

Brief presented to the Senate by the Fédération professionnelle des journalistes du Québec (FPJQ) concerning Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts.

The argument that access to information is essential to democracy is simply put.

Informed voting depends on informed debate. Parliament and the executive branch derive their power from the people, who exercise that power by voting for or against particular people at the ballot box. For the people to effectively participate and vote, they must know and understand what the government is doing. Laws are published. But without additional information, the people cannot know how the executive branch of government is administering those laws – what the government is actually doing. And without that knowledge, informed debate is impossible. Accountable, transparent governance thus depends on the people having information about what the government is doing.

Not only is responsible voting dependent on information – so is the effective exercise of restraint through the judicial branch of governance. Citizens cannot challenge unlawful government action unless they know about it. Constitutional and judicial administrative review also depend on access to information.

Finally, information itself – or the possibility of information coming to light – acts as a check on abuse of powers. Public opinion and debate operate as an immediate check on potential abuse of government power.

The need for information is compounded by the inevitable tendency of governments, and those exercising powers on behalf of the government, to disclose only as much as they deem necessary. Despotism is the historic norm. Democracy sets its face against this. Yet, unchecked, the tendency is always there. And unchecked, it will inevitably undermine democracy.

This proposition has been recognized by statesmen and scholars.

Speech by the Right Honourable Beverley McLachlin,
Chief Justice of the Supreme Court of Canada, May 5, 2009

The Fédération professionnelle des journalistes du Québec (FPJQ) has a membership of over 1,800 journalists who belong to large press groups or are independent, making it the largest association of journalists in Canada. In this brief, the FPJQ addresses several issues relating to the *Access to Information Act* and makes recommendations.

The FPJQ is very disappointed with this weak bill – to quote the expression that the Hon. Senator André Pratte, himself a former

journalist, used in his presentation on March 20 of this year – which in no way reflects the spirit of the commitments made by the Liberal Party of Canada and its leader, Justin Trudeau, Prime Minister of Canada.

Issue: Journalists who would like to obtain certain crucial documents that attest to government decisions cannot determine that they have actually been produced, since there is nothing in this bill that requires the government and its entities to disclose them upstream. This very often means that journalists who have made access requests are told that the documents do not exist.

Recommendation: That an explicit provision be incorporated into the Act to ensure that government documents that attest to government decisions are produced and preserved.

Issue: Journalists who obtain documents too often receive files so redacted that there is nothing left to get out of them. In addition, access to information officers take much too long to provide the files. There is nothing in the bill to provide stricter penalties for excessive redacting or unreasonable times.

Details: In a May 2018 interview, the newly appointed Information Commissioner, Caroline Mayrand, observed a rise in redacting instead of processing requests in a way that respects the provisions of the Act, although she was unable to explain this. She said that the transparency message is not making its way to the bottom of the bureaucracy.

Demonstration: According to recent investigations, barely one quarter of requests result in full disclosure. An analysis by King's College dealing with 428 access requests shows that barely one quarter of requests received a reply in less than 30 days. One third of requests had still not been answered by the end of the investigation, that is, more than four months later.

Recommendation: That provisions be incorporated into the Act to strengthen sanctions against delinquent federal bodies or offices.

Issue: The orders provided for in the bill for giving the Information Commissioner more powers are not enforceable. There is, in fact, nothing in the bill that strengthens her powers, and this means that she would have no recourse to deal with institutions that ignored her opinions. In her own words, she does not have full power to go to the Federal Court to enforce the law.

Historical background: We need only read the previous Commissioners' annual reports to make a disheartening observation about access to information in Canada: the country has slipped six places to the 55th spot in the global freedom of information law rankings.

Recommendation: That the clauses concerning the Information Commissioner's powers be revised to create genuine powers to oversee and sanction an offending government body or office that follows neither the letter nor the spirit of the Act's provisions.

Issue: Section 6 of the Act is amended by giving a government institution the power to reject a request if it does not contain the precise subject to which the request relates, the type of record requested, and the period covered by the request or the date of the document. This amendment is unreasonable. Groups of Indigenous people, academics and historians have already made representations. The government has stated its intention to back down.

Recommendation: That this amendment to the Act be withdrawn.

Issue: Section 6.1 (a proposed new section) allows a head of a government institution to decline to act on a request, even before examining it, for reasons that include the fact that the record does not meet the requirements of section 6, if – this is paragraph (c) – “the request is for such a large number of records or necessitates a search through such a large number of records that acting on the request would unreasonably interfere with the operations of the government institution, even with a reasonable extension of the time limit”, and if – this is paragraph (d) – “the request is vexatious, is made in bad faith or is otherwise an abuse of the right to make a request for access to records”.

Details: The Quebec *Act respecting Access to documents held by public bodies* contains a virtually identical provision in section 137.1. The FPJQ has made representations seeking to have that section repealed because persons requesting access are subject to arbitrary decisions with no oversight of access officers. That section has been used to dismiss requests out of hand, without even processing them first, even though they are legitimate, because of the “repetitious or improper” nature of the requests. At the federal level, who will have jurisdiction to review that kind of decision? The Information Commissioner? The question answers itself (see our previous recommendation).

Explanation: It would be too easy and improper for notoriously delinquent bodies – note that here the bill cites only bad faith on the part of people making requests and not on the part of government bodies! – to reject access requests on that basis. The corollary of producing and preserving documents (see our previous recommendation) assumes that bodies will put in place the necessary systems for efficiently identifying documents. The resources need to be available; this will ensure consistency with the Liberals’ promises.

Recommendation: That section 6.1 be withdrawn from the bill.

Issue: Section 23 and other sections in the bill seem to us to offer too broad a definition of solicitor-client privilege.

Historical background: Solicitor-client privilege must be respected, on the condition that it is asserted fairly and equitably. Here again, our members' experience in Quebec is instructive; government bodies have a tendency to add the names of lawyers or notaries to distribution lists on documents, so they are able to refuse to disclose the documents, citing solicitor-client privilege. The Commission d'accès à l'information, which makes review decisions in Quebec, has stated that in order to assert solicitor-client privilege, there had to be a relationship with a client; the mere fact of including the name of a lawyer or notary in a distribution list does not create that relationship. Solicitor-client privilege is not a catch-all concept for camouflaging documents.

Recommendation: That section 23 and the corollary sections be clarified and limited.

Issue: The bill places significant weight on proactive disclosure of information. Sometimes, this enables governments promoting that idea to hide behind very effective smokescreens. Proactive disclosure is what bodies that have a government agenda do. They can arbitrarily choose the documents that will be disclosed, and even their content. They can remove columns of information from a database. They can remove portions of documents that affect the integrity of the document from the public gaze. Accountability becomes extremely difficult. The FPJQ believes that proactive disclosure of documents does no replace an open, transparent scheme with the least possible restrictions on access to information.

Demonstration: Journalists in Quebec made an access to information request to obtain the opinion of the President of the Treasury Board Secretariat on the rules that federal institutions

should follow when an obligation to disclose internal information of public interest comes into force. The memorandum was redacted and it cannot be determined how that proactive disclosure will be arranged. This is secrecy, and the most complete mystery.

Recommendation: That a provision of the bill strongly reiterate the primacy of a transparent access to information regime with the least restrictions.

Issue: There is nothing in the bill that revisits the multiple restrictions on disclosure of information. It seems that no effort has been made to work on those provisions or modify their substance.

Recommendation: That the clauses concerning the multiple restrictions in the Act be revised.

The FPJQ recommends that this bill be rejected from the outset, that the Treasury Board Secretariat redo its homework, and that it propose a new bill that is more in line with its commitments.

That the government act on the promise it made to Canadians three years ago.

The FPJQ hopes to have contributed respectfully to the debate.

Sources:

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