Brison’s ingenious selling of Bill C-58 to the Senate

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OTTAWA—Treasury Board President Scott Brison was hard at it on Oct. 3 selling Bill C-58 as a great advance in transparency, which it is not.

Kicking off Senate Legal and Constitutional Affairs Committee deliberations on Bill C-58, Brison boasted that Canada is rated No. 1 by fellow governments for its open data portal. But that’s despite Canada’s Access to Information Act being moved down to 55th on the Global Right to Information index scale which compares more than 120 countries’ freedom of information laws.

He did make two concessions at committee; the important one is the government would no longer be demanding that requesters go through a qualifying test before their applications are accepted.

But Brison made it clear his government is not dropping targeting “frivolous and vexatious” users. Yet his examples in front of the committee of the need for new measures to address such requests, as proposed in Bill C-58, were not convincing: asking for all access requests released in a department, someone wanting his ex-wife’s work activity data, seeking a copy of e-mails of 50 human resource officials. All of those situations could be stick-handled under current access legislation.

Bill C-58 places the onus, the time-consuming work, and the costs of determining whether to reject or accept such requests on frivolous and vexatious grounds with the federal information commissioner.

Not giving up on the new frivolous and vexatious clause is a reminder that the government will still come down on some access subjects and users. Reassurances were not even given that voluminous Indigenous land claim requests could not still be targeted as vexatious.

The second concession Brison announced is that the government would drop a one-year transition period between when the information commissioner's office would get and be able to use order-making powers.

Former access to information commissioner Suzanne Legault and others criticized the order-making powers put forward in Bill C-58 as weak, ineffective, and unenforceable. Brison defended his government's weaker version of order-making powers, noting that the government's new commissioner, Carolyn Maynard, who he recently met with privately, was on side and in his court.

Maynard has said she wants to cut down the number of past user complaints where possible and has acted to create an award for access coordinators acting with good "leadership" behaviour, even if there still are long delays in response times in many of the agencies they are a part of.

In his testimony, Brison's crowning sales pitch was reserved for Bill C-58's proposal to legalize a new release system that sets some records aside that government would selectively disclose, like ministers' mandate letters and expenses.

Never mind that such records labelled "proactive" disclosures are to be placed outside of the Access Act's terms and removed from what Brison and officials characterized as being the public "request based side." Brison did not remind Senators that this separated system means removing records like those of the prime minster and ministers permanently outside public Access Act coverage.

He and his officials rather cleverly claimed that this new separate government-controlled release system meant better accountability, transparency, and openness. In fact, his officials testified this new system of government releases resulted in putting a new accountability and transparency purpose clause in

front of the original purpose of the access act, to grant the public right to access government records. They pooh-poohed any suggestion that their insertion of a "proactive" purpose would outrank the public's right to know.

Further, those officials stated that this new accountability purpose clause—far from being mere rhetoric and sloganeering—came to them as an "inspiration" drawing from the "bold" wording found in the Supreme Court's 2014 John Doe decision.

But the reality is that the John Doe court decision ruled that the largely-used policy advice exemption could be expanded. That means far more records federally and provincially are now exempt, hardly making governments more accountable.

As well, Brison admitted, there will be exceptions to "proactive" government postings, with little right to complain or have such exceptions independently reviewed.

I can testify that exceptions are already happening, like in releasing ministers' mandate letters. The release of ones sent to the Canadian Commercial Corporation, the agency involved in some controversial sales like the Saudi Arabia light armoured vehicles arms sale, have been denied. In addition, one exception to proactive contract disclosures encountered was the denial of a Treasury Board-contracted report assessing the government's financial health.

Nobody quite asked how much this separate, large bureaucratic system of government releases outside the Access Act will cost, or whether this system will distract from getting real operational records under access legislation and ensure avoiding ever granting public access to key ministerial records.

Brison said the new "proactive" system could expand, but it would be based on what the government selectively decides as "demand." He did not explain why the very records that should be given priority and routinely released—such as key ministerial, safety, environment and consumer reports—are not.

The suggestion that all those belatedly released mandate letters, briefing notes, Question Period notes, and briefing materials for parliamentary presentations may not amount to anything more than advertising and marketing of government positions and claimed goals was not pursued.

Perhaps the information commissioner could also be mandated to review such materials to verify how much of these government talking points, released months later, might well qualify as being frivolous and vexatious in nature.

Sadly though, those small amounts of government controlled "proactive" releases mask the government's resistance to substantially reducing the numerous exemptions found in access legislation. By not touching the many broad exemptions, the commissioner's order-making capacities are greatly handicapped, with the public being prevented from obtaining many key records.

One area the minister took flak on from Senators was why judges' expenses would be covered under Bill C-58 as this, it was put forward, could effect their reputations and compromise the principle of judicial independence.

Senators asked Brison to convey the message to Justice Minister Jody Wilson-Raybould that they want her to testify on this and other subjects, even though she had not responded to their invitation to appear.

Brison did offer assurances that judicial independence would remain intact, just as MPs' and Senators' parliamentary privileges would remain in place. In a rare moment, Brison showed a bit of backbone asserting that releasing judges and Parliamentarians' expenses was surely one form of improving these august institutions' accountability.

Some other revelations were made amid the slew of questions Senators put forward.

One was that access users could be charged future various fees under the flexible terms of Bill C-58. Request-based disclosures would be subject to

potentially increasing cost-recovery while the far more expensive government controlled “proactive” releases have no cost or recovery restrictions.

Another question asked was about covering the duty to document all important decisions under Bill C-58, given key activities are not always being recorded. The glib response was that administrative guidelines sufficiently cover such an obligation, which is in practice too often ignored.

One Senator asked why get rid of the legislated government publication “Information Source,” which provides a guideline as to the types of records each agency holds, bearing in mind that access users are still being advised to specify the type of records they are seeking.

The response was it is sufficient that some information can be found on department-controlled websites. Also, one could always ask government access coordinators and officials (but try getting an answer or past PR flacks). But agency record classification details and the actual nature of records at hand are rarely divulged nowadays. And departmental employees are still muzzled under deeply embedded conduct codes of silence that form part of Ottawa’s continued culture of secrecy.

Another Senator asked for an evidence-based analysis on the many documented and admitted delays to getting access responses. The response to shortening long delays offered was a few Band-aid solutions like pooling access officers. As well, those “proactive” disclosures (whose disclosure comes 120 days later, or more) will somehow mean fewer access requests, thus cutting wait times for other requests. In the end, no promise was extracted to do a thorough analyses to get to the bottom of delays or towards bringing down increasing late response times.

Senators’ questions showed they had done their homework and were likely to have some recommended changes for the House of Commons after their October hearing of witnesses ends.

Brison was ingenious in trying to make Bill C-58 sound really good to the Senators. He fell back though on saying more changes may come down the

road through Bill C-58's mandated review every five years. And Brison claimed the bill's initial one-time-only review, to be done after its first operational year, also could early-on add those needed "changes."

However, these parliamentary reviews and recommendations are more likely to be too dependent on what the government wants (or does not want) in the way of access amendments.

Judging from what the government has in mind in their announced phase-two cosmetic "improvements" to the slew of exemptions, this will not mean proposing changes that result in many more disclosures. Phase-two "reforms" will not effectively prevent or combat increasing secrecy, or bring Canadian access legislation up to par with other countries' more progressive transparency regimes.

Just in case Senators missed it, Brison repeated Canada is rated No. 1 among and by fellow government partners in the administrative open data portal ranking. That, along with introducing his government's less-than-full order-making powers for the information commissioner and "proactive" releases, were meant to somehow dazzle and herald transparency finally coming to Canada.

Senators have a late extra inning to make a badly-flawed bill a bit better and less bitter.

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