

Confidentiality in Government

by GORDON ROBERTSON*

I have been asked to talk to you about confidentiality in government. I suspect that this is in part because I am one of few who have had the temerity to defend it since Watergate made “secrecy” seem the worst offence against the public good. As Barnum realized in creating his circus, there is a public interest in oddities—from two-headed calves to pig-headed defenders of indefensible propositions. I am such an oddity.

I think, however, that the invitation to me reflected something more serious. It was an awareness that there is, in this question of confidentiality in government, a difficult and important problem that has to receive careful thought if the public good is to be served. All too many people—and almost all journalists—seem to think it is an easy problem made to look difficult only by the stubborn wilfulness of politicians and bureaucrats. If that were so, there would be little point in serious discussion: all that would be required would be firm and decisive action. Unfortunately that is not the case. The problem is genuinely difficult and I assume it is recognition of that fact that brings us here.

Before going further, I think I should declare my position. In one respect, it has remained unchanged. I have never believed and I do not now believe that good and effective government can be achieved with total openness and with no areas of privacy for those who have been given the constitutional responsibility to govern. There has to be a degree of confidentiality in the process of deciding and of administering that goes beyond the obvious reasons of national security and of personal privacy. This is especially true in the case of our parliamentary system of government with its collective, Cabinet responsibility for executive action. Because our system has its own characteristics, which in general have made it one of the most successful of free systems, I believe that one has to be careful about overly-easy application in Canada of rules for openness that have been devised in Sweden or the United States with their quite different forms of government. I say this not because we are any less democratic than they, but because our systems are different, requiring that we

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adopt means compatible with our own system in order to achieve reader access to government information.

For some years now I have believed that the degree of confidentiality we have had in the past and continue to have is too great and that it ought to be diminished. I have also come to believe that it will not be effectively diminished unless we have legislation that sets out the principles and the rules that are to apply in future to access to government information. Such legislation must also establish the method by which final decision is to be taken for marginal or debatable cases. As I will explain, I think those final decisions ought not to be taken by the courts except in cases of litigation. They ought to be taken within the ambit of our unified—not, I emphasize, separated—legislative and executive institutions. That is to say they should be taken within the context of Parliament and the ministry.

In these views, I differ both with the report of the Canadian Bar Association and with the conclusions of the man who has done most to advance serious consideration of this problem in Canada, Mr. "Ged" Baldwin, the Member of Parliament for Peace River. And now that you know where I have come out in my thinking, perhaps I can deal with a few of the more important aspects of this problem.

THE CHARACTERISTICS OF CONFIDENTIAL INFORMATION

It may help analysis of the question to distinguish three categories of information whose confidentiality is important to effective government. The first has to do with the process of decision-making—process as distinct from substance. The second includes those matters of substance that can affect the integrity of the state. These two categories may be said to involve the public interest in the broadest sense. The third category covers a more heterogeneous group of matters connected with particular sectional or personal interests and with specific activities, such as investigations or inquiries. In the balance of this lecture I am going to describe the nature of these categories in more detail, and I shall suggest how each might be approached to provide a degree of public access to information that is consistent with the legitimate needs of confidentiality.

As I have said, we have a system of government based on the collective responsibility of a collective ministerial leadership. We also have a highly developed parliamentary system that requires ministers to be in the House of Commons and to respond to questions day by day on the discharge of their responsibilities. The Question Periods that concentrated, in late October and early November, on the handling of the Security Service of the RCMP were a classic demonstration. The Prime Minister and the Solicitor General were questioned, day after day, on details of their responsibilities and of their actions. Each minister has both political and legal responsibility for his own portfolio. However, the conventional responsibility of the ministry to the House of Commons requires that each exercise his individual powers in a manner acceptable to his colleagues. To ensure that general acceptability, it is essential that ministers consult on any problems or policies of general concern.

The collective decision-making underlying collective political responsibility is the hallmark of Cabinet government. It obviously requires consultation and it obviously requires privacy for the process if differences between ministers are not to become known, thereby destroying the collective responsibility that is fundamental. In other words, consultations between ministers, both in Cabinet and outside, must have privacy. But the privacy has to go beyond that. It has to include the total process by which the individual ministers are advised, both for their particular portfolio responsibility and for their collective ministerial responsibility.

The need for confidentiality of advice to ministers has another dimension. Unlike some countries, we have a non-partisan, professional public service, including the most senior levels. That system depends on the senior advisers and the nature of their personal advice remaining strictly outside the area of political controversy. There are some disadvantages to the system but, so long as we wish to retain it, a condition is the privacy of official advice to the politically responsible ministers.

In considering confidentiality for the processes of the Cabinet, one must, I think, take account of changes that have occurred since the formation of the Cabinet secretariat in 1940. Prior to that time, ministers met without officials, without documents and with no organized records. There was no paper to keep confidential and so the question of confidentiality of documents could not arise. Since 1940, however, and especially since the end of the war, a much more structured system has developed. It is largely the response to the scale of modern government and the complexity of the issues with which it has to deal. There have to be documents to explain issues and proposals, Cabinet committees with officials present for initial discussion, a system of records, and all the paper and paraphernalia that go with such developments. But the essential role of the Cabinet is still the same. It is still the forum that it has always been for the development of a consensus among ministers in order that they can be collectively responsible for the total governing with which they are charged.

The question that has arisen is whether this means that all the paper that is involved—every bit of it—falls within the class of Cabinet confidence because it forms part of a process that must be confidential. It has been concluded that there is no need to go that far. The government recently decided to distinguish between those classes of Cabinet papers that are, by their nature, part of the decision-making process as such and those that relate rather to the factual basis on which discussion and decision rest. Under this plan, for example, a Cabinet memorandum, which contains a minister's recommendation, and which he may alter in order to meet the consensus of the views of his colleagues, is regarded as "internal to the Cabinet" because it deals with the process of decision-making itself. The complex of facts and considerations that are relevant to the decision is placed in a separate background paper. It deals with facts and considerations, not with opinions or proposals. It is not, therefore, regarded as a Cabinet confidence. A Cabinet paper may, however, be confidential for reasons that relate to its particular substance, and this brings me to the second category that I have suggested for confidential information—information that relates to the integrity of the state.

Information having to do with the integrity of the state will usually concern matters such as defence, national security, and international relations. It may, however, relate to federal-provincial relations, to certain financial information at critical times and to one or two other very limited areas. The test must be whether disclosure would or would not cause an injury that would be serious for the state. If not, I think few would argue that it should not be confidential. The question is who is to decide what papers fall into the protected category. It is my argument that it should be the responsibility of ministers to do so, subject to a process of review.

The third category of confidential government information embraces a variety of classes of documents whose disclosure, while not harmful to the decision-making process or the integrity of the state, could injure a variety of individual or sectional interests, including certain interests of government such as contractual arrangements or the development of negotiating positions. This third category would also encompass information relating to police and other investigations, matters before the courts, legal advice, communications between government and private individuals, and commercial information of importance for particular individuals.

THE CLASSIFICATION OF DOCUMENTS

When the principles on which confidentiality should rest are accepted, and when the categories have been determined, the next question is who can mark papers to show that they come within one category or another and how to mark them. At the present time, in the federal government, the "mark" is put on by the person who is responsible for the origin of a document, subject to change of the mark by his or her superiors. The marks themselves are the outgrowth of the last war. We do not have a system of marking that is related to different categories of the kind I have suggested. It will be essential to develop one, and work has been proceeding on that for some time.

I do not propose to go into all the problems that arise in devising a new system of classification and marking. They are many and they are difficult. It must be a system in which the people who impose a mark of confidentiality are satisfied that the reasons do in fact fit under one of the established categories. If it is possible to do it without too much administrative complexity, the marks should in themselves indicate what is the reason for their imposition. In other words, there should be different marks for the different categories, and each should connote the degree of care that ought to be exercised to protect the document.

All of this may sound very technical, but it is fundamental to the translation of agreed principles into effective operation. The success in solving these problems will determine, to a large degree, the success of a more open system and the reduction of dispute about its application.

The imposition of appropriate marks of classification must, in my judgment, be taken as a serious responsibility by all officials who deal with documents that require protection and especially by senior officers. The present tendency is to overclassify, to play it safe. With new and clear rules, accu-

rate classification rather than safe classification should be as “accountable” as other elements of administration.

THE QUESTION OF ACCESS

In its Green Paper,¹ the government has set out a variety of ways in which to deal with disputes as to whether particular documents should or should not be produced when demanded by members of the public. These range from appeal to Parliament to judicial review. I have already indicated that I do not think the last, judicial review, is the wise solution. In this connection, it is important to be clear that I am here speaking of confidentiality in the context of general public access to information and not in the context of documentary evidence in actions before the courts. The considerations that bear on disputes arising under “access to information legislation” are quite different from those that relate to the production of government documents that may be relevant in the resolution of a matter of justice before the courts. The difference is simply that in a matter before the courts the rights of parties may be at issue, whereas at issue under an Access to Information Act is the interest—perhaps simply the curiosity—of the information seeker. And so in matters of litigation, I have no difficulty with the role of the courts in seeking discovery and production. They should not, however, be involved in review procedures under an Access to Information Act.

We have a system of government that depends on the confidentiality of the decision-making process. There is an obvious public interest in maintaining the integrity of the state as the basis of our society. Historically, our constitutional system has operated well and has provided stable, democratic government. In developing a more open attitude towards access to information, we must ensure that we do not endanger the principles or the balance of elements that have enabled our system of government to function successfully. Provided that we can safeguard the legitimate needs of confidentiality, I am confident that legislation establishing the principle that all government information ought to be accessible except for clear and stated exceptions, together with appropriate mechanisms to monitor the application of those exceptions, will enhance the quality of our governmental process. If we do not recognize the legitimacy of these needs, and if we establish rules for access or for review that are in conflict with the basic principles of our system, we shall jeopardize a balanced, sensitive and responsive process. If we do so, we shall diminish rather than enhance the capacity of democratic government to meet the difficult problems of our complex, modern society and to be held responsible in the most effective way for its actions.

Who then is to determine under an Information Act whether a particular paper is to be disclosed? Requests for access will come to departments and ultimately will be referred to ministers. They will produce the documents, or they will claim that they are not producible because they fall under an exempted category in the Act. What kind of review should there be to ensure that the rules are properly applied? Should ministers have the final word—and the

¹ Canada, Secretary of State, *Legislation on Public Access to Government Documents* (Ottawa, 1977).

final responsibility—or should they not? It seems clear that there should be some review, and I think it ought to be by Parliament assisted by an officer of Parliament appointed for the purpose.

Before elaborating my own views on such a review mechanism—and I want to stress that I am speaking personally and have no authority to speak for the Government—I would like to deal more fully with the question of judicial review.

Many, including the Canadian Bar Association, have argued that review of decisions under an Access to Information Act should be undertaken by the courts, as it is in the United States. I would like to suggest that to have the courts take on that responsibility would do injury to them. I would like also to suggest that to have the final decision made by any agency other than the responsible minister, when a document relates to decision-making or to the integrity of the state, would be destructive to the clear identification of executive responsibility which is one of the best features of our parliamentary system of government.

The question whether a document, for which a minister claims confidentiality, does or does not reveal the essentials of the process of deciding, or is or is not likely to do an injury to the state if produced, is not a matter susceptible of precise definition, or of specific interpretation of words, or of the application of “law” in any sense. It is a matter of judgment in the broad areas of state for which government is specifically responsible. That judgment should be made by those who bear constitutional responsibility for the consequences of their actions in matters affecting the security and well-being of the state. We should have someone to scrutinize that judgment, and to aid Parliament in holding ministers responsible for the decisions they make, but we should not remove from them the responsibility to decide or from Parliament the right and duty they now have to exact responsibility.

A second reason for not placing either review or decision in the hands of the courts is that the judgmental factors that affect decisions not to disclose information prejudicial to the state are bound to give rise to differences of view. Such differences cannot fail to become matters of political contention. If the courts make those decisions, by virtue of doing so they will become parties to the contention since ministers, no longer charged with final decision, cannot be held responsible for the consequences. In short, judicial review of ministerial decisions would drag the courts into the political arena.

Lastly, I would suggest that those who argue that we should follow the American practice and place responsibility for reviewing ministerial decisions in the hands of the courts, misunderstand the constitutional differences between parliamentary and congressional government. Parliamentary government relies upon the principle of the interdependence of its unified legislative and executive institutions. This is as fundamental to parliamentary government as is the separation of powers to congressional government. It is, therefore, disheartening to see the doctrine of the separation of powers applied to problems within the parliamentary system and to find such a distinguished body as the Canadian Bar Association asserting that the separation of powers

is a “constitutional fact” in Canada.² With all respect, that is simply not so. The unified nature of the legislature and the executive in parliamentary government is designed to ensure the constitutional responsibility of ministers to the elected representatives of the people. My point is that, because the congressional system demands that the executive and legislative powers be separated, it is unconstitutional and impossible—except in the extreme case of impeachment—for the executive to be responsible to the legislature. There is thus, in the American system, no alternative to having the review of executive decisions by the courts. In contrast, in our system it is not only constitutional but also fundamental that ministers be responsible to Parliament. On matters that are political in character, our system unifies responsibility in Parliament. To retain the integrity of that system, any review procedure under an Information Act should be in Parliament, assisted by an officer with specific powers.

If we pass responsibility to the courts, we will obscure the distinction between the political and judicial processes. To the extent that we do so, we will erode the fundamental basis of both our governmental and our judicial systems. If the decision in a particular matter is fundamentally political and governmental, that decision should be for ministers. I would argue that the decision about the consequences of releasing information that involves matters of state cannot be so precise and so certain as to be legal in nature. It is inevitably political. And so if there is to be a review of such decisions, it should take place in the political not the judicial context.

The government’s Green Paper has canvassed the possibility of an Information Commissioner or an Information Auditor under Parliament with powers to review ministerial decisions and either to report to Parliament or to order production of the documents. These possibilities will require careful examination. An Information Commissioner or Auditor would exist principally to ensure the fair operation of an Access to Information Act. He would operate within the statutory guidelines that would describe the classes of papers fitting within each of the protected categories. His basic function would be to express a view as to whether a minister had reasonably applied the provisions of the Act in denying the release of a particular document.

There should, in my opinion, be no power for an Information Commissioner or Auditor to order disclosure of documents bearing on the decision-making process or the integrity of the state, although he should have the authority to examine them. The Commissioner or Auditor would have the authority to report to Parliament whether in his view the disputed documents had reasonably been included in an exempted category. It would then be for Parliament to hold the minister to account—just as it now does about financial administration on the basis of the report of the Auditor General. Anyone who thinks that an adverse report by the Auditor General is not an effective sanction has not been around Ottawa! An adverse report by an Information Auditor, backed up by a committee of Parliament, could be equally effective.

The third category of documents (sectional or personal interests) could, I think, be treated differently. Decisions on whether a particular paper fits with-

2 T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Canadian Bar Association, August 1977), p. 120. See also pp. 108-28.

in one of the classes in this category could be made with reasonably objective tests. Moreover, because release of information in this area could in no way prejudice the decision-making process or the integrity of the state, there is no clear constitutional need for ministers to make final decision on claims to access. Accordingly, I am inclined to the view that an Information Auditor ought to have the authority to order the disclosure of papers which, in his view, have been unreasonably included in one of the classes falling into the third category.

SUMMARY

I have suggested in the course of this lecture that the administration of legislation on access to information would be assisted if we recognize that there are legitimate needs for confidentiality in government, and that those needs could more readily be reconciled with the principle of access if we distinguish between different reasons for confidentiality. I have suggested that there are three general categories of information that should be considered confidential: the first has to do with the process of governing; the second with the substance of matters whose disclosure would injure the integrity of the state; and the third with particular sectional or private interests. I have indicated my view that the validity of including a paper in a confidential category must be clearly regulated in a new classification system. I have argued that it would be injurious both to our institutions of government and to the judicial process to require the courts to make the final decision whether a particular document should be produced. I have suggested that the only circumstances in which the courts should be involved in questions of disclosure are those that come in the context of litigation where disclosure of documents is germane to the argument of a party to a case. In such litigation, discovery and production would be governed by the Federal Court Act rather than by an Access to Information Act.

Instead of having the courts review the conduct of ministers and officials under an Access to Information Act, I have suggested that such review should be by an officer of Parliament, an Information Auditor. In the first two categories of confidential information, he would have no power to order disclosure. He would report to Parliament on claims for confidentiality that in his opinion had not been reasonable or proper under the Act. I have, however, suggested that such an Information Auditor could be empowered to order disclosure of documents that had been unjustifiably included in the third category.

CONCLUSION

A part of our problem in recent discussion of access to government information has been that too often the argument for it has been made as if there were only one value at issue, that of maximum access to maximum information. That is an important value, but not every reason or every request has the same merit or quality as the general principle. Idle curiosity or fishing expeditions for tomorrow's headline seem, by implication, to have been given the sanctity

of fundamental right and high public purpose. I am sceptical whether all demands to see things deserve that reverence. I am sceptical too whether their satisfaction ought to be financed to any large degree by the public or ought to be given priority over other requirements for the energies of ministers and public servants. The checking of requests for documents, the search for and examination of them, the determination whether they should or should not be regarded as confidential—all of these will take many hours of time of ministers and senior officials. Unless paid for by appropriate charges, they will cost a good deal of taxpayers' money. Access to information is important in a democracy, but not every wisp of curiosity is to be equated with a god-like concern for the public weal. There are other values and other interests and these require equal consideration. If, as I think, good and effective government requires a substantial measure of privacy, it may be that more of the public good for more people may be served by ensuring that we govern as efficiently as we can than by ensuring the quickest possible response to each and every request for information however motivated. In short, there is not just one "good," there are several, and in some respects they can and do compete. The public right to the effective handling of all public problems; the ministerial right to privacy in consulting and deciding; the preservation of a non-partisan, professional public service—these are values too. They need to be entered into the equation along with the "right to know."

We require a dispassionate examination of all these matters if responsible and workable arrangements are to be found that operate to the greatest public advantage. This is difficult when the subject of confidentiality in government is so often discussed in a charged atmosphere in which the very language is tendentious. Terms such as "private" and "confidential," which in my view accurately reflect the nature of the legitimate needs that are involved, are too often replaced by "secret" and "secrecy," with the emotional overtones that make measured discussion difficult. It is heartening to note that, in its paper, the Canadian Bar Association asserts that "no responsible advocate of freedom of information legislation . . . has suggested that policy deliberation, Cabinet confidences or the advice of senior advisors to Cabinet be open to public scrutiny."³ I would like to think that this is generally recognized, but I submit that much of the popular interest in "freedom of information" is directed by a curiosity about the internal processes of government that does not have much purpose behind it except curiosity. If the public good is advanced by its satisfaction, I suspect that is frequently pure coincidence. I am not suggesting that there is anything wrong about this—of course there is not. I simply suggest that it may not loom as large as many proponents seem to think among the things the public interest requires. I submit that we need a more general recognition of the public interest in effectiveness of government to balance the articulate expression of the interest in access. The public good is many-faceted, and it is not advanced by asserting one value at the expense of all others.

³ *Ibid.*, p. 134.