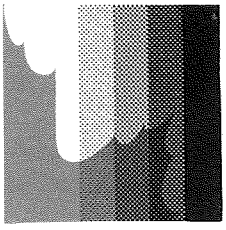
A45

BRIEF TO THE ROYAL COMMISSION

ON

FREEDOM OF INFORMATION AND INDIVIDUAL PRIVACY

ACCESS TO INFORMATION



from

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Prepared by Heather Mitchell, former Counsel to CELA and

Presented by Conrad A. Willemse, Director

October 13, 1977

Let me tell you about some of the information we cannot get from the government, even though it has been collected with our tax dollars.

We cannot get

1. Government correspondence with car manufacturers about secret warranties.

2. Meat plant inspection reports.

3. Supermarket inspection reports. (although in New Jersey, these are posted at the door of the supermarket)

4. Reports of the bacterial content in milkshakes in the North West Territories.

5. Safety tests on life jackets.

6. Results of pesticide residue tests.

7. Test results on paint, carpeting and rugs.

8. Car safety reports.

9. Nursing home evaluation reports.

10. A list of insecticides containing vinyl chloride.

In the U.S., all this information is available because the U.S. has a Freedom of Information Law.

The federal government is the largest, single consumer in Canada. Before it buys anything, it tests a number of brands to see which is best and to see what standard it is necessary for the product to meet. The amount of valuable consumer information the federal government has collected is staggering. But the government will not share this information with the public. Since there is no law giving us the right to see the information, we simply cannot pry it out of the government.

Why won't the government make the information available? The reasons differ depending on the official doing the explaining. Mitchell Sharp says that the information belongs to the government and the government, as owner, have the right to say who can see it. Furthermore, it would be a great inconvenience for civil servants to have to answer requests for information instead of getting on with their real work. Mr. Sharp also says that the Cabinet needs secrecy for its discussion because Canada follows

the principles of Cabinet solidarity and responsible government where in theory at least, Ministers are responsible for policies and if the policies fail, then the Minister resigns. (Under this doctrine, the entire Liberal Cabinet should have resigned before it brought in wage and price controls. The last election campaign was fought on the issue of wage and price controls where the Liberals said they would not bring them in if elected.)

The doctrine of Ministerial responsibility has been severly criticized by writers who say that decision-making is so complex that without information no-one can evaluate a Minister's performance. Since the Minister controls who gets to know what, he or she can effectively avoid being called to account.

Other government spokespersons have said it would be too expensive to provide access to information although no cost figures have ever been given by the government, and that the government must make the final decision because only the government can know if release would be in the public interest as only the government has seen the information.

The Canadian parliamentary system provides a question period for opposition members and any member of the public can ask his or her M.P. to ask a question. But this ignores two points. Firstly, some of us are represented by government back-benchers who, of course, do not ask critical questions of the government and even if we were all represented by fearless champions, the government does not have to answer any question it does not want to. In addition, the question period does not provide speedy replies for detailed information. Often a question waits eight months for an answer. But if one cannot get the information when it is needed, it really is of no use. For example, if I wanted to paint my apartment and I wanted to know what kind of paint the government had used painting apartments for its personnel, I would be in pretty grubby surroundings by the time I got an answer eight months later.

This briefly is the government position:

(a) it would cost too much;

(b) it would interrupt the business flow of government;

(c) it would interfere with Cabinet solidarity and Ministerial responsibility;

Those who are critical of the government denying information point out that the government if over-focused on high policy matters. Everyone agrees that defence secrets are not to be made available and everyone agrees that negotiations between governments ought to be confidiential at least until an agreement is reached. But the information which the public needs isn't defence secrets and it isn't records of high policy discussions. It is basic consumer information collected with tax dollars and basic information which can help voters analyze the performance of the government - in short, access to information will make better citizens because with information people can participate in democratic decision-makign more fully. Access to information is the key to the participatory democracy Trudeau talked about in the early seventies. Why he hasn't allowed access to information remains a mystery.

Tim Lukes, a political scientist at the University of British Columbia, has argued that denying access to government information is basically anti-democratic. Democratic principles require an informed citizenry to make a wise choice at election time. Since most people earn their living in areas other than becoming knowledgeable about the government, the time used for becoming well-informed is leisure time, and therefore any truly democratic society will ensure that it is easy for its members to become well-informed by providing easy access to information.

Other political scientists and legal commentators, notably John Willis now of Dalhousie, and Albert Abel of the University of Toronto have argued that there is enough information provided already and that it isn't used. They say that it would be so inconvenient for the bureaucracy and it would hold up the business of government which is to govern to such an extent if more information were provided that it isn't worth the cost because there will be little if any benefit as people do not use the information currently provided. They point to the fact that people read the comic page and sports page of the newspapers first and turn later to the news pages. Their argument, usually referred to as "the masses are asses" has been recently disproved by voters' studies in the United States. In fairness to Willis and Abel, it should be remarked that this recent information was not available to them when they wrote on the subject.

The government too says that lots and lots of information is already available and agencies such as Information Canada were set up for the sole purpose of informing citizens. But if I go to Information Canada and ask for some material, I can only get what information Canada has got. I can't get anything which hasn't been published by the government. And who decides what will be published? Not me, by my simple request to Info. Canada, but the government. The government therefore controls the flow of information and by ensuring that the information provided is either entirely neutral (such as

some Statistics Canada figures) or is favourable to the government, a citizen is left with the overwhelming impression that the government is doing a good job. By controlling what people can get by way of information, the government indirectly controls our ability to make a wise voting choice.

For example, the Canadian Environmental Law Association had a document leaked to it last year which deals with the Department of Environment view of the Department of Indian and Northern Affairs expenditure plans. Indian and Northern Affairs wanted to make the document, which was an explanation of how the Department was going to spend its money in the north, public. But the Department of Environment said:

> ...the general consenus appeared to be against the publication of the document.
>
> Among other reasons, it is felt that such a publication would not create wide public interest and could be used by interest groups to exercise pressure on government programmes. Also the lack of consistency and accuracy of the data presented and the absence of information on the activities relating to the data were other disturbing factors. In the end, it seemed preferable to publish data bearing on last year's activities.

Nowhere in the document is there any recommendation from the Department of Environment that the Department of Indian and Northern Affairs get accurate information and make that public.

How did Canada get to this position?

Canada inherited its model of government from Britain where the principle of two parties both loyal to the Queen but opposed to each other meant that the party in power did everything it could to prevent the other party from winning an election. The natural tendency therefore was to keep confidential as much informa tion about government plans, projects and programmes as possible.

On the other hand, Canada being very close to the United States had to modify the British tradition in light of the American experience where the American revolution was fought as much against secrecy as it was against tyranny. So Canada does have open government in the sense that there is a public gallery in the House of Commons and in the Senate, the Courts are open and most Municipal Council meetings are open.

Canada has also codified what must be kept secret in the form of the Official Secrets Act (designed to protect Canada from espionage, but in reality protecting the public from all policy information) and in the form of a classification system for documents which ranges from restricted to top secret. (Until the report of the Royal Commission on Security was released in 1969 the existence of the classification scheme itself was secret.)

The Federal Court Act says notwithstanding a subponea, a Minister can refuse to provide information relevant to a Court Action if he or she signs an affidavit stating that the information relates to federal-provincial relations, national defence or security. If the Minister signs the affidavit, the Court cannot inspect the document in question and cannot ask the Minister any questions about his position.

All civil servants at the federal leval and at least in Ontario are required to take an oath when they join the civil service swearing not to reveal any information which comes to their attention during the course of their employment. This broad sweeping oath makes it very difficult for even sympathetic officials to co-operate with information seekers.

Other countries handle the question of access to information much differently. The United Kingdom, of course, has even more secrecy than Canada, but the Nordic countries have complete openness including access to other people's income tax returns. Only state secrets and invasion of privacy are exempted. Sweden is a leader in Europe. Everything is to be made available--in fact a special part of the Prime Minister's office is set aside where the daily correspondence is set out for anyone to inspect it. Sweden also has an Ombudsman, who can intervene on behalf of citizens and can suggest that information be made available. Rarely are his recommendations ignored.

The U.S. is the leader in North America. It passed a Freedom of Information Act in 1966, and after years of court battles, and three years of administrative committee hearings, it was amended in 1974 to cure the worst abuses and to plug some of the loopholes. The two worst loopholes were the lack of time deadlines and the exemption for inter and intra-agency material.

In one case, where Congresswomen Patsy Minks, sued to get the Environmental reports on the proposed atomic blast on Amchitka Island, she got a final answer to her request fourteen months after the blast. Since she had sought to prevent the blast by showing that the environmental report detailed the considerable harm that would be done, she was simply out of luck.

The Department of Transport once classified a study of its own operations as being an internal agency memoranda even though it had been prepared by an outside consultant. When the American group, Consumers' Union, sued to get the report, the government argued that the report contained only opinions and not facts. Consumers' Union pointed out that the contract under which the report had been prepared called for a factual report only.

Consumers' Union argued that if the report contained only opinions, then it did not meet the contract specification and the outside consultants should not get paid. After a long battle, the report was released, and I should add the Consultants had been paid.

Canada can draw a number of lessons from the American and Swedish experience. To avoid the problems that these countries have had, Canada should embody at least the following ten basic principles in an access to information statute:

1. A statement that the statute applies not only to government departments but also to crown agencies and to companies in which the government has more than a one-third interest.

2. Affirmative Duties: Each department must be required to keep an index so that a person who wants information can by looking in the index find a right coding which will lead him or her to the file. Each department must also be required to make information available upon request.

3. Indexes must be published in the Canada Gazette. Although the Canada Gazette is not on every coffee table, it is available in all public libraries and therefore accessible to people throughout the country.

4. Everyone must have equal rights to ask for information without having to state their purpose or citizenship.

5. There must be strict time limits in a statute because without them, delays can be so long that the information becomes useless. Ralph Nader says he once asked for information from the Solicitor-General in Canada, only to be refused eight months later. Upon asking for the same information from the U.S. Department of Justice, he got the information he wanted in twenty days. Journalists too need information in a timely fashion, as does anyone who wants to make a decision.

6. Copying fees should be nominal so that anyone can make a copy of a document and take it away for study. About 2-1/2 cents a page which is the direct cost to a large user such as the government would be adequate.

7. No other fees should be charged. In the U.S., some agencies charged also for staff time, and in one case, the Department of Agriculture asked a requestor for a deposit of $91,000.00 to search for reports of inspections on meat packaging plants.

8. If a request for information is denied, then there must be a right of appeal to the Courts, and the Court must be able to review the matter in its entirety.

In the 1966 U.S. statute, the Courts were restricted to a discussion of whether the procedure used to reach a decision to refuse a request was proper -- they were not allowed to consider all the facts to determine whether the refusal itself was wrong. Courts must be allowed to inspect the document in question to see if the government claim for exemption is correct.

9. The Courts must also have the power to order the government to wait until a determination of the information in question is made before the agency goes ahead. In the case I mentioned before where Patsy Minks sued for the environmental information concerning the Amchitka blast, she should have been able to get a delay in the explosion until her request for information had been determined.

10. The Court must have the power to award costs to an applicant if the applicant substantially prevails; and costs must not be awarded against a person or a public interest group which raises a matter of public importance. In Canada, the costs of going to Court can be staggering so that such a safeguard for the exercise of democratic rights is necessary.

In any statute giving access to information, some exemptions must be made, but these should be strictly limited. I do not agree with Mr. Sharp who says that the government should be able to exempt whatever the government wants to.

I suggest that the following are the only reasonable exemptions to an access to information statute:

1. Information prepared for the purpose of law enforcement.

2. Legal opinions preparatory to the government going to Court; but these should be available after the case is over.

3. Information, the release of which would endanger national security.

4. Information on personnel matters such as performance evaluation reports and information, the release of which would be a clearly unwarranted invasion of personal privacy; although if a person asks for his or her own file, then it should be produced to that person.

5. Information prepared for the purpose of negotiating a contract.

6. Inter and intra-agency memoranda until a decision is made, then the information should be available; further, if the information is communicated to anyone outside the government, then it should be available to everyone. This would stop the current practice of preferential access to information which some business interests get but consumer interests do not.

7. Documents which contain personal medical information should be made available only on the consent of the person involved.

8. Information which would reveal a trade secret should not be made available unless the public interest in open government outweighs the value of keeping the information secret.

In any statute there should be penalties if civil servants fail to comply. Fines awarded on conviction should not be payable out of public money.

In sum then, we need an access to information statute which will require the government departments to keep indexes of their materials and to make information available upon request. There should be a strictly limited number of exemptions to a general principle of openness, and there should be penalties against civil servants who disobey.