Massive Secrecy Inroads and Barriers to Access Near Approval in the Senate

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The Senate Legal and Constitutional Committee is winding its way, clause by clause through Bill C-58. But they have already approved the most divisive change to the Access to Information Act.

That's by their agreeing to divide the Access to Information Act into two parts – one for accessible operational records (part 1) and one outside the Access Act's reach only for government promoted records (part 2).

This in the long run throws the very essence of Access to Information Act under the bus. That's because prime minister, ministers and parliament's records are permanently excluded from access to information coverage under part 2. Such massive secrecy overrides and inroads make past government exclusions seem small in comparison.

At the same time, the Senate Committee on Fisheries and Oceans is examining a disturbing government amendment to the Fisheries Act in Bill C-68 that puts forward a sweeping secrecy clause that also overrides the Access to Information Act.

That clause, section 61.2, states that any indigenous fisheries data given in confidence is confidential, period. That's unless it's public already, or its release has the consent of the submitting indigenous people, or is necessary for procedural fairness and natural justice reasons.

The clause is identified in Bill C-68 as being a consequential amendment to the Access to Information Act. It sets one more worrisome precedent and is the kind of amendment that opens the door to governments' thinking they can and will in future get away with implementing via parliament equally broad exclusions to public access for other records.

On the positive side, the Senate Legal and Constitutional Committee turned down the government demands for more fees in future from access users other than an application fee in the $5 to $25 range, with $5 being the amount now.

But who knows if they or a future government will jack the application fee up to $25 like in Alberta. The current Trudeau government for one, looking for ways to restrict the number of applicants no doubt, if reelected, would entertain at their own peril such a higher entrance fee.

The senate committee and the Trudeau government, nonetheless, did agreed to delete parts of Section 6 of Bill C-58 that would have negatively placed conditions on access users going ahead with applications.

But the senate committee agreed with the government and kept the new amendment to the Access Act that permits barring some people wanting to file requests from using the act if they are deemed - awkwardly - by the Information Commissioner - to be frivolous and vexatious members of the public.

Estimates from provincial experience with frivolous and vexatious provisions are that about one per cent of potential users will be barred from using the access legislation. That works out to some 1,000 people a year being prevented from filing federal requests after being labeled as frivolous and vexatious users.

That's not an insignificant number, a number that could include people government wants barred because they are like “terrorists” flooding government offices with requests that government simply finds offensive and meaningless.

As well, Treasury Board is nowadays promoting a very cumbersome bureaucratic on-line system for the public applying for government records that will for sure turn some potential users off and away, especially new ones.

The senate committee also took a crack at the problem of long delays. They passed an amendment, that could be challenged by the House of Commons, calling for the establishment of a 30-day limit to extensions beyond the initial 30- days government agencies have to respond to access requests. Anything beyond those 30 extra days would require prior authorization from the information commissioner.

With time extensions now of half a year to a few years increasing, their amendment is well-intentioned. But information commissioners usually go along or part way with departments' long extensions and excessive consultations and pleas for having to deal with a large amount of records. Commissioners can take a long time themselves to issue findings, and likely now orders, and they do not necessarily give priority to time delay complaints.

Further, information commissioners have no tough penalties they can impose on agencies violating their “compromises”. Taking agencies to court would itself be lengthy and not necessarily "winnable", especially with the courts still having "de novo" powers and buying into government cases for longer times being needed.

Indeed, a large amount of time was spent at the senate committee discussing whether the information commission new order-making powers being

introduced stymie and weaken the office by a Bill C-58 provision that still insists on giving the Federal Court start-from-the-beginning-again de novo powers to review complaints.

De novo review made sense before because the information commissioner only could investigate and only had recommendation or suggestion powers that governments could and did ignore. The commissioner, unlike now under Bill C-58 terms, could not issue binding orders; the courts could.

The senate committee recognized, however, if they were to drop the de novo clause, a whole series of other amendments to Bill C-58 would be necessary. So they decided to recall the Information Commissioner Maynard, a recent government appointee, who wants no such change.

But no independent access experts would also be called or recalled, especially if like former information commissioner Suzanne Legault they were in agreement that leaving in the de novo clause and many other features of Bill C-58 were regressive and served to weaken an order-making commissioner.

What the senate committee's discussion on the de novo clause really exposes is just how badly flawed Bill C-58 is. The fact remains that the government has set the new information commissioner up for many failures given there were no amendments offered to deal with broad and numerous exemptions, lengthy time delays, and an increasing failure to record key decisions.

One still in place in practice barrier to public access that Bill C-58 does not address was brought to the senate committee's attention, in a brief tabled with the committee in early March, by then Treasury Board President Jane Philpott in her brief reign there.

Philpott, the former Indigenous Services Minister who should know, suggested that continued consultations were needed with indigenous land claims researchers so as to give them better access. The former Indigneous and Northern Affairs Canada who held such historic land claims records had a vested interest in holding the frustrated indigenous researchers work up. So Philpott, to her credit, wanted such records transferred from “Crown-Indigenous Relations and Northern Affairs ...to archival institutions”.

Others researchers too, however, are being denied quick access to secret department archival records but are not being provided with consultation opportunities with Treasury Board. For instance, researchers like Allan Barnes, a former PCO employee whose now a senior fellow at a Carleton University institute have gone to the media, as reported in Canadian Press,

saying that the Privy Council Office is not granting them sufficient and timely access to historic Cold War foreign intelligence records.

They too then want records transferred to the National Archives. Barnes is circulating an e petition to complain about PCO hoarding its historic records. Yet Treasury Board is well aware that many departments like PCO are clinging on to their archival records, wanting them kept secret for as long as possible ensuring that researchers are not given much access to these collections.

Bill C-58 clause-by-clause review continues in April and the Senate Legal and Constitutional Affairs Committee is likely to issue a report for the whole Senate to debate by the end of April. The Senate in turn will refer an amended Bill C-58 back to the House of Commons for approval. If agreement on amendments is reached, then royal assent follows and Bill C-58 becomes law before parliament adjourns in June.

That would be a shame as the bill does irreversible and irreparable damage to open government. It will be hard to undo despite the Bill C-58 establishing future periodic statutory reviews and the current government hypocritical claim that in future their secrecy work can be easily unraveled. Yet the Trudeau government and the officials behind them know full well that Bill C-58's massive secrecy overrides are hard to ever undo.

The blame for such government manipulation and secrecy overrides and less and less public disclosures, and more government propaganda being “pro-actively” disclosed does lie with them. Growing secrecy may become an election issue.

In the meantime, Bill C-58 is still with the Senate to review. For the most part, it appears the Senate will go along with the government's powerful repressive practices that Bill C-58 incites.

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