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I. *Introduction*

Freedom of Information has been the subject of much current debate in Canada, but is not new to the world. The United States enacted their first Act, in 1966,[1] and amendments in 1974 finally gave the Act some worthwhile effect.[2] Sweden has had Freedom of Information legislation for over two hundred years. The experience of these two countries has been very favourable, but Canada refuses to learn from that experience. There is still a fear in the governments of Canada that openness in government would lead to problems, the ultimate fear being that the party in power will no longer be in power after the passage of effective Freedom of Information legislation. Perhaps that should indicate something in itself.

In the United States, after the 1974 amendments, the reaction of the public was overwhelming, and the government, becoming less suspicious of its use, has found that it doesn't discredit executive branch employees. Things now being released south of the border include CIA and FBI files on individuals, the Department of Army Report on My Lai, meat inspection reports showing that products are unwholesome, nursing home reports, anti-trust files relating to merger clearances, correspondence with auto manufacturers on defect investigations, and consumer test reports.

In the Fourth Session of the Fifty-First General Assembly of the Province of Nova Scotia, the Freedom of Information Act was passed,[3] beginning as follows:

> 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;
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> AND WHEREAS the people of the Province should be protected from secrecy in respect of the conduct of public business by officials of the government;

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1. 80 Stat. 250 (1966); signed into law by President Johnson, July 4, 1966
2. 88 Stat. 1561 (1974)
3. Freedom of Information Act, S.N.S. 1977, c.10

> AND WHEREAS the principles recited herein should be consistent one with the other and should operate without contradiction;
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> AND WHEREAS these principles can be better maintained by assuring the people that the Government is operating openly and by providing to the people access to as much information in the hands of Government as possible without impeding the operation of Government or disclosing personal information pertaining to persons or matters other than the person desiring the information;[4]

The preamble above states the basis upon which Freedom of Information legislation is founded. It should be fundamental to anyone's conception of democracy to expect openness in government, full disclosure, and access by "the people". Instead however, the Nova Scotia Freedom of Information Act, hereinafter referred to as the Act, favours the "without impeding the operation of Government" aspect rather than the "access" aspect to such a degree that the Act is in effect a paper tiger — full of sound and fury, signifying nothing.

This comment is designed to outline the Act itself and to demonstrate how ineffective it is in the context of responses received from nine requests for information. The results show that the true intent of the Act is not to promote openness, but to secure secrecy. Knowledge of material contained in government files will still have to be derived from 'leaked' documents, CBC exposés, and other 'high-level' news items — forms that can only lead to distrust and disrespect for government.

II. *The Legislation*

Unlike most other Freedom of Information Acts, the Nova Scotia Act does not begin with the premise that all information is available. Instead, s. 3[6] states that certain listed categories of information are

4. *Id.*, Preamble
5. The nine requests are listed in detail later in the comment. The requests were related to information which would be useful to a consumer as the paper upon which this comment is based was prepared for a Consumer Law course at Dalhousie University.
6. S. 3 of the Freedom of Information Act reads as follows: Every person shall be permitted access to information respecting
(a) organization of a department;
(b) administrative staff manuals and instructions to staff that affect a member of the public;
(c) rules of procedure;

available upon request. This information includes material relating to organization of departments, internal procedure, policy and guidelines followed by a department, final decisions of tribunals, personal information relating to the requestor, and instructions to staff relating to, and having an effect upon, a member of the public.

S. 3 is followed by a list of exceptions in s. 4,[7] whereby information which would be classified as being 'free' under s.3 can be refused. The scope of these exceptions will be discussed later in this article.

The Act purports to have a wide ranging effect. The definition of department[8] covers any body 'all the members of which, or all the members of the board of management or board of directors of which' are appointed by Act or Order in Council or where such persons are public officers or servants of the Crown in the discharge of their duties. As well, the definition of Information[9] is quite

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(d) descriptions of forms available or places at which forms may be obtained:
(e) statements of general policy or interpretations of general applicability formulated and adopted by a department;
(f) final decisions of administrative tribunals;
(g) personal information contained in files pertaining to the person making the request.
(h) the annual report and regulations of a department;
(i) programs and policies of a department; and
(j) each amendment, revision, or repeal of the foregoing.

7. S. 4 of the Freedom of Information Act reads as follows: Notwithstanding Section 3, a person shall not be permitted access to information which
(a) might reveal personal information concerning another person;
(b) might result in financial gain or loss to a person or a department, or which might influence negotiations in progress leading to an agreement or contract;
(c) would jeopardize the ability of a department to function on a competitive commercial basis;
(d) might be injurious to relations with another government;
(e) would be likely to disclose information obtained or prepared during the conduct of an investigation concerning alleged violations of any enactment or the administration of justice;
(f) would be detrimental to the proper custody, control, or supervision of persons under sentence;
(g) would be likely to disclose legal opinions or advice provided to a department by a law officer of the Crown, or privileged communications between a barrister and client in a matter of department business;
(h) would be likely to disclose opinions or recommendations of public servants in matters for decision by a Minister or the Executive Council;
(i) would be likely to disclose draft legislation or regulations;
(j) would be likely to disclose information the confidentiality of which is protected by enactment.

8. Freedom of Information Act, S.N.S. 1977, c. 10, s. 2(d)
9. *Id.* s 2(f)

broad, covering information stored in any manner and on file, in control, or in possession of a department.

An original request can be made in writing, in person, or by telephone.[10] If access to the information is not granted, a written request is directed to the Deputy Head of the Department involved.[11] The request must identify the material precisely,[12] which, by regulation must enable a person employed in the department to which it is directed to identify the material. The person to whom the request is directed has fifteen working days in which to reply — with the provision that a denial must set out the reasons for denial, referring to the exceptions, and state the appeal procedure.[13] If no reply is forthcoming, there is a deemed denial.[14] If the request is granted, the government has the option of providing a copy or allowing access to the original document.[15] Within fifteen days of a denial, deemed or actual, the request can be appealed to the Minister, in writing, and the Minister has thirty days to affirm, vary, or overrule the denial.[16] If he/she denies as well, a person may appeal to the House of Assembly in a form allowed on a motion by a member of the House under the Rules and Forms of Procedure of the House.[17] In a recent appeal, it became apparent that there was no set form for the appeal, but that any form which would get the matter before the House would be sufficient — a House Order, Notice of Motion, Resolution, or Question of Privilege. The person appealing has no right to be on the Floor of the House or to be represented. Any appeal, under such a procedure, will remain on the Order Paper until called by the Government, and as such, does not even have to be heard. In any event, the likelihood of an appeal succeeding in a House controlled by a majority of members of the Party of the Minister from whom the appeal originates is slim indeed.[18]

The provisions of the Act are not to have any effect on information provided to the public by custom or practice before

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10. *Id.* s. 9(1)
11. *Id.* s. 9(2)
12. *Id.* s. 10(2)
13. *Id.* ss. 10(3), 11
14. *Id.* s. 10(4)
15. *Id.* s. 2(a)
16. *Id.* s. 12
17. *Id.* s. 13
18. Information was obtained from a conversation with Mr. Bruce Cochran, M.L.A., Lunenburg Centre.

enactment.[19] It is submitted, that now that the Act gives guidelines as to what is available, this provision will not be of any assistance to a requestor of information. Due to the restrictive nature of the Act as it now stands, it is difficult to imagine that very much information was previously available.

A portion of a record can be released where the exempt portion(s) can be deleted.[20] The provision in s.8 allows the Deputy Minister, in replying, to refer a requestor to published material.[21] The Department can, as well, charge a fee under the Regulations, for search and reproduction set by Statute. If no search fee is set, they are permitted to charge for reproduction only.[22]

In comparison to the other two jurisdictions — Sweden and the United States, it appears that the government in Nova Scotia does not have to provide a catalogue or index of documents on file. Thus, a requestor may find it difficult to make a precise request. There is no appeal to an independent body, and hence no onus on the government to prove the application of an exemption. And, basic to the whole question, there is no access to all information.

III. *The Requests*

The requests that were directed to the various Departments were related to material that would be useful to consumers. The information sought was not particularly important to the government, as they would not lead to any particular embarrassment, and all the requests were similar in nature. While the matters were of concern to consumers, the results obtained are applicable to information in many other fields as well — practically anything which would be requested from the government under the Act.

The following requests were made:

1) Names and addresses of Direct Sellers whose licenses had been revoked, cancelled, or suspended, and those presently being investigated, together with reasons therefore, under the Direct Sellers' Licensing and Regulation Act.[23]

2) Reports of inspectors on completed investigations under the Consumer Reporting Act.[24]

19. Freedom of Information Act, S.N.S. 1977, c. 10, s. 5
20. *Id.* s. 7
21. *Id.* s. 8
22. N.S. Reg. 125/77, ss. 7,8
23. Direct Sellers' Licensing and Regulation Act, S.N.S. 1975, c.9
24. Consumer Reporting Act, S.N.S. 1973, c. 4

3) Reports of inspections of canneries, fish plants, and packaged fish products under the *Meat and Canned Foods Act,*[25] incorporated into the law of Nova Scotia under the Fisheries Act.[26]

4) Names and addresses of any cannery or fish plant which has had its license cancelled under the Fisheries Act.[27]

5) Reports of inspectors and research results under the Amusement Devices Safety Act.[28]

6) The regulations and conditions used by the Board of Commissioners of Public Utilities, results of investigations, etc., under the Gasoline and Fuel Oil Licensing Act.[29]

7) Reports re purchasing information — availability of supply, parts, service, delivery etc., — on the purchase of automobiles under the Government Purchases Act.[30]

8) A similar request to that of number 7 re office equipment.

9) Reports of inspectors under the Day Care Services Act[31] on Day Care Centres in the Halifax area.

Much information possessed by the government could be of use to people resident in the Province. A good example would be the information requested under the Day Care Services Act in request number nine. A new-comer to the Halifax area may be looking for a suitable Day Care Centre for the children of the family. The reports of inspectors would be very helpful in making a decision about a Day Care Centre, and this information may not be readily available elsewhere. Surely it would not be detrimental to any interest of the Government to release such information prepared with the taxpayer's money.

IV. *Analysis — The Results*

A cursory reading of the Act itself together with the results obtained from the requests indicates that the principles enunciated in the

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25. *Meat and Canned Foods Act,* R.S.C. 1970, c. M-6
26. Fisheries Act, R.S.N.S. 1967, c. 109
27. *Id.*
28. Amusement Devices Safety Act, S.N.S. 1975, c. 2
29. Gasoline and Fuel Oil Licensing Act, R.S.N.S. 1967, c. 11 (as amended). The regulations requested were supplied by the Board but requests for reports were denied.
30. Government Purchases Act, R.S.N.S. 1967, c. 120
31. Day Care Services Act., S.N.S. 1970-71, c. 13

Preamble above are not met in the subsequent legislation.[32] Indeed, the provisions of s.3 are much too restrictive and the exemptions of s. 4 are so broad that the Act will be a little assistance in obtaining any useful information. The approach taken in the next few pages outlines the obstacles which have been erected by the Act in attempting to prevent access to information, and demonstrates these obstacles in the context of the reasons given for refusal in the requests made.

A preliminary hurdle rests on the fact that the operative section, s. 3, does not declare all information to be free. Instead, certain subject areas are given in which access will be made available, and even a cursory assessment of these subject areas show that this hurdle is quite formidable. While it may be comforting to know that a person has access to information about the organization and procedure of government, descriptions of forms available, *etc.*, a requestor wanting other information may be hard pressed to find a pigeon hole in s. 3. There are only two areas which could be considered to be residual clauses — instructions to staff that affect a member of the public (s. 3(b)) and programs and policies of a department (s.3(i)). However, in view of the restrictive scope of the remaining provisions and due to the fact that the appeal process is through the Minister and House of Assembly, both of which may have a vested interest in secrecy, the scope of these provisions will likely be limited to a narrow interpretation. The applications under the Government Purchases Act, *supra,* and the Amusement Devices Safety Act, *supra,* were refused on the ground that the information requested was not stated to be available under s.3. The only positive step in the section is that personal information contained in files pertaining to the person making the request is given free access, subject of course to the exemptions of s.4.

If a request does fall within an area covered by s. 3, the request will then be carefully screened through the exemptions of s.4. By s. 4(a), a request shall be denied if it might reveal information concerning another person, without that person's consent. This section was cited in the refusals given under the Direct Sellers' Licensing and Regulations Act, *supra,* and the Day Care Services Act, *supra.* The reply in the latter instance indicated that before a request for reports could be granted, the consent of any individual

32. All nine requests were refused, either on the basis that the information requested did not exist, or for the reasons mentioned in the subsequent discussion.

named in the report would have to be obtained. This would place an unduly heavy burden on a person seeking a report, since it appears that access to any document which mentioned an individual, corporation, business, etc., could be denied unless written consent for release was obtained from that individual, corporation or business. A requestor could not obtain that consent unless he possessed detailed knowledge as to who was named in the report, and that information is not likely to be released. Such a burden would require precise knowledge of the contents of a document, and if someone possessed that knowledge, why request the document?

The requests under the Direct Sellers' Licensing and Regulation Act, *supra,* the Gasoline and Fuel Oil Licensing Act, *supra,* and the Amusement Devices Safety Act, *supra,* were also denied on the basis of s. 4(e) as being information obtained or prepared in the conduct of investigation of alleged violations of any enactment or administration of justice. Violation of an enactment is in essence non-compliance with the terms of any statute, whether or not non-compliance is an offence which could lead to criminal prosecution. In the United States, investigative records compiled for law enforcement purposes are only exempt from production if production would 1) intefere with actual enforcement proceedings, 2) deprive a person of the right to a fair trial, 3) constitute an unwarranted invasion of privacy, 4) disclose the identity of a confidential source, 5) disclose investigative techniques and procedures, or 6) endanger the life or physical safety of law enforcement personnel. An outline of the interests protected in an exemption, like those of the U.S. F.O.I. Act, would prevent the wide usage to which the Nova Scotia exemption is open.

Consider as well the wide ranging use to which some of the other provisions of s. 4 can be put due to the ambiguous language employed. The provision in s. 4 (b) exempts information which might result in financial gain or loss to a person or a department, or which might influence negotiations in progress leading to an agreement or contract. This is obviously designed to prevent the gaining of a businesss advantage through access — but the general language leaves its application open to many instances. The provision in s. 4 (c) is directed to information which would jeopardize the ability of a department to function on a competitive commercial basis. What is the range of circumstances covered by these two sections alone? What interests are they designed to protect? The provision in s. 4(c) covers information that may be

injurious to relations with another government. Thus, access to reports prepared by another Canadian or foreign government can be refused immediately, without a proper balancing of the interests involved. There are exemptions relating to legal opinions, advice and recommendations of civil servants, draft legislation and information the confidentiality of which is specifically protected by enactment. While the Act contains the provision that where confidential information can be deleted, with the remainder being released, a department desiring to keep information secret could use any of the last grounds to refuse a request, even in cases where deletion was possible, there being no appeal to an independent adjudicator.

If the request manages to escape all the listed exemptions, a department can still deny a request if it suggests that the information requested has not been identified precisely enough as required by the Act and Regulations. This was given as another ground for refusal under the Day Care Services Act, *supra*. The reply to the request suggested that the request should have contained the names of centres and individuals involved, the dates of preparation of the reports, etc., This obviously goes too far — as a person familiar with the affairs of the department could have located the reports from the information contained in the requests. As well, the person requesting the information would not likely possess such knowledge as to who was named in the reports and when they were prepared. This ground for refusal could no doubt be used by the government as a residual clause when all else fails. The government is not required to publish indexes for their files, and such a burden on the requestor as was required by the Department of Social Services would effectively deny access in most cases and makes a mockery of the Act.

Another problem arises with the deemed refusal of s. 10(4). A department does not even have to respond to a request. While this no doubt allows the mechanism of appeal to operate, a person requesting information is not notified of a reason for refusal. If a person is to be refused, it would be much better for the Government and the requestor to know why he has not been given access. At least distrust for the government would be avoided.

Another problem which often arises in the Freedom of Information area is the element of time. The need for information is often such that time is of the essence. The Nova Scotia Act does recognize this aspect — there are fifteen working days given for a

department to respond to an original request, fifteen days thereafter for the requestor to appeal a refusal, and then thirty days for the Minister to reply to an appeal. However, the Act contains an inconsistency in this regard in that the final appeal lies to the House of Assembly. Recently, there was a delay of almost ten months between sittings of the House, and this delay may be crucial. However, the likelihood of an appeal being granted by the House may make this point mere academic trivia.

There is one other point that should be made before closing. Unlike the provisions in the United States, the exemptions in Nova Scotia are mandatory. If a document falls within one of the cavernous exemptions, access must be denied. In the United States, the exemptions are permissive and a document may be released notwithstanding that it falls within an exemption. Such an approach permits a balancing of interests on each request that is received.

V. *Conclusion*

The requested material in all nine requests was similar in form and nature and was not of major importance to the Government. Yet all nine requests were denied, with a broad range of reasons given for the refusals.[33] The appeal process is through government channels — through the Minister and the House — a process that has been uniformly condemned by all but governments themselves. The lack of an independent review of the decision by either a court or tribunal results in each department interpreting the relevant provisions and arriving at different conclusions — as shown by the range of refusals given on very similar requests. The departments, in the interest of protecting themselves, are unlikely to narrow the scope of the exemptions, as would possibly occur in court. Without an independent adjudication, it is not even possible to ascertain whether an exemption given as a ground for refusal is appropriate to a particular document. Even if not necessary due to the wide range of exemptions open to it, a department desiring to protect a document from public scrutiny could apply any exemption to that document, whether appropriate or not, without fear of independent

33. A summary of the reasons given in replies to the requests is as follows:
1) Information not included under s. 3 as 'Free' — requests 5, 7, & 8
2) S. 4(a) — information respecting another person — requests 1 & 9
3) S. 4(e) — investigative exemption — requests 1 & 6
4) Information not identified precisely enough — request 9
5) No investigation undertaken/no information on file — requests 2, 3, & 4

examination. But, is there anything to fear? Is it not true that everyone trusts the government?

As well, information which was previously released may well be refused now that definite guidelines are available upon which requests can be measured, notwithstanding s. 5 of the Act stating the contrary. The Consumer Protection Act[34] allows the registrar to disseminate information on many subjects — such as methods of granting credit and the practices of lenders. However, a specific request could be denied as not falling within the provisions of s.3 of the Act, as not being precise enough, or as being information relating to another person under s. 4(a).

The path to be followed by a person seeking information in Nova Scotia is indeed a difficult one and not prone to success. Some have said that at least it is a step in the right direction, but is something badly done better than doing nothing at all? It took over eight years for the United States legislation to be given some teeth, and I suspect that it will take as long, if not longer in Nova Scotia. In the interim, the people of Nova Scotia will have to rely on department leaks, exposés, or turn to the United States, where much information not available through Canadian Governments is being released.[35]

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34. Consumer Protection Act, R.S.N.S. 1967, c. 53, s. 3(d)

35. For instance, all Canadian meat plants which export to the U.S. must be inspected by American inspectors. The reports are filed in Washington, where everyone, Canadian or American, can get a copy for no charge. These reports would in all probability be denied under a request under the Nova Scotia Act.