

Counterpoint

Government and Historian: A Perspective on Bill C43*

For many months now historians and archivists and, indeed, many other social scientists and humanists in Canada have been expressing concern about the Government of Canada's Access to Information Bill, more popularly known as the Freedom of Information Bill. I wish to place my remarks in a somewhat broader perspective: the role the Government of Canada has played in encouraging the research activity of Canadian historians. That is a tall order but it does serve to remind me of a fundamental point in our current worries; without the legislative and financial support which the government has long given to the Public Archives, basic research in many aspects of our history would have been exceedingly difficult if not impossible to do. And, for several decades, the maintenance and enhancement of the Archives was the most tangible and obvious contact the historical researcher had with the government in scholarly work.

More recently, the report of the Massey Commission in the 1950s and following it the establishment of the Canada Council has accustomed historians and other scholars to depend upon an agency of the government to fund substantial portions of their research activity. Apart from having to establish the legitimacy of a scholar's project before a peer review committee, a process that scholars welcomed, there was little evident control by the Government of the research funding it was providing to scholars. And it is probably fair to say that few scholars worried much about the accountability of the government to the citizens of Canada for the funding of scholarly research. But by the late 1960s a major change in thinking about government funding of research was underway. The focus was not on research in the humanities and social sciences, but on technical, medical and scientific research. There, it was concluded, government funding of free research activity was not paying the desired dividends and more direct control of research activity, in the national interest, was in order. As the first volume of the Senate Special Committee on Science Policy put it: "the scientist will have to accept the fact that most research activities have become political in the best sense of the word and must be guided by national goals and subjected to systematic review in the light of these objectives" and again: "the researcher will of course have to remain a true scientist but he will also become a servant of the public with important social functions to perform."

**A revised version of an address delivered to the Association of Canadian Archivists held in Halifax, Nova Scotia, in June 1981.*

Not many historians worried about the implications of this report for their discipline at the time. One who did, and who was singularly perceptive in his analysis, was Professor Roger Graham. His presidential address delivered a decade ago to the Canadian Historical Association was entitled "The Scholar and the State: A Word of Caution." In that eloquent statement Professor Graham observed that the arguments of the Special Committee on Science Policy could apply as much to the historian, the classicist or the linguist as to the chemist, physicist or engineer; that closer control of government funding of research activity could have as much impact upon the Canada Council as upon the National Research Council or the Medical Research Council. "Are we", he asked,

in return for having our research funded out of the public purse, to be expected to adhere to guidelines or directives as to what research we shall do and how we shall do it, guidelines formulated by government or its agencies according to its definition of the needs of the state and society? Are there to be officially designated priorities for research within the probability and amounts of the financial assistance accorded being related to the current social relevance and the possible utility of the project concerned?

A decade later most of my colleagues would, I think, answer both questions with an emphatic "yes". We might disagree among ourselves about the severity of the limitations of present grants policies upon our personal research ambitions. But we generally agree that, for example, the priority given to the Strategic Grants Program of the Social Sciences and Humanities Research Council of Canada (SSHRCC), quite apart from its merits on other grounds, is a major step towards "officially designated priorities for research." Similarly, the adoption of a code of ethics for research on human subjects by the SSHRCC, however desirable it is on other grounds, and its imposition on individual research projects by the scholar's local university administrators, is clear evidence that the funding agency expects the research scholar, in return for public support of his or her research, "to adhere to guidelines or directives as to what research we shall do and how we shall do it," in the words of Professor Graham. With the establishment of specific program priorities in its budget and by the adoption of limiting administrative regulations, the current granting agency has carried the accountability of individual scholars for their research activity far beyond peer review.

As citizens interested in the accountability of government to the people for its expenditure of public funds, we can hardly object to this. For scholars, however, some fundamental and disturbing questions remain. Can regulations which are necessary in one field of research be imposed upon research activity in unrelated fields without crippling some long established research methods? How far can the "steering" of research priorities go before it undermines the scholar's initiative in choosing his or her own subject and direction of research activity? What, indeed, is the proper balance between research activity stimulated by national objectives defined by the government and research projects initiated by the scholar's own curiosity? There are no easy answers to these questions. But the trend in government research policy is clear; an ever growing proportion of research funding is being directed to projects and programs consistent with broadly defined national objectives. More and more scholars are being encouraged to become "servants of the public with important social functions to perform."

A moment ago I mentioned the dependence of historians and other scholars upon the Public Archives of Canada. Here, too, in the public policy proclaimed in bill C43, the government is about to enforce, in Professor Graham's words, "guidelines and directives as to what research we shall do and how we shall do it, guidelines formulated by government or its agencies according to its definition of the needs of the state and society." Here, too, we must welcome the intent of the government to provide greater access to government information and, in the same Bill, to protect the privacy of citizens in their relations with the government. These are essential aspects of living in a free society and Bill C43 makes more explicit the responsibility of the government to the people of Canada in this area. But we also believe that the

government should continue to observe another public responsibility long recognized in legislation and administrative order. That responsibility is to preserve its historical records and, at an appropriate time, make those records available to the public for research purposes. The rub is that Bill C43, in its unamended form, puts these two responsibilities in conflict. Some specific clauses of Bill C43, and some omissions from the Bill, will have the effect of severely restricting rather than enhancing access to the historical records of Canada.

For example, Sections 13 to 29 of the first schedule of the Bill, "Access to Information," list categories of public records to which heads of government departments are directed to deny access. In most cases, such as federal-provincial relations and international affairs and defence, the direction is discretionary. In a few, including "any record... that contains personal information as defined in Section 3 of the Privacy Act," the directive is obligatory. Even more important, the denial of access, with one notable exception, is, or can be, perpetual. That exception is cabinet documents which will be opened "twenty years after the record came into existence."

I do not know why this exception was made. But the exception does recognize a very important principle of records management that has long-standing in archival practice and is implicit in the current access policy as defined by cabinet directive. It is what we call the "passage of time principle." This principle assumes that the reasons for and appropriateness of denying access diminish over time. Or, to put it another way, the public interest in permitting access to government records increases over time. We do not accept the notion that some of these classes of records will, and others may, depending upon the whim of a head of a government department, be closed forever. Consequently, the CHA asked that the "passage of time principle," as it is applied to Cabinet records, be extended to all classes of records exempted in Sections 13 to 29 of the first schedule of the Bill.

Furthermore, Bill C43 makes no distinction between kinds of information and classes of government records, between, say, policy and personnel files or between the administrative files of a department like National Revenue and a citizen's income tax return. Consider, for a moment, the problem of policy and administrative files. They may be two or two thousand pages long. As we all know, many of these files contain pages revealing personal information as defined in the second schedule of Bill C43, "the Privacy Act," including the race, national origin, color, religion, age, marital status, educational or medical history, financial transactions, address or opinions of a private citizen. Any record, so defined, must be closed until 20 years after the individual's death and could be closed forever. If Bill C43 is to be administered according to its present clauses, then the head of every government agency, including the Dominion Archivist, would have to have every record file vetted before it could be given to a researcher. The manpower and budget required to do that is mind-boggling. And, if a letter from Percy Jones revealing personal information was found in an Agriculture Department policy file, what then? The removal of the letter would destroy the integrity of the file for the researcher. But leaving Percy's letter in the file would probably result in closure of the file. Neither alternative is acceptable to the researcher. Here again, we believe that the "passage of time principle" affords a workable compromise that would allow research work to continue and afford an appropriate measure of privacy to Jones. His complaint about the machinations of the Egg Marketing Board in 1981 deserves the protection of privacy. By 2011, we believe the interest in his complaint as a part of the accessible historical record of the Board will outweigh the necessity to continue to protect his privacy.

Other kinds of personal information clearly deserve more extended protection of privacy and the extent should, as in present access policy, vary from case to case. I am not aware, for example, of any significant pressure from historians for access to individual as distinct from aggregate data about income tax returns. And the 90 years from birth rule now in effect for personnel files has not been the subject of much complaint. We have therefore asked that authority be given in Bill C43 for the Governor-in-Council to establish appropriate regulations for access for different kinds of personal information such as this.

The problem does not end there. As we read Bill C43, its clauses apply not just to records at present or in future generated by the government, but also to all public records in the custody of the Public Archives. Strict application of the Bill could, we fear, compel the Dominion Archivist to cull or close most of the government records which are now available. This is surely an absurd situation which, we have been assured, was not foreseen by the drafters of Bill C43. The Minister repeated that assurance when he appeared before the Justice and Legal Affairs Committee on 3 March 1981. But, in pursuit of the Prime Minister's announcement that government agencies would begin to observe the provisions of Bill C43 before it became law, some documents have been, at least temporarily, withdrawn from access. And we have observed a reluctance on the part of the Government's officials to consider, much less support, our recommendation that a simple clause be added to the Bill which would exempt material otherwise available for research at the Public Archives from the restrictions of Bill C43.

Another omission from Bill C43 is equally disturbing. In current practice the head of a government agency has an implicit obligation to retain all of its records and to destroy none of them prior to their evaluation by the Public Archives to determine their historical value. It may well be that a new archives act will in due course make this obligation explicit. But a new archives act has been one of the hoariest of promises and lowest of legislative priorities for many, many years. And while we wait, for a year or another generation for a new archives act, we think this essential protection to the integrity of the government's records should be included in Bill C43.

Finally, there is one other irritating exclusion in Bill C43. The Bill restricts access to government records to Canadian citizens, permanent residents and Canadian corporations, and so threatens to reverse a long and honorable tradition in Canada of allowing access to our historical records to citizens of any country. Much has already been written about this subject both here and in the United States where the Reagan administration is considering parallel restrictions for the U.S. Freedom of Information Act. We agree with those critics who argue that the restriction is silly, or unenforceable, or both. Beyond that, we are very much aware of the impressive contributions foreign scholars have made and continue to make to the writing of Canadian history. Moreover, the support already given by our government to Canadian studies programs abroad could result in even more challenging contributions to our historiography in the future. It therefore strikes us as ironic, if not perverse, that our national government at once encourages more sophisticated understanding of Canada abroad and proposes to deny foreign scholars full and equal access to our historical records in Canada.

These, then, are the major problems for historians which the Canadian Historical Association has identified in Bill C43. The recommendations mentioned above have been presented to the Justice and Legal Affairs Committee of the House of Commons. It would, however, be foolhardy to predict the outcome of the Committee's and Parliament's future deliberations. And even if Parliament accepts all of the recommendations that the Canadian Historical Association and other organizations have made, it seems clear that it will still be more difficult to conduct research in government records under an Access to Information regime than it has been in the past. To date researchers at the Public Archives of Canada have enjoyed the luxury of a generally liberal access policy reinforced by sympathetic understanding of our interests and needs by the archivists administering that policy. In return, I think it is fair to say that historians have used government records with discretion and objectivity.

I am confident that the archivists will continue to receive our requests with sympathy and understanding. But, in whatever form it is finally passed, Bill C43 will greatly complicate the process of releasing information. Inevitably, a bewildering array of regulations, guidelines and procedures will issue forth in its wake. Our archival colleagues, whose primary mandate is the management of government records, will be obliged to observe them. I wish I could be

confident that in the new regime researchers will not have to surmount labyrinthine procedures to get at the documents. I am not.

In an hour of increasing demands for accountability in all that we do, I think it is especially important to recall the traditional values espoused by scholars. Foremost among them is trust in the scholar, trust in her or his sense of fairness and objectivity, trust in her or his commitment to unfettered inquiry for understanding and truth. At bottom, the manic pursuit in government agencies and university administrations for codes, guides, regulations and bureaucratic impediments is a disavowal of that trust in the integrity of the researcher and his or her research.

We all know that trust can be abused. We all know that not everyone who finds his way to the seventh floor of the Public Archives will carry out his scholarly obligations in their entirety to everyone's satisfaction. But we might also recall that the chances that the trust will be observed are enhanced, not diminished, in direct proportion to the freedom given to the researcher to do his work. What is needed, Professor Graham concluded in 1971, "is a reaffirmation of the principle that as far as the world of scholarship is concerned, the public interest is served by protecting to the greatest possible extent the freedom of the scholar, provided that it is coupled with a sober sense of responsibility (which, scholars being human, will not always be discharged) to use that freedom, and with it the public funds that support him, judiciously and well." How much more is that reaffirmation needed in 1981.*

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*A few weeks after these remarks were delivered the Justice and Legal Affairs Committee of the House of Commons accepted an amendment to Clause 8 of Schedule II, the Privacy Act, of Bill C43. The amendment reads as follows: "(3) Subject to any other Act of Parliament, personal information under the control of the Public Archives that has been transferred to the Public Archives by a government institution for archival or historical purposes may be disclosed in accordance with the regulations to any person or body for research or statistical purposes." This clause would appear to exempt government records presently available for research at the Public Archives from the restrictions of the Privacy Act. The other recommendations of the Canadian Historical Association to the Justice and Legal Affairs Committee were not accepted.