Reviewing the Access to Information Act

by Hon. John Reid

Members of Parliament and their staff from all parties have begun to use the Access to Information Act in increasing numbers to assist them in determining what government is up to. This article looks at various issues related to the Act.

The parliamentary interest in the access law is, in my view, an entirely healthy development. However, the reason for this interest is somewhat disturbing. In addition to the Oral Question Period and proceedings in the House and Committee, the traditional ways in which Members obtained information from the Government was through written questions, starred questions and Motions for the Production of Papers. Members have told me that the delays in obtaining information through the traditional ways are such that they are being forced to use the *Access to Information Act*. As a former Member of Parliament and one who had a great deal to do with the traditional system in the early 1970s, I am saddened to see that the former system has been allowed to fall into such a sad state of disrepair that Members no longer see their route to government information through the House of Commons as satisfactory.

Many will come to know first hand what other access users-business and media users, have been experiencing for fifteen years—a bittersweet mixture of exhilaration and frustration. There is the exhilaration of knowing that power has shifted significantly, as a result of this law; shifted from the state, from the bureaucracy, to the individual, the private citizen. Access to government records is no longer by grace and favour. It is a right. Important information does get released; that is most exhilarating of all.

One of the important changes the *Access to Information Act* has accomplished is a significant alteration in the doctrine of Ministerial Responsibility. That doctrine is the cornerstone of representative parliamentary democracy, but it had been clear since the 1950s that the doctrine no longer reflected the real world. Ministers had long ceased to be hands-on operators; instead they spend increasing amounts of their limited time in Cabinet and Cabinet Committee dealing with policy. The operational decisions largely passed to the civil servants.

The *Access to Information Act* has changed the accountability of players in the governmental system. Now, since documents are available, one can find out where, when, why and by whom decisions were made throughout the civil service. Consequently, Civil Servants are now accountable for decisions they make under their own authority where before it was the Minister who had to take responsibility. Of course, the Minister still must take overall responsibility for actions taken (or not taken) by his Department but he no longer takes personal or direct responsibility for all actions taken by Departmental employees.

This significant change in the relationship between Minister and Department is most important. It calls for a cultural change within the government. It is taking place, slowly in some cases, but in a good number of departments it has taken place. It has taken place only when a strong Minister has determined that his Department will obey the Access law.

Of course, legal justifications for secrecy remain; there are thirteen to be exact. But the courts have been consis-

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tent defenders of the principle that the law's exemptions must be interpreted in a limited and specific way. A recent clear example of the Federal Court of Appeal's resolve in this regard was when it ordered the disclosure of a flight safety review report on the crash of a Nationair DC-8 in Saudi Arabia, in 1991 which resulted in the deaths of 249 Nigerian passengers and fourteen Canadian crewmembers. This crash was the worst airline disaster in Canadian history. In ordering disclosure of the report, Mr. Justice McDonald wrote:

> I think it is also important not to underestimate the public's interest in disclosure and the positive impact disclosure may have on the aeronautics industry. It should not be forgotten that in passing this Act, Parliament has specified the important role public scrutiny of government information plays in a democratic system.

Other judges have said the same thing. The courts at all levels are powerful allies in access.

Only some twelve countries in the world have had the courage to give this right of access to their citizens. Even Great Britain, the mother of our parliamentary system, has not yet had the courage to give its citizens a legal right to know.

There are other frustrations as well. Principal among them is delay in receiving responses. Every year, my office reports growing dimensions of that problem to Parliament; every year the problem goes unchecked and every year the delays get worse. One department may improve—with my office on its back. But delay will break out somewhere else.

My predecessor, John Grace used the strongest language appropriate to a Parliamentary officer to describe the problem. He said:

> Delay in responding to access to information requests is now at crisis proportions. Given the clear and mandatory obligations placed on government to provide timely 30-day responses, the flouting of Parliament's will in some institutions is a festering, silent scandal.

Mr. Grace was not silent in the face of the scandal of delay and I have made solving this problem my first priority.

I regret to say that requests seen by some officials as in any way politically sensitive receive the slowest treatment. More consultations are held during their processing, more layers of approval are involved, briefing notes for ministers are prepared and communication plans are developed prior to any response being given. Requests from the members of opposition parties get treated as "sensitive" requests and fall into the slow lane of traffic. Of course, there is no justification for such treatment; the name of the requester and the purpose of a request should be irrelevant. On this point, especially, Ministerial aides take note!

Thus, we receive in our office an increasing number of delay complaints from members of Parliament who use the law. And, of course, after the long wait for the results of our efforts to pry out a response (our investigations take, on average, four months) records may come with exemptions applied. There then often follows another complaint about the exemptions, another investigation, and another frustrating wait. There may even be a court case before the sad saga is over if the government does not satisfy either my office or the requester. The access act is not for the impatient: it is a long-term investment. But it can bring results.

I have no magic formula to end all the frustrations of access users. What is needed along with some sensible amendments to the law is a cultural change in government towards access to information; a deep public commitment to the values of open government: a will expressed at the highest level to make access work. Of course, opposition parties will always like access more than the governing party.

> ***Members of all parties have a vested interest in ensuring that the right to know is strong. No party, after all, stays in power forever.***

There is no doubt that, when the right of access is delayed, it is effectively denied. The Information Commissioner should be given better tools to confront the problem of delay. Those tools can only come from Parliament itself. My predecessor has asked for limited order powers and sanctions to address delay problems, powers such as the removal of a department's authority to charge fees as well as the loss of its authority to invoke any of the law's discretionary exemptions. That would be the price to pay for flouting the law. I agree that those tools are needed; in fact, I am arguing before the Federal Court of Appeal that some are implicit in the current law.

When I was interviewed by the Standing Committee on Natural Resources and Government Operations for this position, I said that after fifteen years of existence, the *Access to Information Act* should be reviewed by a Parliamentary Committee. Since taking office, my conviction has increased that his should be done. The structure of the Access Act is sturdy, but after fifteen years, a score of judicial decisions, and the practical reality of dealing with delays and substantive questions, the time has come for Parliament to re-examine the Act to improve it, to

bring it up to date to meet the new challenges of the twenty-first century.

I am supportive of the thrust of John Bryden's private member's bill to revamp the access law. By keeping up the pressure for a more effective law, Members of Parliament have a better chance than do I of solving the problems which frustrate them. I am grateful to all the members, those from Reform, Liberal and the Bloc who have brought forward private members' bills. And I am particularly grateful to Madam Beaumier and all who supported her bill, to make it an offence to alter or destroy records for the purpose of thwarting the right of access. A powerful message has been sent to the government and to the public service, about the high value members of Parliament place on the right of access to information.

Let me end on a positive note. Even as we rightly deplore the rare instances of records alteration and destruction, even as we lament excessive secrecy, inflation of fees, inadequate searches for records and chronic failure to respect response times, we should not lose sight of the profound difference this law has made in the transparency and accountability of government. Dealing with access is a tough reality for government. The law shifts to government the burden of proving that secrecy is legitimate. The law is available to all at a very reasonable cost—$5 application fee includes five free hours of search time. There are no fees, of course, for making a complaint to my office. I am obliged to investigate all complaints and, consistent with my staff of thirty-one persons, I try to do so in a thorough and timely manner.

Do not lose faith in the Access Act: it continues to pry out information which would otherwise never see the light of day. Despite all the criticism, in its own sometimes faltering, bizarre way, it is working. For any MP serious about obtaining necessary information, it is better than Question Period or the Order Paper. But, as I said earlier, that would not be too hard.

I urge those of you who are users of the Act to be responsible users and to keep open, constructive lines of communication with the departmental Access to Information Co-ordinators who process your requests. They are not the enemy and you should not treat them as such. If you do not like the results—be polite and come to my office to have us take up your cause. To those of you who are on the receiving end of access requests, who must help ministers cope with governing in a fishbowl, be responsible and prudent. Resist the temptation to try to vet all the access requests, which come to your minister's department. Otherwise, you will bring the system to a grinding halt and you will have my investigators crawling all over you. Rather, let us embrace openness. Insist that requesters be given timely service, send a message to the public servants in the departments, that your Minister has the self-confidence to make access work well in his or her department.