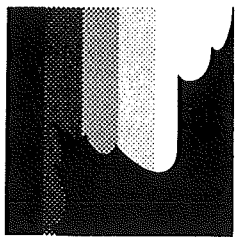

Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

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A BRIEF WITH RESPECT TO BILL 34:
AN ACT TO PROVIDE FOR FREEDOM OF INFORMATION AND PROTECTION OF INDIVIDUAL PRIVACY

SUBMITTED TO THE STANDING COMMITTEE
ON PROCEDURAL AFFAIRS AND AGENCIES,
BOARDS AND COMMISSIONS

Prepared by the Canadian
Environmental Law Association

March 27, 1986

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I. INTRODUCTION

The Canadian Environmental Law Association (CELA), founded in 1970, is a public interest environmental law group committed to the enforcement and improvement of environmental laws, as well as the protection and enhancement of the environment. Strong access to information legislation at both the federal and provincial level has been a long-standing and important objective of our organization. CELA's proposal for an environmental bill of rights as well as several private members bills by the former Liberal leader and the current Health Minister call for the right to access to information concerning the environmental consequences of government or private activities.

CELA depends on quick, free access to government-controlled information. Environmental matters are regulated by government. Government is able to research in detail the environmental impact of private and public sector actions far beyond the level of organizations like CELA and its clients who have limited resources. For CELA, successful fulfillment of its mandate requires timely access to accurate, detailed, and comprehensive information concerning the current state of environmental affairs. CELA believes that if access is expanded, better environmental decision-making can result, benefiting all.

It is our submission that the statutory enactment combined with an attitude of willingness among civil servants who receive

requests for information will enable organizations like CELA to fulfil their respective mandates.

CELA welcomed the early introduction of Bill 34. We believe, however, that essential changes to the current draft are necessary to provide the workable forum for access to government information intended by the introduction of the Act. We feel many of the provisions as drafted undermine the stated purpose of the Act. In fact, the Bill may restrict access that is currently available.

A general comment with respect to the Act concerns the lack of appeals from the majority of refusals, which, in CELA's view, takes away from the effectiveness of the purpose of the Act. We think the Act is extremely weak with respect to review of the institutional heads' decisions. This weakness will be discussed later.

II. REVIEW OF PROPOSED LEGISLATION

A. Section 2 - Definitions

In section 2, the definitions section, the term "institution" is defined as a ministry of the Government of Ontario as well as any agency, board, commission, corporation or other body designated as an institution in the regulations.

Comment and recommendation:

We support the Minister's proposal for designation of the institutions he has listed, but would suggest that all municipal corporations be added as a category subject to the legislation.

B. Section 11 - Obligation to Disclose

Section 11 refers to an overriding obligation to disclose a record "as soon as practicable" where a head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

Comment and recommendation:

The words "as soon as practicable" should be made more specific by addition of the phrase "within less than 30 days," because all requests are to be determined within 30 days under section 27. Further, the adjective "grave" and the term "hazard" should be withdrawn. Environmental hazards are grave by definition and the term only serves to divide environmental hazards into two non-existent categories.

Difficulties with unclear and undefined statutory language, have in the past caused judicial conservatism to prevail over legislative intent. One example arises from the use of the stop order provision, Section 7, of the Environmental Protection Act,

R.S.O. 1980. It states that the Director may issue a Stop Order in the event that a contaminant is discharged into the natural environment which poses "an immediate danger to human life, the health of any persons, or to property." In Re Canada Metal Company Ltd. et al. and MacFarlane (1973), 1 O.R. (2d) 577, 41 D.L.R. (3d) 161 (H.C.J.), the Court overturned a Stop Order issued by the Director against Canada Metal for discharging lead and lead compounds, even though the lead emissions from the Canada Metal plant were excessive and medical affidavit evidence was introduced attesting to the significant adverse human health impact of high blood lead levels in the neighbourhood.

For the Court, an "immediate danger" required that a very stringent test be met. It is our submission that if the Court interpreted "immediate danger" so strictly, "grave hazard" would create too stringent a test. It should be noted that subsequent to Canada Metal the Ministry of the Environment, to the best of our knowledge, has never issued another Stop Order.

Section 11 creates an obligation to disclose a record with respect to the environment and health and safety. That obligation is geared to the public interest and should not be narrowed by qualifiers that are extremely difficult to define. "Grave" and "hazard" are such qualifiers. In the judicial sense they threaten to become barriers that prohibit the proper administration of the Act.

Further, such strict qualifiers may impede the already existing opportunities of the public to obtain information under other legislation. Section 13 of the Environmental Protection Act (EPA) prohibits the deposit, addition, emission or discharge of a contaminant that causes or is likely to cause impairment, injury or damage to property or plant or animal life, harm or material discomfort to any person, or "adversely affects or is likely to adversely affect the health of any person"; "impairs or is likely to impair the safety of any person"; "renders or is likely to render any property or plant or animal life unfit for use by man"; "causes or is likely to cause loss of enjoyment of normal use of property"; or "interferes or is likely to interfere with the normal conduct of business." The confidentiality section of the EPA, section 130, allows, though does not require, the release of information respecting the deposit, addition, emission or discharge of a contaminant.

The Quebec Environmental Quality Act has as one of its objectives to improve pubic information. That objective is implemented under the Act in simple and direct language: "Every person has the right to obtain from the Environmental Protection Branch a copy of any available information concerning the quantity, quality or concentration of contaminants emitted, issued, discharged or deposited by a source of contamination." Such language provides access to information, secured by a statutory right which is not dependent on the whim of public officials. In

1982, Bill 96, an Act respecting environmental rights in Ontario, contained similar language.

Presumably, if the Minister of the Environment is in receipt of a record that contains the evaluation of a discharge of a contaminant under the EPA, he may not disclose that record to the public under section 11 of Bill 34 if it does not reveal a "grave hazard", when he would be able to disclose it under the EPA. The Freedom of Information Act would thus be limiting opportunities for access to information which now exists, rather than establishing the right to information access. Further, it severely restricts the purpose of Bill 34 -- to provide access subject only to specified exemptions. We submit that the bill should include the right created by the Quebec Environmental Protection Act.

C. 1. Section 12(i) - Cabinet Records

Section 12 is the exemption section which protects Cabinet records. That includes, under subsection (f), draft legislation or regulations.

Comment and recommendation:

An access statute must not encroach on or lessen any existing practices which give access to information at the time the statute is implemented. Rather, the statute should affect only those practices which limit access to information. A government

which relies on its openness should not exclude scrutiny into deliberations upon legislation or regulations. As a mandatory exemption rather than a discretionary exemption, this section may hinder moves by government, especially in recent years, to give draft regulations to the public for comment. One recent example was the establishment of the Spills Regulation Advisory Panel to hear submissions on the draft regulation proposed under Part IX of the Environmental Protection Act. It has thus been recognized that it is advisable to have input into the development of a regulation at an early stage in order to prevent future difficulties with that regulation.

This realization was made clear in the Ontario, 1979, Commission on Freedom of Information and Individual Privacy wherein David J. Mullen found that "notice and comment" procedures effectively open up the rule-making process to closer public scrutiny that tends to reduce abuses and after the event criticisms. Citing the federal model of the United States, Mr. Mullen concluded that it is evident that a "notice and comment" procedure encourages the development of better rules and policies. We therefore recommend that subsection 12(f) be deleted from the statute.

2. Section 12(2) - Cabinet Record Exception

Section 12 allows two categories of Executive Council documents to be released: those more than 20 years old, and those for which consent has been received from the Executive Council.

Comment and recommendation:

We submit that the 20 year time period should be described as a maximum, and that the head of the institution should be given discretion to allow access after considering whether the harm resulting from its release outweighs the benefits. If the benefits outweigh the harm, release should be allowed regardless of the document's age.

D. 1. Section 13 - Advice to Government

Section 13 allows the head of an institution to refuse disclosure of advice to government, subject to specific exceptions.

Comment and recommendation:

Monitoring the advice given to government is an essential form of public scrutiny in a free and democratic society. Allowing access to advice to government does not prejudice government. Such access would instead act as a deterrent to misleading or incomplete information being presented to government. Further, the term "advice" is extremely broad. We submit that much of this is already covered by other exemptions: for example, sections 12 and 14 may include the advice received in executive council meetings or the advice received in law enforcement matters.

Section 13 abrogates the principle which should be inherent in a freedom of information statute, that is, all information should

be accessible subject to specific exceptions. Although section 10 follows that principle, the exceptions are so broad as to make that section meaningless. Also, the addition of section 13 is confusing. First, section 10 allows access subject to exceptions including section 13, then section 13 limits access (at the head's discretion) subject to specific exemptions. The simple principle of access to everything subject to limited exceptions should be maintained in understandable language. Thus we recommend the deletion of section 13.

2. Section 13(2)(d) - Exception for Environmental Impact Statement

Section 13(2)(d) allows disclosure of "an environmental impact statement."

Comment and recommendation:

If section 13 is not deleted entirely, we submit that the term "environmental impact statement" should be amended. There is no definition in any legislation of this term. Not only would it be difficult for a head to distinguish between an environmental impact statement and advice under section 13(1), it may also be very difficult for the courts to interpret that term. Section 13(2)(d) should be amended to read "an environmental assessment" or other advice provided under the Environmental Assessment Act, 1980.

E. Section 14(1) - Law Enforcement

Section 14(1)(a) allows a head to refuse disclosure where the disclosure could reasonably be expected to interfere with law enforcement.

Comment and recommendation:

Law enforcement as a head of refusal is broad enough to refuse any matter being considered under any statute. Further, there is currently no appeal from an exemption under section 14(1).

The confidentiality section of the Environmental Protection Act, section 130, specifically allows for emission data as well as other forms of data to be released. This access should not be taken away by the law enforcement exemption.

In 1982, Bill 96, a Private Members Bill introduced by Mr. Elston respecting environmental rights in Ontario, provided a right to examine any test, inspection or analysis relating to any operation under the Minister of the Environment's jurisdiction.

There are a variety of public welfare laws. These have their own investigative and enforcement techniques, many of which do not result in court proceedings. The public has a right to know and participate in these public welfare matters for their own edification and protection, especially where the relevant statute itself does not limit access. We would propose that section

14(1)(a) be deleted because it is too broad, and may disallow access where it is currently allowed.

To clarify the principle that access is to be broadened by this statute, we propose that there should be a general statement in the Act stating that where any other statute allows access greater than provided by this Act, this Act shall not limit such access provided by the other statute. This, we submit, is warranted as an addition to the government's proposed amendment stating that information available by custom or practice immediately before the Act came into force shall not be precluded to by the legislation.

F. Section 15 - Relations with Other Governments

Section 15 allows a head to refuse to disclose a record with respect to relations with other governments.

Comment and recommendation:

Given the relationship of governments dealing with transborder pollution issues, such records should be made available. Public organizations such as CELA protect a public interest and require access to comment on transborder issues. Further, there are no appeals allowed from a section 15 refusal. If this section is not deleted, appeals from refusals under section 15 should be made available.

G. Section 17(1) - Third Party Information

Section 17(1) requires (taking into account proposed government amendments) a head to refuse disclosure of a record that reveals "a trade secret or scientific, technical, commercial, labour relations or financial information, supplied in confidence implicitly or explicity..."

Comment and recommendation:

The section 17 exemption covers not only trade secrets, which, as is well established in law, must be kept confidential, but also financial, commercial, scientific, labour relations and technical information which is confidential according to a standard imposed by the very person who has the greatest interest in keeping the information secret; namely, the third party who supplies it to government.

CELA believes the definition of confidentiality must be one which is arrived at by the government which, at least in theory, represents the public interest in adequate access to information.

Section 17 assumes that there no difference between private business and public business. In CELA's view, there is a very real distinction. Private business is a matter for corporations to disclose or not, as they choose, but public business requires accountability from government, including government decisions with respect to regulations and other policy and program choices which effect private business. In practical terms, therefore, information supplied by corporations for the purpose of receiving

a public benefit, such as government grant, licence, permit, extension or exemption, must be accessible. Without access to information, government's performance in this area is not subject to the essential requirements of accountability.

Practically, government frequently has information which is of great importance to those who work with, use or are otherwise exposed to chemicals, and to those whose concern it is to protect the public from the harmful effects of such exposure. The provider of information is allowed to set the standard on the accessibility of self-defined interests. The manufacturer or supplier has the unilateral and unchallenged right to declare his own data confidential. The result is that the public's right to know about the dangers to which it is or may be exposed will be severely curtailed.

It is essential for CELA that information concerning emissions, discharges and deposits of contaminants as well as health and safety data be exempted from this section.

The overriding principle of "public interest" where decision-making on public issues requires an informed public (the public's best defence against exposure to hazardous or potentially hazardous chemicals is knowledge), the release of such information in the public interest should be made the mainstay of section 17 while allowing a challenge by the third party to disclosure under section 17.

H. 1. Section 18(1) - Economic and Other Interests of Ontario

Section 18(1) gives a head the discretion to refuse to disclose a record that contains any one of seven parameters defining economic and other interests of the Province of Ontario.

Comment and recommendation:

The section is very broadly drafted. One wonders what isn't of "monetary value or potential monetary value"? It is difficult in these times to think of any issues which could not be characterized of "economic interest." What guarantees an equitable interpretation of this section? Further, there is no appeal from a section 18 refusal.

Section 18(1)(b) proposes that access may be refused where disclosure of scientific or technical information may deprive an officer or employee of priority of publication. Given the extremely long delays that frequently occur between submission of an article and its eventual publication, this section may lead to major, unnecessary delays of access. Surely, the public interest comes before private publishing credits.

2. Section 18(2)- Product or Environmental Testing System

Section 18(2) allows the disclosure of a record that contains results of product or environmental testing. However, under subsection (a) there will be no disclosure if the testing was

done as a service by an organization other than an institution and for a fee.

Comment and recommendation:

There is a serious implication in limiting disclosure to test results, unless "results" is defined to include all data leading up to conclusions. In 1969, Industrial Biotest Labora (IBT) tested the pesticide Leptophos. The IBT results concluded that no nerve damage was revealed in the testing. Yet the body of the report included numerous descriptions of neurotoxicity. The pesticide was exported to as many as fifty communities including Canada before neurotoxicity surfaced in the pesticide's market application.

Test results, if seen as "conclusions," can be a dangerous form of information on which to base potential environmental impact.

Further, CELA relies on its remarks made earlier concerning the relationship of the public business to accountability and recommends a change in the language of this subsection so that results of testing done by institutions other than government institutions be accessible, where they are used to obtain government approvals.

I. Sections 19, 20, 21

Section 19 deals with refusals with respect to solicitor/client privilege.

Section 20 deals with refusals with respect to the danger to the safety or health of an individual.
Section 21 deals with refusals with respect to personal privacy.

Comment and recommendation:
Although the intent of those three sections is well placed, there is no appeal from the decision of the head in those matters. CELA submits that there are instances in which discretion in favour of disclosure should be exercised and an appeal in that regard should be made available.

J. Section 22

Section 22 gives a head the discretion to refuse to disclose a record where information is soon to be published.

Comment and recommendation:
The provision which exempts from access information which is to be published within 90 days should be deleted. There is no apparent reason why an intention to publish within 90 days suddenly makes secret what was available before and will be again in 90 days.

K. Section 46

Section 46 deals with the appeal procedures. Originally, the section stated that a person who has made a request "may appeal any decision of a head under this Act through the Commissioner but the exercise of discretion of a head to disclose or refuse to disclose a record which is found to be included under an exemption in sections 13, 14, 15, 16, 17, 18, 19, 20 or 22 is not appealable." The government has proposed an amendment which would delete everything after "Commissioner" and add "The Commissioner shall not order a head to disclose a record where the Commissioner finds that the head may refuse to disclose the record."

Comment and recommendation:

It is CELA's position that section 46 should be rewritten to allow a person who has made a request to appeal any decision of a head under this Act to the Commissioner. CELA has supported the idea of an information commissioner who can provide an inexpensive method of appealing a government entity's decision to refuse access. To limit the Commissioner's power to review the head's excercise of discretion makes his role virtually useless. Surely the head's exercise of discretion should be reviewable given inherent conflicts in the head's role, as well as the lack of a court review on the merits.

Further, CELA suggests that the provisions concerning the information commissioner be amended so that a time limit is

imposed on the information commissioner's work. Without such a time limit, two consequences may result: first, the appeal procedure may take so long that the relevance of the information is lost to the access-seeker, and second, the lack of a time limit may lead the government not to make staffing and funding for the information commissioner's office a priority. If the commissioner is allotted inadequate appropriations to make the office one which can respond and reach a recommendation quickly, the Bill's purpose will be frustrated.

L. Section 48(3)

Section 48(3) allows the inquiry to be conducted in private at the discretion of the Commissioner.

Comment and recommendation:

The parameters of a private inquiry have not been set forward. Under subsection (2) the Statutory Powers Procedures Act does not apply to an inquiry; however, it would be CELA's submission that at least the basic natural justice requirements should apply to such an inquiry.

M. Section 53(1)

Section 53(1) deals with costs for access to a record. Costs may include (a) search charge, (b) costs of preparation, (c) computer and other locating costs, (d) shipping costs.

Comment and recommendation:

These fees must be eliminated. Only the direct cost of photocopying should be made a cost. The principle that access should be made as inexpensive as possible must be maintained in order to fulfil the purpose of the Act.

N. Part IV - Appeals

Part IV provides for appeals to the Commissioner, but does not specify that there is a right to judicial review or any other appeals to the courts.

Comments and recommendations:

The Attorney-General, in his statement to the Committee on March 25, 1986, stated that there is no right to judicial review specified because it is available in any case. He also justified the lack of an appeal right to the courts on the basis that an appeal based on facts and law should allow the court to hear the matter entirely and takes away from the principles of informality and accessibility.

CELA submits that even though judicial review is available in any event, it should be included in the legislation. Also, other provincial statutes allow for appeals to the courts on a question of law, which is a much more limited right than contemplated in the Attorney-General's comments. We submit that appeals on questions of law be specifically allowed.

III. SUMMARY

It is CELA's submission that many changes are necessary to make Bill 34 conform to the principles of access to information that underlie CELA's brief.

Coverage must be broad. Not only must access be available to anyone who wants to ask for it without the necessity of giving reasons, but all government-held information must be available from all government entities within a very short time after the statute is passed.

Access must be free or so inexpensive that fees do not become a barrier to the implementation of the enactment's intention.

Judicial review should be specifically stated to be available, and an appeal from the Commissioner's decision based on a question of law should be allowed.

An access statute should have a minimum of clearly stated exemptions, each of which exempts only that information which cannot be released without causing a stated harm to a stated public interest. This implies that each exemption must be permissive rather than mandatory and must not be a class exemption. Each request for access can only then be evaluated on its own merit.

Because it is inherently difficult for any government entity to assess impartially a challenge to any of its decisions, an access statute must provide a broad impartial review mechanism applicable to all exercises of discretion by institutional heads.

An access statute must not encroach on or lessen any existing practices or legislation which give access to information at the time the statute is implemented. Rather, the statute should only effect those practices which limit access to information.

CELA believes that if the principles we have enunciated are implemented, the Bill will achieve the objective sought.

IV. RECOMMENDATIONS

1. Municipal corporations should be included in the schedule of designated institutions.

2. The Commissioner should have the power to review all decisions made by a head, not just those involving mandatory non-disclosure.

3. All decisions under the Act should allow for an appeal.

4. The mechanism of judicial review should be made available or the final decision on disputed access decisions.

5. Appeals to the courts on questions of law should be specifically allowed.

6. The term "grave environmental...hazard" should be withdrawn and replaced with broader language which does not limit access to information now provided under environmental legislation.

7. The access to information mechanisms should not encroach on existing practices nor limit access provided by other statutes.

8. The mandatory twenty year general protection for information should be replaced with a considered decision on the merits of each request regardless of the age of the information requested.

9. Disclosure of advice to government should be determined by specific exemptions rather than vague language of general application.

10. Law enforcement as an exemption to disclosure should be narrowed to pending litigation or criminal matters.

11. Transborder records with respect to environmental and health and safety issues should be made available.

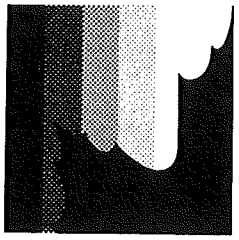
12. Discovery of trade secrets or information supplied in confidence or other broad exemptions should be subject to the overriding principle of "public interest," with the right to appeal by a challenging party.

13. Results of product or environmental testing should include the entire study.

14. There should be no exemption protecting testing results for a fee where the information is used to obtain government approvals or meet government requirements.

15. The ninety day publication protection should be withdrawn.

16. Only the direct cost of photocopying should be charged for an information request.



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