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The Canadian Federal Experience With Commissioner-Initiated Complaints

THE CANADIAN CONTEXT

Canada has public sector freedom of information (FOI) laws in all of its 14 jurisdictions. All of these statutes provide a right of complaint to be lodged by the person who made an FOI request to a public body or the person who is aggrieved by some other matter relating to requesting or obtaining access to information.

These laws also provide for an independent third-party review mechanism of FOI decisions made by public bodies, although the review model and powers may vary from one jurisdiction to another. The independent reviewer may be a commissioner, ombudsman, official or commission appointed by the legislative or executive authorities. Depending on the specific jurisdiction, the reviewer may have powers and duties to investigate, mediate or adjudicate the matter. In making a finding under the access statute, the reviewer may have advisory powers, i.e. powers to recommend that a public body take certain action, and/or order-making powers. In addition, all the Canadian statutes provide for review before the courts, either as a second or alternative level of review.

At the federal level, the Office of the Information Commissioner of Canada (OIC), an ombudsman, is the first level of review with the possibility of going to the Federal Court

of Canada, then the Federal Court of Appeal and then the Supreme Court of Canada for denials of access.

The above describes the situation in Canada for FOI reviews that are triggered by individuals who believe that their rights of access have been denied. In two jurisdictions, namely Manitoba¹ and the federal level, the FOI statute also allows the independent reviewer to initiate a complaint and conduct an “own-motion” investigation. This paper focuses on the federal experience with Commissioner-initiated complaints.

Legal Authority for Commissioner-Initiated Complaints

The Information Commissioner of Canada (“Commissioner”) derives his legal authority to initiate a complaint and investigate on his own motion under the *Access to Information Act* (ATIA). Subsection 30(3) ATIA provides, “[w]here the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof.”

The ATIA gives no guidance, other than the bare-bone words quoted above, as to the circumstances under which the Commissioner can or should initiate a complaint, nor as to Parliament’s intention in giving the Information Commissioner this power. As the Commissioner is the master of his own procedures in investigating a complaint under the ATIA², he has the discretion and flexibility to determine what procedures will be followed in a particular review.

Taking a pragmatic approach of its role and functions, the Office of the Information Commissioner (OIC) has, in the 24 years of its existence, exercised its power to initiate complaints in a variety of circumstances. This power has become an important tool in the complaint resolution system to identify systemic issues or major deficiencies with ATIA compliance, make appropriate recommendations to government to resolve them, and bring them to the attention of Parliament and the public.

¹ Subsection 59(5) of Manitoba’s *Freedom of Information and Protection of Privacy Act*, S.M. 1997, c. 50, provides that “The Ombudsman may initiate a complaint respecting any matter about which the Ombudsman is satisfied there are reasonable grounds to investigate under this Act.”

² Section 34 *Access to Information Act*, R.S.C. 1985, c. A-1, provides that “Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner.”

Under What Circumstances Would the Commissioner Initiate a Complaint?

The Commissioner would initiate his own complaint in, basically, two sets of circumstances. In the first, the Commissioner will decide, in the course of investigating one or several complaints of the same nature, that the issues are serious enough to warrant a review going beyond the narrow scope of the individual complaints. An individual who complains that a record has been destroyed or altered is one such example. There may also be situations in which the Commissioner sees merit (e.g. fairness) in investigating a particular issue that has come to his attention but the individual has lost his or her right to complain because the statutory timeline has expired.

In the second circumstance, the Commissioner, based on a body of evidence derived from his work in investigating complaints, identifies a systemic problem in one institution or several institutions that merit an in-depth examination. Chronically late responses, a large backlog of unanswered requests are such examples. One of the more prominent of this second circumstance is the annual “Report Card” reviews of federal institutions’ performance in complying with the ATIA, specifically deemed refusals under the Act.

Departmental Report Cards

By 1993, it had become increasingly apparent that, despite being pointed out and discussed in virtually all previous annual reports of the Information Commissioner, the problem of delays by federal institutions in responding to access requests had not been solved, but, in fact, had become an epidemic. In that year, the Commissioner self-initiated a complaint into the “practices and procedures” of access to information request processing of Transport Canada. The results of this review were published along with recommendations. This was quickly followed by similar reviews in 1994 of two more federal institutions, and another in 1996. Despite these initial usages of Commissioner-initiated complaints, the problem continued to worsen government-wide. Delay complaints made to the Commissioner had risen yearly and, by fiscal year 1997-98, delays accounted for almost 50% of all complaints. Out of this was born the more permanent form of own-motion complaints now known as “The Report Cards.” The first of these was issued in March 1999 as part of the 1998-1999 Annual Report.

The Grading Approach

Parliament made it clear in the access law that timeliness of responses was as important as the responses themselves. Subsection 10(3) of the ATIA deems a late response to be a refusal to give access. Consequently, the Information Commissioner adopted, as the measure of performance, the percentage of access requests that have become “deemed refusals” under subsection 10(3). The grading scheme adopted was:

% of requests in deemed refusal

0-5 Full compliance A

5-10 Substantial compliance B

10-15 Borderline compliance C

15-20 Below standard compliance D

20+ Red alert F

That first year, six federal institutions were subject to this review. The results showed that the “best” institution had 34.9% of their requests in deemed refusal and the “worst” institution had fully 85.6% of their requests in deemed refusal.

Since the first Report Cards were issued in 1999, this type of review has been done annually with new federal institutions being selected for review along with a continuing review and follow-up of those institutions that received failing grades. This last fiscal year, 17 institutions were reviewed.

To What Extent do Report Cards Work?

At an administrative level, Report Cards have had a variety of benefits. With their introduction, the Commissioner initially observed a dramatic reduction in the number of delay complaints: from a high of 49.5% in 1998-99 to a low of 14.5% in 2003-04.

However, in recent years, the number has begun to rise again. This last fiscal year, they accounted for 23.7% of the complaints from the public, down slightly from 24.1% in 2005-06, but still far above the low-point achieved in 2003-04.

Also, despite the failing grades that some institutions have received over the years, they have, at least at the staff level, welcomed the scrutiny. Why would this be the case? As a result of the well-publicized Report Cards, many institutional access offices received a

much-needed boost in funding and personnel, allowing them for the first time to be better resourced and staffed to deal with access requests within the statutory time-limits.

Further, because the OIC posts the individual Report Cards on its website and reports the results to Parliament in its annual reports, the newly-created Standing Committee on Access to Information, Privacy and Ethics became interested in the problem of delays. The Committee began summoning Deputy Ministers and other senior officials to appear before it to explain the reasons for their institution's getting an "F" in their Report Card. This had the effect of getting senior-level commitment from five institutions to monitor and improve performance, including a promise to put more resources into place in both the institution's access office and in the operational areas where searches and initial reviews are undertaken.

The Report Cards also demonstrated to institutions that improvement in response times to access requests requires careful attention so as to:

- 1) minimize the action/decision points in the system,
- 2) educate everyone involved in processing requests as to what is expected of them and how much time is available to them for the purpose, and
- 3) generate statistical reports to enable managers to monitor performance, identify bottlenecks and take corrective action before complaints are made to the commissioner.

The Report Cards were also instrumental in uncovering one of the most common reasons for delayed and inadequate answers to access requests - the poor state of records management in many departments. Departmental access coordinators tell the Commissioner that central records registries are unreliable and that electronic records are rarely included in the departmental records systems or properly conserved even in the operational units where they are created. Searches for records in response to access requests are time consuming as a result, and there can be little certainty that the searches have located all relevant records. This deficiency undermines the right of timely access to records.

On a less positive note, the benefits initially derived from the introduction of the Report Cards seem to be less marked as the percentage of delay complaints is on the rise again. Since the inception of the Report Card reviews, the number of complaints of delay

received by the Commissioner has dropped from in excess of 50% of the office's workload in 1997 to a low of 14.5% in 2003-2004. In the last fiscal year, however, some 23% of complaints related to delay. The OIC has also noticed an interesting development: institutions are invoking extensions more often and for longer periods to avoid falling into a deemed refusal situation and the risk of a bad grade.

At a more managerial level, there are several reasons why Report Cards have proven to be a very useful tool:

1. they help the Commissioner evaluate an important component of an institution's performance under the ATIA;
2. they serve to encourage federal institutions to put access to information performance higher on their list of priorities. Ministers and Deputy Ministers do not like to receive grades that reflect poorly on their leadership;
3. Report Cards help create and disseminate a wealth of information across government about "best practices" in administering the access to information program as they are focused on encouraging federal institutions to achieve success through sound administrative processes, training, and work tools, as well as sufficient staff; and
4. Report Cards assist Parliament in playing a targeted and focused oversight role, as noted above with the Standing Committee on Access to Information, Privacy and Ethics calling senior officials from the institutions which received failing grades to explain their poor performance and their plans to improve performance under the ATIA.

Finally, the Report Cards have caused some departmental officials to ask the Information Commissioner to expand the benchmarks used to grade the performance of departments. At present, Report Card grades depend entirely on the percentage of access requests which were not answered on time. Officials have indicated that other benchmarks might be helpful in assisting institutions and the Commissioner to get a multi-dimensional appreciation of an institution's performance. Some of the other performance indicators that have been suggested are: number of pages of records disclosed; percentage of requested information that was exempted; and the amount of information disclosed

informally or proactively disseminated. The Commissioner is now reviewing how the Report Cards could be more effective in assessing institutional performance under the ATIA. This is timely as the Treasury Board Secretariat starts collecting government-wide statistics on an annual basis for the purpose of assessing compliance with the ATIA.³

Over the years, the Commissioner has initiated a number of other reviews as a result of identifying a systemic issue involving one or several federal institutions. The following are examples.

Chronically Late Responses and Large Backlogs of Unanswered Requests

During fiscal year 2005-06, the Information Commissioner initiated 760 complaints against federal institutions. This was an unprecedented number of Commissioner-initiated complaints. Many wondered if it indicated a shift in the Commissioner's approach to oversight.

The 760 complaints were made against three federal institutions: Royal Canadian Mounted Police (481), Privy Council Office (126), and the Department of Foreign Affairs and International Trade (153). The following year, another 393 such complaints were initiated against the Canadian Border Services Agency. All the complaints concerned delay. Indeed, in each case, the initiated complaints covered all access requests to these three institutions that had not been answered, despite the lapse of statutory deadlines (i.e. all requests in "deemed-refusal" status). When some requestor-initiated complaints of delay were filed against these institutions, the investigators, upon questioning the departmental officials, were told that the institutions were unable to make any commitment dates for completion of those particular requests because they were behind in all of their requests. Upon further questioning, it appeared to be true. The complaints filed were just the tip of a huge iceberg of unanswered requests. However, there were other factors that contributed to the Commissioner's decision to initiate complaints vis-à-vis all of these unanswered requests.

The first reason was a long-term inability by these institutions to respect statutory response deadlines. The second reason was the apparent failure of these institutions to act on recommendations for improvement that the Commissioner had made to these

³ See new section 70(1) (c.1) ATIA.

institutions in previous Report Cards. The third reason, perhaps the most important, was a concern that a “squeaky-wheel-gets-the-grease” approach (i.e. awaiting the receipt of individual complaints of delay against these institutions) was unfair to the many requesters whose answers were late but who did not choose to make complaints to the Information Commissioner.

The Commissioner will review the effectiveness of this type of review undertaken outside of the Report Card process, given the recent trend upward in the number of delay complaints, and the fact that, even after this extensive investigation, only the Canadian Border Services Agency has improved its processing abilities.

Destruction or Alteration of Records

In 1996, two incidents involving allegations of document destruction or alteration, when faced with access requests, occurred. The first instance involved a senior manager of Transport Canada who had ordered her officials to destroy all copies of an audit report into a refurbishing project. The order was given to ensure that the report (critical of senior managers) was suppressed. After investigation, the Commissioner concluded that the circumstances indicated that the senior manager knew an access to information request

had been made or was imminent and had ordered the records destroyed in order to deny a right of access under the Act. Despite efforts to make the report disappear, the Commissioner's investigator found a copy of the report in the hands of a manager who believed the order to destroy it to be wrong. It was eventually disclosed to the requester.

The second case, which received wide media attention, involved National Defence. A journalist, alleging that records had been altered before being released to him under the access law, asked the Commissioner to investigate. The investigation demonstrated that the journalist's allegations were true. Not only had the records been altered before release, orders were subsequently given to destroy the originals. The wrong-doing might never have come to light but for a few courageous employees who delayed in obeying certain orders and reported the misconduct to superiors.

In 1997 another Commissioner-initiated investigation was begun which eventually had a major effect on the Act. Canada had a major scandal involving tainted blood being given to people during the 1980s. During the proceedings of the Commission of Inquiry into Canada's Blood Supply, evidence was given that recordings (and transcripts) of meetings

of the Canadian Blood Committee had been destroyed in the late 1980's. There were allegations that the destruction had been ordered to prevent interested persons (such as journalists and those who had been infected with HIV from contaminated blood products) from obtaining the records under the *Access to Information Act*.

The Commissioner, after consultation with Mr. Justice Krever and Health Canada (whose officials welcomed the investigation), initiated a complaint on his own motion against the department for the purpose of finding out what really happened. After attempts to halt the Commissioner's investigation by challenging his jurisdiction before the Federal Court failed, the Commissioner completed the investigation and issued his report. He concluded that the destruction was ordered and carried out so that the records could not become subject to the right of access. The Commissioner concluded that the decision to destroy the records was motivated by concern about potential litigation and liability issues associated with tainted blood products. Most serious to the Commissioner was his finding that the then Executive Director of the Canadian Blood Services, who had custody and control of the records, knew, or ought to have known, that there was a pending access to information request for the records and, hence, that destruction was improper.

This latter incident lead eventually to the passage of a Private Member's Bill, a rare occurrence, making it illegal to destroy, mutilate, falsify or make a false record, conceal or alter a record and to direct, propose, counsel or cause any person to do any of the previous acts. Stiff fines and/or imprisonment are the penalties.⁴

Claims of Cabinet Confidence

In the federal access to information regime, information contained in records that qualifies as Cabinet confidence information is excluded from the Act. As such, the Commissioner has no right to obtain and examine these records. In considering whether to exclude Cabinet confidences in an access request, the federal institution that has control of the records at issue will submit them as well as a schedule to the Privy Council Office. The Privy Council Office then reviews the information, makes a determination and issues a certificate to the effect that the records are indeed excluded from the operation of the Act and, therefore, not accessible to the requestor.

⁴ See section 67.1 ATIA.

Because of the unusual nature of complaints involving Cabinet confidences – one federal institution having the records and making the initial determination of exclusion, and a second institution, the Privy Council Office, making the final decision – the Information Commissioner decided some years ago to initiate a separate complaint against the Privy Council Office whenever he receives a requestor-initiated complaint related to that first institution's refusal to disclose Cabinet confidence information. In this way, the Commissioner can deal directly with the true decision-maker, the Privy Council Office, for this special category of records so as to be able to properly and thoroughly investigate all aspects of the refusal.

CONCLUSION

In conclusion, it is clear that Commissioner-initiated complaints have a valid and vital role to play in any review mechanism to resolve complaints regarding requests for access to government records. They provide a way to get the big picture of what is happening within the system, as well as providing a method of drawing together all of the many threads which could go unresolved if a review mechanism relied solely on complaints from requestors. They help draw attention to key elements of the access to information process that federal institutions need to improve in order to provide requestors with timely access to the information to which they are entitled under the ATIA. Indeed, the destruction of records review led very quickly to the strengthening of the legal framework. These in-depth reviews provide the Commissioner with the body of evidence and facts needed to provide government from time to time with recommendations for improvements to the access to information legislation.

On the other hand, such reviews have their limitations. Their benefits tend to be short-lived between reports, and if used too often, can lose their effectiveness. And although it is proper for the Commissioner to resort to this investigative tool to keep major issues alive in both the eyes of the public and Parliament, it is up to the Government to implement the Commissioner's recommendations and other sustainable solutions that will improve institutions' performance, and hence compliance under the ATIA.

Commissioner-initiated complaints have traditionally focused on specific systemic issues or major deficiencies experienced in one or more federal institutions in administering the access to information program. The challenge for the Commissioner is to find new and

different approaches that will provide for early detection and resolution of issues and difficulties that will assist requestors and be useful to federal institutions, such as the promotion of best practices for the administration of access requests as well as ways to achieve success through training, work tools for employees and adequate resources.
