Why does our federal government have to be so secretive? The Prime Minister himself, writing in Cité Libre in 1964, asserted that the democratic process requires the ready availability of true and complete information so that people can objectively evaluate their government's policy. Shortly after he became Prime Minister in 1968, Mr. Trudeau responded to a question in the House by stating "information is perhaps the most important single subject which is facing not only this government but all governments in Canada (and) we intend to do as much as we can to correct the lack of proper information available to the people of Canada."

Yet in 1977, the government led by this man still operates under a curtain of secrecy, with very few opportunities for individual citizens to know the information upon which government decisions are based. Remember that this is information which is collected at great expense to the taxpayer.

It is a truism today that with the closed style of the Trudeau government, most of the important information from Ottawa comes to the public's attention through leaks. Whether it is through, the vehicle of a Globe and Mail expose, a CBC special or questions of an opposition Member of Parliament, it is clear that there are frustrated civil servants who are willing to invoke their own brand of civil disobedience as a reaction to the oppressive policy of the present government relating to the dissemination of information. In many respects, these civil servants are minor league Deep Throats, operating out of Ottawa, firmly convinced as to the righteousness of their particular cause and romanced by an often-willing press gallery or Opposition anxious for the big story.

FREEDOM OF

and The Green

The trouble with this system is that not only does it encourage responsible civil servants to breach their oath of secrecy, but there is no rationale or consistency as to what information leaks out and what remains suppressed. And public suspicion continues.

There has been some small progress in the last ten years. For example, the federal government in 1969 agreed to transfer all government documents more than thirty years old to the Public Archives. The Parliamentary Committee on Statutory Instruments was established in 1971 to review all government regulations, and to force publication in all but a few excepted areas. In 1975, the government tabled guide-
lines relating to the production of government documents requested by individual Members of Parliament. However, these guidelines, while they did set forth the general principle that government information should be made public, contained 16 exemptions that were so broad that the government was really left with the unfettered discretion in deciding what could be released and what was to be withheld.

For example, under these 1973 guidelines there was a major Opposition initiative to press the government in the House for the release of details of a report made into allegations of corruption and rigged tendering with regard to the student housing cooperative at Rochdale College in Toronto. The government refused, notwithstanding the millions of dollars of taxpayers' money involved, on the ground that there were criminal charges imminent and disciplinary action was going to be taken by the Ontario Association of Architects. However, after almost four years, there have been no criminal charges laid and no architect has had his licence lifted, and the public is none the wiser.

What additional sort of information has the government been found to be suppressing under these 1973 guidelines?

- The government has refused to make known all the details of its CANDU reactor sales to Korea and Argentina;
- It has refused to make public the details of an investigation into the degree of radioactivity in the waters near Port Hope, Ontario;
- It has refused to release details of its report into arsenic poisoning in the Yellowknife area of the Northwest Territories;
- It has refused to release the information it has gathered with respect to federal government tendering practices for dredging contracts and Sky Shops and related issues;
- It has refused to release details concerning the appointment of auditors for the CNR and Air Canada, or contract between CNR and Air Canada.

Mr. Atkey was the Member of Parliament for St. Paul's in 1972-74. He practices law with the Toronto firm of Osler, Hoskin & Harcourt and is a professor of constitutional law at the University of Toronto.
Clearly, the present arrangement is unsatisfactory. Not only is it undemocratic in that it hampers Members of Parliament in representing their constituents as participants in an informed debate, but it breeds distrusts and cynicism of government generally.

Many Canadians had hoped the situation would change when the government in its October, 1976 Throne Speech expressed concern for the "citizen's right of access to the information necessary to make well informed judgments and take responsible action." The government promised a policy paper "in the hope that early agreement might be reached on the best methods to improve public access to government information.

It was expected that the policy paper would actually recommend legislation and perhaps contain a draft bill. After all, a number of private Members of Parliament, most notably Jed Baldwin, M.P., for Peace River, had already introduced Bills outlining the mechanics of what had to be done. Extensive public hearings had been held on Baldwin's Bill by the Parliamentary Committee on Statutory Instruments throughout 1976. The government was also aware that the United States has had freedom of information legislation since 1967, which has worked rather effectively.

Most of the Bills discussed in Canada have tended to follow the U.S. model. They would give citizens the statutory right of access to information held by governments or their agencies, would list certain narrowly defined exemptions such as national security in very precise terms, and would provide for independent third party adjudication by the courts or someone like an ombudsman or parliamentary commissioner in the event of disputes.

POLICY PAPER MERELY JUSTIFIED CONCEALMENT AND THE "NEED" FOR ANONYMITY

Just two days before the hyped-up Canada Day celebrations on July 1st this year, Secretary of State John Roberts, quietly released the long-awaited policy paper in the form of a Green Paper entitled "Legislation on Public Access to Government Documents." There were no recommendations and no draft Bill.

It would not be unkind or unfair to rename the Green Paper "A Defence of Government Secrecy." Two extracts from the introductory chapter of the Green Paper are most instructive. The first is the superficial justification put forward for privacy of decision-making in government:

"Government and Opposition are a little like football teams, who, in the huddle, prepare their action out of earshot. To open up their advance planning to full public examination that risks destroying their ability to put the plans into action."

The second is a ridiculous attempt at justifying the need for anonymity of public servants who sign government reports, memoranda or letters:

"Advice contained in such documents might be construed in the press and Parliament as embarrassing to a Minister or be used to try to break down the unity of the governing party..."

The only legitimate basis put forward for the preservation of privacy of decision-making in government relates to the concept of ministerial responsibility. The Green Paper rightly states that the theory of
ministerial responsibility implies the answerability of Ministers of Parliament for the actions taken by them or by public servants responsible to them. It is even admitted that to the extent legislation on public access to government documents would require Ministers to decide on the applicability of exemptions requested in applications for access, "the exercise of ministerial responsibility would be sharpened." But the suggestion is then made that ministerial responsibility could be eroded if the Minister's decision were subject to a mandatory reversal by some review mechanism such as a judge with power to require the release of documents.

This suggestion is based on two false assumptions: one, that ministerial responsibility is somehow an obsolete and inviolable obligation, something which any close observer of Canadian Cabinet Ministers, and the Hon. Jean-Pierre Goyer in particular, would deny; and second, that judges or independent commissioners appointed to review decisions are incompetent or at least unmindful of the reasons for confidentiality in such areas as national security. In short, the bogey of ministerial responsibility does not stand up in practice.

Dealing with the question of exemptions from any obligation of the government to make information public, the Green Paper comes up with a suggested list of nine. While some such as international relations, national defence or information invading the personal privacy of the individual are quite justifiable, it is significant that the list of nine is really a reworked version of the 16 exemptions contained in the 1973 guidelines for M.P.'s. They retain all the secrecy concepts to which the government has resorted in refusing information requested in recent years.

The most contentious part of the Green Paper is contained in a discussion of the appropriate review process for adjudication of disputes once a government department or agency had decided that documents requested by an applicant fall under one of the exemptions. The Green Paper puts forward five options:

- parliamentary scrutiny;
- an information auditor reporting to Parliament;
- an information commissioner with advisory powers;
- an independent information commissioner with powers to order release; and
- judicial review with judges empowered to order release.

It is clear that the Green Paper looks with disfavour on the fourth and fifth options because they are seen as contrary to the basic principle of ministerial responsibility and would also place the independent commissioner or judge in a political rather than judicial role.

A JUDICIAL OFFICER IS SAID TO BE UNQUALIFIED TO JUDGE A THORNY PROBLEM

However, the fallacy of this rationale is exposed by the following statement:

"There is no way that a judicial officer can be properly made aware of all the political, economic, social and security factors that may have led to the decision in issue."

This is transparent nonsense. Not only is it insulting to the competence and experience of our senior judiciary in Canada but it is based on a notion that our government must be protected
from the courts, a proposition which is contrary to any fundamental understanding of the rule of law. We have a long tradition of independent judicial review of administrative action in our Canadian legal system, and decisions respecting access to government documents should be no exception. It is not enough to have scrutiny by Parliament or an information auditor or commissioner answering to Parliament as the necessary third party adjudication in the event of disputes, particularly when government Ministers can usually rely on a disciplined majority of supporters in the House of Commons as loyal party supporters to uphold their actions against any criticism.

It may be that some types of parliamentary reform might give that venerable institution some effective power for making government Ministers more accountable for their information decisions, but this does not seem to be in the offing. And it is simply insufficient to say that the public can make the final decision at election time, given the complexity of access to information disputes at any one given time and the ability of Cabinet Ministers to selectively release those facts which diffuse criticism while concealing information that would generate debate.

The Green Paper is not without any redeeming features. In a chapter entitled "Financial and Managerial Considerations", an attempt is made to assess overall costs based on American experience with the Freedom of Information Act. Allowing for fundamental differences in size and in American and Canadian politicolegal traditions and attitudes, it is projected that a U.S.-style Act in Canada would generate 70,000 applications annually, at a cost to federal government departments of about $10.5 million. Start-up costs would be another $1 million on a national basis and it is suggested that an information commissioner with an appropriate staff would cost about $800,000 per annum. Even in this area, the Green Paper reveals its bias by refusing to attempt even a general estimate of overall costs of the adoption of the judicial review option, notwithstanding the existence of a comprehensive financial data base of courts administration in most provinces and at the federal level.

The Green Paper is remarkably silent on the question of results of American experience under the Freedom of Information Act. It does point out that corporations have tended to be the most aggressive users and it has not been of such a great benefit to journalists since they have to work to fairly short deadlines and find the administrative machinery involved too cumbersome to be of immediate and consistent use in their day-to-day work. The easy answer in Canada of course is to avoid making the administrative machinery cumbersome. But let's look at some specific examples of information gained by individuals and journalists through the American Act:

**ACCOMPLISHMENTS OF THE U.S. FREEDOM OF INFORMATION ACT ARE CONSIDERABLE**

- The public learned of reports on the cancer-causing properties of chloroform, which is widely used in cough syrups.
- The public learned of an army-sponsored study on the effects of marijuana use, showing new-found harm in some instances and no harm in others.
- The public learned of safety defects in a number of automobiles, and recalls resulted.
The public learned of radio-active contamination of New Mexico's water supply, and as a result many lives may have been saved.

Independent reports from the United States also indicate that even the aggressive corporate users of the Act have found the legislation genuinely useful to aid in the legitimate implementation of corporate and public strategy, largely in the gathering of background information to evaluate new products, potential markets, product innovations, and so forth.

The U.S. Freedom of Information Act has also been of assistance to Canadians. In one example, the Northern Health Service of the government of Canada had refused to make available to a Member of Parliament which stores had sold sub-standard milkshakes because in the government's view this would destroy its rapport with the stores. The information was obtained from the U.S.

In another example, the federal department of Transport had withheld as too technical the safety test results on lifejackets and snowmobiles. Again, the material was obtained in the U.S.

This situation is deplorable, not just because of the embarrassment to our sovereignty, but because it gives us a bird's eye view of the sort of information lying just beneath the surface in Canada which the government seems determined to keep under wraps: The recent uranium cartel information is only another in a series of examples where information suppressed by the Canadian government has surfaced in Washington as a matter of public record.

What can we expect in the future? It would appear that the federal government feels that the way to involve citizens is more ministerial speeches, news releases, television spectaculars, royal commissions and even multi-million dollar ad campaigns. But surely this is mere window dressing. The only cure for the present cynicism, if public confidence in government is to be restored, is to provide the facts.

AVOIED CLANDESTINE ACTIVITIES OF U.S. EXECUTIVE BUT WE REMAIN SUBTLE

It would be unfair to suggest that the present curtain of secrecy in Ottawa is rooted in outright corruption and wrongdoing. We have been lucky to have avoided much of the clandestine and surreptitious activity which was prevalent in the U.S. Executive just three or four years ago. But the instinct for secrecy in the Canadian government is much more subtle. It is basically to provide mistakes and bad judgment from being observed. Too many of our Cabinet Ministers and Chairmen of government agencies crave perfection and the appearance of being right and looking impeccable.

The trouble with this is that, with the power of television and the mass media, nobody believes that any public office holder or official is perfect. They are all human and are bound to make mistakes in fulfilling their public mandate, and the public knows this.

Freedom of information is as much a state of mind as it is a law. No government leader, no matter how clever or articulate or determined, can hope to obtain public support for his policies unless there is a demonstrated willingness to open up the workings of government to ordinary citizens. Because if there is no openness, there is no trust. Without trust, the task of effective responsible government becomes impossible.