

To Ken Rubin, organic farmer and full-time snooper,
Ottawa's information law is closer to a secrecy act. Without him we
might never know what the federal government is up to

State Secrets

Four years ago, right after the Access to Information Act was proclaimed, an Ottawa man named Ken Rubin filed more than two dozen applications for information on subjects ranging from nuclear power to indoor air pollution. He waited until this spring for answers to some of his requests. Rubin is a self-confessed "access junkie," and his dealings with the federal bureaucracy provide a fascinating and disquieting glimpse of the information law in action. Since his first round of applications, he's filed at least 463 more with various federal departments and agencies and lodged eighty complaints with the information commissioner, Inger Hansen.

He's launched five Federal Court actions, and taken part in several other cases; and he's written about fifty reports and articles on his findings. Without Rubin we would not know, for example, that our government has been lobbying hard in Washington to block a U.S. ban on asbestos — a campaign that tarnishes our reputation as champions of a clean environment in the acid-rain debate. Rubin's experiences show why he and other users — and now, significantly, the House of Commons justice committee — are calling for major reforms in the act and its enforcement.

One of his initial inquiries in 1983 concerned health and safety rules in meat-packing plants. There had been a rash of reports by U.S. consumer groups, and similar allegations by meat-inspectors' unions in Canada, about meat from sick animals, meat handled by sick workers, meat contaminated with chemicals, meat improperly stored or exposed to flies and rodents. Rubin's interest had

been aroused by the government's reluctance to release detailed information.

After negotiating with Agriculture Canada's "access coordinator" — each government agency has someone who's supposed to handle inquiries under the act — and cramming in the department's library, Rubin decided he wanted to see a file of meat-inspection reports as well as the department's 1982 and 1983 audit reports on the plants; he also asked for correspondence, including letters between Agriculture Canada and various meat-industry trade associations about how they would deal with access requests. Because the information was "in the public interest" and he intended to publicize it, Rubin asked for a waiver of any fees.

First came a series of delays — thirty days here, forty-five days there — while the department studied the applications and informed all the companies that might be affected. Meanwhile Jim Romahn of the *Kitchener-Waterloo Record* began seeking similar information. The reports released to Romahn were so heavily censored that he complained to Hansen, the quasi-judicial official who mediates disputes over access. After more delays, her intervention produced some less-censored reports, dealing mainly with smaller packing houses.

The smaller packers had apparently decided it was not worth a big legal bill to fight public scrutiny, but a dozen of the larger meat companies — including

BY ROBERT BOTT

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Canada Packers, Burns, Schneider's, and Gainers - brought out their heavy legal artillery. In a series of actions, they asked the Federal Court to block Rubin's and Romahn's requests on grounds that the reports were "commercial confidences" exempt from the act and that they would suffer "commercial injury" from their release to the media. Rubin contended that another section of the act, overriding commercial confidentiality in cases of public health and safety, should apply. By now he had made three more applications for information. The dispute is still before the court. The federal justice department is now on its third lawyer in the case, which goes to trial this fall; it could then proceed to the appellate division of the Federal Court and to the Supreme Court of Canada.

At one point, the department told Rubin he would have to pay \$80,000 - including computer time billed at \$16.50 a minute - for search and preparation of documents; he refused and, after negotiation, obtained some of what he sought for free. Meanwhile, Agriculture Canada revised its inspection and audit forms so that the information would be less embarrassing if released. "Agriculture Canada is supposed to be on my side in this," Rubin says sarcastically, but in his view the department has bent over backwards to please the meat packers. For their part, the meat packers maintain that problems identified in the old reports have been corrected and that to publicize them now would needlessly damage the industry.

An organic farmer, freelance researcher, and political activist, Rubin has spent many hours since 1983 on the meat-inspection case, which he sees as a classic conflict between the public interest and the Canadian penchant for confidentiality. He has no client for the work and has received no money for it. "I'm trying to find out how good the sanitation and hygiene is in the plants and how that affects the kind of meat that we get," Rubin says. He also wants to alter attitudes in a department that has traditionally hoarded data. Most of all, however, he wants to prove that, measured by progress towards open government, Canada is still in the Dark Ages - that the present act is a failure and, in some ways, a step backwards.

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Ironically, if Rubin had merely wanted to see Canadian meat-inspection reports, the easiest way would have been to apply under the U.S. Freedom of Information Act for reports on meat sent south over the border; Ralph Nader's researchers have been obtaining these since the early 1970s. The American law, first passed in 1966 and substantially liberalized in 1974, put out the welcome mat. Last year alone, more than 321,000 requests were filed in Washington for data on everything from road-paving contracts to Star Wars. Nearly all were answered fully, cheaply, and comparatively quickly. Although Congress has recently made some moves to close the floodgates, the FOI Act has gained so many friends that major restrictions are unlikely. Other countries - including France, Australia, New Zealand, and the Netherlands - have since followed the U.S. example but, significantly, the list does not include Britain: in the British parliamentary system, bureaucrats are traditionally faceless and blameless; only ministers are held responsible for government actions.

Typically, we waffle: Canada has an access law; a grudging concession to American trends; but - perhaps reflecting the durability of our British political institutions - it doesn't work very well. That's Rubin's point. "I want to see a genuine information-release law," he says. "I want to see the means in place that would allow ordinary Canadians, not just the elite opinion makers, to have

fast, low-cost, over-the-counter access."

Persistent and somewhat self-righteous, Ken Rubin has been hacking away at the windmills of business and bureaucracy all his adult life. At forty-four, he carries out an incredible range of campaigns from his cluttered office - no computer, just a telephone, a portable typewriter, and piles of files reaching to the ceiling - in a modest single-family house in the Glebe district of Ottawa. He first became interested in the links between information and power in the 1960s while earning three master's degrees - history, political science, and community development - from the universities of Manitoba and Southern Illinois. By the time he moved to Ottawa in 1969, Rubin was firmly committed to developing a political "third force" to counter the

power of corporate and government elites. Although in 1977 he began growing flowers, herbs, and vegetables commercially on a thirty-two-acre organic farm in Luskville, Quebec, he has devoted most of his efforts to civil liberties, consumerism, and environmentalism. His own skill was research, and in 1974, when the toughened U.S. FOI was enacted, Rubin eagerly joined a loose coalition known as the Access Group to lobby for similar legislation here.

The Access Group, led by Alberta Conservative M.P. Gerald Baldwin, ran into the same obstacles that thwart access today. In 1977, the Liberal government granted privacy protection and access to personal files held by the federal government under the Canadian Human Rights Commission Act, but access to other government information was relegated to a discussion paper. Joe Clark's Conservatives introduced much more progressive legislation, but they were ousted while the bill was still before a committee. Finally, in 1980, the Liberals brought forward the present Access to Information Act (and the closely related Privacy Act). It became law in 1983. The act offers an emasculated version of access. One key provision, Section 21, says the government may refuse for twenty years to release "advice or recommendations developed by or for a government institution or a minister." Rubin calls this the "Mack truck" exemption; you can drive anything through it.

The Canada Mortgage and Housing Corporation invoked Section 21 when

Rubin asked to see minutes of its board and executive committee meetings between 1970 and 1985, and the refusal was upheld by the trials division of the Federal Court. Last February, Rubin took the case to the appellate division of the court, the first such appeal of an access judgment. "It's a key test case," he says. Previous rulings, however, have upheld the government's broad interpretation of the section.

The only real solution may be to change the law. Indeed, the Commons justice committee in its major report *Open and Shut*, released last March, says that Section 21 is "far too broad." The committee recommends a time limit of ten, not twenty, years and says the section should include an "injury test" requiring the government to prove to a judge or commissioner that actual harm would result from a disclosure.

New legislation could appear this winter.

Another loophole is the blanket exclusion of cabinet confidences. The Treasury Board, for example, cited this section to withhold background information on its implementation of the access act, on grounds it had been discussed by cabinet. Public Works tried to use the same argument to withhold information about urea-formaldehyde foam insulation (UFFI) in federal buildings, until Rubin went to court. Rubin calls this the "black hole" provision, because purported cabinet confidences can't even be examined by a judge or commissioner to determine whether that's what they are. The justice committee recommends scrapping the exclusion and replacing it with a simple exemption, covering only actual cabinet discussions, agendas, and draft legislation. The exemption would apply for fifteen years, and claims under it would be subject to review.

There are so many exempted categories that the law now reads like an Official Secrets Act under another name: the government may refuse access to almost any information it doesn't want released. Some departments, such as Supply and Services, now use the act to withhold what they once gave out voluntarily.

The most commonly used exemptions are those protecting commercial information — the ones that have caused Rubin so much difficulty in the meat-packing case. The justice committee recommendations would leave most of

What Rubin calls the "black hole" is a blanket exemption of all cabinet secrets: the purported confidences can't even be examined to see if that's what they are

these protections intact, but they would shorten the time limit for response and would clarify circumstances in which public interest could override commercial interest.

Shorter time limits, strictly enforced, would solve a lot of problems. Ken Rubin — pedalling from office to office on his ancient one-speed bicycle — copes pretty well with bureaucratic foot-dragging. But for journalists, "access delayed is access denied," according to Frank Howard, a writer for *The Ottawa Citizen*. Howard is a veteran reporter who once spent nearly five years as a government information officer; his "Bureaucrats" column is widely read, and sometimes feared, in the capital. He says that delay is the favourite defensive tactic of bureaucrats, and he cites his own quest for information about leases issued by the National Capital Commission (NCC), one of the biggest landlords in the Ottawa-Hull region. He's been trying for three years to find out whether well-connected tenants are getting special deals.

After several months of informal inquiries that produced only a list of properties, without names or lease terms, Howard filed an access request in May, 1984. A month later, he complained to Inger Hansen. The NCC claimed, among other things, that disclosure of lease details would violate the Privacy Act. The commissioner pointed out, however, that there is an exception in the act for information about individuals receiving

financial benefits from the government. Then she undertook a statistical study to determine whether there were indeed financial benefits to the lessees. "She was being cautious," Howard says, "in case she had to go to court." The survey seemed to confirm financial benefits, but now there were more delays while private tenants were asked if they had objections to release of the information; some did, and the NCC remained adamant. "Either she or we will be going to Federal Court," Howard says. He may get the records — for tenants in 1984, when the request was filed; it would take a new application to get more current data — but he's pessimistic about the process. "The government has fantastic resources to block access. They can say 'No' long enough to scare off most people."

Hansen, despite her ten investigators and two assistant commissioners, is understaffed and "too soft on the bureaucracies," he believes. He says that her background as a lawyer, former prison ombudsman, and former privacy commissioner doesn't equip her to attack secrecy with the required vigour. Rubin agrees with this assessment, and the Commons committee report also recommends a larger staff and a more aggressive role for the commissioner. Hansen says she's opted for a gradual process of building up precedents, of training bureaucrats in the law. Is the act working? "Yes and no," Hansen says. "It takes time to change attitudes."

The biggest flaw in the present act is its daunting complexity. Users have to jump through a lot of bureaucratic hoops — correctly addressing the form, precisely specifying the documents sought, using the right phrases to request fee waivers. The number of applications a year has risen from 1,500 to 3,600, but a substantial number of users — about eleven per cent — have filed complaints. Hansen has found about half of the complaints insupportable under the act; the remainder have been resolved by negotiation or ministerial intervention, discontinued by the claimant, or taken to Federal Court by the commissioner and/or the complainant. Unfortunately, many of the disputed cases deal with the most valuable information.

Rubin says that the patient citizen can probably make a simple request just by talking to government access personnel

or programme officers and reading the official publications. More complex or sensitive inquiries are likely to require lawyers or consultants, who typically charge \$100 to \$800 to help process a request. Rubin's fee is \$50 per application, less for the needy whose goals he shares. For all his research and consulting, he makes no more than \$5,000 to \$15,000 a year. His inquiries usually begin as personal quests which produce revenue only if the media, public-interest groups, or labour unions want the results and pay for his time and persistence.

If delays, exemptions, or complexity don't stop the inquirer, the government may use the spectre of enormous search charges, as Agriculture Canada did in the meat-packing case. Peter Calamai of Southam News says the most his organization has actually paid in search charges was \$1,538 — to obtain some of former Prime Minister Trudeau's expense accounts. In other cases, however, Southam has dropped inquiries after being asked for fees as high as \$10,000. The justice committee recommends widening the commissioner's power to order fee waivers.

Calamai, with the part-time assistance of his wife, Mary, has filed more than 225 access requests since 1983; the Southam Ottawa Bureau has registered more than 400 requests; Southam and the Ottawa bureaus of the Canadian Press, *The Globe and Mail*, and *The Toronto Star* are the heaviest journalistic users, and now routinely obtain titillating tidbits such as ministerial expense accounts and the results of government-commissioned opinion polls. The other major newspapers have all made at least occasional attempts to use the act. Jim Romahn of the *Kitchener-Waterloo Record* has written a number of stories on the meat-packing industry, based on the information he extracted. The *Calgary Herald* overcame the objections of tobacco manufacturers to obtain a list of additives commonly used in cigarettes, although the government withheld "trade secrets" about which went into which brands; and a few months ago the *Herald* obtained a briefing paper outlining the arguments against privatizing Petro-Canada.

There should be more media use, Calamai says. When Southam reporters (with help from Rubin, for which he was paid a few hundred dollars) obtained ac-

I f the exemptions, the delays, and the complexities aren't hurdle enough, departments can invoke huge search fees: Southam's been threatened with bills of up to \$10,000

cess to Atomic Energy Control Board minutes dating back to the 1970s, they reported only the most glaring failures and inadequacies in Ontario Hydro nuclear generating stations. There are probably dozens more stories there in the minutes, Calamai says, but no-one else has gone looking.

News organizations, in fact, lack the institutional memory required to lay long-term siege to the bureaucracy. Reporters' change assignments, issues come and go, deadlines loom daily. Calamai himself is leaving Ottawa in November to become Southam's Washington bureau chief. Some journalists have suggested setting up a central clearing house for access requests but so far it's just an idea. The media apparently prefer to count their profits while Ken Rubin does the job for next to nothing.

In any case, journalists account for only about twenty per cent of access requests. The biggest users are probably businesses, but the act has also been used by public-interest groups, labour unions, lawyers, academics, and ordinary citizens. Because applicants need not specify their occupation unless they are seeking fee waivers, it's hard to say exactly who they are. Ron Atkey, a Toronto lawyer and former Conservative minister, has advised corporate clients to have a secretary file the application from her home address so the government won't know who is asking. This is particularly useful when a company is testing the act, to see what infor-

mation is available. At present, most of the secrets are secure.

Whether this changes will depend largely on the government's response to the justice committee's report. The former committee chairman, Blaine Thacker, a Tory from Lethbridge, thinks the recommendations will get a sympathetic hearing. He recalls the Conservatives' long campaign for access when they were in opposition and during the Clark minority, and he cites Brian Mulroney's own pledges in his pre-election book, *Where I Stand*. "It's in a cabinet minister's interest to see that the public gets predecision information," Thacker argues. "In this huge country, with all its diversity, it's important that the public see the conflicting inputs that went into a decision." Access, he says, is also essential to offset the power of the mandarins: "The bureau-

crats are sophisticated, educated, and permanent. They know that information is power, and they don't give it up easily."

The committee, however, ignores one reason why the government doesn't like to open its information hoard — embarrassment. "A lot of the stuff," says Rubin, "is very stupid and mundane."

Rubin fears the government will delay the issue until after the next election. In the meantime, he'll continue "to monitor things from a citizen's point of view." Last February he scored one of the victories that keep him going: through an access request, he obtained a report showing that toxic moulds are an important factor in indoor pollution. The four-agency, \$750,000 study, completed in June, 1986, indicated that the infamous UFFI may be no worse than any other insulation, dangerous mainly as a breeding ground for moulds. The study might have become public eventually; but bureaucrats, having spent \$253-million to compensate homeowners who installed UFFI, were not likely to call a press conference to admit they might have missed the real health threat. Rubin initially sought the data to satisfy a personal interest, but then shared the results with Southam for \$250. He was gratified to see a front-page story in *The Ottawa Citizen* on February 28 about the mould study; it included a phrase that pops up regularly: "...obtained for Southam News by researcher Ken Rubin using the Access to Information Act."