

Notes and Communications

Freedom of Information: The Role of the Courts

There are two requirements essential to effective freedom of information legislation whether broadly or narrowly framed. First, there must be an adequate index to the information; if the sources of information are unknown, informed requests for access cannot be made. Second, should the public servant or minister controlling certain information refuse to release it, the citizen seeking access must have a route of appeal. This second element was the subject of a public forum sponsored by ACCESS, A Canadian Committee for the Right to Public Information, in Ottawa on 6 December 1977. Entitled "Freedom of Information: The Role of the Courts in the Settlement of Government Information Disputes," the session consisted of presentations and rebuttals by four distinguished panelists: Richard Gwyn, Parliamentary Syndicated Columnist, the *Toronto Star*; Geoffrey Stevens, Associate Editor, the *Globe and Mail*; Anthony Westell, Professor of Journalism and writer, Carleton University; and Peter Grant, Chairman, Freedom of Information Committee, Canadian Bar Association. Grant and Stevens strongly favoured the courts as the final arbiter of access disputes, but Gwyn and Westell firmly disagreed, drawing a lively discussion from the audience.

The courts—or, for that matter, any outside authority with power to order the release of government information—are feared chiefly for the apparent threat to parliamentary tradition and to responsible government. Unlike the American constitutional system, wherein the courts arbitrate freedom of information disputes, Canada has rejected the separation of powers. That the courts should make executive decisions is repugnant to the Canadian ideal of Ministers of the Crown being responsible to the House of Commons as the supreme sovereign power in the name of the monarch. The courts exist to make judicial interpretations, not political decisions. To illustrate that this distinction was not a red herring, Westell sketched an example of the possible consequences of the court route. Should a citizen demand to see documents concerning the saltfish trade between Canada and the United States, and should the Minister of Fisheries refuse to release them because of possible embarrassment to a foreign power (one of the exempted records categories), the citizen would appeal to the courts. The judge would be faced not with the judicial role of interpreting a statute or other legal document, but with the political decision of whether the release would indeed embarrass a foreign power as claimed by the Minister. Should the judge order the release of the document, the Minister would lose responsibility for the administration of his department. The following scenario could develop: the United States, outraged by this breach of confidence and embarrassed by indications that it had perhaps secretly favoured Canadian rather than its own fishermen, cuts off the importation of Canadian saltfish into the United States. As a result, thousands of Canadian workers become unemployed and millions of dollars of export trade are lost. The outcry over these events would clearly be political and directed at the Minister, even though his

responsibility for the incident had been removed. This situation would destroy democracy, for the country would be ruled by judges rather than by the elected representatives of the people.

Ideally, therefore, the House of Commons should review any minister's refusal to grant access, just as it reviews all other executive actions. But, during periods of majority rule when individual Members of Parliament have very little independence, access appeals would be decided according to party lines rather than upon their merits. After alluding darkly that Guy Fawkes would be quite justified in blowing up such a parliament as unworkable, Westell suggested the establishment of an Information Auditor reporting directly to Parliament as does the Auditor General. To preserve ministerial responsibility, the Information Auditor could not compel the production of restricted or exempted documents but, like the Auditor General, his annual report exposing the excesses of certain ministers would carry great moral and political clout, resulting in a broader interpretation of freedom of information legislation.

Gwyn, a former senior Ottawa mandarin, advanced more cynical and perhaps brutally realistic reasons for avoiding the court route. If ministers and bureaucrats could be forced by an independent outside authority to produce documents, they would react by deliberately hiding important information. Phantom registry systems and duplicate files—one public and innocuous, one for real decision-making—would soon appear. Top secret or national security classifications would be applied to any document having even the slightest degree of sensitivity, as well as those which were merely politically inexpedient. The horrific consequences for government administration itself, let alone for access requests or eventual archival acquisition, can be imagined. The entire issue would be approached by bureaucrats and ministers as a political rather than a moral or legal question. Political pressure from an Information Auditor similar to that applied by the Auditor General would produce results; outside authority interfering in the executive process would produce evasion and delay.

Grant and Stevens rejected these arguments. Bureaucrats and ministers cannot be trusted to act responsibly. Both are self-serving; neither wants any information possibly scandalous or even embarrassing released to the public, for this would make their lives more difficult. They fear the court route not because this procedure would undermine ministerial responsibility or public service neutrality, but because they know full well that a judge would decide against them should their evidence be weak. Celebrated examples such as the Yellowknife radiation scare, RCMP scandals, and the uranium cartel demonstrate that information is often withheld because it is politically embarrassing to the government, not because it falls legitimately under one of the exempted records categories. Mandarins and politicians are terrified of the court route because they know that judges would not tolerate purely political considerations interfering with the operation of freedom of information legislation. Furthermore, to assert that under such a system the courts would be entering the realm of politics or that a judge is not equipped to assess executive decisions is nonsensical. Of course the judicial review is political, but so is every other court case dealing in any way with constitutional law or any action or function of government. To claim that a judge cannot weigh the merits of both parties in an access dispute over saltfish implies that he cannot weigh conflicting evidence in a murder trial. And, finally, the use of the courts in this manner is not an alien American practice, but is founded upon British precedent.

The panelists agreed that one common misconception, perhaps fostered by the prominence of journalists among those lobbying for freedom of information, is that freer access will benefit primarily those working in the media. Faced with short deadlines, the need for snappy topics, and the inability to pursue research subjects in depth over time, journalists are less likely to utilize the provisions of a freedom of informa-

tion act than individual citizens, special interest groups, and business. Consumer, native, environmental, and civil libertarian organizations need access to government documents—produced, after all, by their own tax dollars—in order to study government policy and practice. Only the published results of such studies will command the attention and comment of journalists and Opposition MPs. In the first instance of applying for access, these groups and individuals need the protection of a powerful, independent arbiter of access disputes, not the fragile attention of some official who is subject to the very minister whose policy is under assault. Therefore, only the courts or some Information Commissioner empowered to release documents can render a freedom of information act more than political window-dressing.

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Nova Scotia's Freedom of Information Act

Nova Scotia has just passed an Act Respecting Access to the Public to Information on File with the Government (Acts of 1977, Chapter 10, which became law on 19 May 1977), which may be cited as the Freedom of Information Act. The opening clause of the preamble has a ring which Joseph Howe would have appreciated:

Whereas since 1848 the people of the Province of Nova Scotia have had responsible government whereby the members of the House of Assembly and the members of the Executive Council are responsible for their actions to the people who have elected them through regularly held elections . . .

The categories to which the act applies include such formal documents as staff manuals and instructions to staff which affect the public; rules of procedure and forms in current use; statements and interpretations of general policy; departmental annual reports, programs and policies; final decisions of administrative tribunals; and personal information contained in files pertaining to the individual making the request. Personal information here refers to "information respecting a person's identity, residence, dependents, marital status, employment, borrowing and repayment history, income assets and liabilities, credit worthiness, education, character, reputation, health, physical characteristics or mode of living." Further clauses allow an individual to have errors in his or her personal record corrected and to limit the use of the information to the purpose for which it was provided and so prevent the use of such information by another department without the consent of the individual. If publication of information is contemplated at a future date or such information is already published, the applicant shall be so informed.

If access to information is not forthcoming, then a formal written request must be submitted. A reply should be received in fifteen days; no reply within this time constitutes a denial. However, a denial in writing with an explanation must follow. There is machinery for appeal to the Minister and as a last resort to the House of Assembly. So far there have not been any remarkable cases under the Act and the Public Archives of Nova Scotia remains unaffected by it. Documents freely available before the passage of the Act remain so.

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