Freedom Of Information Act : TOP SECRET

by Tom Riley
for Canadian University Press

Secrecy. The withholding of documents. An iron curtain of secrecy clamped firmly against the prying eyes of the public, with no right to information that is collected and compiled on behalf of the people. Obsessiveness with secrecy that can only lead to distrust on the part of the people.

And where is this country that consistently denies its citizens the fundamental right to know what information its government is basing decisions on and why? Well, right here in Canada, as a matter of fact.

Exaggerated you say? Not really, as there are no statutes on the books that say the government has to provide information to the public. It releases only what it chooses to release. In the House of Commons there are the 1973 guidelines for notice of motion for the production of papers. However, there are 16 exemptions under these guidelines (of information not available) and, as many an MP who has tried to get information can testify, they are so broad that requests are turned down daily. Access to information by members of parliament really exists only in theory.

Examples abound showing that information is being withheld on a grand scale and that the government only gives up what it decides is in its best interests.

In this past session of Parliament we have seen the Sky Shops affair, the Judges affair, the secret list of 21 (now there are even more lists, including one on federal NDP leader defused the controversy in the House.

Recently, there was Canada's involvement in the uranium cartel price-fixing scandal. And, during that particular juicy case, the government in September, 1976 passed an order-in-council which prohibits any discussion of the documents involving the cartel and makes it an offence for any person with access to the documents to show them. The documents were available to only a few members of the government.

The justification? It was done, said the government, in the name of the people of Canada, to protect them and their interests. Yet, the documents are available to the U.S. Congress the U.S. courts and the U.S. press. Here in Canada MPs cannot see the documents, let alone private citizens, who might like to see the documents to decide for themselves on the actions of the government in forming the cartel.

These are just a few examples of the withholding of information in Parliament. In each of these cases the government can withstand questions from the Opposition because it forms the majority in the House and party discipline is very tight. The average MP votes according to the dictates of the party; free votes are very rare.

Yet, the problem of secrecy and the lack of access to public documents goes beyond Parliament. It extends to all government departments and agencies. What we can see is what the government decides we should see or wants to release.

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Ed Broadbent, who has wondered aloud what he has done to get on a list), Polysar, the Atomic Energy Canada Limited nuclear reactor sales kickbacks, and the RCMP's covert operations against l'Agence Presse Libre. These led to the Liberals naming an RCMP inquiry after steadfastly saying an inquiry was unnecessary. The about-face came after RCMP Commissioner Maurice Nadon called for an inquiry and effectively

can manipulate information as it chooses to its political advantage. It also means the bureaucrats can continue to hoard information and build power. Civil servants who feel an issue should be aired often resort to the inspired press leak, breaking either their oath of secrecy or, if the documents have been classified, the Official Secrets Act. It has been estimated that 80 per cent of government documents are classified as either top secret, secret, confidential or restricted.

In the final analysis, the question becomes, how can people make rational decisions if all the facts are not available?

The government has made some concessions and introduced a green policy paper titled Legislation on Public Access to Government Documents which discusses legislative options. But the green paper is only a discussion paper and has no actual legislation in sight. Some observers predict none until after the next federal election, despite enormous public support for access to information.

It is this attitude of entrenched secrecy and refusal to open up the dusty files which

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led to the call for a Freedom of Information Act. The demand is for easy access to all levels of government, and an independent review mechanism to the courts when a request for information is denied.

This is not to say that some information should not be exempt. Advocates of a Freedom of Information Act readily recognize that government cannot be run in a goldfish bowl; however, any exemptions, such as national security, international affairs, or investigative files need to be clearly defined. For example, in the case of investigative files there is no intention to stop investigations by the police in ongoing criminal inquiries; but after a certain time period, or when the file becomes inactive, access by public will be allowed. The U.S. Freedom of Information Act allows for this access; the FBI has received thousands of requests for information and has released files.

Conservative MP Gerald Baldwin (Peace River), long-time information advocate and crusader, says the end to secrecy must come because people are becoming increasingly disillusioned with governments and want something better.

He is not alone. Pressure for a good information law is increasing. Groups have sprung up across the country in the last 18 months demanding that governments take action.

Based in Ottawa is Access, a Canadian committee for the right to public information, which represents nearly three million Canadians. Access membership includes the Canadian Daily Newspapers Publishers Association, the Canadian Community Newspapers Association, the Newspaper Guild (all three of these groups passed resolutions at their annual conventions calling for enactment of information laws at all levels of government), the Canadian Labour Congress, the Public Service Alliance of Canada, the Canadian Association of University Teachers, the Canadian Teachers Federation, the Canadian Nature Federation and the Canadian Association of Social Workers.

In addition to these groups and a host of citizens groups which have emerged to demand an information act, a non-partisan committee of MPs was formed in the Commons to push for legislation. Liberal MP Lloyd Francis heads the committee which includes Gerald Baldwin, Ray Hnatyshyn and Andrew Brewin. They hope to build a broad base of non-partisan support in the House.

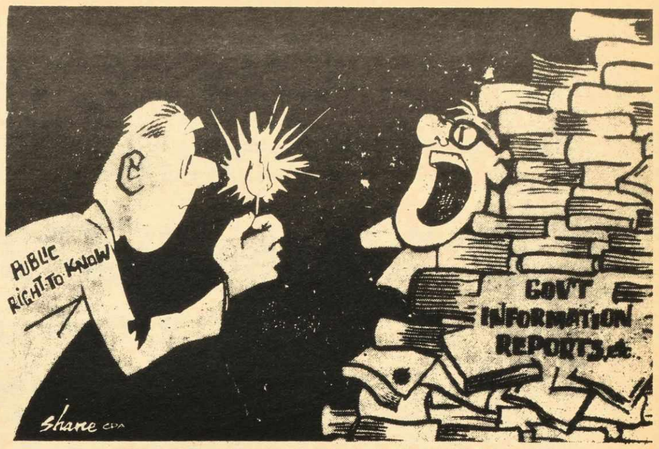
Baldwin heads another group, the League to Restore Parliamentary Control, which has an advertisement campaign in daily and community newspapers across Canada asking people to sign the ads, which call for freedom of information legislation and more government accountability for the tax dollar. Baldwin says response to the campaign has been encouraging.

The campaign by the Canadian Bar Association is perhaps next to Baldwin's the most widely publicized of them all. At its annual convention in August, 1976 the association devoted an entire day to freedom of information. One event was a panel discussion between former Liberal cabinet minister John Turner, Nader, Baldwin, former Privy Council president Mitchell Sharp and Ontario deputy attorney-general Roy Callaghan, which was chaired by Justice Thomas Berger.

The discussion led to the passing of a freedom of information resolution with only one dissenting vote. The resolution called for the enactment of information laws at all levels of government. As well, it called for a review procedure in the courts where the government could show why a document should not be available for release upon request. This is a reversal of current practice where the individual or group has to show cause why they want a particular report.

In February, the Canadian Bar Association held a press conference in Ottawa after presenting its resolution to both the Justice Minister and the Prime Minister. Association president Boyd Ferris said the government had no intention of introducing information legislation, and it was the Association's plan to actively lobby for such laws.

In August, Ferris called a press conference to release a report by University of Victoria Professor Murray Rankin which heavily attacked the government green policy paper. The Rankin report said "by the paucity of its analysis, the blurring of its stated opinions and the misrepresentations of the goals and practices of freedom of



"PUT THAT LIGHT OUT! THIS STUFF'S INFLAMMABLE"

Governments can only benefit from being open with the people.

information legislation, the green paper leaves little doubt that legislation will not be forthcoming."

There are many issues involved in the freedom of information debate. These include accountability of governments and civil servants, what precisely the exemptions should be, the amount of time needed between the request for documents and their actual production and the costs of reproducing requested documents. However, these are all secondary to most observers. For them the central issue is the type of review mechanism to be used if a request for information is denied. The question is one of ministerial responsibility versus judicial review.

The government's green paper discusses five options for such a review: a parliamentary option, where the denial would be debated and decided in Parliament; an information auditor who would report to Parliament once a year on requests denied; an information commissioner with advisory powers who would hear cases and then report them publicly, but would leave final decisions to the minister; an information commissioner with powers to order release who would be able to study a case and order the minister to release the document in question after deciding that a case was valid; and an appeal in the courts.

The green paper rules out court appeals and an information commissioner with power to order release of documents. The document says these methods are inconsistent with the theory of ministerial responsibility and anything done to abrogate these powers would set a dangerous precedent at odds with Canada's constitution and traditions.

Yet, governments can only benefit from being open with the people. Mitchell Sharp has said he thinks the government should pass legislation to show people how little information the government really is withholding. An interesting viewpoint in the light of recent events in Canada.

It is this very thing that information advocates strongly disagree with. They say any information legislation must contain a form of review removing it from the political arena.

But the proponents of ministerial responsibility say ministers are responsible only to Parliament and to the people. This argument, however, does not stand up because of cabinet solidarity and majority rule. And a case could easily be forgotten at election time.

And so the debate rages on. But it is still anyone's guess as to when legislation might be introduced. Still some observers have said the mechanism is now in gear for freedom of information legislation in Canada. Recent moves by the federal government show it will be as slow as possible.

Nova Scotia Freedom Act : "A farce"

by Scott Vaughan and Jeff Round

The Freedom of Information Bill, introduced by Attorney-General Leonard Pace in the spring session of the Nova Scotia legislature, will become law in the province on November 1.

Premier Gerald Regan said "that the bill will further facilitate communication between the people of Nova Scotian and their provincial government, for it gives to every Nova Scotia the right to obtain information which he never had a right to before.

The purpose of the Freedom of Information Bill, or Bill145, is to uphold and reinforce the principles of responsible government and government accountability by "assuring the people that the Government is operating openly and by providing to the people access to as much information in the hands of Government as possible without impeding the operation of Government..."

Attorney-General Pace told the **Gazette** that "there are two main benefits stemming from the bill; first, people will have access to information, as a right, to not only governmental information but also their own personal files kept by government departments, and, secondly, it will lay down some ground rules for the public and the civil servants as to the process through which government documents can be obtained".

While the bill sets out to guarantee access to information it also takes measures to protect privacy as well, limiting accessibility by creating certain safeguards. "A good example of this is seen in the case of the criminal charges," Pace stated. "Keeping such information from public disclosure is simply a matter of protection for the innocent," he declared.

There are numerous qualifications to what is actually open to public scrutiny; in all there are 16 clauses in the bill where the government can decide to withhold information. An example is Section 4, clause h), which states: "a person shall not be permitted access to information which would be likely to disclose opinions or recommendations by public servants in matters for decision by a Minister or the Executive Council" Pace said that the ultimate decision as to what is "likely" rests with the Minister in question.

Any person requesting information from the government must submit the request in writing. If the request is turned down, that person may appeal the decision with the Deputy-Minister. If refused by the Deputy-Minister, he or she can then go to the Minister, and, if that fails, hire a lawyer and bring the appeal to the National Assembly. An appeal cannot be made to the courts.

A quicker way to appeal the decision, Pace pointed out, is by going to the Ombudsman, which he said was an "effective weapon in exerting public pressure. Generally ministers will comply with the demands and pressures put forth by the Ombudsman".

In response to recent criticism of Bill 145, the Attorney-General concluded by saying that "when a new act is passed, it does not immediately become edged in granite. The bill is flexible. We want the experience of trying it. If necessary we can change it, although we see this as a very important measure that has been taken and not just the beginning step".

According to Bill 145 the information which the public is being given the right to falls into ten categories:

"a) organization of a department; b) administrative staff manuals and instructions to staff that affect a member of the public; c) rules of procedure; d) descriptions of forms available or places at which forms may be obtained; e) statements of general policy or interpretations of general applicability formulated and adopted by a department; f) final decisions of administrative tribunals; g) personal information contained in files pertaining to the person making the request; h) the annual report and regulations of a department; i) programs and policies of a department; and j) each amendment, revision or repeal of the foregoing."

Further enquiry into this section of the bill reveals, however, that only one of these categories, g) "Personal information contained in files pertaining to the person making the request", is at the present moment unavailable to the public. But even so, under the N.S. Human Rights Act people already have a limited access to such files. Information in all other categories stipulated in the bill is already available from public bookstores and in Hansard Reports (which cost about 15¢) or simply by calling the department in question.

"There are no benefits. In fact the entire bill can be summer up in one word—a frace," said John Buchanan, leader of the opposition party in the N.S. Legislature.

"The Regan Boys are out to show the world that they are operating aboveboard. It's all just political window-dressing. If anything, it leaves the situation worse than before by implying that nothing else is available."

Buchanan feels that the bill actually will not reveal the kind of information which should be made available to the ordinary citizen. "It will give the public a right to government documents of non-importance, while information which the government has hidden from the general public, particularly in the area of government expenditure, will remain hidden."

Buchanan cited the modernization of the Sydney Steel Company as an excellent example of this. There have been years of study on the project with certain innovations being done by private companies, but it has not been made public during these years either the names of the companies and, most of all, the cost. Buchanan estimated there has been roughly $80 to $90 million spent on the Sydney Steel Company, yet when he demanded from the government actual figures and studies carried out Premier Gerald Regan flatly refused to comply with the request.

In the event of a need to appeal a request Buchanan claimed "it would be useless going from the Deputy-Minister and then to the Minister because the Deputy-Minister works under the Minister so in both cases the response would be identical". He also pointed out that it would be absurd for a private citizen to pay enormous legal fees to bring an appeal before the House of Assembly "when you could purchase the same information from a bookstore for about 50¢".

"The government has attempted to pull the wool over the eyes of the public by claiming that it is guaranteeing as a right information which is already available to them," Buchanan concluded.