BRIEF

to
STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
On Bill C-58 – An Act to amend the Access to Information Act and the Privacy Act

On November 21, 2018
By
Professor Michel W. Drapeau

BARRIERS TO ACCESS

The Supreme Court of Canada in Dagg v. Canada (Minister of Finance), [1997] S.C.R. 403 held that the overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.

With increasing disappointment, I hold the honest opinion that we are the early witnesses of a regime that is on a slow, yet hopefully reversible, descent into irrelevance. This may be explained in part because in the past Parliamentarians have not played a leading role in examining how the current system is structured, funded and operated. For all intents and purposes, this role has effectively been deputized to the Information Commissioner, who has successfully advocated that their role and function be transformed from that of an Officer of Parliament (an Ombudsman) to one which would be vested with quasi-judicial powers.  

This begs the question: would the grant of ‘order-power’ to the CAI ameliorate the response time for the benefit of requesters under the ATI. In my considered opinion, the answer is a resounding no. Why?

The Commissioner actually plays no role in the front-end part of the ATI regime focusing entirely on only 2.2% of the access requests submitted year in and year out.

1 Professor Michel W. Drapeau is in the active practice of law specializing in military law, access to information law and privacy law. He is also an adjunct Professor of Law at the University of Ottawa. He is the co-author of several legal works including the best-seller Federal Access to Information and Privacy Legislation Annotated [FATIAPLA] by Carswell which is in its 18th edition.

2 That would constitute a repudiation of the foundational basis for the creation of that office as envisioned in the 1977 Green Paper on Access to Information Legislation. [See Part 13.1 of FATIAPLA].
1. During the 2016-2017 fiscal year, there were 91,880 access requests submitted to federal institutions. Over 85% of the access requests received during that year were closed within 60 days of their receipt. A rather respectable performance.

2. During 2016-2017, the Office of the Information Commissioner (OIC) “registered” a total of 2,077 complaints. Only 1,312 of these complaints were categorized as “refusal to disclose” complaints which is focused on the application of exemptions. During the same period, the OIC laboured under a backlog of 1 ½ years worth of complaints (3,010 complaints).

A LOOK BACK AT FIRST PRINCIPLES

The 1977 Green Paper on Public Access to Government Documents [Green Paper] considered a number of possible procedures to ensure the ongoing performance and oversight of the access to information regime. The weight of the arguments was not in favor of a review process outside ministerial authority regarding the release of government documents by providing order-power to the Information Commissioner. The Green Paper opted instead for what it referred to as the “Parliamentary Option” giving Ministers, and not a quasi-judicial body acting as the Information Commissioner, responsibility for the final decision as to the release of information in records.

[This Parliamentary] option would involve scrutiny by Parliament of the administration of a statute by the instruments used to review the administration of other statutes, such as questions in the House of Commons, debates on Estimates, Ministers and officials appearing before committees, and Opposition

---

See OIC 2016-2017 Annual Report. These complaints are broken down as follows: 1,312 refusal complaints (about the application of exemptions); 1,249 administrative complaints (about delays, time extensions and fees); and, 37 Cabinet confidence exclusion complaints.

The Annual Report also notes that at the start of the 2016-2017, the OIC had a backlog of 3,010 complaints.
days. Means might be provided for some cases to be discussed during the Proceeding on Adjournment Motion in the House of Commons. . . This option would have the advantage of constituting no infringement of present ministerial and parliamentary responsibility. It would, furthermore, involve very little incremental administrative expense.⁴

Armed with this potent right of access to Parliament,⁵ the Information Commissioner was expected to promote awareness of the importance of open and transparent government and apply democratic pressure on federal institutions to make information more easily available to the public so as to keep the federal government accountable to Canadians. Past Commissioners, in particular the late John Grace and the Honourable John Reid, were particularly skilled in the use of this right of access to Parliament at critical junctures when accountability, transparency and openness in our governmental system required more balance between Government and citizens.

Granting the Information Commissioner with ‘order-power’ would effectively strip the OIC of her status as an Officer of Parliament because with the assumption of quasi-judicial functions, the Commissioner would become duty-bound to “act judicially” instead of carrying out her work under the guidance and direction of Parliament and report to a Parliamentary Committee. Also, acting judicially, she would no longer be able to exercise some of her powers listed at section 36 of the Access to Information Act, such as:

a. Enter any premises occupied by any government institution;

b. Converse in private with any person in any premises entered; and

c. Examine and obtain copies of or extracts from books or other records found in any premises entered.

The grant of ‘order power’ to the OIC would also lead to an even greater bureaucratisation and judicialization of the current OIC complaint mechanism potentially forcing ATI complainers to experience even longer delays than is currently the case to have access to either the Federal Court or to the requested records. Therefore, granting the Commissioner additional power to order the release information in government records, as currently envisioned by Bill C-58, should not be seen as a panacea and an effective response to the current stalemate situation with regard to the access to information regime.

But there is more.

---

⁴ See FATIAPLA, Chapter 13 page 13-17.

⁵ The 1979 Discussion Paper (See: FATIAPLA, Chapter 13, page 13-84) which states:

Given the importance of the right of access to be created by this legislation, it seems important that its implementation should be subject to ongoing supervision by a parliamentary committee.
The **Green Paper** warns that such a process would result in a diminution of the role played by Parliament in our political system.

[T]he power to order mandatory release of documents [can be expected to] involve more elaborate and time-consuming procedures than option three (An Information Commissioner with Advisory Power). Its main disadvantage is that it would be contrary to the basic principle of ministerial responsibility. 6

[...]

*Under our current conventions, it is the Minister who must remain responsible for deciding whether to refuse or grant access to documents and this responsibility is a constitutional one owed to his (or her) Cabinet colleagues, to Parliament, and ultimately to the electorate. A judge cannot be asked, in our system of government, to assume the role of giving an opinion on the merits of the very question that has been decided by the Minister. There is no way that a judicial officer [either the Information Commissioner or the Federal Court Judge] can be properly made aware of all the political, economic, social and security factors that may have led to the decision in issue. Nor should the courts be allowed to usurp the constitutional role that Parliament plays in making a Minister answerable to it for its action.*7

This does not mean, however, that the current role and functions of the Information Commissioner should not be substantially reviewed. Quite the reverse. There is an urgent requirement to conduct such an examination system-wide. We will discuss this in the next part.

**ACCESS REGIME NEEDS A SYSTEM AUDIT**

Despite having been in existence for 35 years, the federal access to information regime has yet the subject of a system wide audit.8 As a result, by and large, each of the several hundreds federal institutions subject to the access/privacy legislative regime operate in a sort of isolation each adapted to meet and reflect their own specific organizational context. Such an audit would permit a review of the staffing system within of each of these organizations to not only determine compliance with the requirements stemming from access and privacy laws but provide an objective assessment of the operations, governance, resources and information systems deployed within the access/privacy regime.

**Office of the Information Commissioner**

6 See *FATIAPLA* Chapter 13, page 19

7 See *FATIAPLA* Chapter 13 pages 19-20.

8 InfoSource: Access to information and privacy statistical report, 2016-17 reports that since 1983, a total of $542 million has been spent by the federal treasury to fund the ATI function.
The OIC presently houses in excess of eighty (80) personnel to handle its sole and only function, the investigation of complaints. Over the years, the OIC has assumed an increasing range of functions and the creation and the staffing of new and expanded functions has been done at the expense of its investigative branch whose personnel is devoted to its core and only function, the investigation of complaints.

a. **Core function.** The OIC has currently assigned 32% of its human resources to handle its core function, that is the investigative function (with a total of 28 investigators) to address the annual crop of complaints, plus backlog of complaints.

b. **Management and administration.** To provide direction, management and support the OIC has on strength a total of five (5) senior executives and 35 administrators and managers which together account close to half of the available human resources.

Sharing a common corporate support base with the Office of the Privacy Commissioner

There is great similarities and commonalities in scope and mandate between the OIC and the Office of the Privacy Commissioner (OPC), each operating under a statute which mirrors the others’ powers and responsibilities. Each of these two offices are housed under the same roof, with its very own corporate administration structure. Given the high degree of commonality of purpose, efficiency gains could be made by combining the estimated 20 lawyers and 13 administrators under an unified administrative services organization.

**CONCLUSION**

The OIC also plays an important role in maintaining the integrity of the access to information regime (as is) by ensuring that Parliament – and Canadians – have access to independent information as part of the framework of accountability and scrutiny of the Executive Government. This was anticipated by those who drafted the ATIA by giving this independent statutory officer extraordinary powers to investigate complaints as well as a right of access to Parliament to alert the Canadian democracy when government and its several institutions fail to live up to their obligations. To perform that function with both diligence and rigour, the Commissioner needs to remain an Ombudsman (as an Officer of Parliament) and not become the head of an administrative tribunal.

---

9 By way of example, a Courts Administration Service was established in 2003 to support the four courts of law (Federal Court of Appeal, the Court Martial Appeal Court, the Federal Court and the Tax Court) so as to facilitate coordination and cooperation and enhance accountability for the use of public money and supervision over and direction of the support and administrative functions
This obviously places onerous demands on the Commissioner who, like her predecessors, must constantly display strong, if not forceful, and sustained advocacy to counter-balance a government’s failure to respect the citizens’ right to know. The visibility of her presence is also important to the Court, senior officials of governments, as well as ordinary citizens who, as both users of access and complainants.