepted. Many of the proposals, however, include an exempt category for national security as well as national defence. A category for defence of the realm would adequately cover defence policy, strategy, and intelligence services, yet not enable it to be used to mask illegal operations of police forces as has occurred recently. The Freedom of Information legislation in the United States forced the Federal Bureau of Investigation to reveal its program of harrassment against dissident groups.

The factual portion of cabinet documents should not be exempted by the legislation. Many cabinet documents are already split into two sections, one giving information and the other policy options. The Secretary of State recently said:

It has always seemed to me a paradox that in the parliamentary system with its emphasis, at least in the past, upon confidentiality within the public service, and secrecy of decision-making in the cabinet and secrecy of party decision-making in various caucuses of the various parties—that in a country which espouses open government, so much of the decision-making process should take place behind closed doors and away from public view.⁸

In his presentation to the Joint Committee, Donald Rowat developed a government-secrecy continuum which estimated that Canada keeps 55 percent of its government information secret.⁹

The problem of definition of exemptions is not an easy one, but it is solvable. In his study for the Privy Council Office on information legislation, Donald Wall showed how the Official Secrets Act, originally aimed at military security, has been misinterpreted to cover almost all government documents.¹⁰ To counter these definitional problems, independent review is mandatory. At present, under section 41 of the Federal Court Act, if a Minister states that a document is injurious or not in the public interest, not even the court can examine the document. In his detailed investigation prepared for the Canadian Bar Association, Professor Murray Rankin concludes that the effect of

6 "Tell Us More, Not Less," *Economist*, 4-10 February 1978, p. 18.

7 "Notices of Motion for the Production of Papers," in Canada, House of Commons, *Debates*, March 1973.

8 Canada, House of Commons, *Debates*, 16 December 1977, p. 1957.

9 *Minutes of Proceedings and Evidence of the Standing Joint Committee on Regulations and Other Statutory Instruments*, no. 15, 25 February 1975.

10 Donald Wall, "The Provision of Government Information," in *Minutes of Proceedings*, no. 32, 1975.

the Official Secrets Act, the present classification system of government documents, the oath of secrecy, the criminal code sanctions restraining civil servants, and the Federal Court Act is "a very persuasive veil of secrecy surrounding national security matters which largely succeeds in inhibiting any possibility of extra-judicial information access."¹¹ He also argues that there is no constitutional, legal or practical reason preventing judicial review of access disputes. Few would disagree that an informed public is the basis of democracy. This public has the basic right to information. The courts at present are the basic protectors of our rights. Why should they not guard these rights as well?

Gordon Robertson, Secretary to the Cabinet for Federal-Provincial Relations, feels that information access is fundamentally a political decision, not a basic right. Consequently, he feels ministers responsible politically for these decisions should be the ones who ultimately make them. Government-produced information is so basic to all aspects of Canadian life, however, that this is no longer the case. "Government has become perhaps the most important single institutional repository of information about our society and its political, economic, social and environmental problems. In some areas, the government is virtually the only significant source of information."¹² Again it has been estimated that more than 70 percent of government work involves information production.¹³ How can such an important aspect of our government institutions be neglected? Hugh Winsor asked "who really runs government and who really initiates, formulates and researches new policies—the politicians or the bureaucrats?"¹⁴ What action is taken when a piece of information is in hand may well be a political decision. The information itself, however, is not necessarily political. Information produced within government should be available to the public just as it is to those within government who make policy decisions.

An efficient method of handling review would have two stages. First, an independent information commissioner would review cases of denial by investigating the documents involved and advising the inquirer and the government agency whether the information falls under an exempted category or not. Secondly, if the inquirer still wished to pursue the matter, the request would pass through the court system. This dual method would divert the majority of cases from the courts and yet give applicants an opportunity for binding review.

Information is a central issue in our complex society. It is essential that we finally face the complex questions involved in its organization and ensure consistent access to this vital national resource.

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ACCESS

Freedom of Information in Municipalities

Long before the present concern about freedom of information, Ontario municipalities

11 T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Canadian Bar Association, 1977).

12 Secretary of State, *Legislation on Public Access to Government Documents*, p. 17.

13 ACCESS, *Canadian Legislation Policy Report*, p. 1.

14 "Cabinet's Secrecy Habits Die Hard," *Globe and Mail*, 23 November 1976.