

A Reply to Mr. Robertson

by LINDA S. BOHNEN*

I shall preface my comments on Mr. Robertson's address by outlining the perspective from which I speak. As a lawyer working in the Office of the Ombudsman of Ontario, I have regular contact both with citizens whose problems can be resolved not infrequently simply by obtaining and conveying to them information they have been unable to obtain on their own, and with civil servants employed by the Province of Ontario who generate, process and utilize large amounts of information and whose employer, perhaps like the Government of Canada, is sometimes highly possessive of its stores of information. Since I also have more or less regular contact with Ministers of the Crown and Members of the Ontario Legislature, I think it can be fairly said that I have day-to-day contact with the groups that represent opposing interests in the debate on access to government information.

As you may know, the function of the Ombudsman is to investigate any decision or recommendation made, or any act done or omitted in the course of the administration of a governmental organization, that affects any person or body of persons in his or its personal capacity. It would be impossible to investigate complaints unless we were assured of access to information, a fact the authors of The Ombudsman Act fortunately foresaw by giving us certain powers to require the production of documents. Section 20(1) of The Ombudsman Act authorizes the Ombudsman to require any officer, employee or member of any governmental organization, who in his opinion is able to give any information relating to any matter under investigation, to furnish any documents or things in his or her possession or under his or her control that relate to the matter under investigation. The Ombudsman is also empowered to summon before him and examine under oath any complainant, any officer, employee or member of a governmental organization, and any other person.

I speak from the perspective of one who has learned in a very concrete way the importance of access to information. My experience in the Office of the Ombudsman has taught me that, in a very real sense, access to information is power; lack of access to information is powerlessness. I have seen that such powerlessness produces in a populace feelings of alienation and frustration which are not lessened when it is learned that some of the foremost advocates of confidentiality have been busy appropriating for themselves individual medical and income tax records. The natural reaction to this is cynicism.

In my opinion, freedom of access to government information is an essential measure of the health of a democracy. However, freedom of information legislation is not a panacea. I do not expect, for example, that, if such legislation were enacted in Ontario, all citizens could solve their administrative problems with the government and so render the Office of the Ombudsman unnecessary. Most citizens would simply not have the resources to utilize the legislation or the sophistication to surmise that certain information exists. For

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the man or woman on the street, especially those who live outside the capital cities, the Office of the Ombudsman would continue to play an important role in seeking out and digesting government information. For these reasons I predict that the greatest beneficiaries of freedom of information legislation would be the news media and organized public interest and pressure groups, but the benefits would also filter down to the whole of society.

Like Mr. Robertson, I believe that the subject of access to government information must be discussed in the context of the reality of the Canadian political culture. I might add that, for many of us, that reality has undergone a metamorphosis over the past few weeks as we have learned, almost daily, new and startling information about such matters as the conduct of the RCMP.

In April, 1974 Mr. D.F. Wall of the Privy Council Office wrote in an exhaustive report on the Provision of Government Information:

The complaint most often made and most intensely expressed concerning the provision of government information was that the practice of the Canadian government (although enshrined neither in principle nor policy) was to release only that information which was considered advantageous or harmless, and automatically to withhold the rest. The operative principle seemed to be 'When in doubt—classify it!' Virtually all of those interviewed strongly felt that this basic practice, and the attitudes of cautious, defensive and often self-righteous exclusivity which surrounded it, was the primary barrier to the fulfilment of the government's obligation to inform the public as to its intentions, policies and programmes.

Mr. Wall's conclusions are still valid today:

1. that, for lack of a coherent and comprehensive policy for the provision of information to the public, based on clear and acceptable principles, the process of government in Canada is becoming increasingly incomprehensible to those who are governed;
2. that the governmental function to provide information is in essence woven into and inseparable from the function of government itself. To govern is to inform—to be well-governed is to be well-informed; and
3. that, while the fulfilment of the public's right to information must be balanced against the fulfilment of its right to be protected against the abuse of information, the public also has a right to know the means by which that balance is struck.

In my opinion, while it is clear that certain types of information must be kept confidential for varying periods of time, the governing principle must be that the onus is on the government to justify withholding such information. The corollary of this principle is that there must be an authority separate and independent from government to determine whether information has been justifiably withheld and, if it has not, to order disclosure.

It is with these principles in mind that I turn to Mr. Robertson's lecture. I might say that I approach any discussion of confidentiality couched in general categories with a certain unease which stems from the suspicion that general categories can be used too easily as catch-alls for specific pieces of information that can be described so as to fit into those categories, but in respect of which

there is no compelling need for confidentiality. Therefore, I am happier discussing confidentiality in reference to very specific types of information.

In this connection, I raise for your consideration Bill C-255, The Right to Information Act, proposed by Gerald Baldwin in the House of Commons on October 15, 1974. The Bill proceeds from a general provision that:

Any Canadian, or any person not being a Canadian who resides in Canada, may apply to the government for a record made in the course of public business and the government shall, within a reasonable time thereafter, provide a copy of such record to any person who so applied or make such record available for inspection by him.

From this provision are excepted eight types of government records, the most important of which follow: those concerning the security of Canada; where any statutory or other law provides that such record or part thereof shall not be made public; made in the course of an investigation or inquiry in the administration of the law or in the course of obtaining or giving legal advice or in contemplation of a legal proceeding; where the information on record is of a confidential nature exchanged by public officials within the government or between public officials of the government and any other government and is expressed to be confidential; or where the information on record relates to the private affairs of any person or organization and, upon a balance of convenience between private and public interest to provide or to make the record available.

I do not suggest that Mr. Baldwin's list is perfect. For instance, his third exclusion on the basis of statutory or legal grounds is troublesome—notwithstanding that this sort of codification of the principle that the specific takes precedence over the general is frequently found in Canadian statute law. For example, this exception would, if I understand it correctly, have protected the confidentiality of the uranium cartel regulation. Even more troublesome is the fourth exclusion where there is a circularity of language; any document which the public official had the foresight to label confidential might well be excluded under this head.

Another approach to exceptions is contained in The Ombudsman Act. Section 21 states:

1. Where the Attorney General certifies that the giving of any information or the answering of any question or the production of any document or thing,
 - (a) might interfere with or impede investigation or detection of offences;
 - (b) might involve the disclosure of the deliberations of the Executive Council;or
 - (c) might involve the disclosure of proceedings of the Executive Council or of any committee of the Executive Council, relating to matters of a secret or confidential nature, and would be injurious to the public interest,The Ombudsman shall not require the information or answer to be given or, as the case may be, the document or thing to be provided.

2. Subject to Subsection 1, the rule of law which authorizes or requires the withholding of any document, or the refusal to answer any question, on the

ground that the disclosure of the document or the answering of the question would be injurious to the public interest does not apply in respect of any investigation by or proceedings before the Ombudsman.

Our Office has of course exercised restraint and responsibility in requesting information which would, for example, result in disclosure of Cabinet deliberations. Even so, it is significant that to date the Attorney General has never acted under Section 21. To my mind one of the virtues of Section 21 is that it imposes the duty of certifying on a single, clearly identified Minister, and not on each Ministry or Minister, or on the Executive Council or Cabinet itself.

My strongest disagreement with Mr. Robertson, though, is with his opinion that the courts should not, with one exception, adjudicate on when the government should be required to release information. In my opinion the courts—or a single court such as the Federal Court—are ideally equipped to perform this function because of their requisite independence from government, and their experience in statutory interpretation and in weighing conflicting interests of the type likely to arise in applying freedom of information laws. In addition, one hopes that any government could with confidence disclose to a judge the most sensitive information which, rightly or wrongly, it might be reluctant to disclose to an administrative agency.

In my view, Mr. Robertson conceives the existing and appropriate ambit of the courts much too narrowly. The courts often decide on issues which far transcend private interests—for example, in references on constitutional questions which do not even arise in the contest of private interests. Mr. Robertson also underestimates the importance of what he refers to as “idle” or “mere curiosity.” I believe the interest of the citizen in information compiled by his or her government is more substantial and valid than these words imply. I also suspect that most Canadians have more interesting things to do than to make requests for information in which they have no real interest.

Alternatively, I could accept an Information Commissioner or Auditor or Ombudsman being the adjudicator, provided his or her decision would be conclusive and binding on the government.

It is true that, in giving a court or an agency the power to make orders binding on government, the court or agency would in that limited respect be above government. But this has occurred before in Canada and would not, to my mind, disturb unduly our constitutionally established relationships of power and responsibility.