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SUBMISSIONS

of the

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

to the

STANDING COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

with respect to

BILL C-43: An Act to Provide for Access to Government-held Information

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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. An access to information statute has been a long-standing and important objective of our organization.

The central point of our Brief is that the Bill, as it stands, is too vague for anyone to decide whether it will provide more access to information or whether it will provide less. CELA is gravely concerned that the Bill will result in less information being available.

The Canadian Environmental Law Association depends on quick, free access to government-held information. This is so because environmental matters are heavily regulated by government. In addition, governments have the resources to prepare detailed research about the environmental impact of various policies as well as of statutory and regulatory measures. Neither CELA nor its clients, who can only draw on CELA services if they cannot afford private lawyers, have similar resources.

In any environmental case, success is determined by the accuracy and detail with which facts are presented to show that the point of view espoused by one party or another is the correct one and entitles him or her to some remedy.

Because CELA and its clients often cannot afford original research, CELA must use information which has been prepared elsewhere, usually by government. Therefore, for CELA to continue its work, it is essential that its present access to information be preserved. CELA believes that if access is expanded, both for itself and for members of the public, only better environmental decision-making can result.

In our view, this is both a matter of statute law and a matter of attitude and willingness among civil servants who receive requests for information. On this latter point, CELA supports the work of the Treasury Board in preparing civil servants for implementation of Bill C-43, coordinating the preparation of indexes and rationalizing procedures in departments.

In general, the Bill contains some good provisions; for example, the creation of a kind of ombudsman, called an information commissioner, who should provide an inexpensive way of appealing a government refusal to provide information.

On the other hand, there are a number of changes which CELA believes are essential if the Bill is to work.

II. PRINCIPLES OF ACCESS TO INFORMATION

CELA's comments are based on principles which we believe should be found in any access to information statute. As the Committee may know, from its examination of the testimony on access to information before the Standing Joint Committee on Regulations and Other Statutory Instruments, CELA first enunciated these principles five or six years ago. Since that time, CELA's thinking has become more focused, in large part because of the wealth of material available on the positive changes which the 1974 amendments to the U.S. Freedom of Information Act brought.

Nevertheless, the principles which are espoused by CELA before the Standing Joint Committee are the same as those which follow:

A. Coverage

Coverage must be exceedingly 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.

B. Index

An index to the information or documents held by each government entity must be prepared, kept up to date and made widely available at low cost, to aid both an access-

seeker and a civil servant who must answer a request.

C. Fees

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

D. Time Limits

Requests for access must be answered within a time which makes the answer retain its relevancy to the requestor.

E. Exemptions

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, not mandatory, and must not be a class exemption. Each request for access can then be evaluated on its own merits.

F. Impartial Review

Because it is inherently difficult for any government entity to assess impartially a challenge to any of its decisions, an access statute must provide an impartial review mechanism which is at arm's-length from government entities.

G. Preserving Existing Access

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 only affect those practices which limit access to information.

III. BILL C-43 AND THE CELA PRINCIPLES OF ACCESS

CELA wants now to draw the Committee's attention to the difficulties which the proposed Bill puts in the way of achieving the principles outlined.

A. Preserving Existing Access

CELA is concerned that because Bill C-43 is so broadly worded it will become a kind of code of information practices which will govern all access and withholding decisions of the government. If that is the case, CELA must look forward to paying for access to information where access is now free; to mandatory exemptions being used to block access for all time to some information which is now made available albeit as a matter of grace; to a complete absence of access to recent information which the Bill will exempt under the phasing-in provisions of Section 28.

B. Coverage

The coverage provisions in Bill C-43 are not complete in themselves nor are they extensive enough.

a) Limits of other Sections:

The coverage sections are not complete in themselves because other sections limit their scope. For example, Section 25, a mandatory exemption for information which is "required under any other Act of Parliament to be withheld from the general public or from any person not legally entitled thereto...", substantially inhibits access. It is not clear how section 25 will

work because no list of statutes which do or do not meet its two conditions is provided.

b) Persons entitled:

CELA believes that restricting access to citizens or permanent residents merely increases the cost of access to the general public. The restriction encourages lawyers or newly created resident corporations to provide an accomodation for those seeking access and to pass on the results for a fee.

c) Exempt Government Entities:

The Bill offers no explanation for why certain entities are exempted. Indeed, the Bill does not even list those which are exempted. CELA believes that all entities should be subject to the Bill. Any entity which holds information which would be harmful can protect its information under an exemption from access, not an exemption from coverage.

C. Indexes

Because the index to "classes of records" as required by the statute is not yet in use, CELA is unable to evaluate whether the definition "classes of records" is the equivalent of an index to "government-held information" or "government-held documents". CELA believes any index should list the very information or documents an access-seeker wants rather than merely the classes of records which the government holds.

D. Cost

CELA urges the Committee to make substantial changes in the

fees which can be collected pursuant to this Bill. There are four possible fees which an access-seeker may have to pay. Three of them may be demanded before any access is permitted. The initial fee is up to $25.00 which must accompany each request is, in effect, a tollgate which only the rich can pass through. CELA, for example, will be severely limited if it is required to pay an initial fee of up to $25.00 for each request it makes. CELA believes that many other public interest organizations which rely on government information, and which are beset by budget cuts and lack of funding, will be drastically affected by the tollgate and other fees.

CELA believes that the cost of administering the access statute should be spread across all taxpayers even though only some taxpayers use the program. Many government programs benefit only a small group but are paid for by the entire population. Veterans' benefits, unemployment insurance, and agricultural subsidies are some examples.

CELA does believe that it is legitimate to ask an access-seeker to pay for copies of documents which the access-seeker requests. To reach this position however it is necessary to change Section 12 so that an access-seeker has a real choice of whether to order copies and pay for them or to inspect the records and avoid the charge for copying. At present, the government entity makes the choice. Charges for copying should be at the direct cost to the

government entity. This is the policy implemented by the U.S. Freedom of Information Act. CELA believes that any charge in excess of direct cost will be an unfair and often insurmountable barrier, not only to CELA but also to university researchers, independent research institutes and journalists.

The fee structure in the Bill has a second deleterious effect. The Bill provides for a review of the statute's operation after three years. But if high fees are charged at the beginning, the data necessary for a competent review will not be available because those without money will not be able to use the access provisions.

We suggest that the tollgate provisions, as well as all requirements for fees except the direct cost of photocopying, be deleted from the legislation. At the end of three years, there will be adequate data to evaluate the statute. It would then be appropriate to re-evaluate access for the direct cost of photocopying to see if frivolous or vexatious requests were being received. CELA rejects the notion that fees discourage frivolous or vexatious requests. Fees merely discourage requests from poor individuals.

E. Time Limits

CELA believes that the thirty-day time limit is an appropriate one for a new Canadian statute. Any extensions permitted must have tight limits imposed. The provisions which exempt

from access information which is to be published within ninety days should be deleted. There is no apparent reason why an intention to publish within ninety days suddenly makes secret what was available before and will be again in ninety days. If there is some valid reason, then CELA suggests that the time limit be the same as the time limit for replies; namely, thirty days.

We also suggest that the Bill be modified to provide a step system of time limits. During the first two years of phasing in, the time limit should be thirty days; for the next two years the time limit should be twenty days; and for the subsequent future, the time limit should be ten days. The Committee is no doubt aware that ten days is the time limit in the U.S. Freedom of Information Act. In Sweden, the time limit appears to be twenty-four hours. [1]

F. Exemptions

CELA believes that the mandatory exemptions should be changed to permissive exemptions. Class exemptions should be eliminated. Each exemption should state the public harm of which there must be a real possibility before access can be refused. The problem of mandatory exemptions is a serious one. A mandatory exemption requires the Minister to withhold, no matter how irrelevant, non-injurious or old the information requested may be.

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1 Mitchell, H: Access to Information and Policy-Making: A Comparative Analysis, (Toronto: Commission on Freedom of Information and Individual Privacy)

Equally, class exemptions apply to all information in the class, no matter how innocuous. CELA believes that before a government entity refuses access, it should carefully consider the harm, if any, which might result from release of the information. Neither class nor mandatory exemptions require a balancing of interests.

In effect mandatory and class exemptions create a new regime of secrecy. There can be no more access to this information even on the present basis of "access by grace". To permit access to information covered by a mandatory exemption is to disobey the Act, and disobeying an Act of Parliament is an offence under the Criminal Code.

a) Section 20 (a):

In this portion of the Brief CELA wishes to concentrate on the exemptions in Sections 20(1) and 20(2).

Section 20(2) is the only place where environmental information is mentioned directly. For the Committee's convenience and because these comments will refer to it in detail, Section 20 is reproduced.

20.(1) Subject to subsections (2) and (3), the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose any record that contains the results of product or environmental testing carried out by a government institution unless

(a) the testing was done as a service and for a fee; or

(b) the head of the institution believes, on reasonably grounds, that the results are misleading.

(3) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

CELA's first concern is the fact that this is a mandatory exemption with no time limit on how long such information can be withheld.

The second concern is the breadth of coverage. The exemption covers not only trade secrets, which, as is well established in law, must be kept secret, but also financial, commercial, scientific 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. At the least, 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.

The entire exemption rests on assumptions which CELA does not share. It is CELA's belief that these assumptions impute to corporations the elements of humanity which natural persons possess and which give rise to a need for the protection of their personal privacy. Section 20 simply adopts the privacy notion without considering the differences between natural persons and corporations.

The Section also assumes that there is 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 each chooses. But

public business requires accountability for government making including government decisions with respect to regulations and other policy and program choices which affect corporations. In practical terms therefore, information supplied by corporations for the purpose of receiving a public benefit such as a government grant, license, 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 which are necessary in any democracy.

Therefore, CELA urges the Committee to amend Section 20 to make it a permissive exemption and to add a time limit on how long information may be withheld. Exceptions to the exemptions are also necessary to reflect the ideas concerning the public business outlined above.

b) Section 20(2):

Section 20(2) is the only place in Bill C-43 where environmental information is mentioned directly. Although, at first glance, this subsection creates a substantial gap in the blanket coverage of the mandatory exemption in Section 20(1), upon careful consideration, Section 20(2) is no fetter at all. The conditions in Section 20(2)(a) and (b) make this so. First it is only the results of testing carried out by a government institution which shall not be withheld. Again CELA refers to its remarks

concerning the public business and urges the Committee to change the language of this subsection so that results of testing done by those other than government institutions which are presented to obtain a public benefit, be accessible.

Second, even though the results "shall not be withheld", the exceptions to this provision include results where "the testing was done as a service and for a fee". Thus Subsection (2)(a) substantially undermines the limited but good work of the opening sentences in Subsection (2). Because most government institutions with testing facilities carry out tests for other government institutions for a fee (which is called cost recovery), and, by definition, as a service, results can be hidden from the public under this clause.

Third, Subsection 2(b) would allow results of product or environmental testing to be withheld if the head of the institution "...believes, on reasonable grounds, that the results are misleading...". CELA believes that it is equally important for the purpose of accountability to know that test procedures have led to misleading results. In addition, the definition of "misleading" changes with each person who attempts its interpretation. It seems much more sensible to release the test results together with an opinion from the head of the government institutions that they are misleading. CELA's suggestion has the advantage of requiring accountability not only in the testing

itself but also from the head of a government institution who may have to make a decision whether to re-test, whether to act on the results or whether to reject them entirely.

In sum, CELA strongly urges the Committee to amend Section 20 to make it a permissive exemption and to amend Section 20(2) by deleting Subsections (a) and (b).

c) Section 16(1)

CELA is also concerned about the wide interpretation which could be given to the exemption listed in s.16(1)(a)(ii) relating to information obtained or prepared in the course of investigations pertaining to "the enforcement of any law of Canada or a province". Currently under our environmental legislation, there are a myriad of law enforcement techniques available which do not result in court proceedings. These include, for example, administrative orders issued by the Ministry or a designated person pursuant to s.33.1(2) of the Fisheries Act which can restrict the operation of a work or undertaking that may be deleterious to fish. Indeed, it would seem that any action of a government institution could be seen as "the enforcement of any law of Canada or a province". CELA believes this exemption should be limited to investigations in contemplation of litigation or a prosecution before the courts.

CELA is concerned about the breadth of language used in some of the other exemptions as well. In particular, CELA is concerned that what may be accessible because it is among the interstices of one exemption may not be accessible under the provisions of some other exemption.

G. Impartial Review

a) Information Commissioner:

In this brief, CELA has already supported the idea of an Information Commissioner who can provide an inexpensive method of appealing a government entity's decision to refuse access. 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 a priority. If the Commissioner is allotted inadequate appropriations to make his or her office one which can respond and reach a recommendation quickly, the Bill's purpose will be frustrated.

CELA suggests that time limit be equal to the limit for preparing a reply to a request; namely, thirty days.

b) Judicial Review:

The sections concerning judicial review in Bill C-43 also need amending. The sections appear to limit judicial review to the procedures and methods used by the head of a government institution in coming to his or her decision whether to permit access or refuse it. CELA believes that a judge must be able to substitute his or her decision for that of the head of the government institution; and the judge must be able to consider every facet of the problem and not be limited to a mere review of procedures. Therefore CELA urges the Committee to amend Sections 50 and 51. CELA believes that appropriate wording would reflect the principles set out at the beginning of this Brief; namely, that a judge is to answer the question, "can the information requested be released without harm to a stated public interest?". This question implies that a judge would stand in the place of the Minister and consider the matter afresh. Sections 50 and 51 prevent a judge from addressing this question.

H. Conclusion and Recommendations

Many changes are necessary to make the Bill conform to the principles of access to information discussed in this Brief. While we have not provided a clause by clause review, we believe that if the principles we have enunciated are implemented, the Bill will achieve the objective sought.

Our specific recommendations are as follows:

1. The Bill must be changed so that it cannot be used to restrict existing access practices. This implies:
   a) no fees of any kind for access which is now free;
   b) no mandatory exemptions; and
   c) that the phasing-in provisions of Section 28 apply only to that information which is not now available.

2. Three of the fees must be eliminated. Only the direct cost of photocopying can be demanded. CELA believes that without this change, all other suggestions for changes are meaningless because access will be much too expensive.

3. The provisions of Section 20(1) and 20(2) must be changed to reflect the distinction between private business and public business, and to make the release of test results routine and without exception.

4. Sections 50 and 51 must be changed to permit a full de novo review by the Federal Court.