Postponed transparency bill does little to promote access while government increases secrecy

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KEN RUBIN

Accountability

OTTAWA—Just as summer sets in and the parliamentary sitting ends, in come some very weak transparency amendments.

What started as an election "open government" pledge in the fall of 2015 now appears in mid-2017 as Bill C-58. It took three cabinet ministers last week—Treasury Board President Scott Brison, Democratic Institutions Minister Karina Gould, and Justice Minister Jody Wilson-Raybould—to announce so very little.

The main expected change to cover some ministers and prime minister's records under the access legislation was abandoned, given ministers' and the PMO's resistance.

Instead, Brison tried to spin how great it would be that some mundane briefing lists, mandate letters, and ministers' expenses would become legally available as part of a take-it-or-leave-it government publication scheme.

The central amendment that did materialize calls for giving the information commissioner binding order-review powers, with the burden of proof on the government to defend its secrecy practices.

But the commissioner's newly acquired order-making powers would be largely crippled and counter-productive, because no amendments were put forward to change the numerous broad exemptions in the Access to Information Act that cut off access to many government records.

Without changing the top-down, broadly applied policy advice and cabinet confidentiality regime, the amendments proposed do little to help the commissioner set meaningful precedents or change Ottawa's secrecy. The commissioner remains unable to review cabinet confidences.

Amendments were not offered either to remedy lengthy delays or give the commissioner enforceable penalty powers for those agencies still delaying releases.

The commissioner, under the Bill C-58 amendments, must also give corporate third parties special rights to be consulted before issuing orders. These orders can and will in many cases be challenged in Federal Court by the government and corporations, and possibly overturned.

What also makes a mockery of the Bill C-58 order-making initiative is that the Justin Trudeau government has put forward other legislation that makes certain records off-limits to the commissioner, the courts' review, or their ability to order releases.

Bill C-22 gives the new National Security and Intelligence Committee of Parliamentarians' government secretariat and departments power to unilaterally decide what is to be considered security-excluded data, without independent review. The bill also greatly enhances the prime minister's power to decide what security data is documented and released to this committee, which he controls.

Omnibus budget legislation, bill C-44, contains a section devoted to setting up a Canada Infrastructure Bank that, in Section 28, gives the government power to decide unilaterally what is privileged information (commercial infrastructure, financial, and political transactions) with no independent review. It is already a controversial enough bill with its provisions that grant Ottawa political direction power in the bank's operation.

The budget bill also contains separate provisions that allow the key House of Commons Internal Economy Committee to continue to meet on many issues behind closed doors with no independent recourse to independent review.

So under Trudeau's Bill C-22 and C-44, new security and commercial data exclusions are put in place that override access legislation. And one amendment in Bill C-58 also directly increases secrecy by expanding and broadening the legal definition of what is able to be exempt under solicitor-client relations.

Public access is not well served either by the government amendment in Bill C-58 giving themselves the mandatory right to refuse to process some requests because they are too complex, hard to answer, too frivolous, or submitted in what the government decides is "bad faith."

The commissioner then can endorse or reject the government decision of who are targeted unfit access requesters, and also exclude hearing from complainants who are difficult and vexatious.

Such anti-access provisions contradict having a duty to assist requesters and being open to giving more opportunities to releasing more information.

The amendment regulations also raise the spectre of a return to high fees in the future being demanded of requesters.

Much was made of the lengthy amendments in Bill C-58, setting up a legal publication system parallel to access requests, including for Federal Courts.

But that system mainly produces some but not all expense and contract information (there would be exceptions) and ministerial mandate letters and ministerial briefing information. It is a stopgap, government-controlled, limited administrative information system not subject to appeal to the information commissioner or the courts, containing a few sanitized offerings the government wants to provide.

It is not at all a system that instantaneously and legally makes needed data on health, safety, consumer, and environmental conditions, as well as government operations, automatically public. It is far from the legitimate proactive disclosure system needed. It offers no legal recourse when there are delays in getting information and rejects making order-binding appeals possible on the type and quality of information the government provides.

If anything, the Trudeau government wants to hide operational and safety data making, the data difficult to get with access requests. It much prefers extending and enhancing secrecy arrangements, such as in the case of one just-obtained, severed PCO document, where Trudeau was to sign in July 2016 an agreement with Quebec for sharing only sensitive classified information. This is not a government intent in entering agreements for promoting both jurisdictions' pro-active release of information.

Information Commissioner Suzanne Legault, in her final annual report, shared numerous examples of government efforts at refusing information and of poor service that the amendments do little to change.

CBC's Dean Beeby recently discovered that Trudeau's PCO officials were to be added to those gagged for life from revealing classified information. That form of silencing officials does not change with the announced amendments.

CBC's Dave Seglins recently reported on how the government is hoarding secret archives of data on Canada's past actions. That does not change either with these amendments.

The problem is the government's actual secrecy agenda and legislative actions have crushed any anticipated hope that more sunshine and less roadblocks are coming to Ottawa after a 35-year wait for better transparency.

The claim of one Bill C-58-offered amendment is to wait every five years for "advances." But from other jurisdictions' experience and institutional push-backs, it is far from certain that such parliamentary mandated, periodic statutory reviews accomplish many progressive changes.

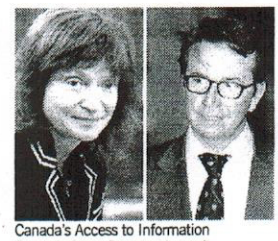
The formula for rebooting Ottawa's penchant for secrecy must start with replacing Brison in a summer cabinet shuffle. He has been mostly non-committal, glib, and backtracking on transparency advancements.

Brison could not even be bothered to offer a detailed government response to the House of Commons Access to Information Committee recommendations for reform or show up at a March national transparency conference he sponsored.

His replacement, if there is one to be found, needs to be an effective heavyweight champion for open government.

It is highly unlikely that the current selection process under Trudeau and Brison will bring forward and produce an information commissioner who is a strong, independent right-to-know advocate for the next seven-year term.

The search for a new information commissioner, now in the highly secretive government-controlled competition that closed as of June 16, must be restarted. An open competition attracting the best candidates, run by Parliament, where short-listed candidates are presented in public, would be the best route to go.



Canada's Access to Information Commissioner Suzanne Legault and Treasury Board President Scott Brison. After some weak transparency amendments, Ken Rubin writes that Mr. Brison should be replaced as Treasury Board president with a 'heavyweight champion for open government.' *The Hill Times photograph by Jake Wright*

And most important, real proactive, timely disclosure and service, with a duty to document, with a public-interest override provision, fewer and narrower exemptions, and an independent commissioner with binding, enforceable order powers, not limited in what can be reviewed, are the main stays that are needed for a long overdue, second-generation transparency bill to succeed.

The proposed Bill C-58 amendments are weak and not a formula for rebooting Ottawa's penchant for secrecy. What we have is a government frivolous and deviously intent on sweet-talking and subverting transparency.

Ken Rubin is an advocate for the public's right to know and expert on access-to-information laws and processes. He is reachable at kenrubin.ca.

The Hill Times

Summary of Bill C-58, An Act to Amend the Access to Information Act, received first reading June 19, 2017:

This enactment amends the Access to Information Act to, among other things,

(a) authorize the head of a government institution to decline to act on a request for access to a record for various reasons, including because it is vexatious or made in bad faith, and give the person who made the request the right to make a complaint to the Information Commissioner if their request is declined;

(b) authorize the Information Commissioner to refuse to investigate or cease to investigate a complaint that is, in the Commissioner's opinion, trivial, frivolous or vexatious or made in bad faith;

(c) clarify the powers of the Information Commissioner and the Privacy Commissioner to examine documents containing information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege in the course of their investigations and clarify that the disclosure by the head of a government institution to either of those Commissioners of such documents does not constitute a waiver of those privileges or that professional secrecy;

(d) authorize the Information Commissioner to make orders for the release of records or with respect to other matters relating to requesting or obtaining records and give parties the right to apply to the Federal Court for a review of the matter;

(e) create a new Part providing for the proactive publication of information or materials related to the Senate, the House of Commons, parliamentary entities, ministers' offices, government institutions and institutions that support superior courts;

(f) require the designated Minister to undertake a review of the Act within one year after the day on which this enactment receives royal assent and every five years afterward;

(g) authorize government institutions to provide to other government institutions services related to requests for access to records; and

(h) expand the Governor in Council's power to amend Schedule I to the Act and to retroactively validate amendments to that schedule.

It amends the Privacy Act to, among other things,

(a) create a new exception to the definition of "personal information" with respect to certain information regarding an individual who is a ministerial adviser or a member of a ministerial staff;

(b) authorize government institutions to provide to other government institutions services related to requests for personal information; and

(c) expand the Governor in Council's power to amend the schedule to the Act and to retroactively validate amendments to that schedule.

It also makes consequential amendments to the Canada Evidence Act and the Personal Information Protection and Electronic Documents Act.