The Senate Can Review and Constructively Change Bill C-58’s Most Negative Consequences to Open Government

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

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Bill C-58 in its current form assails the public’s right to apply and probe for government information, curtails and compromises the Information Commissioner’s order-making review powers and leaves intact a system of excessive secrecy that even Senators would have trouble penetrating. It gives government even more powers, defeating any aspirations for fuller disclosures.

But after thirty-five years, Canadians want and expect progressive amendments to the Access to Information Act that Bill C-58 dismally fails to provide.

The Senate can remedy the most serious anti-access provisions of Bill C-58 that deter sought-after fuller public access to information, that deflate the need for stronger independent review, and that prevent expanding institutional and group coverage.

Ten areas for amendment of Bill C-58 are identified that the Senate, in its legislative review role, should consider adopting as priorities for its consideration in their efforts to amend and improve Bill C-58.

They are:

Recommendation 1

**Background:** The first amendment proposed would add language that strengthens the government’s constitutional and statutory duties and commitment to assist and enhance the public right to access.

**Solution:** Section 4 (2.1) is amended as follows: “The head of a government institution shall, under the constitution, without regard to the identity of a person making a request for access to a record under the control of the institution, [delete “make every reasonable effort to”] undertake to assist and serve the person in connection with the request, undertake to ensure the records sought are in written form, and undertake to respond to the request accurately and completely with the fullest and possible disclosure, and, subject to regulations, provide quick and timely access to the record in the format requested”.

Recommendation 2

**Background:** Sections 6 and 6.1 place restrictions on the public's access rights. Requesters already have to attempt to provide a description of information sought. Yet the government still wants to be able to decline to process some public applications for information that do not meet their imposed conditions and insists that the Information Commissioner be forced to stick handle their wishes to do so. If anything, the duty to assist applicants needs to be substantially improved as set out above in
Recommendation 1. As well, assisting applicants includes dealing with hurdles to access caused by longer and longer delays and ending the possibility of the government levying fees.

**Solution:** For unfettered public access to records, Sections 6 and 6.1 should be deleted. Their removal would start the process of reconciliation and take back efforts to belittle, manipulate, discriminate, deter and delay the public's right to know. As well, Section 9 must be amended to restrict the total time government can take once the initial 30 day response period ends to up to an additional 60 days, and if not met, subject to penalties upwards to $100,000. The current Section 11 and Section 71 (e) (Regulations) should be deleted so that it is clear that all fees related to access and disclosure are eliminated.

**Recommendation 3**

**Background:** The next proposed amendment strengthens independent order-making review of information denials.

**Solution:** Sections 30-36 must spell out that the Information Commissioner has the power to conduct full and timely investigations, undertake formal mediation, conduct inquiries, publish investigative findings. Sections 41-48 must make clear that the Information Commissioner is a truly independent review office and able to issue certifiable enforceable stand alone binding orders and has full commissioner order making powers. The Commissioner would assume this new strengthened role immediately upon legislation passage with no transition period.

**Recommendation 4**

**Background:** The courts should not be used as a way of weakening a more effective Information Commissioner.

**Solution:** Section 44.1 should be deleted to clarify that the Federal Courts can conduct judicial reviews of Information Commissioner orders but not be given powers to begin new proceedings that exclude full consideration of those Information Commissioner investigations and orders.

**Recommendation 5**

**Background:** The fifth amendment proposed is a positive step forward to ensure there is a strong, much improved purpose clause to access legislation.

**Solution:** Section 2 should be redrafted so that one, the Access to Information Act's prime constitutional purpose is the fullest and fastest disclosure of records where a regime of numerous exemptions is finally removed as the act's prime companion purpose; two, the proposed self-serving new Section 2.1 amendment that introduces the notion of a one-sided government “accountability” management code is withdrawn; and three, the act's purpose clearly includes extending access coverage, and to advance this ministers, the prime minister, parliament and institutions, institutions performing a public function and groups receiving federal money must be now covered.
Recommendation 6

**Background:** The Access to Information Act can no longer have two conflicting principles. Its express purpose of disclosure must be prime and not accompanied by the enhancement of secrecy practices. As it now stands, numerous broad and vague exemptions and a growing list of exclusions to public access are given prominence.

**Solution:** At this juncture, right now, a new Section 11 should be introduced as a preamble to the listed exceptions to public access that makes clear exemptions are narrow, limited and specific but also restricted via harms tests and a general public interest override. This will be a start. Within a year, the second part of a new Section 11 would kick in that would make all exemptions discretionary ones and end any exclusion of records, including cabinet records, from public access and independent review within a year.

Recommendation 7

**Background:** Parliament must have a key role in reviewing secrecy practices in place and in enacting better disclosure practices.

Section 99 of Bill C-58 allows for a parliamentary review of access legislation once every five years but it does not give parliament the prime review mandate to continually review and report on secrecy practices and the many statutory prohibitions preventing transparency where changes to access to information legislation are urgently needed.

Further, Section 93 simply states a government report would be produced within a year and does not focus in on drastically cutting exceptions to public access. The government has already in any case announced plans for limited phase-two changes that such a government report would reconfirm. This would give little chance for much parliamentary and public debate, or allow time for legislation being passed before an election occurs.

Section 93 would permit the government of the day every five years to set the agenda by tabling a report that gives parliament a secondary and limited role. Putting priority on government reports on access to information as a major condition of statutory review is a step backward unlikely to result in significantly strengthening access legislation.

**Solution:** Bill C-58 would mandate under revised Sections 93 and 99 the designated parliamentary committees to assist and report on within one year on the means of making all exemptions by law discretionary and ending any exclusion of records, including cabinet records, from public access and independent review. Within a three-year period parliamentary committees would be mandated to conduct a fuller review of all enactments and secrecy measures that affect access to information disclosures. This fuller parliamentary review of exceptions to public access would focus on helping restrict, narrow, and make more specific exemptions and on removing all unnecessary exceptions to public access, and do such reviews annually thereafter. As well, each year, the designated parliamentary committees would be mandated to review what additions should be made to the list of pro-active disclosures.
The designated permanent access to information committees in the House of Commons and the Senate must be given adequate resources to do this comprehensive work and be able to issue report findings and propose legislative changes. In addition, Parliament and its designated committees will be central to the selection of an Information Commissioner who would assist it in its reviews of secrecy enactments and pro-active disclosure additions.

Recommendation 8

Background: As it now stands, Part 2 undermines and conflicts with Part 1 access legislation. An amendment is needed that would remove the barriers between Part 1 and 2 that legally create under Part 2 a new restrictive separate government class of records that limits pro-active public disclosure. Instead, the focus must be on opening and greatly expanding pro-active public disclosure.

To elaborate, Bill C-58 creates under Part 2 a whole new separate but very limited and in some cases already part of a government-controlled publication regime. It excludes from access coverage unpublished records from the offices of ministers, the prime minister, parliament and institutions and permits only data releases from those bodies if approved by the government.

Part 2 as drafted would rule out much better, less expensive and more timely, broader pro-active routine disclosures. It would permanently disallow much broad coverage of institutions. It prevents public application to many data and record sets and prevents such omissions and delays to release from being subject to independent Information Commissioner review.

Solution: Sections 2 and 91 must be redrafted so that Part 2’s purpose and intent should extend and add access and review rights enabling a publication regime of legalized immediate routine disclosures of information that the public needs and wants. This includes safety, health, environment and consumer information. It must specify that the disclosure of ministers, prime ministers, parliament or other institutions or group records are not excluded from application and review and disclosure under Part 1.

Bill C-58 must clearly state pro-active disclosures released and added to annually are not unilaterally chosen and edited, and are instead open to public applications and scrutiny and independent review and that public institutions and publicly funded bodies are covered by access legislation and not set apart from Part 1 and are embedded in Part 1 as a more immediate route for total public disclosures.

Finally, two companion Privacy Act amendments are put forward for consideration that would help enhance and improve public access to records.

Recommendation 9

Background: Bill C-58 under Part 2 government terms would permit disclosure of some of the expenses of public officials. But under the Privacy Act not all public employee and public official expense data is releasable, including benefits and perks data and currently this can be denied under Section 19 of the Access To Information Act as personal information.

Solution: Amend the definition of what constitutes public access exceptions to the definition of personal information under Sections 3. J and 3. L of the Privacy Act so that public employees and officials'
benefits and perks are disclosable and cannot be denied under Section 19 of the Access To Information Act as personal information.

**Recommendation 10**

**Background:** Representatives from the indigenous community have asked that new restrictive access measures that they were not consulted on under Sections 6 and 6.1 be deleted from Bill C-58. Sections 6 and 6.1 would act as a barrier to the already authorized access to personal and historic indigenous information for those doing land claims research under Section 8 (2) (k) of the Privacy Act. To promote better access, Section 8 (2) (k) of the Privacy Act should be amended to make clear that consultations and joint record management agreements are needed for keeping required records. Such authorized access could also be included for survivors and their next of kin and commissions of inquiries examining indigenous issues.

**Solution:** Section 8 (2) (k) of the Privacy Act could be amended as follows:

“to any association of indigenous people, indigenous residential school survivors or their next of kin, Indian band, indigenous inquiry; or any person acting on behalf of such association, survivors or next of kin, band, inquiry, for the purpose after consultation of permanently keeping the records in retrievable order and for the purpose of researching or validating or the claims, titles, disputes or grievances of any of the indigenous people of Canada.”

**Summary**

The public has been frustrated by very limited access legislation that barely functions in a timely and informative way. Bill C-58 in its present form, makes matters worse, including for the Senators’ right to get information.

Yet the public wants serious movement to improve access legislation where the principal tenet becomes disclosure with fuller access and review rights and much less secrecy. The Senate can champion this need.

My previous submissions to the House of Commons Standing Committee on Access to Information, Privacy and Ethics on Bill C-58 are on that committee’s web site. More about my advocacy work over the years can be found at kenrubin.ca.

Respectfully Submitted

Ken Rubin