Antiterrorism and Secrecy

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In the weeks following the horrific events of September 11, 2001, the government rushed to put in place legislative tools for use in the so-called "war on terrorism." One of those initiatives was the *Anti-terrorism Bill*[1], introduced into the House of Commons on October 14, 2001. Contained in that Bill was a sweeping derogation from the right of access contained in the *Access to Information Act*.[2]

As first introduced, section 87 of *Bill C-36* would have authorized the Attorney General of Canada "at any time" to "issue a certificate that prohibits the disclosure of information for the purpose of protecting international relations or national defence or security." That same provision also stated that the *Access to Information Act* would not apply to any such information.

The first version of section 87 of *Bill C-36* contained no time limits on the period of secrecy. As well, it removed the authority of the Information Commissioner and the Federal Court of Canada to review the information covered by a certificate for the purpose of providing an independent assessment of whether or not secrecy was justifiable.

This unprecedented shift of power, from individual Canadians to the state, came under intense scrutiny by the Standing Committee on Justice and Human Rights of the House of Commons and by a special

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1 Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, 1st Sess., 37th Parl., 2001 (assented to 18 December 2001: *Anti-terrorism Act,* S.C. 2001, c. 41) [hereinafter *Bill C-36*].

2 R.S.C. 1985, c. A-1 [hereinafter *Access Information Act* or Act].

committee of the Senate, which was struck to conduct a pre-study of the Bill. The then Minister of Justice was asked to explain the reason for this new blanket of secrecy.

In all of her evidence before the committees of the Senate and the House of Commons, the Minister offered only one explanation. The explanation is most exhaustively set out in her response, to a question posed by Mr. Michel Bellehumeur during the former Minister's appearance before the Justice and Human Rights Committee on October 18, 2001. Mr. Bellehumeur asked the Minister why she proposed to remove from the scope of the *Access to Information Act* (and from review by the Information Commissioner and the courts) the very type of information which the exemption contained in section 15 of the Access law was designed to protect from disclosure. The Minister answered as follows:

> "No, what section 15 does in fact is leave open, creates a loophole in terms of the possibility of disclosure of information that may have been provided to us by our allies and in fact we know that in relation to these sensitive matters where in fact one must work with one's allies—one is gathering intelligence, one shares intelligence—much of this speaks to the national security, not only of this country, but of other countries, and to the very lives of perhaps informants and others. Unless we can guarantee to our allies that that kind of limited, exceptionally sensitive information will not be subject to public disclosure, we will not get that information and we will not be able to fight terrorism as effectively as we should.
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> I'm afraid, Mr. Chair, that under existing access legislation, there is a loophole created because it permits the Access Commissioner to make certain recommendations. In fact, as far as we're concerned, that is not sufficient for our allies and we must do that which is necessary to ensure we have the best information and we are protecting that exceptionally sensitive information."

The Information Commissioner and others challenged the Minister to explain the "loophole"—it could not be the Commissioner, as he has no power to order the disclosure of records. The Commissioner reminded the Minister of a very recent, government-commissioned study, which concluded that the *Access to Information Act* posed no risk of possible disclosure of sensitive intelligence information, that no such information had ever been disclosed under the Act in the 18 years of its life and that

the *Access to Information Act* régime offered as much or more secrecy to intelligence information as do the laws of our allies.

The only "loophole", thus, could be the possibility that a misguided judge of the Federal Court would order the disclosure of sensitive intelligence information, notwithstanding a clear exemption of such information contained in the Access law. Given the Federal Court's history of applying sections 13 and 15 of the Access law and the presence of appeal mechanisms to the Federal Court of Appeal and Supreme Court of Canada, the "misguided judge" theory had no rational basis. Moreover, there was an air of unreality to the former Minister's suggestion that our allies had asked the government to give them a "guarantee" by plugging the "misguided judge" loophole. The Information Commissioner asked the former Minister to produce the evidence of any such request; none was forthcoming.

The Minister could not produce the evidence because our major allies and suppliers of intelligence also operate under freedom of information laws, which include avenues of independent review. They understand that the purpose of these laws is to remove the caprice from decisions about secrecy, by subjecting such decisions to a legislative and judicial system of definition and review. The allies want no more than the simple assurance from Canada that intelligence information which needs to be protected can be protected. Not a single ally doubts Canada's ability to do so under the existing *Access to Information Act*.

In the face of the criticism, the former Minister went back to the drawing board and made a number of changes. It would be a mistake to assume, however, that these changes amounted to concessions to her critics. In fact, the amendments broadened the sweeping scope of secrecy certificates, and increased the power of the Attorney General to interfere with the independent investigations of the Information Commissioner. The government's addiction to secrecy was to be fed at all costs!

First, the scope was broadened by changing the permitted purposes for a secrecy certificate from:

> version #1: "for the purpose of protecting international relations, national defence or security"

to:

> version #2: "for the purpose of protecting information obtained in confidence from or in relation to a foreign entity as defined in subsection 2 (1) of the *Security of Information Act* or for the purpose of protecting national defence or national security."

To fully appreciate the breadth of version #2, one must carefully read subsection 2 (1) of the *Security of Information Act*,[3] it defines "foreign entity" as:

> "a) a foreign power
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> b) a group or association of foreign powers, or of one or more foreign powers and one or more terrorist groups, or
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> c) a person acting at the direction of, for the benefit of or in association with a foreign power or a group of association referred to in paragraph (b)."

The effect of this change from version #1 to version #2 is to give the Attorney General the power to cloak in secrecy information on any subject provided in confidence by any person, group or foreign power.

Second, the former Minister amended *Bill C-36* to provide that, where a secrecy certificate is issued after an investigation of a complaint has been commenced by the Information Commissioner, "all proceedings under this Act [the *Access to Information Act*] in respect of the complaint, including an investigation, appeal or judicial review, are discontinued." As originally introduced, *Bill C-36* contained no such provision. In the original version, the Information Commissioner could continue his investigation (and the courts could continue their reviews) with the only restriction being that neither could have access to the information covered by the certificate.

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[3] R.S.C. 1985, c. O-5

The troubling significance of this change requires some explanation of the nature of most complaints to the Information Commissioner. Access requesters, typically, do not request access to a specific record. Rather, they typically request access to records on a particular subject such as, for example, the steps being taken by Health Canada to respond to the threat of terrorism by anthrax or changes being made by Transport Canada to policies on air passenger screening or the policy of the Canadian Forces with regard to prisoners taken in Afghanistan.

Hence, it is usual that a number and variety of records are identified as being relevant to an access request; it is also usual for a variety of exemptions under the *Access to Information Act* to be relied upon to justify any refusals to give access. In all such cases, the requesters have a right to complain to the Information Commissioner and to expect an independent, thorough investigation of the denial of access.

Here is the rub. If, during the Commissioner's investigation, a secrecy certificate is issued with respect to even one record of all those covered by the access request, the Commissioner's investigation is discontinued in its entirety. Furthermore, if the matter has proceeded past the investigation stage and on to a Federal Court review, the issuance of a secrecy certificate, for even one record, has the effect of discontinuing the entirety of the Federal Court review.

Let this sink in for a moment. The federal government has given itself the legal tools to stop in its tracks any independent review of denials of access under the *Access to Information Act.* The interference is not even limited to the information covered by the secrecy certificates.

Yes, the former Minister protested that this outcome was not what she intended. She said she intended that the Commissioner's investigations and court reviews would be discontinued only insofar as they relate to the information covered by the secrecy certificates. It was pointed out to her that, if a more limited effect was intended, the form of the words used in the amendment to the companion provision contained in the *Privacy Act*,[4] should be followed. With respect to proceedings under the *Privacy Act,* the amended *Bill C-36* provides that, when a secrecy certificate is issued after the commencement of an investigation by the Privacy Commissioner: "all proceeding under this Act *in respect of that*

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[4] R.S.C. 1985, c. P-21.

information, including an investigation, audit, appeal or judicial review, are discontinued" [emphasis added].

The former Minister urged Parliamentarians and the Information Commissioner to trust her word that the amendment to the *Access to Information Act* (which reads: "in respect of the complaint") has the same effect as the amendment to the *Privacy Act* (which reads: "in respect of that information"). The former Minister said her word was enough, there was no need to correct the obviously inconsistent language. Is this any way to make law?

This was not the only "trust me" aspect of the former Minister's explanations about her amendments. She told the committees that, in an effort to ensure as little interference as possible with the work of the Information Commissioner, she had changed the original version of the Bill, which allowed the Attorney General to issue a secrecy certificate "at any time." Here is the limit she imposed:

> "The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament."

On November 20, 2001, the former Minister of Justice gave the Justice Committee her opinion as to the effect of this provision on investigations by the Information and Privacy Commissioners. She said:

> "Also, under the amendments we are proposing to *Bill C-36*, the certificates could no longer be issued at any time, which is the present language, but only after an order or decision for disclosure in a proceeding. The result is that the certificate could only be issued after the judicial review of an access or privacy request."

The former Minister's view, then, was that a secrecy certificate could not be issued during the Commissioner's investigation or during a Federal Court review under the *Access to Information Act*. A certificate, according to the former Minister, could only be issued in the event the Federal Court were to order the disclosure of the previously withheld information.

If the words of the amended Bill had clearly stated what the former Minister said she intended them to say, the Information Commissioner would have much less to complain ... alas, they do not. The Information Commissioner drew the Minister's attention to the fact that

the Commissioner holds the power of a superior court of record to compel disclosure to him, for investigative purposes, of any information he deems relevant to an investigation. The Commissioner pointed out to the former Minister that, in the absence of clarifying words, such as "disclosure to the public or a member of the public," it would be open to the Attorney General to issue a secrecy certificate for the purpose of resisting an order made by the Information Commissioner requiring that records be disclosed to him.

The Commissioner also reminded the former Minister that she herself, in three Federal Court cases, was arguing that certain national defence and security information should not be disclosed to the Commissioner. She made the argument in those cases that compliance with the Commissioner's order for production of the records in those cases constitutes a "disclosure" for the purposes of the secrecy certificates issued under the previous sections 37 and 38 of the *Canada Evidence Act*.[5]

In her appearance before the Senate Special Committee on December 4, 2001, the former Minister attempted to answer this concern. She stated:

> "Second, Mr. Reid has made reference to Crown arguments in litigation to suggest that the Attorney General could use the certificate process to terminate his investigations. As you can appreciate, I cannot comment on matters before the courts. However, I can remind this committee of the original purpose of the certificate scheme, namely, to protect a narrow class of highly sensitive information following the issuance of an order or decision that would result in its disclosure.
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> The critical words of the Bill refer to an order or decision that would result in the disclosure of the information. This would be a critical test that I, as Attorney General, would have to be satisfied with on a case-by-case basis before issuing a certificate."

Could there be a less resounding refutation of the Information Commissioner's concerns? While it is unclear exactly what this statement means, it is clear that the former Minister did not deny that this amended version of *Bill C-36* (now in law) gives the Attorney General the power to

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[5] R.S.C. 1985, c. C-5.

use a secrecy certificate to resist giving records to the Information Commissioner.

This brings us to a consideration of the final "concession" which the former Minister made to the critics of the original version of *Bill C-36*. An amendment was introduced creating an opportunity for a party to a proceeding (in relation to which a secrecy certificate is issued) to seek from a judge of the Federal Court of Appeal, an order varying or canceling a secrecy certificate.

If this form of independent review is the "*quid*" for the "*quo*" of cutting off independent review under the *Access to Information Act*, it is woefully inadequate. The reviewing judge is not permitted by this amendment to conduct any of the usual types of judicial review of an administrative decision (*de novo*, legality, correctness); rather the reviewing judge's sole authority is to review the information covered by the certificate for the purpose of deciding whether or not it "relates to":

1. information disclosed in confidence from, or in relation to, a foreign entity;

2. national defence; or

3. security.

One would be hard pressed to imagine any operational information held by any of our investigative, defence, security, intelligence, immigration or foreign affairs institutions, which would not "relate to" one or more of these three broad categories. This "relates to" form of judicial review does not authorize the reviewing judge to make any independent assessment of the sensitivity of the information or of the Attorney General's purpose in issuing the certificate. This form of judicial review is significantly less rigorous than the independent review of secrecy certificates available in our major allied countries. This form of review has been aptly termed "window dressing" because it does not subject the Attorney General to any meaningful accountability for the use of certificates.

In times of emergency or threat, it is sometimes necessary for states to take rights away from citizens and give new powers to governments. But, also, history is replete with examples of unnecessary power grabs by states in the guise of protecting the welfare of the collectivity. The challenge for any healthy democracy is to resist the temptation of states to overreach. Our government failed the challenge

when it gave itself the power, through the secrecy certificate, to escape independent scrutiny of its decisions to keep secrets from its citizens. "Trust me," the former minister said, "these provisions will be rarely, carefully and fairly used!" The bill having now been passed into law, we have no choice, but to trust, because we have lost the ability to independently verify that our trust is well-founded.