THE *ACCESS TO INFORMATION ACT*:

10 YEARS ON

The Information Commissioner of Canada
112 Kent Street, 3rd Floor
Ottawa, Ontario
K1A 1H3

(613) 995-2410
1-800-267-0441 (toll-free)
Fax (613)995-1501

Cat. No. IP34-5/1994
ISBN 0-662-61386-4

"It is a question of power and we all know that those who have information are those who wield real power. But in a democracy such as ours, power and information must be widely shared...[Government] information belongs to the people of Canada, unless there is a very specific and fundamental reason for keeping it secret."

— The Right Honourable Joe Clark

"...a democracy cannot function unless the people are permitted to know what their government is up to."

— Henry Steele Commager

Of the world's 187 independent countries, only 12 give citizens the legal right to government information. Canada is one of the nations that has taken the step to open the filing cabinets and databases of its bureaucracy.

Just over a decade ago, Canada joined the ranks of this small, enlightened group of Western countries. The *Access to Information Act* and its companion legislation, the *Privacy Act* came into force on Canada Day, 1983. With this move, Parliament granted Canadians and landed immigrants the right to view their personal government-held records, and the legal right to all other government-held information, subject to specific and limited exemptions.

While 10 years is a modest milestone in the life of any legislation, it is an appropriate occasion on which to reflect upon the Act and how it has affected legal, social and administrative landscapes in Canada. A number of questions emerge in this process. How did the Act come into being? How has it functioned? Who has used the Act and to what ends? Have we come any closer to prying open the iron gates of administrative secrecy? This brief history will attempt to answer these questions, as well as to raise a few about what may lie ahead on the information highway.

CANADA'S INHERITANCE:
THE PUSH AND PULL OF PARLIAMENTARY SOVEREIGNTY

Canada was not the first, nor even the fifth, country to grant access to government information. Sweden, long considered an enlightened homeland of information policy, enacted its law in 1766 in the form of a freedom of the press act. The law was enshrined in the country's Constitution in 1949.

Sweden's example, and the rise of participatory democracy, eventually spurred other governments to place administrative secrecy and information policy on their political agendas. In the last quarter century, western countries have experienced mounting pressure from academics, journalists, and public interest groups challenging government secrecy. They have called for a public standard of accountability from government officials for the dizzying number and import of decisions being made on the public's behalf. This demand for freedom of information legislation brought legal mechanisms for information sharing to Finland in 1951, the U.S. in 1966, Denmark and Norway in 1970, and France in 1971.

Canadian advocates of the right-to-know were strongly influenced by the American legislation. Soon after the U.S. Freedom of Information law was enacted, several members of Parliament introduced private member's bills in the House of Commons to propose a counterpart Canadian law. Yet it would be another 17 years before Canadian information legislation would come to pass.

In fact, a handful of provinces would enact an early form of freedom of information legislation before the federal government. Nova Scotia became the first province, and the first jurisdiction in the Commonwealth, to pass freedom of information legislation in 1977. New Brunswick's *Freedom of Information Act* was passed in 1978, and Newfoundland and Quebec followed in 1981 and 1982, respectively.

In light of Canada's political heritage, the parliamentary system with its dedication to ministerial responsibility and a public service which inherited the British penchant for secrecy, foot-dragging is comprehensible. Another two Commonwealth countries with parliamentary systems, New Zealand and Australia, were also dawdlers, gaining information legislation in 1983. Britain has been examining such legislation since 1911, on and off, mostly off, and has yet to enact a law, though one has began a plowy

legislative progress.

Canada's case is informed by a particular set of circumstances: no radical, revolutionary break from the mother country and the pull of dual attractions, aristocratic, hierarchical roots and American liberal and egalitarian ideals.

The entrenchment of fundamental rights and liberties in the Charter of Rights and Freedoms in 1982 has had a widely acknowledged impact on government and the courts. To a lesser extent, the information and privacy laws have been recognized as mechanisms in defense of individual rights. In 1986, the Justice and Solicitor General parliamentary committee reviewed these laws and produced a report entitled, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. The all-party committee described the *Access to Information Act* and the *Privacy Act* as "potential instruments with which to strengthen Canadian democracy" finding that the Charter and the two Acts "represent significant limits on bureaucracy and have provided a firm anchor to individual rights."

Perhaps self-consciously, however, Canadians have often defined their political culture by the ways in which it differs from and resists the American fact; especially the strand which weaves back to John Locke's principles of popular sovereignty. This system invests "the people" with sovereign power, and they, in turn, delegate it to government. This brand of popular democracy identifies administrative secrecy as a denial of responsibility by those in positions of powers.

Canada, on the other hand, has inherited parliamentary sovereignty, in which sovereign authority is viewed as an attribute of those who wield the powers of government, namely, the Prime Minister and Cabinet. Government tradition holds each minister responsible for the actions of his or her department; broad access, it was feared, could dilute that responsibility and make ministers less accountable to the public. This subtle, yet important, difference has deeply shaded the discussion of information policy in this country.

Moreover, the *Official Secrets Act* was scarcely a harbinger of openness. This was the law designed to prohibit and control access to and disclosure of sensitive government information. What constituted an "official secret" was not helpfully defined. While this legislation was largely intended to combat espionage and to protect national security, official secrets could be considered broadly as any

information of an official character. They could even include the findings of federal inspectors who discovered ground beef padded with pork or inspector's reports which found underweight bags of fertilizer. Information that should have belonged to the public remained firmly in the grasp of government. It is understandable why open government in Canada, after 10 years of access to information, is a concept still in its early childhood. Canada's first Information Commissioner, Inger Hansen, once commented that it may take longer than a decade "to turn around the ship of state".

A Kafka-esque anecdote illustrates the penchant for secrecy taken to a harmless extreme: a secretary in the Privy Council Office grew so accustomed to stamping "secret" on documents that she imprinted that stamp on a notice of the office Christmas party. When the offending memos were left lying on desktops, security inspectors promptly gathered them up and lectured their owners about their inattention to security. There is no assurance that the penchant was always so harmless.

Another wall the pre-Act information seeker had to scale was the appeal process. Applicants who were refused information by the federal government could challenge the decision in the Federal Court of Canada, an onerous and frustrating and expensive process. Applicants shouldered the double burden of convincing the court that they had suffered harm because of a denial of access and of providing evidence that the government official who had refused to release records was in breach of a statutory duty to do so. Most statutes made no mention of a requirement by officials to respond to requests for information from the public: this task quickly became one tailored for Sisyphus.

Professor Donald Rowat of Carleton University, an early advocate of open government, put it wryly when he described this style of government as "based on the premise that we must trust the government and hope for the best". It was, he said, "entirely too paternalistic a concept for democracy."

THE GENESIS OF THE ACT: THE COMPETING VISIONS

The early years, the years of the genesis of the Act, could be subtitled: of advocates and critics. Competing visions of what open government should mean, and what a Canadian information policy

should look like, surfaced and frequently clashed for two decades. Was the law to be a window or merely a frustrating peephole into the regulatory and bureaucratic processes of government?

The legislative history resembles an odyssey. The legislation had its dogged champions, notably, Gerald or "Ged" Baldwin, as the father of access to information in Canada. Mr. Baldwin introduced a private member's bill in 1969, and re-introduced it in subsequent sessions until 1974, when his bill was referred for study to the Standing Joint Committee on Regulations and Other Statutory Instruments.

This Conservative MP believed strongly that politicians and the bureaucracy need to be accountable to their constituents, a position that may have developed during his years fighting for civil liberties as a frontier lawyer in Peace River, Alberta. With a nod to Western populism, he subscribed wholly to the tenets of popular sovereignty.

As far as Mr. Baldwin was concerned, the right to govern stemmed from the people. His populism was reinforced by action: he formed the League for Parliamentary Accountability and paid for advertisements in publications around the country, urging people to demand more accountability from their elected representatives. His quest for freedom of information policy in Canada became a personal crusade.

Mr. Baldwin was responsible for the creation of ACCESS, A Canadian Committee for the Right to Public Information, Ottawa's first effective lobby group for access to information. With Senator Eugene Forsey, he was co-chairman of the first all-party committee for freedom of information. Yet, Mr. Baldwin was not the first parliamentarian to speak of freedom of information in the House of Commons. The distinction goes to Barry Mather, a New Democratic Party MP, who introduced the first freedom of information bill in a Canadian legislature in April, 1965.
Mr. Mather somewhat loftily described his bill as an attempt to enact 18th century utilitarian philosopher Jeremy Bentham's basic parliamentary rule that public affairs must be conducted publicly. His first bill died on the House of Commons Order Paper, never receiving second reading. In each and every parliamentary session between 1968 and his retirement from the House of Commons in 1974, however, Mr. Mather re-introduced identical legislation. On four separate occasions, his bill even reached second reading, though never, of course, survived beyond this stage.

Champions of access legislation could be found elsewhere, particularly the university. Donald

C. Rowat, a professor of political science at Carleton University, was one of the strongest advocates. He tried to mobilize support for the policy in the 1960s, arguing that administrative secrecy was incompatible with modern democracy. He was joined by law professor T. Murray Rankin of the University of Victoria who wrote an important Canadian Bar Association study entitled, *"Freedom of Information in Canada: Will the Doors Stay Shut?"*

Lobby groups, representing organizations ranging from the Canadian Bar Association, which published a model bill, to civil liberties associations, to public interest and environmental groups, pushed hard for legislation.

The cause was somewhat advanced in 1968 after the election of Pierre Trudeau as Prime Minister. In the early 1960s, Mr. Trudeau, as an academic, had advocated transparency in government and there were hopes that he would support greater openness. The best the first Trudeau administration produced was the final report of a federal task force on government information. It proclaimed "the right of Canadians to full, objective and timely information and the obligation of the State to provide such information about its programs and policies."

The commission gave support to granting a limited number of persons controlled access to very specific files and documents. The wider access called for by researchers and academics was not endorsed. The idea of administrative secrecy was still deeply entrenched and the prevailing attitude was that all that was needed was a rationalization as to why it should continue.

The pressure from Opposition MPs, pressure groups and academic communities continued, and in 1973 the next Trudeau administration tabled official guidelines, "to enable members of Parliament to secure factual information about the operations of government and to make public as much information as possible." Once again such rules seemed to be a half-hearted effort to counter government secrecy.

In 1974, Ged Baldwin's bill received second reading in Parliament and was sent off to a committee for further examination. With a mandate to hear evidence from Members of Parliament and the public, the Standing Joint Committee on Regulations and Other Statutory Instruments became the central forum for discussion and debate of freedom of information legislation in Canada. Between February 1975 and June 1978, the Committee heard evidence from academics, media representatives,

public servants, parliamentarians and public rights advocates. Wider public interest coalesced around the issue after the committee conducted a series of public hearings in 1974 and 1975, after which it tabled a report approving in principle the concept of freedom of information legislation.

Another step forward was the release of the government's Green Paper, *"Legislation on Public Access to Government Documents"* in 1977. While the paper considered several options for access legislation, it placed heavy emphasis on protecting the policy-making process. The release of policy documents, it was argued, would threaten the neutrality of the civil service and the tradition of ministerial responsibility.

The real turning point came with the election of Joe Clark's minority Progressive Conservative government in the spring of 1979. Mr. Clark had made access legislation a campaign promise. True to its word, the government introduced Bill C-15, the *Freedom of Information Act*, which established a broad right of access to government records, an elaborate scheme of exemptions, and a two-stage review process. The legislation was debated at second reading at the end of November and was referred to the Standing Committee on Justice and Legal Affairs. Within days the minority Conservative government was unseated; the legislation died on the order paper.

The newly-elected Liberal government could hardly do less than Joe Clark. It announced that freedom of information and privacy legislation would be introduced to Parliament in 1980. Thus, almost 15 years after the first private member's bill, Bill C-43 was introduced. It received second reading in January 1981 and was referred to the Standing Committee on Justice and Legal Affairs.

No significant amendments were made as a result of these hearings. During the review, however, Prime Minister Trudeau expressed concern that the access bill would threaten full debate in Cabinet by giving courts the power to review Cabinet memoranda. Eleventh-hour amendments created the Act's exclusion of Cabinet documents and ensured that court review powers did not extend to Cabinet material. Ministerial responsibility was to prevail.

Not surprisingly, there was protest from Opposition MPs and journalists. Many believed the bill was less tilted towards disclosure than it should have been. Other MPs were appeased by the fact that the legislation was to be reviewed three years following its implementation. Some were simply glad that

any form of the legislation was nearing passage.

The Canadian law's exemptions against disclosure of information were more numerous and more broadly framed than equivalent exemptions in the U.S. access legislation. Four mandatory and nine discretionary exemptions imposed restrictions on access to Canadian government files. The government retained absolute privilege on Cabinet confidences.

The Minister of Justice was given responsibility for access to information policy matters while the President of the Treasury Board was charged with implementing and administering the Act across government.

The *Access to Information Act* was granted Royal Assent in July, 1982 and came into force on July 1, 1983. The public now had the legal right of access to government records in some 150 federal departments and agencies. Government institutions covered by the Act appointed access to information co-ordinators who had the daunting challenge of balancing loyalty to their departments with the public's right to know.

Perhaps the most effective, and unprecedented provision in the legislation moved the burden of proof from the applicant to the government. Anyone refused information from a government institution after making a formal request under the Act had the right, within one year, to file a complaint with the Information Commissioner. The Commissioner, appointed for a seven-year term by an order-in-council, upon resolution of both Houses of Parliament, was made responsible to Parliament, not to the government. He was an independent official with strong powers of investigation although no power to order the disclosure to requesters of withheld records.

THE COMMISSIONER'S OFFICE: THE "CONSCIENCE OF THE SYSTEM"?

> *"The commissioner is the key to making access to information an effective reality for every Canadian...I expect the office of the Information Commissioner to become over time more than an information ombudsman, more than an access advocate. I expect it is to be the heart of the system."*
>
> — Francis Fox, Minister of Communications

Though not speedy in establishing access to information rights, Canada has distinguished itself as one of the first jurisdictions to establish an Office of the Information Commissioner. While other access laws provide for some form of appeal, Canada is among the few to have an umpire's office devoted solely to resolving access questions.

This office may indeed be the heart of the system; it is certainly the nerve centre where the complaints of dissatisfied information seekers send messages about the health of the legislation. Unlike the U.S. system, in which the only course of appeal is through the courts, the Information Commissioner uses his good offices in good faith negotiations. As well as being a mediator, the Commissioner is also Parliament's eye on the Act, reporting to Parliament once a year.

Order powers, however, are not part of his repertoire; the classic ombudsman possesses influence and moral suasion rather than power. While he is able to compel public servants to hand over information for review, he can only make recommendations, not enforce decisions as to whether information should be released. Critics of the legislation take aim at the Commissioner's seeming lack of power — his inability to compel release of documents. The virtue of the ombudsman's approach is, however, that it allows for a less adversarial, less legalistic more informal style. The test of a constructive relationship with government institutions is whether it results in the release of more information than under a régime with the power to enforce orders.

The bureaucracy of the Commissioner's office has been kept spare: a staff of 32, mostly investigators who review complaints. Of the approximately
9,000 yearly requests, it is estimated that one in every nine results in a complaint.

A final arrow in the federal commissioner's quiver is his power to seek a Federal Court review if he believes the information seeker has been improperly denied access. The arrow was drawn and fired on more than 50 occasions during the seven-year tenure of the first Information Commissioner, Inger Hansen. Perhaps such frequent resort to the Court was inevitable at the beginning. But the results were mixed.

Some of the Court decisions provided important legal precedents for the interpretation of the

Act. Several decisions have affirmed the purpose clause of the Act, in favour of disclosure. In another instance, Mr. Justice Francis Muldoon ruled that the Information Commissioner can take agencies to court for not complying with time limits and for seeking extensions without good cause.

But litigation has been costly and slow depleting resources and goodwill. Nor have decisions consistently translated into action in the bureaucracy; lengthy delays persist. Worse, some court decisions weakened rather than strengthened the Act as an instrument of openness.

The current Commissioner, favouring persuasion over litigation, has brought just five cases to the courts in four years. Notably, then Prime Minister Mulroney as head of Privy Council Office was taken to court when he refused to release the results of six nation-wide opinion polls reporting public attitudes about national unity and the Constitution. The judge eventually ruled in favour of disclosure; yet, in a frustrating turn of events, the ruling came after the Constitutional referendum and a day after the government had itself released all the information in dispute.

IN COURT AND OUT

The first Federal Court case was decided more than nine years ago, in 1984. Since that time, 60 judgments accompanied by reasons have offered judicial interpretation of the Act's exemptions, review provisions and access procedures. The court may order disclosure whenever it finds the institution was not authorized to refuse access. The Act also contains special review provisions for third parties who have supplied commercial information to government. The government institution must give notice whenever it intends to release third-party information that might be protected by the commercial information exemption.

Federal Court judges have ordered disclosure of some of the following types of commercial information: information about a company's application for a federal government grant or benefit; details of the winning tender for a government contract; information about the government approval of a clinical drug; safety information gathered by government inspectors about an airline company. Few decisions have been in favour of withholding information under the exemption.

The most widely publicized of these cases concerned the release of meat-inspection reports. When the news media reported that several consumers had eaten small bits of metal in their hot dogs, a reporter teamed up with a public interest researcher to obtain the federal inspection reports on more than 30 meat-packing plants. After four years and an appeal, the court upheld a ruling that said the reports must be revealed to the public. The court rejected attempts by nine companies to suppress the reports which the companies argued would be mishandled by journalists.

Judicial review has consistently affirmed the basic tenets of the Act, frequently in decisions which interpreted the Act's purpose clause. In an important 1984 decision, *Maislin Industries Ltd. v. Minister for Industry, Trade and Commerce*, Associate Chief Justice James Jerome of the Trial Division ruled in favour of disclosure, citing the mission or purpose of the Act to "codify the public's right of access to government education," and affirming the burden of proof must rest on "the party resisting disclosure" the government.

Decisions handed down by the Federal Court can, of course, be appealed to the Federal Court of Appeal; this option has been rarely used. The first Federal Court of Appeal decision dealing with the Act came five years after the Act was introduced. The successful appeal resulted in the Canada Mortgage and Housing Corporation being ordered to re-examine and release minutes of management meetings.

THE EARLY YEARS OF THE ACT: GREAT EXPECTATIONS TO VIRTUAL REALITY

The federal government's 1977 Green Paper projected an estimated 70,000 formal requests each year for government records under any freedom of information law. The projections were highly inflated. In the ten-year experience, 70,385 requests have been filed. Sheer volume is not the sole test, however, of the Act's usefulness. Simply by existing, the legislation is the cause of uncounted informal releases of information.

These 70,385 requests have uncovered, with the prodding of the Information Commissioner or often the courts, a surprising variety of information, from politicians' travel expenses and Cabinet minutes on the October Crisis, to meat inspection reports and information about forestry practices.

Information requesters come from all quarters. The most active, in order of frequency, are: business, individual citizens, media, special interest groups, academics, and lawyers. The annual number of access requests has increased steadily during most of the Act's short history. There were 1,523 requests filed in the Act's inaugural year; by 1990-91 that figure had increased to a high of 11,093. For as yet unaccountable reasons, perhaps more informal release of records, use of the Act has levelled off with requests decreasing to 10,376 requests in 1991-92 and 9,729 requests as of March 1993.

While the media's access efforts capture public attention, businesses are by far the greatest users. According to 1992-93 statistics, about 43 per cent of all requests came from the corporate sector, a percentage remaining stable over the years. Businesses file 4,000 to 5,000 requests yearly; many of them, not surprisingly trying to determine the missing ingredients in their bids for government business or to find out what government needs and wants. The Department of Supply and Services receives the most access "traffic", averaging 20 per cent of all requests. Revenue Canada also receives a number of requests from businesses, often from those wanting to see their own files after an audit or after having goods seized at the border.

Unlike media requesters, businesses are not anxious to propel their access findings into the public realm; it is rare that the Information Commissioner or anyone else hears about these cases. Among those which do surface, there is a strong indication of growing corporate interest in information

supplied by private firms to governments, information about drug products, airlines, pesticides, weapons, prosthetic devices, food products, service contracts, computer contracts, and tendering procedures.

Some critics contend that this latter use of the Act clashes with its lofty principles: a better educated citizenry and a more knowledgeable electorate. Yet a business person is entitled to receive and to use such information for any purpose, including self-interest. There can also be a good measure of public interest in business users acquiring information which could lead to more competitive pricing for government contracts. Business checking on business can help consumers.

While the Act enshrines the principle that records should not be disclosed if to do so would harm a private business, there is an exception to this rule. Business interests can take a back seat when public health, public safety or protection of the environment are at stake.

The second largest group of requesters is the general public, the private citizen. The 1992-1993 statistics report that 39 per cent of applications were made by individuals. This statistic contradicts the notion that all but the experienced and privileged access user can make use of the law.

Cases have emerged during the past decade which show individuals using the Act to unearth information of personal import and, not incidentally, exposing wrong-doing. A Canadian Forces warrant officer used the Act to obtain a military report concerning an explosion that killed two of his children. A report revealed that the explosion occurred after a backhoe operator, working without supervision, ruptured a gas line near the man's home at Canadian Forces Base Edmonton. The warrant officer brought two law suits against the federal government in light of the report.

Of the thousands of formal requests filed since 1983, roughly 20 per cent have come from journalists and special interest groups. While journalists themselves comprise on average only nine to 10 per cent of access seekers, the information they request often reaches a broad section of the population through reports in the news media.

Some journalists find the access procedures cumbersome and delays too lengthy. They are also some of the harshest critics of the legislation. One cynical journalist has said that a single access request

can yield, at worst, two stories — one about the requested information and one about the complaint that may accompany it. But it is worth remembering that the Act was not designed to meet with the occupational needs of journalists or any other group.

Many journalists who repeatedly lodge complaints are, however, becoming very good at exercising their rights under the Act and in discovering ways to make the procedures work. Some reporters have investigated the capacity of the Act to function as a journalistic tool. Kirk LaPointe, Ottawa bureau chief for the Canadian Press, is a longtime user and sometime critic of the Act. He has described it as both a "better tool of history than of journalism" and a "last resort for reporters."

The most recent statistics may bear him out: there has been a decline in the last two years in the number of journalists making use of the Act. In 1991-92 media requests made up 9.7 per cent of the total requests; these statistics had remained fairly constant through the years. But in 1992-93 journalists represented just 7.6 per cent of the 9,729 requests.

While Mr. LaPointe's observations may be accurate, the Act *has* made available records and information that would have been largely hidden from journalists and subsequently the public view. In the little blue journalistic bible, the *Canadian Press Style Guide*, Mr. LaPointe has compiled a useful list of some of the records that are available including: basic facts on just about anything the government does; public opinion research, including surveys of the public, focus groups or experts; audits, the details of spending practices and assessments of the effectiveness of departments and programs; memos and reports, some of which may have crucial information deleted; and bureaucratic expenses covering such items as the costs and contractual details for consultants, hospitality travel and conferences.

These last two items of "what you can get" describes stories which could be described as, "expense-account" journalism — airing some of the free-spending laundry of public officials. Useful as such exposure may sometimes be, of greater import are the hundreds of stories that have entered the public domain as a result of the Act, stories that reveal consequential and vital government-held information.

Just a sampling of that information: Cabinet instructions to the Royal Canadian Mounted Police on obtaining information about separatist activity in Quebec and about the October Crisis in general;

memos and letters dealing with the admission to Canada of the former Iraqi ambassador Mohammed Al-Mashat; background studies provided to Cabinet on the economic impacts of free trade; Transport Canada audits which showed problems at Air Ontario, the operator of a 1988 downed aircraft that killed 24 people; the award of the $1.4 million CF-18 maintenance contract to Montreal-based Canadair Ltd., despite a superior bid by Bristol Aerospace of Winnipeg; an environmental study which warned that a large oil spill could be expected in or near Canadian waters every year or two, with coastal British Columbia facing close to half of these spills; a 1987 report submitted to Agriculture Canada, which suggested that a $1-billion federal subsidy to grain farmers may have been unnecessary because most Prairie farmers were already scheduled to receive large payments from the Western Grain Stabilization Program.

Another of the Act's more prominent and vocal users is public interest researcher Ken Rubin. A persistent, and tenacious user of the Act, Mr. Rubin, by his own reckoning, has made more than 3,000 requests for information. He has filed 400 complaints with the Commissioner's office and, at last count, he has been to Federal Court 30 times to challenge actions to withhold information. He is a skilled traveller through the administrative maze of the Act, and often works in tandem with reporters from large news media outlets, feeding them information which is transformed into news. His name and "revealed through the *Access to Information Act*" are a familiar double-punch on many news stories.

Mr. Rubin has uncovered information about a number of environmental concerns, including information about the extent of the Canadian asbestos lobby in the U.S. He found that government emissaries were lobbying to change EPA standards at the very time of Canada's acid rain deliberations. He was also responsible for uncovering the minutes of a meeting of the Atomic Energy Control Board that revealed officials had serious concerns for the safety of nuclear installations.

Mr. Rubin obtained and made public government reports about Air Ontario which shed light on the Dryden air disaster, as well as memos in 1987 which suggested the Pentagon had approached then defence minister Perrin Beatty about testing the advanced Cruise-missile in Canada. In addition to his quest for information on meat packing plants, Mr. Rubin unearthed a report from the Department of Health and Welfare which revealed that food poisoning afflicted two million Canadians each year. The study revealed that food-borne diseases costs the country about $1.3 billion annually in medical care, and losses suffered by food processors and retailers.

Journalists and public interest advocates are not the only requesters who make news with the Act. The most famous example of multiple requests are those of Montreal tax lawyer, Claude Désy, who has made more than 4,500 requests for Revenue Canada records and another 2,679 complaints to the office of the Information Commissioner. During the course of Mr. Désy's requests, Revenue Canada had to commit 10 people, analysts, and support staff to servicing these requests. The department disclosed 234,234 pages of information. Mr. Désy also kept investigators in the Commissioner's office busy with delay complaints associated with his huge requests.

They were not frivolous. Mr. Désy sold the valuable tax information in a newsletter. He claimed he was trying to open up tax rulings that should have been made public. While his foray was viewed by some as a blatant abuse of the spirit of the Act, it had the effect of forcing Revenue Canada to organize their holdings in a form that would be more readily available to the public.

Parliamentarians as a group have made surprisingly little use of the Act. While it was widely expected that Opposition Members of Parliament would champion the disclosure of tightly- clasped government records, the legislation has received remarkably little attention in the Commons or Senate. The Act awaits a new Parliamentary "champion".

One example, however, of a successful Parliamentary foray into government documents was that by Lorne Nystrom, the NDP's finance critic. In 1989 he obtained documents revealing the government's plans to cut transfer payments to the provinces by $2.2 billion over four years. Mr. Nystrom not only made this information public, he made much of the fact that the records were delayed by the Department of Finance for two and one half months after he requested them. All of this was widely reported, leading to questions about the government's commitments to universal health care and funding for other social programs.

Academics account for only two per cent of all access requests. Some historians have had unexpected difficulties as a result of the personal privacy exemptions. Some researchers even claimed that they lost access to records which had not been reviewed for exemptions prior to the passage of the access Act. Other historians found, however, that merely by existing, the Act resulted in more information being released informally.

THE ACT IN REVIEW

The Act underwent a statutory review by a Parliamentary Committee three years after its debut. Parliament had wanted to be sure that the balance was right, that exemptions were neither too broad or too narrow. This scrutiny yielded an unanimous all-party report titled, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. Though the MPs put forward more than a hundred amendments to the legislation, most of the suggested changes were in the nature of fine-tuning, none going to the heart of the legislation.

The government's response to the report was published in a 1988 report entitled, *The Steps Ahead*. While most of the recommendations dealing with the *Privacy Act* were accepted, some of those pertaining to the *Access to Information Act* were never translated into legislative amendments or new administrative policies.

The Information Commissioner's annual report is also a review of how the Act is working, yearly accounts of successes and failures. These reports also speak to the gradual acceptance of a culture of openness at the same time as raising warning flags for the future.

A word about process. The Act allows for a 30-day period after receiving a formal request, during which time an access co-ordinator must produce the information requested or give reasons for denial or delay in writing. While the majority of requests are handled in less than 30 days, processing times have been sluggish. In 1983-84, only six per cent of the requests processed took more than 61 days to complete. Overall, 18.7 per cent of requests took between 31 and 60 days. The most recent statistics show that a greater percentage of requests are taking longer and longer to complete. By 1992-93, some 21 per cent of requests took between 31 and 60 days; a stunning 21.4 per cent took longer than two months.

When the present Commissioner took over in 1991, one-third of the complaints were of delays. Since that time, a special unit of his investigators has concentrated on the problem. The Commissioner's office, on request, will assist government departments in improving their turn-around

times.

Complaints about excessive fee charging may be made to the Information Commissioner. Four types of fees may be levied: applications; reproduction; search and preparation; and computer time. Everyone pays a $5 application fee which pays for hours of search time. Thereafter charges for searches, photocopies or computer time can be applied. According to 1992 statistics, the government collected on average $12.30 in fees for each completed request although the average cost exceeded $700. Some critics of the Act say that exorbitant fee estimates are given in order to dissuade potential applicants, others believe the government should be more diligent in collecting fees and apply them to the administration of the Act.

Many users have avoided excessive fees by applying for fee waivers on the grounds that release of requested documents will be of "general public benefit." There is, however, no definition in the Act of general public benefit. The Act allows the head of each government institution to create an appropriate policy on the waiver of fees.

Concerns over the quality of record-keeping by public servants have been another source of complaints. The furore over the Meme breast implants raised questions about the record-keeping practices of Health and Welfare Canada. The
Information Commissioner was asked to investigate allegations of improper records destruction and altering of records dealing with the department's studies of the implant's safety.

It became clear during the course of the investigation that some records were ordered destroyed and others were altered. But was the destruction to prevent embarrassment or acceptable, routine practice? The Commissioner recognized that it is "difficult to determine when a record ceases to be a draft and should become a departmental record," but cautioned the department that the destruction of records that may prove embarrassing is not acceptable under the Act.

Another problem is political interference. Some requesters believe that the neutrality of the public service and the spirit of the Act have been compromised in the response to especially sensitive access requests. A 1986 memo by Paul Tellier, then clerk of the Privy Council, in the wake of media reports of prime ministerial travel expenditures, advised deputy ministers that access requests related to

the Prime Minister should be cleared with the Prime Minister's chief of staff before any information was to be released.

While simply checking with the Prime Minister's Office is not illegal, the perception was that public servants were being encouraged to protect the Prime Minister. This matter also raised the issue of whether or not the decision to release information, especially sensitive information should be centralized in one office.

The access Act has more potential than any statute to harass, embarrass, distract and annoy the government of the day. In his 1991-92 report to Parliament, the Information Commissioner had this to say about the tests of the government's resolve to adopt the spirit of the Act:

> *"Releasing information which is convenient to release is no test at all. Releasing information with no potential for embarrassment is no test. Releasing information which reveals mistakes or misjudgments or has a potential for misunderstanding is a test. Let it be said at once that government institutions pass such tests every day."*

There are encouraging signs of government openness right across Canada. Most of the provinces now have some form of legal provision for access to government information. In New Brunswick, Newfoundland, Saskatchewan and Manitoba, the provincial ombudsman's mandate includes access to information complaints. Nova Scotia, Quebec, Ontario and, most recently, British Columbia have freedom of information legislation that designates other independent watchdogs. Alberta is in a debate over an access law.

Experience has shown that the institutions most at ease with the law are those that have most often been tested, have handled the most requests. One can only speculate as to how much more open government would be had it been challenged 70,000 times yearly, as the authors of the Green Paper predicted would happen.

Perhaps no one expected that the most restrictive elements of parliamentary sovereignty and ministerial secrecy would be overturned in a decade. Yet both the hope and the reality is that Canadians are on the right path and are moving, however haltingly at times, towards more open

government. In the end, that surely will mean better government.