

## OPINION



Photograph by Jake Wright, The Hill Times

**Oh let the sun shine in:** Treasury Board President Vic Toews, right, pictured with Conservative MP James Bezan, appears to be satisfied about the ATI domain. Why not? Since taking office, few, if any, records of substance, which may have caused embarrassment to the Harper government have been released.

# CHOOSING NEXT INFORMATION COMMISSIONER: A TALL CHALLENGE

The government likes the status quo on access to information, but the access to information commissioner is not an agent of government.



BY MICHEL W. DRAPEAU

**O**TTAWA—Accountability requires transparency. Transparency, however, cannot be achieved without an effective access to information (ATI) regime which provides information for citizens about what their government is doing. Transparency not only strengthens a democracy, but it promotes efficiencies because public engagement provides government with feedback about their performance. Thus, the responsibilities of an information commissioner are essential and his performance and competence are vital to Canadians. This is why we should pay attention when next Parliament will be asked to endorse the government's candidate for

the position of information commissioner.

I trust and hope that this time around a veritable process will be relied upon to select the best qualified person for this position. The last time the selection process turned out to be surreal by failing to respect the principle of transparency in the selection process. Consider. In September 2006, a notice of vacancy detailing the criteria for the appointment of a commissioner was published in the *Canada Gazette*. Seven Canadians, including myself, presented their credentials but none interviewed. Instead, acting in the best tradition of patronage appointments, Prime Minister Harper hand-picked Robert Marleau. The rest is history.

Given this sorry precedent, it is anything but certain that, this time around, many otherwise well-qualified individuals will bother to submit themselves through a similar charade. Who can blame them? The current "competition" may not therefore yield a coterie of high-quality potential candidates from which to pick the one individual able to restore the office to its former *grandeur* while being effective as an independent Parliamentary officer, at arm's length from government.

It is trite to say that the job of information commission is not a sinecure. First, it demands an ability to walk alone. Criticism, direct or indirect, can and does come from all angles: Parliamentarians, the bureaucracy, ATI users, and most certainly the party in power. Second, an ability to not only distance

oneself from the power elites and the mandarins but to keep in mind that its clientele is made up of ordinary citizens who rely on the Commissioner, acting as an Ombudsman, to enforce their right of access to information held in government records. The challenge is huge. However, the late John Grace and more recently, John Reid, have shown us that individuals can rise to these expectations and engender hope that government of the people, by the people and for the people is a fact.

This time around, however, the job of the commissioner will be even more taxing because of the present vulnerable state of the access to information (ATI) regime. Besides possessing ample self-confidence, strength of character and an architectural vision of the future of access, the commissioner will also require strong engineering and administrative skills to wrestle with the following several challenges to put the access regime back on the rails.

**Lack of respect of access legislation by federal institutions.** There is a broad lack of respect by federal institutions for their obligations, particularly but not limited, to the short delays imposed by the statute for the disclosure of records and for the limited use which should be made of permitted exemptions, exclusions and exceptions to the rule of access. Also, in many instances, it seems, as a matter of automatic reflex, departments and agencies rely on the extension of time limits provision before complying with an ATI request. This lack of respect is now the norm in the result that a large number of access requests are not even acknowledged within the statutory timeframe, let alone result in the disclosure of records.

**Growing backlog of complaints.** The systemic lack of performance by institutions has led to a significant increase in the number of complaints filed with the Office of the Information Commissioner (OIC). This has also led to a two-year backlog at the OIC. Because of this backlog, the average wait for the publication of the findings and recommendations of these investigations by the OIC is at least two years, effectively eroding further the statutory right of access to records within a 30-day statutory timeframe.

**Subordination of the OIC.** The current structure, operating model, funding and staffing practice of the OIC increasingly mimics those of large departments. Most, if not all, officials and staff members of the OIC have been recruited from the public service, and, not unexpectedly, they act as public servants used to being subordinated to the whims and directions of central agencies such as the PCO, the Treasury Board Secretariat and Justice Canada who increasingly play a dominant role in the management of the access process. This is not the way an independent office, reporting to Parliament and charged with overseeing the activities of the government should be operating. In other words, the OIC is not a government institution *per se* and should not operate like one.

**Bureaucratization of the OIC.** Besides the creation of two assistant commissioner positions, over the past three years, several management levels have been added and many individuals occupying these new positions have been assigned a plethora of tasks which have little, if anything, to do with the single core function of the OIC, the investigation of complaints. It has more to do with matters such as strategic planning, policy and legislative development, training, communications and public affairs, etc., diluting the investigative capacity of the OIC.

**Turnover of investigators.** Many of the skilled and experienced investigators have left. Although the void is being filled, the vast majority of replacements lack the sort of investigative skills and experience required. At the same time, over the past two years, the OIC has received an average of 2,400 complaints and it has only managed to investigate an average of 1,200 per year. Meanwhile, the complement of full-time investigators has been reduced from 24 to 21, meaning that, despite the increase in the annual complaint workload, there are less OIC personnel dedicated to the investigation of complaints.

**Lack of effective Parliamentary oversight.** Over the past three years, the House Committee on Ethics, Access and Privacy appears to have been preoccupied by the more politically "sexy" aspects of ethics and privacy. And, when it did turn its mind to access, it more or less indulged in facile propositions to make cosmetic changes to the ATI statute. This, in reality, is a diversion to the real structural and systemic problems plaguing, not the statute, but the performance of the OIC and federal institutions. In reality, the current lack of ATI compliance and performance can and must be fixed whether or not the statute is changed in any way.

The OIC is now flush with a budget of \$10-million and a staff of 102, and soon to grow to 112, including two assistant commissioners, nine directors, five lawyers, four chiefs, and four managers. Hence, the office ought to be primed and ready to be led by a civilian commissioner who believes in the quasi-constitutional "right to know" as a *sine qua non* for a society pursuing the promotion of democratizing values abroad.

As the minister responsible for the access legislation, the President of the Treasury Board Vic Toews appears to be most satisfied about the current state of affairs in the ATI domain. Why not? Since taking office, few, if any records of substance, which may have caused embarrassment to the Harper government, have been released and, even if such records existed, the delays being experienced by ATI users mean that any such threats are on the back burner. One way for the government to ensure this status quo would be to rely upon the tried and proven method of appointing, say, a serving or retired senior public servant who instinctively would understand the imperatives of prudence and circumspection as opposed to transparency and openness. However, as noted, the commissioner is not an agent of government; he is first and foremost an officer of Parliament. As such, it behooves each of the opposition parties, in particular the official opposition, to verify participate in his selection and appointment so that Canadians can once again exercise their quasi-constitutional "right of access" to information in government records and thus ensure government accountability through a free flow of information.

By the same token, there are persistent rumours that the government is contemplating combining the privacy commissioner and the information commissioner into a single office and trust its stewardship to Jennifer Stoddart whose own term as privacy commissioner is coming to an end in December 2010. This would run counter to the recommendations made by retired Justice Gérard Vincent LaForest of the Supreme Court of Canada who, after conducting an exhaustive study in 2005, concluded that such a merger would have a detrimental impact upon the policy aims of the Access to Information Act, the Privacy Act and the Protection of Privacy and Electronics Documents Act. Hopefully, this will remain just that, an unfounded rumour.

On the other hand, fortunately, our civilian society is blessed with a cornucopia of talented, educated, sage people who have the education, skills, experiences and abilities to take on such an appointment and to remedy the systemic non-compliance. People such as Ed Broadbent, retired justice John Gomery, professor Maureen McTeer or Hugh Winsor, amongst others, could be called upon to bring instant integrity as well as recognition and respect to the position of information commissioner. Given their standing, reputation and *savoir-faire*, they could not only act as a powerful champion for the diminished "right to know" but demonstrate to Canadians and the world-wide access community that openness, transparency and accountability will flourish again within the Canadian democracy. But there are others, just as well qualified, some of whom have no doubt already submitted their application.

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