BILL C-43: A CRITICAL VIEW

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John D. McCamus
Osgoode Hall Law School
York University
4700 Keele Street
Downsview, Ontario M3J 2R5

ABSTRACT

A critical examination of the main features of the proposed Canadian access to information legislation. The provisions of Bill C-43 will be compared to the American Freedom of Information Act and to the proposals set forth in the Report of the Ontario Commission on Freedom of Information and Individual Privacy. Particular emphasis will be placed on the procedural aspects of the Canadian scheme and the exemptions from the general rule of public access.

RESUME

Notre exposé sera un examen critique des points importants du projet de loi canadien sur l'accès à l'information.

Nous comparerons les dispositions du Bill C-43 à ceux de l' "American Freedom of Information Act" ainsi qu'aux propositions contenues dans le rapport présenté par l' "Ontario Commission on Freedom of Information and Individual Privacy".

Nous appuierons plus spécialement sur l'aspect procédure du projet canadien et des exemptions par rapport à la règle générale régissant l'accès public à l'information.

BILL C-43 -- A CRITICAL VIEW

The proposals of the Government of Canada for an information access law are the product of an extraordinary lengthy period of gestation. In 1969, a federal Task Force on Government Information published a report, To Know and Be Known, which stressed the need for the adoption of effective measures to ensure greater public access to government information. Four years later, in 1973, the Government tabled in the House a directive entitled "Notices of Motion for the Production of Papers" which listed the types of government records to which access would normally be given to Members of Parliament. In that same year, a Private Members Bill was introduced by Gerald Baldwin, M.P. which set forth a freedom of information law similar in its general design to the American Freedom of Information Act. The Government directive and the Baldwin bill were then referred to the Standing Joint Committee on Regulations and Other Statutory Instruments for study and comment. That Committee, in turn, conducted extensive public hearings and tabled a report in December, 1975 recommending the enactment of a Canadian freedom of information law. In June, 1977, Secretary of State Roberts tabled a Green Paper in the federal House espousing a philosophy of greater openness in government and exploring a variety of alternative methods for designing a freedom of information scheme. The Green Paper was then referred to the Joint Committee for further study. Again the Committee ultimately reported to the House recommending the enactment of a freedom of information law. The short-lived Conservative government introduced a freedom of information bill, Bill C-15, in October, 1979 but did not survive for a sufficient period to see to its enactment. Finally, then, on July 17th, 1980, the Liberal government introduced Bill C-43. Perhaps no other item on the legislative agenda in recent years has been the subject of so much study and deliberation prior to the introduction of a bill.

Notwithstanding the level of cynicism which had been generated by this lengthy legislative "wind-up", the introduction of Bill C-43 met with a generally enthusiastic response from members of the opposition and representatives of the media. My own favourite is a piece in the Toronto Star of July 22nd, 1980 by Richard Gwyn, titled, "Freedom of Information bill proves the system works". Mr. Gwyn, usually quite levelheaded in matters of this kind, went on to report, somewhat breathlessly one imagines, that Bill C-43 is probably the best or most open freedom of information scheme this side of Sweden. I wish I could be as enthusiastic. In fact, Mr. Gwyn's remarks are fanciful. Bill C-43, if enacted in its present form, will arguably not even be the best freedom of information law this side of Nova Scotia. The province of New Brunswick has enacted a freedom of information law which is in some respects a more satisfactory and impressive scheme than that set forth in C-43, all the more so inasmuch as it was enacted approximately three years ago. The most obvious

point of comparison for C-43, however, is the American Freedom of Information Act. What we have in Bill C-43, in essence, is a very much watered down version of the American legislation.

The American Freedom of Information Act was enacted in 1966 after a period of agitation for reform and Congressional deliberation of some four or five years. Congressional hearings in 1972 entertained a number of complaints concerning the design and administration of the 1966 Act. As a result, several amendments to the legislation were made in 1974 and, indeed the Act was further strengthened in 1976. My principal complaint with respect to the drafting of C-43 is that it appears to ignore much of this American experience. By way of contrast, the Ontario Commission on Freedom of Information and Individual Privacy which was established in 1977 and published its three volume final report titled "Public Government for Private People" in September of 1980, places greater weight on the U.S. experience and, by inference, credits it with more relevance to the Canadian scene than did the drafters of C-43.

Federal spokesmen over the years have tended to underplay the relevance of American experience by characterizing the differences between the American and the Canadian constitutional systems in a way which can fairly be described as rather misleading. Too often the U.S. Freedom of Information Act has been characterized as an American solution to an American problem. The American Act has been dismissed with the suggestion that it is a device which is inappropriate in a parliamentary democracy where we are favoured with unique mechanisms of accountability - in particular, the convention of ministerial responsibility which are much more effective than the mechanisms of accountability in place in the American system. It may well be that the American constitutional system is such that it needs the accountability mechanism of freedom of information legislation, but we Canadians can get along quite splendidly without it. Further, it was argued, a freedom of information scheme of the American variety would foul up the operation of these traditional and smoothly functioning mechanisms of accountability which are a part of the Parliamentary system.

Fortunately, few were convinced by arguments of this kind. After all, it is errant nonsense to suggest that the executive branch of government is more accountable to the legislature in our system of government than it is in the U.S. Although there are many virtues inherent in the Parliamentary system which are absent in the American, on this point the American system is vastly superior. With the separation of powers between the executive and legislative branches in the U.S. system, federal executive agencies are indeed very accountable to Congress. Under our own system, however, the domination of the legislative branch by the executive by virtue of the party system and Cabinet government means that the accountability of the executive branch

and of its agencies is, at least in the context of majority government, to a large extent merely pro forma. Under the U.S. system, well staffed congressional committees explore vigorously the deficiencies in the performance of executive agencies. As part of its offensive against the executive, Congress enacted the freedom of information law so as to ensure that executive business was, to the greatest extent practicable, conducted in the open. The American Freedom of Information Act, it should be noted, was drafted by and enacted by Congress, not by the White House. Under the Canadian system, of course, Bill C-43 was drafted by the executive itself, the very branch of government which is to be the subject of regulation.

This fundamental difference in the two systems of government does explain why considerably more support is to be found in the American system - amongst legislators at least - for freedom of information laws. But it is a bit galling to be told that the American system does not provide for as effective a system of accountability of the executive branch as the American system. On the contrary, the relative ineffectiveness of our own system in this regard suggests that there is a much greater need here for the increased level of accountability of the executive branch effected by information access legislation. Canadian opposition M.P.s complain vociferously that they are frequently denied access to basic information about the conduct of public business. As the Watergate period illustrated, American executive agencies have little or no power to withhold information concerning their activities from congressional inquiry.

The alleged concern that importation of the American scheme would undermine the parliamentary convention of ministerial responsibility is also an obfuscation. There are essentially two branches to the convention. First, ministers are said to be accountable to Parliament for the administration of their departments. Is it not obvious that increased access to information would simply enhance the operation of this aspect of the convention? The second branch - the tradition of a non-partisan and relatively anonymous public service - poses greater difficulty. Senior public servants are normally not called upon to explain or justify advice given to their ministers. It is the minister who assumes responsibility for action taken. Hence, disclosure of the advice of senior public servants may be thought to be inconsistent with this aspect of ministerial responsibility. It must be emphasized, however, that this is also a problem in the American system of government. Members of the U.S. Cabinet are no more enthusiastic than Canadian Cabinet Ministers about the disclosure of information of this kind. Thus, under the American Act, records containing policy advice are exempt from access. Although reasonable people can differ as to whether or to what extent information of this kind should be

exempt, it is obvious that the American Act is, in this respect, quite consistent with our traditions.

It must be conceded, however, that there are a number of difficult problems involved in the drafting of a freedom of information scheme and, further, that it would not be a prudent course for a Canadian government to simply import the American scheme as is. Nonetheless, the striking difference between the American Act and Bill C-43 is that in facing the difficult questions, the American Act almost invariably opts for openness whereas the Canadian version opts for government secrecy and the administrative convenience of the bureaucracy. I propose to briefly illustrate this proposition and to provide further comparison with the proposals of the Ontario Commission.

A common feature of freedom of information schemes is that they impose on the individual seeking access to government records some portion of the cost of providing this service. The arrangements for the charging of fees set forth in C-43 are, however, considerably more disadvantageous to requestors than those contained in other schemes. In the first place, C-43 requires government agencies to charge requestors an initial application fee. More importantly, C-43 permits agencies to charge requestors not only for the cost of searching for and copying records but, as well, the cost of reviewing the record and making a decision as to whether or not it is accessible under the act. In other words, a government agency could charge a requestor for the cost of lengthy deliberations leading to a decision to not disclose or, indeed, for the cost of legal advice obtained in order to determine whether or not the document in question is covered by one of the exemptions to the general rule of access. The American Act and, in turn, the Ontario Report permits only charges for the direct costs of search for and duplication of requested records.

The heart of any freedom of information scheme is to be found in the exemptions it sets forth from the general principle that the public should have a right of access to government records. As is the case with the American scheme, Bill C-43 contains essentially three kinds of exemptions: (i) those designed to enable the government to engage in certain kinds of decision-making processes (e.g. Cabinet deliberations) and to deploy adversarial strategies (e.g. in the enforcement of the criminal law) in an atmosphere of confidentiality; (ii) those designed to protect the trade secrets and other confidential commercial information of private firms which may be contained in government records; and (iii) those designed to prevent the disclosure of information about identifiable individuals which would amount to an invasion of their personal privacy. Although Bill C-43 thus follows the American pattern, the equivalent exemptions in C-43 are significantly more protective of government secrecy than those in the American Act. As well, C-43

contains a number of exemptions that simply do not appear in the American legislation. One of the most important to fall within the latter category is the exemption contained in C-43 pertaining to certain kinds of information relating to federal-provincial affairs. Neither the American Act nor the Ontario Proposals contain an exemption of this kind. As the Ontario Report indicates, the most sensitive information relating to federal-provincial relations would be protected by other exemptions in the scheme - such as those relating to Cabinet documents, the advice of public servants, etc. - and thus an exemption relating specifically to such matters is unnecessary. Given the importance and sweeping nature of federal-provincial relations in our constitutional system, is it not obvious that the factual record relating to federal-provincial relations should be accessible to the public? Moreover, given the recent interest in the referendum as a mechanism of constitutional change, is it not arguable that a fully informed choice in such matters can be made by the electorate only if the factual record relating to, for example, fiscal arrangements and federal-provincial transfers of assets, is made available to the public at large. Does a government which refuses to inform its citizenry prior to a referendum not commit a fraud on the electorate? Quite apart from the spectre of referenda, however, the desirability of full access to basic information concerning federal-provincial relations, especially at this point in our history, seems self-evident.

The gathering of information for law enforcement purposes is an activity which creates a need for an exemption of some kind. The American Act responds to this need by stipulating that information relating to law enforcement activity is exempt from the general principle of access if its disclosure would harm one of a number of specified public interests. Thus, for example, one cannot obtain access to investigatory information disclosure of which would interfere with enforcement proceedings or disclose the identity of an informant, endanger the life or physical safety of a law enforcement officer, and so on. The specific listing of interests to be protected was an improvement to the Act effected by Congress in 1974 in response to concerns that the previous version of the law enforcement exemption had been shielding more law enforcement information than effective administration of the criminal law required. In Canada, the Macdonald Commission, in its first report on "Security and Information" made recommendations concerning the drafting of a law enforcement exemption for Canadian freedom of information law. The Commission noted (at p. 39) that "in the fields of security and intelligence and the administration of criminal justice we believe that there is considerable scope for openness..." but went on to recommend that the American scheme could be improved by making additions to the list of interests to be protected by the law enforcement exemption. The Ontario Report basically follows the pattern of the Macdonald Commission

recommendation. In Bill C-43, however, the statute confers power on the Cabinet to exempt by regulation the entire investigative and intelligence files of law enforcement agencies. Thus, even if disclosure would not in any way harm the public interest in effective enforcement of the criminal law, no right of access is conferred. When it is noted that law enforcement, for purposes of the scheme, embraces not merely the Criminal Code but all federal statutes, it is easily seen that the law enforcement exemption in C-43 potentially immunizes an enormous range of government information from public access.

Another obvious area of difficulty in designing an exemption from the scheme arises in the context of commercial information. In carrying out planning, regulatory and investigative functions, the government collects and, indeed, generates considerable information about commercial firms. Some of the information is supplied, either voluntarily or involuntarily, by the commercial firms in question. Some of the information is developed by the government itself as, for example, where the government monitors compliance with such federal law as the food and drug regulations. Speaking very broadly, commercial firms are likely to be concerned about two different kinds of disclosures. First, they would be concerned about the possible disclosure of trade secrets and other proprietary information. The second concern relates to the disclosure of information which, though not of commercial value to competitors, might result in embarrassment and hence damage the trade reputation of the firm or its principals. Thus, for example, food retailers are likely to oppose the disclosure of information relating to their failure to comply with federal food composition standards. Publicity was recently given, for example, to the fact that some firms were mixing substantial quantities of pork with their hamburger meat.

In designing a commercial information exemption to a freedom of information scheme, the central question to be addressed is whether to protect any information other than trade secrets and other proprietary information. The American Act and the Ontario Report adopt the philosophy that while it is legitimate for commercial firms to maintain secrecy with respect to their trade secrets, there is no public interest to be furthered by avoiding, for example, the embarrassment that might result from the disclosure that particular firms have carried on their business in violation of federal law. Bill C-43, on the other hand, forbids disclosure of information which could result in material loss to a commercial firm and thus appears to exempt information which, though not a proprietary in nature, might embarrass the firm in question. Thus, consumer groups could not discover under C-43 which retailers had been sprucing up their hamburger meat with generous portions of pork.

Two further points relating to the commercial information exemption should be noted. First, unlike the American Act and the Ontario proposals, Bill C-43 does not merely exempt commercial information from the general principle of public access, it prohibits disclosure by the government of the information in question. Under the American Act, a government agency may decide to disclose exempt information because it believes it is in the public interest to do so. Bill C-43, in prohibiting disclosure, appears to withdraw this discretion to disclose. The exemption is "mandatory" rather than merely "permissive". It is not at all clear why the government would want to tie its hands in this way. Surely there must be circumstances in which the government would see it as being in the public interest to disclose information which might be embarrassing to a commercial firm. Unfortunately, this wrong-headed notion of "mandatory" exemptions is also found in five of the other exempting provisions in Bill C-43.

The second point relates to the conferral of procedural rights on commercial firms to challenge and ultimately obtain a court order prohibiting disclosure of commercial information. Again, this represents an innovation in Bill C-43 which is not contained in either the American Act or the Ontario proposals. In essence, Bill C-43 entitles a commercial firm that is concerned about a proposed disclosure of information to appeal the decision to disclose on up through the judicial system ultimately to the Supreme Court of Canada. When one compares the likely resources of commercial parties to those of the consumer groups which are likely to be seeking disclosure, it is evident that this unequal contest is unlikely to conduce to the disclosure of information. There is little evidence in the American experience that procedural rights of this kind are necessary. A study undertaken for the American Administrative Conference has uncovered only two occurrences of the kind of problem which these procedural rights are designed to remedy - disclosure by a government of exempt information which harms a commercial firm. Bill C-43 adopts this unnecessary procedural sledgehammer in order to squash a gnat.

One of the tough problems for those designing freedom of information schemes is to be found in the exemption for personal information. To what extent can I as a requestor obtain records which disclose information about another identifiable individual? In resolving this question, it is easily seen that one man's freedom of information is another man's invasion of privacy. A requestor may wish to obtain, for example, information concerning the actions or qualifications of public servants, the identity of or representations made by individuals lobbying to seek changes of the tax system, information concerning people licensed by the government or, more generally, personal information of some historical or other research interest. Many of the individuals about whom information is sought might protest that disclosure of

information about them amounts to an invasion of their personal privacy. Many, indeed perhaps most, government records contain some information of some kind about a named individual (at the very least, something about what the author of the particular document wrote on a particular occasion). Accordingly, the design of the personal privacy exemption is a matter of the utmost importance for the effectiveness of a freedom of information scheme. The American Act resolves this tension between privacy and openness by establishing a "balancing test" in the personal privacy exemption. Under the American Act, then, a requestor can obtain a copy of a government record containing personal information provided that in so doing there is no "unwarranted invasion" of another person's privacy. The Ontario proposals recommend a refined version of this balancing test by indicating the kinds of factors which should be taken into account in determining whether a particular invasion of privacy is, in all the circumstances, unwarranted. Bill C-43, on the other hand, simply bans the disclosure of personal information. There are two exceptions to this general prohibition on access. The public is entitled to obtain information concerning the terms and conditions of the employment of public servants and government contractors and information about the identity of individuals who receive "discretionary benefits of a financial nature".

No doubt, the drafters of C-43 believed that a clear rule as to what kinds of personal information should be disclosed would be preferable to the uncertainty of the American balancing test. The provisions of C-43 in this regard, however, well illustrate the futility of such an approach. Surely there is much more that one ought to be able to learn about the activities of public servants, especially those at a senior level, than the proposed legislation permits. Further, it is not at all clear that the identity of individuals who receive discretionary benefits essentially of a welfare nature should be disclosed to the public. More importantly, the virtually complete ban on the disclosure of all other kinds of personal information means that C-43 will be much reduced in its usefulness to requestors of all kinds. In particular, this will mean that C-43 is of little or no use to the research community. Historical research, for example, has been much enhanced in the U.S. by the American freedom of information scheme. Canadian historians will derive little or no benefit from the proposed Canadian legislation.

There is much more that one could criticize in the Canadian scheme. Thus, for example, the Act extends only to the records of agencies which are listed by regulation. Thus, it is somewhat difficult to determine which agencies have been excluded from the Act, particularly where their reporting status through a line department is somewhat obscure. The proposed list contained in a schedule to C-43 does indicate, however, that one obvious target for a freedom of information scheme the crown corporations

- are omitted from its coverage. When one considers the enormous importance of these bodies in such areas as transportation, communication, and energy policy, it is difficult to see any rationale for their exclusion. Both the American Act and the Ontario proposals bring such bodies within the converage of the legislation.

Beyond this, there are a number of features of the Act which, although not terribly significant in themselves, do indicate something of the spirit in which the Act was drafted. For example, rights of access are conferred essentially upon Canadian citizens only. Can we expect the return of those "Only Canadians Need Apply" signs of yesteryear? If the intention of the provision is to deny access to members of the KGB, one suspects that this insidious organization will be sufficiently astute to make requests through the good offices of a Canadian citizen. The more likely effect of the provision is simply to offend the only likely group of foreigners to make applications under the Act -- our neighbours to the south. There is some irony in the fact that notwithstanding our established Canadian tradition of complaining that Americans show little interest in matters Canadian we are now preparing to deny that tiny band of American scholars who have an interest in Canadian affairs access to government information under our freedom of information laws. Canadians, it should be noted, are not excluded from applying for access to American government records under their freedom of information scheme and many Canadians have taken advantage of this opportunity.

If it may be said that the basic recipe for C-43 hails from Washington, then, there are a number of features of this scheme - timidity in drafting the exemptions, a preoccupation with administrative convenience, procedural devices which are ungenerous to the requestor - which give the scheme the unmistakeable flavour of Ottawa. Some critics, offended by these and other features of the scheme, may feel that the proposed legislation creates the illusion of change but in substance merely confirms the status quo. On this ground it might be argued that the public would be better served by its withdrawal. My own view is a more hopeful one. Although Bill C-43 may represent more modest progress than its advertising would suggest, it does nonetheless represent some progress in the direction of a more open system of government. Notwithstanding its many deficiencies, it is still quite conceivable that it will create an important and progressive change in the climate within which decisions to respond to citizen requests for information are taken. If so, it may well be that Bill C-43 will be seen, in retrospect, as an important first step in rendering the government in Canada more accountable to its citizenry through the provision of greater access to the public of information concerning public affairs.