Access to Departmental Records, Cabinet Documents, and Ministerial Papers in Canada

RICHARD J. BAZILLION

In both Canada and the United States, public records are broadly defined as material produced by a governmental department or agency in the course of its activity. The Presidential Records Act of 1978 requires the unitary American executive to conform to this definition. Documents generated by Canada's collegial executive, whose members are drawn from the majority party in Parliament, are not, however, uniformly classifiable as public records to which timely access might be granted under freedom-of-information (FOI) legislation. For several reasons the Canadian situation is somewhat more complicated than the American: (1) maintenance of cabinet solidarity demands that a certain amount of official secrecy surround cabinet deliberations and that confidentiality be preserved for a considerable period; (2) the anonymity of public servants in a parliamentary system must be protected so that they may advise their ministers fully, frankly, and in confidence without involving themselves in the political process; (3) ministerial papers, distinguished both from the records of departments over which ministers preside and from cabinet documents, remain the private property of cabinet members, although they contain many public documents that would assist subsequent holders of the portfolio in carrying out their duties.

Canadian political traditions have influenced the definition of what constitutes a public document and the extent to which access is permitted to material so defined among departmental records, cabinet documents, and ministerial papers. Handling of all three types by the Public Archives of Canada (PAC) depends, in turn, on procedures devised by a parliamentary system attempting to balance public demands for government information with concern for its own integrity. Analysis of Canadian access regulations thus reveals several contrasts with practices in the United States, differences stemming in part from the parliamentary conventions of British North America.

The political structure of Canada, based as it is on the inherited Westminster model, mixes cabinet government with a constitutional principle familiar to Americans: judicial review of legislative acts. But a formal separation of powers, counterposing executive, legislative, and judicial branches, does not exist in Canada. Members of Parliament who are invited by the prime

minister to join his cabinet comprise an executive which, unlike the American presidency, has no independent existence of its own. It is, in effect, the executive committee of the parliamentary majority. Cabinets traditionally deliberate *in camera* and reach their decisions by unanimous consent. Once policy is set, ministers must support it regardless of any misgivings felt during debate. If unable to do so, they must resign and perhaps even cross the aisle to join the opposition. They are, in any event, bound by oath "to keep close and secret all such matters as shall be treated, debated, and resolved on in Privy Council, without publishing or disclosing the same or any part thereof, by word, writing or otherwise to any person out of the same Council, but to such only as be of the Council."[1] As far as Parliament or the public is concerned, the main test of a government's wisdom is its ability to have its programs enacted. Since the documentary material related to decision-making is not made accessible to persons outside the cabinet, it is often impossible to determine why one line of policy triumphed over its rivals.

Because the Canadian executive can normally count on a parliamentary majority, it feels less pressure than does the American presidency to reveal its thought processes. There follows a natural tendency toward administrative secrecy which circumscribes the definition of and access to public documents, particularly those bearing on cabinet deliberations. Access to administrative records produced routinely by government departments, regulated until recently by Cabinet Directive No. 46 (CD 46), of 7 June 1973, is now governed by an Access Directive approved by Cabinet in June 1977 and issued on 14 November 1978. Both instruments contain similar definitions of "public record" and "access," but differ significantly over the transfer process. According to CD 46, for example, a "'public record' means correspondence, memoranda or other papers, maps, plans, photographs, films, microfilms, sound recordings, tapes, computer cards or other documentary material (a) made or received by any department or agency, (b) preserved or appropriate for preservation by a department or agency, and (c) containing information relating to the organization, functions, procedures, policies or activities of the department or agency or other information of past, present or potential value to the Government of Canada." The Access Directive extends this definition by referring specifically to machine-readable records "having long term value." By "access" to such material both regulations mean "permission to members of the public to view, copy and use a public record for research purposes." Ordinary citizens, especially journalists, are not encouraged to embark on fishing expeditions among government files. A minister may deny access to departmental records altogether for several reasons, including legal restrictions on their release, preservation of confidentiality in international relations, avoidance of embarrassment to the government, protection of national security, and guarding of personal privacy. Though the 1978 directive re-

[1] Quoted in David Johansen, "The Public's Right to Know," printed as an appendix to Canada. Parliament. *Minutes and Proceedings and Evidence of the Standing Joint Committee on Regulations and Other Statutory Instruments* [cited hereafter as SJC Minutes], Issue No. 81, June 29, July 6, July 13, 1976, p. 45.

tains the earlier emphasis on ministerial discretion over access, it does resolve an issue of immediate concern to the PAC involving transfer.

CD 46 had allowed ministers to prohibit transfer to the Public Archives of all exempted (i.e., restricted) records; but the Access Directive provides greater incentive to departments to transfer all their non-current materials without delay.[2] Even under CD 46, it should be noted, virtually everything had in fact come to the PAC. The new directive simply brought the regulations into conformity with practice and, at the same time, fulfilled the spirit of the Public Records Order of 1966, which required all departments to establish records-management procedures in consultation with the Dominion Archivist. Transfer, moreover, is no longer linked to access regulations, thus allowing the PAC to gain physical possession of material regardless of age or any restriction, aside from a statutory one, that may have been placed on it. There remains, however, a qualification on the order to transfer public records "as soon as practicable." The Dominion Archivist states in his instructions to staff members that "there are several classes of records that the Directive indicates a department or agency may choose not to transfer to the Archives Branch": (1) records containing information it would be illegal to release, (2) records required by the department in its operation, and (3) records "that the Minister of a department believes contain information whose disclosure would not be in the public interest." Should the Dominion Archivist disagree with a departmental decision to place records in category (2) or (3), he may ultimately appeal to cabinet. Only in the first case is there a definitive prohibition in the regulations. CD 46, on the other hand, had stipulated that "a public record *shall not* [my italics] be transferred" in any of the three foregoing instances.

Ninety-five percent of accessioned departmental records are destroyed in the end, with those retained falling under a modified thirty-year rule. Once in archival custody, all departmental records not specifically exempted from release by a minister (i.e., those "of a very highly sensitive nature") are automatically available after three decades. Records exempted by law, no matter how old, may not be released to researchers. Ministerial discretion, exercised in consultation with the Dominion Archivist, determines access rights in other cases. That is to say, access is possible to any records, even those once security classified, unless there exists a specific statutory denial.

Considering the caution with which records of a clearly public nature are treated in Canada, Americans conditioned by their experience with FOI legislation may raise several questions. Is access to public records more difficult to gain in Canada than in the United States? What sort of information, and for what reasons, is likely to be withheld? Is FOI of a type now fa-

[2] The following comments are based on the text of CD 46 printed as an appendix to Canada. Secretary of State. "Legislation on Public Access to Government Documents" (Ottawa, 1977), on the text of the Access Directive of 1978 supplied to me by the Public Archives and on the Dominion Archivist's instructions to his staff regarding the Directive in a special issue (undated) of the *Records Management Bulletin* published quarterly by the Records Management Branch of the PAC. The handling of dormant records from 1945 to the late 1950s is discussed in A. M. Willms, "The Role of the Public Archives Records Centre in Federal Records Management," *Canadian Historical Association Papers,* 1960-61, pp. 104-17.

miliar in the United States appropriate or even possible under Canada's parliamentary system? Debate on FOI has been under way in Canada for some years. Archivists, historians, political scientists, and politicians thus have had ample opportunity to ponder whether, in the Canadian context, the comprehensiveness of the historical record, already eroded by use of the telephone, will be diminished still further by measures intended to promote access to information. Although no consensus has emerged, the main considerations have been identified.

Everyone concerned with access problems realizes that cabinet government, for as long as it has existed in Britain and the former dominions, incorporates a large degree of official secrecy.[3] In order for a collective executive selected from among the legislators to assume full responsibility for the decisions of the parliamentary majority, that executive must be willing to stand or fall in the House of Commons on the merits of its policies. Since Parliament is supreme, neither balanced by another arm of government nor bound by judicial interpretations of a written constitution, law is essentially the will of the cabinet imposed by majority rule. There is no incentive to explain to the public why and how cabinet reaches the decisions it does. Ministers are enjoined by their oath from discussing the decision-making process publicly. Civil servants are forbidden by the Official Secrets Act to provide unauthorized persons, such as members of Parliament, journalists, or enemy agents (an ironic concatenation) with information which falls squarely within the public domain and may even be generally known.[4] Also useful in enforcing government secrecy is a section of the Federal Court Act of 1970, which stipulates that ministers may refuse to produce documents demanded by a court or royal commission of inquiry simply by affirming that to do so would endanger national security.[5] Thus, no matter from which angle the question of access is approached, documents are found to be confidential if ministers or their deputies so decide. Appeals from such decisions are not provided for under existing laws and regulations, a state of affairs not entirely satisfactory to some members of Parliament and the public.

Late in 1974 a Progressive Conservative member, Mr. Gerald W. Baldwin, introduced a bill which he called "An Act respecting the right of the public to information concerning the public business." The Commons referred Baldwin's proposal, known after receiving second reading as Bill C–225, to the Standing Joint Committee on Regulations and Other Statutory Instruments. During its lengthy hearings, the committee solicited reaction to FOI in many sectors of Canadian society. Eventually the government expressed its own position in the 1977 Green Paper entitled "Legislation on Public Access to Government Documents." Had the Liberal Party retained power, this statement would have provided clues to the type of FOI legislation they intended to introduce. The Green Paper of course ceased to represent official views on access when the Liberals lost the general election in

[3] Gordon Robertson's most recent argument in favor of preserving confidentiality is "Confidentiality in Government," *Archivaria* 6 (Summer 1978): 3–11.

[4] See "The Official Secrets Act," Chap. 0–3, *Revised Statutes of Canada,* 1970.

[5] See "The Federal Court Act," *Revised Statutes of Canada,* 1970, 2nd Supplement.

May 1979. Yet their attitudes are likely to be shared by any party in power, regardless of its support for FOI while in opposition.

Three shades of opinion, excluding the government's stand, appeared in the course of the committee's inspection of C–225. Donald C. Rowat, a Carleton University political science professor and strong proponent of open access to most sources of government information, maintained that "secrecy is a great convenience for the government and we must not let the government take the stand that it is not going to reform the situation and say, 'Come Leo, come Lo, my status is quo.' "[6] In the Canadian context, Rowat's views on access represent a very liberal position. "There is so much evidence of the undesirable effects of administrative secrecy," he wrote some fourteen years ago, "that I believe the time has come to question the entire tradition. After all, it is based on an earlier system of royal rule in Britain that is unsuited to a modern democracy in which the people must be fully informed about the activities of their government."[7] In 1969, the Task Force on Government Information did in fact go so far as to assert "the right of Canadians to full, objective and timely information about [government] programmes and policies."[8] Perhaps because the task force responded too enthusiastically to the spirit of the late 1960s, its report was largely ignored.

While the desire of Rowat and the task force for greater freedom-of-information may seem unremarkable to Americans, the notion of open access to, for example, cabinet documents (which include internal memoranda, agendas, drafts of proposed legislation, consultants' studies, and any other material related to the decision-making process) is a novel one in Canada. No Canadian government could reasonably be expected to agree with Rowat, in spite of the reinforcement given his stand by the task force report.

Those who have reflected on the dilemma posed by administrative secrecy generally believe that a move to open cabinet documents, as opposed to departmental records, to public scrutiny inside thirty years would damage the quality of evidence one day available to historians. "If, for instance," wrote a critic of Rowat's views, "each government felt itself free to release the secrets of its predecessors, the incentive to leave no secrets behind would be a strong one. Furnaces would probably burn fiercely at each change of government."[9] Gordon Robertson, former Secretary to the Cabinet for Federal-Provincial Relations, argues that all cabinet documents must remain confidential for a full thirty years so that "their publication can have no significant effect on the relations between and the reputations of public men who have worked together in cabinet and who may have to do so again."[10] In Robertson's opinion "the collective executive that is the heart of our parliamentary system must have

[6] SJC Minutes, Issue No. 15, 25 February 1976, p. 19.

[7] Donald C. Rowat, "How Much Administrative Secrecy?" *Canadian Journal of Economics and Political Science* 31 (November 1965): 480.

[8] The Task Force on Government Information, *To Know and Be Known,* vol. 1 (Ottawa: Queen's Printer 1969), p. 61.

[9] K. W. Knight, "Administrative Secrecy and Ministerial Responsibility," *Canadian Journal of Economics and Political Science* 32 (1966): 79.

[10] Gordon Robertson, "Official Responsibility, Private Conscience and Public Information," *Royal Society of Canada Transactions,* 4th Series, vol. 10 (1972), p. 155.

secrecy: it cannot work without it."

Moderate advocates of easier access are themselves sensitive to the constraints imposed by the Canadian political system on freedom-of-information. "It seems to me," wrote Colonel C. P. Stacy, a government historian, "that the dominance of the executive in parliamentary countries renders those countries rather less likely to have really liberal public records policies than nations in which the legislature is more independent."[11] Yet a number of witnesses before the Standing Joint Committee expressed the hope that, as one of them put it, "Cabinet secrecy [could] be restricted as much as possible to the real business of Cabinet."[12] Suggested means of reducing excessive secrecy included restricting the use of security classification to obvious cases involving national defense, the protection of individuals, or the conduct of foreign affairs. But it remains very difficult to dispense with administrative secrecy in whole or in large part without challenging the political system under which Canadians have been governed for over a century.

Proponents of a justifiable increase in access to documents held by departments or connected with policy formulation in cabinet confront problems that are basically archival in scope. Desire for access must be weighed against concern for the integrity of the historical record. To be preserved at all, records, documents, and papers must first be accessioned. The prime minister decreed in 1969 that cabinet documents must eventually be transferred to the PAC where, protected by the thirty-year rule, they metamorphose gradually into historical evidence. The Access Directive of 1978 accorded similar treatment to departmental records. Ministerial papers, on the other hand, are more intractable. They are the personal property of their creators, to be disposed of as the owners wish despite the fact that they contain many documents relating to the administration of government departments.[13] A generation ago the Royal Commission on National Development in the Arts, Letters and Sciences (the Massey Commission, 1949–51) deplored the practice of allowing former ministers to retain possession of both public and private documents. "It is clearly contrary to the public interest," wrote Vincent Massey, later Canada's first indigenous Governor-General, "that public papers should pass into private hands; apart from the question of principle, there is no assurance that these papers will be safely kept."[14]

The Public Archives may induce ministers to deposit their files by offering security storage, through which the materials are given space but are not formally accessioned. The archivist has no control over the ultimate disposition of the papers, and there is no guarantee that they will ever reach the public domain.[15] Wilfred I. Smith, the present Dominion Archivist, pointed out in his committee testimony that Canada's problems with ministerial

[11] C. P. Stacy, "Some Pros and Cons of the Access Problem," *International Journal* [Canada] 20 (Winter 1964/65): 49–50.

[12] SJC Minutes, Issue No. 17, 4 March 1975, p. 7.

[13] C. P. Stacy, "Canadian Archives," *Royal Commission Studies: A Selection of Essays Prepared for the Royal Commission on National Development in the Arts, Letters and Sciences* (Ottawa: King's Printer, 1951), p. 247.

[14] *Report of the Royal Commission on National Development in the Arts, Letters and Sciences* (Ottawa: King's Printer, 1951), p. 115.

[15] Terry Eastwood, "The Disposition of Ministerial Papers," *Archivaria* 4 (Summer 1977): 10.

papers are not unique. The public or private nature of such material is undefined in most countries, including the United States. Passage of the Presidential Records Act in October 1978 helped somewhat to clarify the American situation. The Nixon imbroglio, out of which came the definition of presidential and vice-presidential papers as public records, may well influence developments in Canada under the new Conservative government of Prime Minister Joseph Clark. For now, matters remain as Smith described them in 1976: " . . . when a minister leaves office he takes everything, normally. This makes things very difficult for his successor, who comes into the same portfolio, encounters the same problems and does not have the record because it is locked up."

In contrast with ministerial papers and cabinet documents, departmental records are more easily denoted public. Yet providing timely access to them is not a simple matter. The new Access Directive orders that most such material be transferred to the PAC but allows ministers to restrict access within and beyond the thirty-year period. In addition, the tradition of parliamentary supremacy prevents the courts from compelling a minister to lift an exemption against his will, transfer notwithstanding. It seems unlikely that the forthcoming FOI legislation will permit judges to interfere with ministerial prerogative in this respect. The Conservative government may indeed assume the views, on access, of its Liberal predecessor.

The former government, in its Green Paper of 1977, refused to modify existing practices, especially with regard to cabinet documents. "To open up the decision-making process to public scrutiny in such a way as to diffuse responsibility," stated the report, "risks diminishing the power of Parliament and the public to hold to account the powers of government."[16] The cabinet of Pierre Elliott Trudeau proved unwilling to permit judicial review of adverse ministerial decisions on access to departmental records, citing the possible erosion of ministerial responsibility to explain why a minister could not allow a court to overrule him. As Gordon Robertson recently warned: "Judicial review of ministerial decisions would drag the courts into the political arena."[17] If, for national security or other reasons, a minister refuses a court's request for a document, no recourse exists under the Federal Court Act. The Green Paper insisted that FOI legislation would have to be consistent with this act. Access to current and transferred departmental records would therefore remain subject to ministerial discretion.

The Green Paper's defense of restricted access failed to impress the Standing Joint Committee, which issued its final report on 28 June 1978.[18] "The list of proposed exemptions," it said, "is far too broad and ill-defined, leaving too much discretion to the government." The committee recommended that access be denied only when "disclosure could reasonably be expected to be detrimental to the national defence," and that the same test be applied in all cases in which denial of access is contemplated. No doubt recalling President Nixon's fre-

[16] Green Paper, "Legislation on Public Access to Government Documents" (Ottawa: Printing and Publishing, Supply and Services Canada, 1977); issued to present the government's position, for discussion purposes only.

[17] Robertson, "Confidentiality in Government," p. 8.

[18] SJC, "Fifth Report," 28 June 1978, 10 pp.

quent appeals to "national security," the committee rejected this term altogether and advised, moreover, that "national defence" be defined in detail to prevent the government of the day from doing so according to its own lights.

With respect to cabinet documents and policy advice received from public servants, the committee admitted the need to preserve a certain degree of confidentiality. It sought, at the same time, to reduce administrative secrecy to the lowest level consistent with the operation of a parliamentary system. Cabinet documents of the following sort should be exempt from disclosure inside thirty years: those "prepared expressly for or in connection with the deliberations or decisions of the Cabinet or of a Cabinet Committee." Timely access ought, however, to be permitted to "documents composed of mainly factual or statistical material." Thus, documents on which cabinet decisions were based would become accessible, but those pertaining to the decision-making process itself would be protected by the thirty-year rule. As for policy advice, exempted documents would be those "containing matter in the nature of an opinion, advice or recommendation prepared by an officer of an Agency or Department and submitted . . . for consideration in the performance of any function leading to the making of a decision or the formulation of a policy." The principle of civil-servant anonymity is consequently maintained, while documents which "contain or explain the decision that has been made" become eligible for release. Unqualified confidentiality is accorded those documents "the disclosure of which would constitute an unwarranted invasion of personal privacy or documents which are voluntarily supplied to the Government on the basis that they be kept confidential." The same privilege is extended to opinions rendered by government lawyers and to commercial information that might damage specific enterprises if released.

The most comprehensive recommendation made by the committee is that all existing legislation adversely affecting access rights be amended to conform with the FOI principle. The Federal Court Act is specifically mentioned, though nothing is said about the Official Secrets Act.

Finally, the committee report suggests that disputes over access be adjudicated first by an information commissioner who would be responsible to Parliament and, on appeal, by a federal court judge who may overrule a denial of access. "The argument that ministerial responsibility precludes [judicial review]," states the report, "is a time-worn dogma that collapses upon an examination of English and Canadian consitutional precedents."

The Conservative government's freedom-of-information bill (Bill C-15), introduced on 24 October 1979, bears the imprint of the Standing Join Committee. Examination of the proposed legislation reveals that its access guidelines are indeed less restrictive than those in the Green Paper, yet generally consistent with Canada's political traditions. Significantly, C-15 would repeal Section 41 of the Federal Court Act, which at present gives ministers absolute control over access to departmental records. A federal court could permit access over ministerial objections "if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest [on the basis of which the official is denying access]." C-15 thus rejects the "time-worn dogma" that the committee had scorned in its final report.

Two other features of Bill C-15 bear

mentioning, since they contrast rather sharply with views expressed in the Green Paper. First, the list of exemptions is more precise than in earlier proposals, though by no means fatal to government secrecy. Exempted classes of documents are: (1) "information that was obtained in confidence" in the course of international or federal-provincial relations; (2) records that would compromise foreign or intergovernmental relations or "the defence of Canada" if disclosed; (3) information on criminal investigations in progress or on investigative techniques; (4) information potentially injurious to individual safety or the Canadian economy, or in violation of personal privacy or the confidentiality of "financial, commercial, scientific and technical information"; (5) cabinet documents recording the decision-making process, except those specifically released by the Prime Minister or those more than twenty years old; (6) records exempted from disclosure by statute; (7) information to be published imminently or documents more than five years old the release of which "would unreasonably interfere with the operations of [a] government institution."

Second, citizens who are denied access to information are entitled to complain to an information commissioner, whose position is created by C-15. He may launch an investigation and is entitled to receive all relevant information. Should the complainant be dissatisfied with the information commissioner's report, he may seek judicial review. "The burden of establishing that access to a record . . . requested under this Act may be refused shall be on the government institution concerned" (Sect. 44). A federal judge who is unconvinced by government arguments may order the release of documents. The information commissioner thus stands between the public and the courts, possessing only the power to make recommendations, not the right to issue binding decisions.

Bill C-15 qualifies ministerial discretion over access by according the right to judicial review. Yet it also supports the prerogatives of department heads by prescribing a long, rather general list of exemptions. A minister determined to keep certain information confidential could probably find reasonable grounds to do so. The Canadian approach to FOI, reflecting as it does the nature of Canada's parliamentary system, is therefore more circumscribed than the American. At the same time, C-15 is a major improvement on the existing situation and is expected to be enacted by Parliament early in 1980.

The foregoing discussion of the FOI issue in Canada is intended to demonstrate a relationship between the desire for timely access to government information and concern for the integrity of the historical record preserved in the Public Archives. The two matters are inseparable in a parliamentary system and are not easily reconciled. "The balancing of competing public interests," as the Green Paper concluded, "is the essence of political decision-making. It is always a difficult task, the more so when focussed on a question so entirely novel to Westminster-style systems of government as legislation on public access to government documents." The problem is one of weighing the need-tō-know against the requirements of cabinet administration. For, carried to its logical extreme, the demand for freedom of information is an implied attack on political traditions inherited from Britain and retained for more than a hundred years despite the compelling republican-presidential system adopted by the United States.

Bill C-15, which does not apply to

ministerial papers and which exempts cabinet documents related to the decision-making process, poses no threat to the quality of the historical record collected by the Public Archives. Under the Access Directive of 1978, departmental files and cabinet documents are consigned to the PAC, and it is unlikely that enactment of C-15 will significantly alter their scope, content, or historical value. Almost all of this material ultimately becomes available to historians and political scientists, though not as quickly as some of them would prefer. Ministerial papers, for their part, remain the private property of their creators who may elect either to destroy or deposit them, or to retain personal control over them.

The fact that C-15 neither interferes with the private status of ministerial papers nor permits timely access to cabinet documents is simply a recognition of the realities of Canadian political life. It is fundamental to parliamentary systems that politically neutral and anonymous public servants advise a collegial executive in confidence. While administrative secrecy may therefore be reduced, it can never be eliminated. To attempt to do so would ensure that documentation concerning the decision-making process would never find its way to historians and that an accurate reconstruction of the past would eventually become impossible.

Editor's note: In a letter to the editors on 20 December 1979, the author brought his article up to date with the following: "... the government of Canada fell last week. This means that Bill C-15 is dead. If the Conservatives are re-elected they will revive it. But presumably the Liberal position remains as stated in the Green Paper. The general election will be held on February 18 [1980]. Perhaps you could add an editor's note to the article, referring to the uncertainty of the situation here. It may be some time now before Canada gets FOI legislation." By the publication date of this issue of the *American Archivist,* the Canadian election will have taken place.

RICHARD J. BAZILLION is associate professor of history, chief librarian, and university archivist in Algoma University College, Sault Ste. Marie, Ontario, Canada.