



Comments

to the

Standing Committee on Access to Information, Privacy and Ethics

Bill C-461

An Act to amend the Access to Information Act
And
The Privacy Act
(disclosure of information)

May 28, 2013

Introduction

The Canadian Union of Public Employees (CUPE) has always advocated the need for better access to information. In fact, only a few weeks ago, CUPE took position in favor of a greater disclosure in Quebec for all governmental organizations. As a general rule, CUPE believes that transparency promotes better management of public funds. It therefore encourages any action along these lines.

Along with this position, CUPE also believes that the media must be free to investigate and provide information on the topics of their choice. Why? Because no true democracy should control its news organizations. In the case of the CBC, this means that it must remain independent from government, a principle enshrined in the Broadcasting Act since 1991.

To ensure that the CBC has the same freedom of expression as other broadcasters – meaning that it can contribute to Canadian democracy despite the fact that it is a property of the state – legislators incorporated specific provisions to ensure the independence of the public broadcaster:

“**46.(5)** The Corporation shall, in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and journalistic, creative and programming independence.”

This clause and other similar ones¹ in the Act were adopted after the Standing Committee on Communications and Culture filed a series of recommendations on February 12th 1987. The report recommended that the Broadcasting Act include provisions relating to the financial management of the CBC based on the following principle:

« The CBC should remain exempt front the power of direction provisions which are applicable to other Crown corporations under the *Financial Administration Act*, and from any other provisions which would compromise the "arm's length" relationship of the CBC with the government².” [emphasis added]

¹ Sections 35.(2), 52.(1) and 52.(2) of the Broadcasting Act also protect the independence of the public broadcaster. It should be added that the principle of general interpretation of the Broadcasting Act, section 2(3) also states that “This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.”

² Quoted in: Peter S. Grant and Grant Buchanan, « Canadian Broadcasting Regulatory Handbook 2012 », eleventh edition, McCarthy Tétrault LLP, 2012, p. 70.

ACCESS TO INFORMATION

History

When the Access to Information Act was extended to Radio-Canada, in 2007, Parliament introduced an exclusion, inspired by the Broadcasting Act, to protect its independence:

« **68.1** This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration.³ »

Following a dispute between the Information Commissioner and the CBC, the Federal Court, as well as the Federal Court of Appeal, considered the interpretation of this provision. As section 68.1 is part of the exclusions in the Act, but also contains an exception, the Appeal tribunal ruled in November 2011:

“...the Federal Court judge correctly concluded that, despite the fact that it appears under the heading “exclusions”, the exception which section 68.1 embodies requires that recourse be had to the Commissioner’s power of examination in order to give effect to this provision. Although Parliament intended that information related to journalistic, creative or programming activities be excluded from the application of the Act, it also wanted that information related to the CBC’s general administration – as defined in section 3.1 – not be excluded⁴. »

The Court determined that the Information Commissioner had the right to study the information, which fell under the exclusion for journalistic, creative or programming activities according to CBC. Without this mechanism, applicants who had been denied information by the CBC would have no way of knowing whether the information requested was actually covered by the exclusion. The parties were satisfied with this decision and according to the Information Commissioner, the CBC changed its ways in order to comply:

³ Access to Information Act, art. 68.1.

⁴ CBC v. Canada (Information Commissioner), 2011 CAF 326 (CanLII), November 23 2011, paragraph 70.

“The CBC has reported to us that it now retrieves and processes all requested records. It has also informed us that it is now releasing more information than it was previously⁵.”

Last December, the CBC got an A for its performance regarding access to information. The public broadcaster was given an F for the fiscal year 2009-2010, which led the Information Commissioner to conclude:

“The Canadian Broadcasting Corporation (CBC) made dramatic improvements in its access to information operations and achieved an outstanding level of compliance in 2011–2012. The CBC reduced its deemed refusal rate significantly—from 57.7 percent in 2009–2010 to 4.2 percent in 2011–2012⁶”

Bill C-461’s proposed amendment

Though the access to information issue is on the right track at the CBC, Bill C-461 proposes to amend the Access to Information Act. The exclusion of article 68.1 - the same one that has been clarified by the courts - would be abolished and replaced by an exception included in article 18.2 to read as follows:

«**18.2** The head of the Canadian Broadcasting Corporation may refuse to disclose any record requested under this Act if the disclosure could reasonably be expected to prejudice the Corporation’s journalistic, creative or programming independence⁷. »

This formulation was proposed by the Information Commissioner in October 2011, before the Federal Court of Appeal issued its judgment on article 68.1. This begs the question: why change the law now that the interpretation of this provision has been clarified and the CBC has complied with the decision? Taxpayers have already paid for the interpretation of article 68.1. CBC has invested and has improved its whole process to access information. Why should government spend more time and money on correcting an issue that has already been dealt with?

⁵ Information Commissioner of Canada, « 2011-2012 Report Cards», A Special Report to Parliament, December 2012, p. 17.

⁶ Information Commissioner of Canada, « 2011-2012 Report Cards», A Special Report to Parliament, December 2012, p. 16.

⁷ Bill C-461, proposed article 18.2.

In our opinion, the answer lies within the question. Even if the proposed Bill C-461 provides wording that gives a seemingly better access to the information than section 68.1, it also has many uncertainties. What is indeed the scope of the concept of "independence in journalism, creative or programming" which is at the heart of proposed article 18.2? Does this concept include only independence from the government or also independence from third parties as well? How will the CBC prove that a journalistic piece of information "could reasonably be expected to prejudice" that independence? Does the new wording provide the same protection to journalistic sources as article 68.1? These simple questions show that the proposed rewriting is subject to interpretation and it will probably have to be clarified by the courts...

Discriminatory treatment

The exception proposed by Bill C-461 would also introduce inequities between the CBC and its competitors in the Canadian broadcasting system. As you know, the Broadcasting Act protects freedom of expression and the independence of journalism, programming and creation for all broadcasters (public, private, community). So why would the CBC be the only media required to show, for each access to information request, that disclosure would cause harm?

On this topic, we share the analysis delivered to you by Professor Pierre Trudel, of the University of Montreal, specializing in communication law, in October 2011:

“Actually, from the moment it was decided that the CBC is part of the broadcasting system, it became important to ask whether we were willing to force all broadcasting companies to subject themselves to the Access to Information Act. If that isn't the case, we will have to go back to the exclusion.

That's why we chose an exclusion. It protects the freedom of the press, journalistic freedom. Forcing a media organization, each time a request is made, to prove that there is harm that could cause a document to be disclosed very seriously affects its independence and flexibility to do investigative journalism, develop programs, be active in programming rights and the advertising market. That's why there's an exclusion.

That's why I think an exception, an injury-based exception, isn't an adequate way of ensuring that the public broadcaster is operating in a way that respects the constitutional freedom of expression, and that also properly protects both private broadcasters and the public

broadcaster. I also have a lot of doubts about the constitutional validity of a proposal that would force the CBC to prove every single time a person requests a document that it will cause some harm. This would be the same as asking a newspaper or television station to consistently prove that its editorial freedom is being affected.

But we're talking here about an environment to produce a creative activity, programs and news. If a broadcasting agency like the CBC is required to take action to continuously defend itself against access to information requests, I'm not at all certain that it will still have the ability to ensure its own editorial freedom, which is recognized among broadcasters⁸.”
[Emphasis added]

In other words, the burden of having to prove prejudice every time the CBC needs to protect an information is denying the broadcaster a fundamental right. This requirement - created by Bill C-461 – would unnecessarily interfere with the freedom of the press of the public broadcaster. It would also pave the way for a long court challenge that would take us back to the starting point.

In addition, the new wording would disadvantage the CBC compared to its competitors. Indeed, under proposed section 28.1, the CBC should reveal any information related to its journalistic, creative and programming activities that would not affect the independence of the Corporation. Until now, this concept has been interpreted as independence from the government. The public broadcaster could then well be forced to reveal the content of his journalistic investigations to any applicant other than the government - including, potentially, its competitors!

In such a context, it would be extremely difficult to conduct journalistic investigations at the CBC. Yet it is the kind of work the public broadcaster does and it is very popular with the public. One might wonder if the Commission Charbonneau would currently be held, in Quebec, if it wasn't for the powerful investigative journalism done by teams of journalists from Radio-Canada...

If passed, Bill C-461 could contribute to the disappearance of investigative journalism and exclusive news at the CBC. This event would greatly undermine the competitiveness of the public broadcaster in the news market.

⁸ Canada, House of Commons, « Evidence », Standing Committee on Access to Information, Privacy and Ethics, number 010, 1st session, 41st parliament, Octobre 25, 2011.

PRIVACY AND THE PROTECTION OF PERSONAL INFORMATION

We must also consider the impact of changes brought by Bill C-461 on the Privacy Act. The amendments provide firstly, the elimination of the absolute exclusion under section 69.1

“69.1 This Act does not apply to personal information that the Canadian Broadcasting Corporation collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose⁹.”

This section would be replaced by an exclusion limited to sections 4 to 10 and subsection 12 (1) of the Act. The latter amendment would read as follows:

“28.1 The head of the Canadian Broadcasting Corporation may refuse to disclose any personal information requested under subsection 12(1) if the disclosure could reasonably be expected to prejudice the Corporation’s journalistic, creative or programming independence¹⁰.”

However, subsection 12 (1) would allow for any Canadian citizen or permanent resident to obtain CBC's personal information collected as part of a journalistic investigation. It goes without saying that this provision would considerably complicate the work of CBC journalists. In many cases, it would be impossible to prove an injury related to the independence of the CBC to prevent the disclosure of information. Not yet aired, investigative work could easily be offset by applicants or the work would become impossible to complete given the information had been disclosed.

Similar to the proposed section 18.2, the new article 28.1 of Bill C-461 and subsection 69 (3) pave the way for a series of uncertainties. Subsection 69 (3) states:

“69(3) (3) Sections 4 to 10 do not apply to personal information that the Canadian Broadcasting Corporation collects, uses or discloses for solely journalistic, artistic or literary purposes”

Currently, CBC is exempt from applying the whole of the Privacy Act to information collected in the course of journalistic, artistic or literary purposes. If Bill C-461 is passed, we can justifiably wonder what would be the impact of the

⁹ Privacy Act, section 69.1.

¹⁰ Bill C-461, proposed section 28.1.

implementation of all provisions of the law with the only exception of sections 4 to 10 and subsection 12 (1).

We can already see that the Governor in Council could use subsection 12 (3) of the Privacy Act to circumvent the inapplicability of paragraph 12 (1) at Radio-Canada. This article specifies :

“**12(3)** The Governor in Council may, by order, extend the right to be given access to personal information under subsection (1) to include individuals not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate¹¹.”

Other provisions also would force the CBC to put more energy in the protection of personal information, which in the current context of cuts would be detrimental to its mission as a public broadcaster. For example, section 11, which sees to the creation of index of personal information banks, would apply to the CBC if the proposed changes are adopted.

Conclusion

After this presentation, to ask whether Bill C-461 provides any benefit to Canadian society is a legitimate question. What would be the advantage for citizens to see the CBC waste public funds in legal battles to protect its mission and constitutional rights of freedom of expression? What would be the benefit to Canadians if certain sources of information were alienated from the public broadcaster? Wouldn't it make the CBC less competitive in journalistic terms? What gain would there be for citizens to increase the burden of CBC to protect personal information journalists have collected as part of their jobs?

The question is not to remove from public scrutiny information on the management of CBC. Canadians need to know this. We aim merely to protect the CBC's mission, its freedom to work under viable circumstances and its competitiveness within the Canadian media system, especially when it comes to news.

CUPE therefore requests that the Standing Committee on Access to Information, Privacy and Ethics reject Bill C-461.

¹¹ Privacy Act, section 12(3).

WHO ARE WE?

The Canadian Union of Public Employees (CUPE) is Canada's largest union representing more than 630 000 members, with 8,150 workers in the communications sector in Quebec. These comments were prepared in collaboration with two employee unions at the CBC: STARF, which represents 1200 technicians and craftsmen, and CUPE 675, with its 600 clerical and professional workers.