Further Submission to the Senate Standing Committee on Legal and Constitutional Affairs  November 9, 2018  Ken Rubin, Investigative Researcher

May I offer further background notes on Bill C-58 that reflect some of the senators questions being posed, some of the issues under debate, and that are based on my own over five-decades of access to information experience (that includes 16 years before federal access legislation, 36 years afterwards and 30 years afterwards of Ontario FOI legislation with appeal and court interventions).

. constitutional issues

Nothing is quite as important as adding the word “constitutional” to Bill C-58, giving recognition in sections 2 and 4 to the constitutional right of and to access to information. The Canadian Charter of Rights and Freedoms under Sections 2 b, 3 and 35 confer such a right and the courts on several occasions have confirmed the Access to Information Act as more than just a statutory government bill. (Recommendation 1 and 5)

. purpose clause

Likewise, section 2 must reflect the spirit of the right to access, not further the government's “accountability” and “pro-active” government publications agendas. It must also not continue to give or make exemptions and exceptions a purpose of Bill C-58 or further restrict coverage and divide the act into special government-released records and government records released by way of the right to access. (Recommendation 1, 5, 6, 8)

. automatic routine disclosures

Nothing in Bill C-58 should prevent the routine release of information by request, demand and necessity. Such is the case for timely and automatic required release of key decisions and health, safety, environmental, consumer and risk assessment records. (Recommendation 8)

. duty to document/creative avoidance

Contrary to government assertions, it is insufficient to claim Treasury Board administrative guidelines are adequate to ensure that government in fact documents key decisions. Not recording many such government actions is devious, deliberate and happens daily. The duty to assist means active not passive or preventative service for users, stands for documentation guarantees, and puts to the test every time a willingness to strive for full disclosure. The duty to document and serve also means that government cannot, either in record management directives or via cutting off how long "pro-active" disclosures are kept, unilaterally determine when records are destroyed and inaccessible. (Recommendation 1, 2, 4)

. indigenous special access mechanisms

Adding the word “constitutional” helps underline the importance of Section 35 indigenous rights
that include having access to records, especially historic records or records that relate to those records. Recommendation 10 elevates indigenous groups and individuals rights to be consulted in managing records that affect their access rights. To elaborate, this preferably, could be best done jointly with the arms-length Library and Archives Canada. As well, section 13 should include all indigenous governing groups but should be discretionary in nature and not be used as a means of increasing secrecy and preventing disclosures. The committee discussions of how to handle indigenous access needs has been by far the most far reaching and valuable either via access legislation or otherwise. (Recommendation 1, 4, 10)

. voluminous or other “bad faith” requests

Anti-access provisions are still found in section 6.1, including assuming even with modern technology that large volumes of records must be denied and that they cannot be handled. Government likes to talk of the wonders of open government/open electronic data but moves in the opposite direction. Current access intake procedures where requests are discussed with users can handle broad requests without just initially assuming they must be labeled in some cases as “bad faith” requests. (Recommendations 1, 2, 10)

. public interest override

While there is more to restricting exemptions and exclusions than found in adding a public interest override clause in Bill C-58, doing so now signals a first-step change in government control and user's rights. Such an override provision can easily can be accommodated in Bill C-58 as a proactive disclosure measure. The precedents are there in the access legislation for the public interest overriding commercial interests and privacy concerns. (Recommendation 5, 6)

. contract disclosures proposed government amendment

The cryptic pronouncement of Democratic Institutions Minister Gould that the “pro-active” disclosure provisions go too far in the case of contracts, one of the most useful type of records government holds, shows the faulty thinking of government officials of what is or is not “pro-active” disclosures. Contract amendments that postpone contract deliverables, that change the scope of work or specifications or add to the contract terms even that are under a $10,000 change are significant to knowing how Ottawa spends money or how Ottawa can manipulate contracts such as military contracts, IT contracts, Parliament Hill renovations and Senate temporary conference center home contracts. All contract data, warts and all, should be readily released. (Recommendation 8).

. parliamentary review

Most senators have concluded that the government under Bill C-58 terms wants to take over and control any parliamentary review. Making parliamentary reviews dependent on government reports and what the government wants (or does not want) in way of access amendments, is one-sided and counter-productive. Judging from what the government has in mind in their announced phase-two proposed cosmetic “improvements” for the slew of exemptions, this will not mean proposing changes resulting in much more disclosure. Phase-two “reforms” will not effectively prevent and combat
increasing secrecy or bring Canadian access legislation up to par with other countries' more progressive transparency efforts. If anything, parliament in its permanent review capacity should be more proactive and allow for continual examination of secrecy practices and secrecy clauses in legislation and be able to assess the means needed to improving public disclosures. (Recommendation 7)

. Ontario-like review record indexes and explicit mediation reports

There are many component elements not there to have under Bill C-58 the makings of a truly independent Information Commissioner with effective enforceable order powers. One requirement that needs explicitly to be stated is that the commissioner should have mediation powers to give users a mid-term report on the status of their complaint appeals in keeping with Ontario's practice. As well, both Ontario's Information Commissioner and the courts in the United States (the Vaughn index) at the appeal review stage ensure that government prepare an index of records, both those released, those partially released and those denied and even those instances when records were not kept. Such record indexes and mediation reports should be spelled out in Bill C-58 as crucial tool in government and the commissioner responsibilities in their duty to assist complainant access users. (Recommendation 3, 4)

. mandamus writs

While it is not a desirable means to get an information commissioner orders enforced, it is a tool open to access users too should government agencies or the commissioner be delaying or blocking access.

. court experience - lay litigant; future challenges to information commissioner orders

This may seem to be inconsequential but access is not just a process for lawyers or corporations but for the public. This means allowing anybody to apply, complain or represent themselves throughout the access process and to not be burdened by barriers and extra costs. In past and in future, even with the information commissioner having order powers, expect both government and users to occasionally go to the courts to challenge commissioner rulings. In the case of users, at least those not coming as commercial third parties wanting to block disclosures ordered, challenges will come given the commissioner rulings being too pro-government and or because access legislation exemptions and exclusions are just too favorable to expect all commissioner rulings will assist users to get more disclosures instead of upholding government's broad exceptions to release.

. information commissioner and government positions converging

Simply because the recently government appointed information commissioner is in support of some government positions on Bill C-58 like having a vexatious and voluminous clause in the legislation with her office spending time and resources examining such cases does not mean that these government-commissioner agreed-to positions are the best position for full access rights. If the commissioner gets involved in determining situations that interfere with government operations it puts the office too close to those government operations. The commissioner as well could claim some complaints are frivolous or interfere with commissioner' own complaint
workload. The Information Commissioner asked senators however not to throw out Bill C-58 but only to adopt a few amendments concerning her office being strengthened (in part). Using just this one case - that of putting the commissioner office in the position of judging government desires to throw out access requests - however is time consuming, resource draining and counter productive and weakens and does not strengthen the effectiveness or independence of the commissioner's office.

. Information Source

One senator asked why get rid of (or not update) the legislated government publication “Information Source” that provides a guideline to the types of records each agency held bearing in mind that access users are still being advised to specify type of records they are seeking. The government response that their more recent web sites and officials' help will be good enough begs the question of where do access users get to really know what records each agency holds. Agency record classification details and the actual nature of records at hand are rarely nowadays divulged and even officials have trouble knowing where their records are or how to get them retrieved. And departmental employees are still muzzled under deeply embedded conduct codes of silence that form part of Ottawa's continued culture of secrecy practices.

. time delays/time caps and accelerated access/expedited processing

Another senator asked for an evidence-based analysis on the many documented and admitted delays to getting access responses. The government response to shortening long delays presented a few band-aid solutions like pooling access officers or that “pro-active” disclosures would cut down the number of requests (“pro-active” e disclosures however only come 120 days later or more likely much later and at times are difficult to find and access). In the end, no promise was extracted from government officials to do a thorough analyses to get to the bottom of delays towards bringing down increasing very late response times. Without set times, penalties for missing deadlines and commissioner monitoring, do not expect ending delays of up to several years to go away. Also, the commissioner can too be the source of very long multi-year delays and that too requires time set time caps. And finally, corporate interests, unnecessarily add to delaying release being wrongfully granted special notification and objection privileges which corporate lawyers testifying want extended. (Recommendation 1, 5)

. fees

Questions about why even retain the $5 application fee or its possible legal rise to $25) were not quite answered nor was the possibility of future various fees being charged access users under the flexible terms of Bill C-58. Yet the far more expensive government controlled “pro-active” releases have no cost or recovery restrictions. Eliminating fees opens up a new section for what should be the starting place for greatly restricting exemptions and eliminating exclusions. (Recommendation 2, 6, 8)

. in camera hearings

Dealing with what is blown up as a case of interfering with judicial independence, especially the case for and against including disclosing judges' expenses or court records, has taken up more time than most other issues and led as well to the issue almost being aired in secret by hearing the secret testimony of now identified senior tax court judges. But an in-camera hearing where previously unidentified judges could have testified in secret would be contrary to transparency aims being examined by the committee. The media and the public would have been denied
access to these judges' views. The secret transcripts of their in-camera hearing would then not become accessible for twenty or many many years more, or may never have become accessible. Without media monitoring indicating such a secret hearing was eminently pending and the judges sensing public concerns, the in-camera hearing would have proceeded - thus showing the value of fighting first and foremost for everyone being open in the discussion of such public issues.

I understand that I am on the proposed witness list and would be glad, if called upon to testify to expand on Bill C-58 deficiencies and positive ways forward and potential amendments.

What Canada could stand on guard for is an open society where freedom of expression includes access to information as a right and where as a country we love to get at the truth and be truthful.

Respectfully Submitted,

Ken Rubin