

OPINION

Myths and mirrors of access

The access to information act isn't working. It's time for Parliament to re-assert the indivisibility of its supreme authority to devise laws and to instruct these officers to focus on their statutorily-defined functions, period.



BY MICHEL W. DRAPEAU

As Churchill once said: "It is always more easy to discover and proclaim general principles than to apply them." This maxim immediately came to mind when I read a transcript of the Oct. 29, 2009, meeting of the Standing Committee on Access to Information, Privacy and Ethics during which Robert Marleau, who recently resigned from his position as information commissioner, made an appearance as a "private citizen." Hum! Marleau used the occasion to express his disappointment at the government's response to his 12 recommendations for changes to the access to information statute, recommendations which were endorsed last year by the committee. Marleau's opening comments critiquing the government's response are baffling:

"[The committee] report contains 11,000 words—the government's response in English [is] 636 words. About 300 of those are addressed to the former commissioner John Reid's initiatives. ... There are other interesting nuggets, but I'll leave that for another day.

Reading of the transcript reveals a sense of frustration on the part of Marleau at not having had any of his cherished recommendations for legislative changes adopted by government. How else to explain his surfacing, just four short months into retirement, to pursue an agenda which is no longer his responsibility? Yet, the former commissioner was at pains to explain that this was not the case: "I can tell you that I did not leave in frustration. . . . I left quite satisfied." If this was really the case, it begs the questions: why parade in front of the committee? Why not permit instead his appointed successor do her duty?

Partisanship aside and truth be told, Justice Minister Rob Nicholson, acting on the advice of his officials at the Justice Department, was

absolutely correct in rejecting, *holus bolus*, the 12 recommendations. Why? Because, as stated previously, before increasing the powers of the information commissioner and, *inter alia*, opening up Canadian data banks to the world, thereby creating a larger ATI bureaucracy, one needs to first recognize that the genesis of the current structural problems facing the access regime is not the statute itself but the combination of (a) a government which speaks of accountability without transparency, and (b) the tinkering with the 25-year true and proven investigative process. The latter resulted in a backlog of complaints of epic proportions. In this one instance, wisely, the Conservative government has chosen to stay the course on ATI reforms and let a new administration at the Office of the Information Commissioner focus instead on its statutory mandate, and not the lobbying of Parliamentarians for a modification to its existing mandate.

Having pen in hand, perhaps the time has also come to also address some of the other myths about access to information which the Oct. 29, 2009 "love-in" permitted to flourish.

Our very own British North American Act of 1867 remains, to this day, the predominant constitutional authority relied upon by the courts and the Canadian legislatures in crucial matters such as the division of powers between provinces and the federal government. Despite the fact that new technologies such as radio, television, internet, etc., were not in existence at the birth of our nation, and hence not addressed in the BNA Act, that statute has withstood the passage of time quite well. Likewise for the Charter of Rights which came of age in the same year as the Access to Information Act (ATIA). Yet, no one suggests that the Charter of Rights must now be changed, in any fundamental way, because it has reached adulthood.

Of the 689 or so federal statutes currently in force, there are a number of laws which have been enacted either prior to or shortly after the passage of the *Access to Information Act*, ditto for the



Shine a light: Justice Minister Rob Nicholson, right, acting on the advice of his officials at the Justice Department, was absolutely correct in rejecting, *holus bolus*, the 12 recommendations. Why? The genesis of the current structural problems facing the access regime is not the statute itself but the combination of (a) a government which speaks of accountability without transparency, and (b) the tinkering with the 25-year true and proven investigative process.

Canadian Bill of Rights, 1960; the Canadian Human Rights Act, 1976. Yet, there is no hue and cry, as there is about the ATIA, about the urgent need to modernize these statutes. Why? Because, the courts have demonstrated an ability to interpret these statutes in a modern setting. Likewise for the ATIA. For instance, in 2001 the Federal Court in the case of *Yeager* had to decide whether "software" fell within the definition of the word "records." The court decided that "software," whose very existence came about after the enactment of the ATIA, was not included in the definition of "records." Voila. Simple.

The plain truth is that for quite a while now it has become accepted practice, but, I hasten to add, only within the federal access and privacy domain, that the very persons charged with the application of these statutes, as enacted by Parliament in 1983, have been leading the charge to change these statutes, to meet, I believe, their own requirements and, perhaps even, their vision of things. One needs to ask, why we are letting these officers of Parliament assume, in such a manner, the very role of Parliamentarians, that is, to make law? Perhaps the time has come for Parliament to re-assert the indivisibility of its supreme authority to devise laws and to instruct these officers to focus on their statutorily defined functions, period.

In his remarks, Marleau noted that, in a famous ruling, the Supreme Court declared the right of access as being a "quasi-constitutional principle." However, in *Dagg vs. Canada (Minister of Finance)*, the Supreme Court held that the rights to state-held information were designed to improve the workings of government; to make it more effective, responsive and accountable to the citizenry. In that decision, the Supreme Court stated that "privacy," not "access," is "worthy of constitutional protection." Statements about the "quasi-constitutional status" of the access to information were made by the Federal Court, not the Supreme Court, in a 2002 decision by Mr. Justice McKeown and then again in 2004 in a decision by Madame Justice Dawson.

To be frank, I know neither the meaning nor the extent of a "quasi-constitutional right." If it means, by analogy, that one's right of access should be treated as a chartered "constitutional right," then, pursuant to section 24(1) of the Charter, the infringement of the "right of access" should immediately be reviewable by a court of competent jurisdiction, not left to the discretion of an ombudsman. There should also be a range of affirmative remedies to ensure future compliance. This is obviously not the case. It would also mean that our public service would be in deep trouble because each time they are found to be in violation of the ATIA, which is more often than not, they would be committing a cardinal sin against the "supreme law of Canada." This is also not the case here. Public servants are obviously breaking the law when they fail to meet their statutory obligations, but under the ATIA their legal liability in such instances is limited to having their misdeeds become the subject of a complaint with no legal consequences, save under Sec. 67.1(1) and 67.1(2), the violation of which can have grave consequences.

The fact of the matter is that by labelling the ATIA as a quasi-constitutional statute has a certain authoritative "ring" to it, but that's all. Given the supremacy of the "rule of law" in Canada, naively perhaps, I do not want to accept the fact that our elected officials are regularly permitting our public servants to flaunt the supreme law of Canada.

In 1977, the Trudeau government published a Green Paper on Legislation on Public Access to Government Documents suggesting that government should expect to receive approximately 70,000 requests a year. That number was used to plan the budgetary and human resources allocations for federal institution subject to the Act. The reality is, however, that from 1983 to 2006, the average number of requests submitted annually was 13,212 per year. It peaked at 29,182 requests for 2006-2007.

By way of comparison, in 2002, the U.S. government received more than two million FOA requests from citizens, corporations and foreigners. In 2006, the

25 U.S. agencies received and processed about four million requests. After applying the "rule of ten" based on comparative population and allowing for fundamental differences in American and Canadian politico-legal traditions and attitudes, our government is faced with a rather small number of requests each year, to say the least.

Having now been rebuffed by the minister of justice, the Standing Committee on Access to Information, Privacy and Ethics is now at a crossroads. By all accounts, the access to information regime is at a standstill and users are no longer able to rely on this democratic tool to gain access to government records. What should the committee do? First off, it is perhaps time to turn the microscope around. Instead of looking at the investigation of complaints *per se*, the committee should be examining the front-end aspect of the ATIA regime by undertaking the following four actions:

Compel the attendance of senior bureaucrats charged with the executive management of the ATIA function. This includes the Clerk of the Privy Council and the Secretary of the Treasury Board to ascertain what can be done in terms of policies, human resources, increased budgetary allocations and enforcement of the said policies;

Compel the attendance of the deputy ministers, or equivalent, and senior staff of each of the ten most-complained against organizations to ascertain the causes of their non-performance;

Request that the Auditor General of Canada perform a systemic audit of the access to information regime to determine if the current problems are caused by an absence of leadership or resources or an unwillingness to obey the law; and

Give instructions to the Office of the Information Commissioner to devote all of its considerable human and financial resources on the single-task which this office is charged with namely, the investigation of complaints, to ensure both the elimination of the two-year backlog of complaints and the acceleration of the time required to investigate complaints.

news@hilltimes.com
The Hill Times