
Parliamentarians and Canada's Access to Information Act

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The *Access to Information Act* was passed by the House of Commons in June, 1982 and proclaimed July 1, 1983. The Act provides for a mandatory review of the provisions and operations of the Act by a parliamentary committee.

This review will be carried out by the House of Commons Standing Committee on Justice and Legal Affairs which will begin its hearings in May 1986. After over two and a half years of existence, most independent observers agree the Act has not done a great deal to open up federal records, although it has interested particularly media reporting on certain federal activities. It has been used infrequently with an average of about 3000 applications filed a year. The largest single identifiable group of users are journalists who account for about twenty per cent of all applications. Among the general public the act remains little understood and hardly any effort has been made to publicize its existence.

The Act provides for an Information Commissioner to consider complaints and the most frequent complaints are about time delays, unreasonable fees or broadly applied exemptions. Complaints are in the ratio of approximately one to every ten applications filed. The majority of applications do not result in full release of information, some of which was available informally before the Act's proclamation. Exemptions have been sought by 100 of the 142 federal agencies covered by the Act; the most frequently used (cited in about one in five cases subject to exemptions) are denials on the grounds of policy advice, commercial information and personal information.

Parliamentarians have been very minor users of the Access Act, although the number of House of Commons members using the Act seems to be rising. The reasons for the disinterest vary. There are many new MPs and some probably do not know about the Act. In this Parliament many current MPs are from the party in power and have easier access to government information than do opposition members. There are also many former cabinet ministers in the opposition who either know how to get information from the departments or are not keen to see the Access Act open their records on public business transacted during their administration. Members have many demands on their time and they may find it easier to let other Access Act users obtain data which they then use. One example of this is when the Canadian Press, using the Act, obtained figures in September, 1985 about the awarding of outside legal work by several federal agencies.¹ The matter was then raised in the House of Commons. Finally perhaps MPs may believe it is demeaning to their privileges as parliamentarians to have to acquire information via the Access Act and upon denial to then have to appeal to a servant of Parliament, the Information Commissioner.

This last point is a difficult one to answer — should MPs be treated as ordinary citizens or do they have special parliamentary privileges? Perrin Beatty, for instance, while in opposition, found that the only way Revenue Canada would release some program evaluation data to him was if he filed an Access Act request. The then Revenue Canada access coordinator was on record as saying that the Act applies equally to everyone "whether king or pauper."²

A parliamentarian may find himself in the situation of complaining to the Information Commissioner to obtain information public employees say the Act requires them to obtain under the Access Act. In one reported case an MP complained about a time delay in receiving three Veteran Affairs' evaluation reports.³ In another reported complaint an MP complained about the \$300 fee charge and required \$100 deposit to obtain data on the Cinola gold mine proposal on the Queen Charlotte Islands.⁴ The member considered the department's reply "an abuse of the Act and an abuse of the rights of a member to access information on behalf of his or her constituents". The member did not respond to the Commissioner's request that representations be made to her why the fee should be waived in this case or, if he wished, for all Members of Parliament. The Commissioner dismissed both member's complaints as not supportable under the Access Act.

There are some obvious reasons why MPs should use the Access Act. Like journalists, they know a good story and have their sources. Either the information sought under the Access Act is obtained and used or if denied, the matter then can be brought up in parliamentary debate. For example Ed Broadbent requested from the Department of Finance the release of projections which show how employment will be affected by spending cuts announced in the Minister of Finance's economic statement of November 8, 1984.⁵ The reply was that the econometric computer model was exempt because it is injurious to release in the financial interests of the Canadian government (Section 18 of the Access Act) and because the model is policy advice (Section 21). Mr. Broadbent then criticized the Minister of Finance for such secrecy.

Private members are not privy to the information and information resources a Cabinet Minister has at his or her disposal and may want to take advantage of all avenues of information release that can help their constituents and their careers. The Access Act route can at times be quicker than the Written Order Paper (where no legal time limits apply)⁶ or the informal route of calling up a Cabinet Minister or departmental employee where the answers provided may be vague and where no written documentation is provided.⁷

Members use of the Access Act could increase if other information channels are restricted, if parliamentarians' roles are strengthened under the proposed powers for committees or if the party research offices begin to systematically collect information on certain topics using the Access Act. However, MPs usually

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need a quick reply and the Access Act is not fashioned to give them this. Furthermore an MP's office does not have trained staff or a budget devoted to making Access Act requests.

Little is known about whether Senators are users of the Access Act. Certainly a few Senators like Senator Godfrey played a key role in promoting the Act as Co-Chairman of the Joint Standing Committee on Regulations and Other Statutory Instruments. While presently excluded under the Government's terms of reference from any direct role in reviewing the Access Act, Senators may have the necessary time to become access users and nothing prevents them from examining the access legislation's weaknesses and strengths.

At least one territorial member has used the Access Act. Tony Penikett, when he was the Opposition Leader in the Yukon sought, unsuccessfully, data on a Decima Research public opinion poll.

Though parliamentary committees may have considered using the Act, they have usually relied on their own questioning ability or their research resources to try and get answers. Only occasionally have they used their right to subpoena certain witnesses or order the production of further materials.

A recent case illustrates how hard it can be for parliamentary committees to obtain information. The Standing Committee on External Affairs and National Defence was looking for information on eight existing NORAD agreements between Canada and the United States as part of their examination of renewing that agreement. The Canadian Defence Ministry refused to release these "classified" documents although they had previously been provided to other Canadian parliamentarians. The committee was able to find this information in Washington.⁹

Parliamentary committees have not always pressed for further information. The Standing Committee on Justice and Legal Affairs, for instance, received over 140 annual reports on access and privacy operations from federal agencies for 1983/84 and 1984/85. Instead of challenging the sparse data contained in these two sets of annual reports and urging the responsible Minister to issue instructions that access problems be reported annually, the Committee, busy with other tasks, has not asked the President of Treasury Board to issue departments instructions to improve information the committee will need for the 1986 review of the access legislation.

As parliamentary committee's roles are strengthened with House rule reforms it will be interesting to see whether committees and their staff use the Access Act or other of their information powers.

The *Access to Information Act* does not cover disclosure of information on the public business transaction of an MP, Senator, a Cabinet Minister, a parliamentary committee, information prepared by the Library of Parliament or political parties. Such information is available to the public under the Access Act only if the records are found in departmental files covered by the Act.

While there may be validity to excluding the purely constituency and personal political records of parliamentarians there is less justification for excluding records involving public policy making and public expenditures. Parliamentary committees can and do have portions of their proceedings *in camera* for steering committee business or policy discussions with certain witnesses. If transcripts exist for such meetings there is no time limit on when they can be released. In June 1984, John Reid's private member's bill (C-252) was passed to grant public access to the 1940-45 records of the Special Committee on the Defence of Canada Regulations (i.e. the impact of the War Measures Act) after they had remained secret for 40 years.

The only current way of getting at parliamentary records is to persuade those with the records to release them, pass special legislation like C-252, rely on leaks, or try to use the Access Act to get part of the information.

It is ironic too that while parliamentary records are excluded from the Access Act, parliamentarians can find exemptions applied by public employees to departmental records covered under the Access Act that, for instance, prevent them from finding out about policy advice a public employee gave to a politician.

It is often overlooked that the Access Act is far from a nonpartisan tool because:

- a) it highly favours the Government in power as it presently is laden with exemptions and a cabinet confidences exclusion system.
- b) opposition parties are normally going to make hay when abuses under the Act occur or when politically useful information is released under the Act.

The Access Act can prevent politicians from finding out about information developed by public employees while allowing the public employees to protect their records and control the day to day release of government records. It was devised mainly by public servants and its operation is mainly run by them with rare ministerial or parliamentary involvement. The directives Treasury Board and individual departments develop are not reviewed by parliamentarians.

It must be a bit worrisome, with information being one of the main businesses of the federal government, for parliamentarians to discover that the Access Act is one more shift of information power out of their hands into those of bureaucrats and cabinet ministers.

Parliamentary supremacy can hardly be obtainable when information is secreted from it and boxed into the Access Act. Parliament created the Access Act and Parliament can review it including the question of whether parliamentary records should be covered under the Act. How parliamentarians handle this review role or their role as users of the Access Act has not been given much systematic thought. Hopefully, this article will raise some questions and provide some information for discussion now that parliamentary review is only a short time away. ■

Notes

¹See the *Globe and Mail*, September 12, 1985

²*Ottawa Citizen*, March 18, 1984. There are also cases where ordinary citizens, such as Professor Ernest Regehr, of Waterloo University was given less information on Canada's military sales abroad than that given to MP Nelson Riis in an 1985 access application.

³Annual Report, Information Commissioner, 1984-85, p.83.

⁴*Ibid.*, pp. 102-103

⁵*Ottawa Citizen*, November 14, 1984

⁶The new rules place a limitation of four on the number of written questions a member can have on the order paper at any one time.

⁷The classic case of how slow the Written Order Paper system can work was one of the late Tom Cossitt's questions first placed on an Order Paper in June 1976 and finally answered in June, 1984 in answer to the same question put by his wife, Jennifer Cossitt when she entered the House in 1982. The data requested was about the use of Air Canada passes by officers of the Canadian Transport Commission, their spouses or travelling companions.

⁸One agreement, for example, dealt with the placement of American nuclear weapons in Canada in the event of war

⁹See *Ottawa Citizen*, December 5, 1985.