Reforming the Access to Information Act

by John Bryden, MP

The recent imbroglio surrounding the Access to Information Commissioner's request for the Prime Minister's agenda books and the Privacy Commissioner's attack on that request provide a dramatic illustration of the need to overhaul Canada's federal freedom of information and privacy legislation. This article, by a long-time advocate of Access to Information reform, looks at the recent and unusual controversy between two officers of Parliament as well as the larger issue of what needs to be done to improve the laws they are charged to uphold.

In response to a complaint from someone who had been denied access to the Prime Minister's agenda books, Information Commissioner John Reid took the Prime Minister's Office to federal court, as he is entitled to do by the access legislation, asking that he be allowed to examine the agendas to determine whether withholding them was justified. The Commissioner's application was upheld and the PMO's appeal has gone to the Supreme Court. At the time of this writing, the ruling of the Supreme Court was still pending.

The contretemps between the Information Commissioner and the PMO pales into insignificance when compared with the Privacy Commissioner George Radwanski's public reaction to it. In an open letter of May 10, 2001, the Privacy Commissioner portrayed himself as the "champion" of the "legitimate privacy rights of every Canadian, whether it be an unemployed labourer or the Prime Minister of our country" and went on to inform the Information Commissioner that "your pursuit of agendas is totally unacceptable."

Even though it is absolutely extraordinary and in my view improper for one officer of Parliament to directly criticize another, the Privacy Commissioner did not hesitate to be condescendingly censorious: "Sometimes it is tempting for those of us in positions of some authority to try to do things simply because we can; it is very important to resist that temptation."

The Privacy Commissioner argued that agendas are protected from the reach of the *Access to Information Act* because they "are information not about government programs or policies, but about an individual....They are about an individual's activities, contacts and whereabouts - whom he meets, whom he telephones, where and when he gets a haircut, with what friends he has lunch..." He concluded that it is tantamount to "information rape" to subject any individual - including the Prime Minister - to the equivalent of "the eye of a TV camera that broadcasts his every move." Poor Prime Minister!

The difficulty with that argument is that agendas have been accessed in the past by deleting personal informa-

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tion. Nothing deterred, the Privacy Commissioner broadened the definition of personal information beyond the *Privacy Act*, claiming that an agenda "in its entirety... is by its nature personal information and its disclosure constitutes invasion of privacy." He then chided the Information Commissioner, telling him, "Common sense alone should tell you what you would find the agendas to contain: the record of a mix of political, governmental and personal contacts and activities." And further: "They contain information as to the full range of the Prime Minister's activities including Cabinet meetings, Caucus meetings, foreign and diplomatic contacts, Liberal Party activities, personal and family appointments." Ironically, and apparently oblivious of having already said that agendas are not about government programs and policies, the Privacy Commissioner used the exemption sections of the *Access to Information Act*, not the *Privacy Act* to tell the Information Commissioner how to do his job.

Without needing to know any details of the Information Commissioner's presentation before the courts, most people familiar with the Act will appreciate what is at issue. There is no doubt that the Prime Minister's agenda book contains all kinds of confidential information that should be withheld in the interests of national security and effective government. The agenda books of public servants are keenly sought by historians and journalists as much for what they do not say as what they do. The lack of mention, for example, of members of a visiting provincial or foreign delegation would be indication that the Prime Minister chose not to see them. Conversely, a delegation in Ottawa to meet the Prime Minister secretly would be disclosed. No minister or senior public official can operate at that level of openness.

The current *Access to Information Act* provides many of the necessary exemptions from disclosure in Sections 14-18 which permit the government to refuse to release records that contain information that would be injurious to federal-provincial affairs, the conduct of foreign affairs and the defence of Canada or would compromise public safety or management of the national economy. All of this kind of information, expressed or implied, one would expect to find in the Prime Minister's agenda books. The problem is the act does not specify this. Depending on the precedents and arguments presented to them, the courts have the option of choosing not to connect the word "information" in the exemption sections with agendas. Lawyers for the PMO would have had to scramble to persuade the judges to read into the law that which is not actually there in words. For those of us who have long advocated for an overhaul of the *Access to Information Act*, there is little sympathy for a government being hoisted by this petard of its own inaction.

The Privacy Commissioner has said he intends to seek intervener status before the Supreme Court; the judges will hear all testimony, ponder, and decide. What every MP, ordinary Canadian, and journalist should be worried about, however, is the fact that Privacy Commissioner in his open letter used the concept of privacy to justify ministerial secrecy. If an officer of Parliament could be so confused as to the application of the *Access to Information Act* versus the *Privacy Act*, what of government officials? This is an especially urgent concern given that Treasury Board last year fielded the Access to Information Task Force to review the Act and make recommendations to Cabinet this fall. If the civil servants conducting this study are doing it from the same perspective as the Privacy Commissioner then their report could do more damage than good.

Philosophical Debate Between Access and Privacy

The great divide philosophically between those moving toward more openness in government and those who are not is encapsulated in another statement in the Privacy Commissioner's open letter. He says "Access to information is an administrative right that may lead to better government. Privacy is a fundamental human right that is essential to freedom and dignity." The meaning is clear: the right of politicians and civil servants to privacy trumps the administrative advantages of transparency. There could be many in government who believe that.

Speaking as a Member of Parliament, charged by my constituents to promote good government, I can only say that I am of the diametrically opposite view. When one chooses to become a politician, or Prime Minister, or high public official one does so knowing that one must necessarily sacrifice most of one's privacy. Public attention is both the reward and the curse of public office and one cannot have one without the other. The *Privacy Act's* stated purpose is to protect the personal information that ordinary Canadians confide in the government. It was never intended to protect government.

On the other hand, in a democracy surely the public's right to know that it is being governed honestly and competently is superior to whatever right to privacy public officials might have. Sadly, the Canadian government has never stated that it believes in this principle. Indeed, it has prevaricated by the very choice of name for its freedom of information legislation: *Access to Information Act*. It is a cautious title, used only by Canada, Hong Kong and South Africa. It implies that people are entitled to government information but the government has no responsibility to provide it. One cannot expect federal pub-

lic servants to be committed to a principle higher than the feeble one the federal government has so far expressed. If the Privacy Commissioner and others view freedom of information as of mere administrative utility, then it is because government has made no effort to dissuade them otherwise.

Therefore, reform of Canada's freedom of information and privacy legislation must begin with a strong statement that the government is committed to the principle of openness. In my 1999 private member's Bill C-264 to reform the *Access to Information Act*, the first amendment would have changed the name to "The Open Government Act." The second amendment would have committed the government to transparency by declaring that "it is the Government of Canada's duty to release information that will assist the public in assessing the Government's management of the country and in monitoring the Government's compliance with the *Canadian Charter of Rights and Freedoms.*" Just those two amendments alone would have had a profound impact; they would have removed any doubt about whether privacy or openness rules.

The next step is to purge the act of those clauses that disguise what the government is concealing that it should be revealing. The most blatant example is Section 23 which allows the withholding of any record that "contains information that is subject to solicitor-client privilege." Obviously this clause refers to the kind of confidentiality that must exist between solicitor and client before the courts. However, government lawyers frequently send advice to ministers under this rubric, thereby improperly making their advice unknowable and unchallengeable. This puts Members of Parliament and the public at a tremendous disadvantage when trying to have flaws in bills corrected. Most ministers defer to the legislative advice they receive from the Justice Department, assuming it to be infallible. Obviously it is not but rarely can it be known in order to test it.

The Cabinet confidentiality sections of the Act are also ambiguous and in need of overhaul. Senior officials of the Privy Council Office and the Prime Minister's Office have to come before a committee of Parliament and spell out precisely those things they think must be kept secret in order for these key departments to function effectively. If agendas need to be withheld, they should say so. If policy papers can be open while specific advice to Cabinet must be closed, then they should say that, too. Parliament can then debate their recommendations, judge them on their merit, and put the result of that debate into an amending bill. Freedom of information legislation is only as successful as it successfully defines what should be kept secret.

The Act needs a number of other fixes, to be sure, but these are mostly of a technical or administrative nature. The really important changes are those that make as much information available as possible while respecting a dedicated bureaucracy's need for a reasonable degree confidentiality. Only then can one create the culture in government where the default option of choice is to release rather than withhold. Unfortunately, the reverse is more often the case. When in doubt about whether something must be disclosed by the Act, officials tend to choose secrecy rather than openness. This must change.

Reform of Canada's freedom of information laws, however, must include privacy legislation. Computer data collection and the Internet have overtaken what information can in practice be protected. Every time a person makes a purchase, donates to charity, or logs onto a web site, he or she can be collected by name and address onto a data base somewhere. Individual profiles are built up and lists created that are bought and sold across national borders. Last year's *Personal Information Protection and Electronic Documents Act* does nothing to stop this activity. Nor can it. Information on consumers has become an international commodity.

The danger now is that government may still weigh into the openness equation rules on protecting privacy that are no longer enforceable. The predilections of the current Privacy Commissioner aside, the practical reality is that much of the personal information that federal legislation protects is readily available elsewhere. It would be the epitome of misplaced political orthodoxy to compromise effective freedom of information in order to preserve personal information that already and inevitably is in the public domain.

Like reform of the *Access to Information Act*, the answer must be to overhaul privacy legislation so that it protects only that personal information in the possession of government that actually can be protected: tax filings, employment records, medical files, ethnicity, choice of religion, and the like. End of story. There is no point in trying to protect consumer information. It just cannot be done.

The "bottom line" is a cliché but it is no cliché to say that the best way for a nation to harness the opportunities of this new electronic age is to hone and polish the laws that make the people the partners of government. Transparency leads to efficiency and efficiency leads to shared knowledge and increased competitiveness. Even more important, transparency gives people confidence in their country and its democratic institutions.

In a rapidly changing world, Canadians will need all the confidence in themselves they can muster if they are to weather the storms to come.