

Book Reviews

Legislation on Public Access to Government Documents. HON. JOHN ROBERTS. Ottawa: Minister of Supply and Services Canada, © 1977. 39 p. ISBN 0 660 01074 7 \$2.00; \$2.40 outside Canada. (Text in English and French; separate title pages and pagination.)

Freedom of Information in Canada: Will the Doors Stay Shut? T. MURRAY RANKIN. s.l.: Canadian Bar Association, © 1977. 155 p. Free.

"Open government is the basis of democracy," proclaims the ringing first sentence of the Federal Government's "Green Paper" on public access to government documents. But quickly thereafter, "the public interest" is introduced and frequently cited as the litmus paper to test any proposal for freer access to government records. This concern for the public interest on the part of government is indeed commendable, but would have been more reassuring had the term been clearly defined. Through over-use and abuse, "the public interest" has become identified with those regimes of the political right and left demanding complete disclosure of the affairs of individual citizens while preserving the inviolability of government information for such broad categories as "national security" and "the confidentiality of advice" tendered by public servants. In the Green Paper, the public interest is advanced far too glibly in defence of ministerial responsibility and public service neutrality in order to maintain a narrow interpretation of access to government information.

The Government recognizes that it controls "perhaps the most important single institutional repository of information about our society and its political, economic, social, and environmental problems" (p. 3). It also firmly believes in "the basic principle that since such information is developed at public expense, it ought to be publicly available wherever possible" (p. 3). Yet the Government must restrict access to those documents which might be used illegitimately or unfairly, for example, documents which might permit the infringement of the individual's right to privacy.

Although the Green Paper does make passing mention of the principle of privacy, this important issue is not fully discussed. Since the Human Rights Act covers the privacy aspect, the Green Paper deliberately avoids consideration of the question of access to Government documents containing personal information. This separation of the two basic principles involved—the right to know and the right to privacy—is unfortunate since the two are closely related. The Americans have found some conflict between their Freedom of Information Act and their Privacy Act; some American Government departments, for example, cite the Privacy Act when refusing access to files.

Present classification practices within the public service are questioned by the Green Paper. By presenting clear guidelines authorizing release of information, the Government hopes to end excessive use of such classifications as "secret" and "confidential." Yet it is precisely this lack of clear guidelines which casts doubt on the Government's intentions regarding access. Why does the Government state that exempted categories of documents should be few in number while enumerating nine such categories, some of which are so general as to permit even the most inexperienced bureaucrat to withhold information. In fact it is difficult to imagine what documents might not be exempted.

There is little point in passing access legislation without providing a satisfactory review process. The Green Paper favours retaining the system of ministerial responsibility whereby the Minister has final authority concerning access to government documents. However, the Government seems prepared to accept the establishment of an "information auditor" who would submit a report to Parliament on the validity of departmental decisions. This option is unlikely to win acceptance among those who argue for some outside, non-political individual or body to serve as an impartial adjudicator. Two other options mentioned by the Green Paper have already won acceptance outside Government: the independent commissioner empowered to release documents and—the solution favoured by the Canadian Bar Association in particular—formal judicial review. The latter alternative the Government feels would undermine the concept of ministerial responsibility, add greatly to the caseloads of the courts and be expensive for the appellant.

In estimating the costs of search, review and reproduction that will be incurred by the departments in processing applications for access, the Green Paper makes a not altogether convincing comparison with the American experience. After reaching a figure of fifteen million dollars for the total cost to all departments in one year, the Green Paper argues that this might be reduced some 30 percent by "allowing for fundamental differences in American and Canadian politicolegal traditions and attitudes" (p. 26). What these differences are and how they would be reflected in the costs of processing applications are not explained. Neither is what the Green Paper terms "frivolous applications" which the Government hopes to exclude by charging a standard ten- to fifteen-dollar fee for each request. This amount does not appear unreasonable to the Paper's authors, although two paragraphs earlier, concern is expressed that any charge over \$150 "would preclude on economic grounds the participation of the great majority of Canadians" (p. 26). Surely access to Government information should not be dependent upon one's income!

In August, 1977 the Canadian Bar Association adopted at its annual meeting the research study prepared for it by Professor T. Murray Rankin of the Faculty of Law, University of Victoria. Rankin dismisses the Green Paper as a milksop offered by the Government to those Canadians who believe that citizens in a free society have the right to know how their Government is spending their money and what agreements are being entered into on their behalf. The Green Paper "represents a passionate attempt to avoid any meaningful legislation" (p. 2). Rankin believes that the Government is deliberately misleading Canadians by suggesting that ministerial responsibility and public service neutrality are in jeopardy if any approach other than the Government's is adopted. He objects to "the paternalistic tradition of official secrecy in Canada" (p. 2) and its possible perpetuation by legislation arising from the Green Paper.

Rankin's excellent discussion of the evolution of laws and principles governing access in both Canada and the United States is only spoiled by his overly legalistic presentation. One presumes that since the Bar Association is giving away free copies, it in-

tends that the publication should reach as wide an audience as possible. Only the committed though will do more than read the Introduction and the final chapter on the Green Paper which are, incidentally, written in a strident tone unlike the rest of the volume. The genesis of the book was a study Rankin did at Harvard Law School. Unfortunately, instead of completely rewriting the earlier study and adding the final chapter, he did only the latter. However, the reader's patience in wrestling with legal terminology is rewarded by a greater appreciation of the present barriers to access including the doctrine of standing, crown privilege, Section 41 of the Federal Court Act, civil service oaths of secrecy and the classification system—all of which permit the Government to decide who shall have access.

For those not already familiar with the American Freedom of Information Act, Rankin gives a useful description of its evolution and implications, which serves to introduce his thesis that the concept of judicial review is directly applicable to the Canadian situation. Those who do not agree will be hard pressed to refute Rankin's arguments that "the existence of an independent Judiciary has long been a fundamental principle in both England and Canada" and that "no constitutional, legal or practical impediment stands in the way of judicial involvement in the adjudication of freedom of information questions" (p. 128). Indeed, Rankin argues that there is no alternative social institution in Canada capable of scrutinizing sensitive Government documents.

Rankin effectively questions the motives of the Government, reasoning that were it really serious about passing effective access legislation, more thought would have gone into the preparation of the Green Paper. By stressing cabinet policy deliberation in talking about documents, the Government diverts attention from "the factual briefs, reports, background papers and other similar Governmental documents" which are the targets of those wishing access. While one may disagree with Rankin's attribution of questionable motives to the Government in presenting the Green Paper, his book has made a valuable contribution to the discussion of access legislation.

Both the Green Paper and Rankin's study should be required reading for archivists working with government records. Any legislation permitting freer access to federal, provincial, or municipal documents will undoubtedly result in more records being transferred to the appropriate archives. In addition, some records now in archives will certainly be the target of citizens utilizing the new legislation. Archivists therefore should anticipate the possible implications of such legislation, not only in terms of space, financial and staff requirements, but also in terms of their own ethical stance on this issue.

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Comments on the Green Paper on Legislation on Public Access to Government Documents and Recommendations for a Model Bill on Freedom of Information in Canada. A submission by the CANADIAN BAR ASSOCIATION to the Standing Joint Committee on Regulations and Other Statutory Instruments. Prepared by the Special Committee on Freedom of Information of the Canadian Bar Association. Ottawa: Canadian Bar Association, 1978. 31 p.

Of the two parts of this submission, the "Comments" and the "Recommendations," it is the latter which is the most useful. The comments are basically a reiteration of