

TRANSPARENCY AND BETTER MANAGEMENT

A clear message from the first phase of the Inquiry, reinforced throughout the preceding chapters, is that a lack of transparency in the system made it possible for some individuals to subvert management processes and bypass lines of accountability. At the time the Commission was appointed, the Government made a commitment to improve transparency throughout its systems and processes and, since then, it has introduced various measures and policies with regard to disclosure, reporting and audit. For the most part, the Commission believes that these steps have been positive and that they deserve its support.

The Commission wishes to emphasize a key concept that may be learned from the private sector: greater transparency promotes accountability and better management. The best managers are those whose administrative practices are transparent and who accept that they are

accountable not only to their superiors but also to the shareholders of the corporation. Consider, for example, the availability of information about the salaries of chief executives of major corporations whose shares are publicly traded. Such information is almost always disclosed, and shareholders expect to have access to it. By contrast, it is uncommon for the public, who are, in a sense, the shareholders of the various enterprises, agencies and corporations operated by the federal government, to be made aware of the salaries and bonuses paid to Deputy Ministers and heads of Crown Corporations, in spite of the fact that these officials are being compensated with money that comes indirectly from taxpayers. Information about the salaries of the officers and directors of publicly traded corporations is furnished because of the laws, regulations and stock exchange rules that apply to them, yet the largest public enterprise in Canada, the federal government, does not require comparable information to be made available to citizens.

This chapter explores the means of achieving greater transparency in several areas and suggests an explicit link between increased transparency and the achievement of better management and accountability throughout the public sector. Critics, both inside and outside government, talk of “shifting the paradigm” or a “change in culture.” By seeking and attaining greater transparency in the various areas discussed below, the federal government will be better managed because it will be more accountable. That will help to create the cultural change being sought. A change in thinking and approach would be a logical outcome of the steps taken to improve transparency and its corollary, accountability. It is the Commission’s view that improved transparency and accountability will, ultimately, elevate the effectiveness and efficiency of management throughout the Government.

To encourage new attitudes, the Commission distinguishes between wrongdoing and error. Public service managers may be reluctant to accept greater transparency because they fear the consequences of

their errors of judgment being publicly exposed. But errors of this kind should be exposed to public scrutiny and comment, and the public servants responsible for errors committed in good faith should not be penalized because they made a decision that did not achieve the anticipated results. Wrongdoing, in contrast, must be dealt with appropriately, once detected, and sanctions applied.

Mistakes occur even in good management regimes, and some degree of risk-taking is to be encouraged when it is undertaken in the interests of innovation. If public servants are encouraged to take calculated management risks in an open and transparent system, the media and the public should be ready to pardon occasional errors and to moderate criticism of government practices in general. If the public service is to operate in the open, it is only fair to allow public servants some flexibility to manage within such an open system and to make occasional errors.

Access to Information

An appropriate access to information regime is a key part of the transparency that is an essential element of modern public administration. A shift in culture can yield significant benefits. The Commission supports the need for effective public access to information about the workings of government. On the basis of the evidence presented in the first phase of the Inquiry, however, the Commission was given reason to believe that the Government's response to access to information requests does not always respect the spirit and intent of the existing legislation.

Canada's Information Commissioner, John Reid, made a submission to the Commission, and his recommendations merit serious consideration.¹ There are valid arguments for secrecy concerning certain government operations and Cabinet deliberations, for example, where matters of national security are concerned. At the same time, the arguments in favour of secrecy have been over-emphasized since the legislation was

first proclaimed into force on July 1, 1983. The Commission believes that, in general, public servants should not fear embarrassment in the event that their advice to their superiors may be disclosed, even in cases where the advice has not been followed. Surely the public understands that there may be more than one opinion on many subjects, and that Ministers are frequently in the position of having to make difficult choices among a variety of options. Even if a Minister chooses a course of action contrary to what is recommended by department officials, neither the officials nor the Minister should be criticized for advice given or a decision made for legitimate reasons. In any event, should not the public, the persons most affected by decisions made by their elected representatives, be entitled to know what options were considered before a decision was made? If a Minister chooses an option that leads to poor outcomes, the public is entitled to be made aware of such errors in judgment, subject, of course, to the exceptions in matters of national security and others of comparable sensitivity.

Mandatory Record-Keeping

The Commission concurs with the Information Commissioner that there should be mandatory record-keeping in government, and that the obligation to create a “paper trail” should be something more than a matter of policy. It should be an explicit part of the law of Canada.

Accordingly, the Commission agrees that the *Access to Information Act* should be amended to include an obligation on the part of every officer and employee of a government institution to create records that document decisions and recommendations, and that it should be an offence to fail to create those records. Going further, the Commission believes that there should also be free-standing record-keeping legislation which would require public servants and persons acting on behalf of the Government to collect, create, receive and capture information in a way that documents decisions and decision-making processes leading

to the disbursement of public funds. This would make it possible to reconstruct the evolution of spending policies and programs, support the continuity of government and its decision-making, and allow for independent audit and review.³ Such record-keeping legislation should state clearly that deliberate destruction of documentation and failure to comply with record-keeping obligations are grounds for dismissal.

The reason for the creation of legal obligations to maintain and not to destroy government records, in addition to similar rules in the access to information regime, is that the rationale for mandatory record-keeping does more than facilitate public access to information: it ensures good government and accountability, a requirement consistent with the theme of the Commission's overall recommendations.

Recommendation 16: The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions.

Support for Amendments to the *Access to Information Act*

In general, the Commission endorses many of the Information Commissioner's proposed amendments to the Act,⁴ insofar as they would advance the desired principles of transparency and accountability. In particular:

- It endorses an amendment to the access to information legislation that would state that the Act's purpose "is to make government institutions fully accountable to the public and to make the records under the control of those institutions fully accessible to the public."

- It agrees that amendments to the Act should contain provisions that place a good-faith obligation on government institutions to make reasonable efforts to assist information seekers, and to respond to requests in an open, accurate, complete fashion and without unreasonable delay. The Act should state explicitly that records must be disclosed whenever the public interest in disclosure clearly outweighs the need for secrecy.
- It endorses a clause which specifies that each head, deputy head and access to information coordinator must “ensure, to the extent reasonably possible, that the rights and obligations set out in this Act are respected and discharged by the institution.” It is particularly important to emphasize the obligations of access to information coordinators in order to ensure their authority within every Government institution.
- It sees little reason for the large number of federal government institutions that are exempted from the provisions of the Act. It supports an amendment to the Act that would require the Government to add virtually all remaining federal government institutions to Schedule I of the Act, which sets out the institutions that are covered. This point was made by Professor Alasdair Roberts in his research study prepared for the Commission.⁵ Information Commissioner John Reid’s list of federal government institutions that are not currently subject to the Act, but should be, is a very long one indeed. Since changes to Schedule I would be made by government regulation after amendments to the Act are passed by Parliament, the Commission agrees that the amendments to the Act should include the right to make a complaint to the Information Commissioner if the Government fails to add any particular government institution or institutions to the list. Moreover, since the Canadian Broadcasting Corporation would be added to the Act, the Commission agrees that the CBC should be authorized to withhold records if their disclosure would be injurious to the integrity of newsgathering or programming activities.

- It agrees that certain terms used in the Act should be clarified. For example, “government institution” should explicitly include the office of the head of a government institution (for example, a Minister’s office). “Record” should explicitly include any electronic communication. Where a record relating to an “investigation” is protected, it should be understood that an “audit” is included in the term “investigation.”
- As a general principle, it endorses a reorientation of the general rules that apply to access to information. At present, the Act gives the Government the discretion to withhold records if they fall within certain categories of documents listed in the Act. The Commission supports a different approach, whereby the first rule would be that records must be disclosed, unless their disclosure would be injurious to some other important and competing interest (in other words, an “injury test” applies). Similarly, the Commission supports amendments that would substantially reduce the kinds of records that the Government may withhold on the basis of the injury test, such as
 - the existing section 13 category of records obtained in confidence from international, provincial or municipal government sources, including aboriginal governments;
 - the existing section 16 category of records relating to crime detection, prevention, suppression, law enforcement or threats to national security;
 - the existing section 18 and 20 categories of trade secrets and other financial, commercial, scientific or technical information belonging to the Government or to third parties; in particular, the test for protecting such government information should be injury and not “substantial value”; “trade secret” should be narrowly defined; and details of a third party’s contract or bid for a contract with a government institution *must* be disclosed;

- the section 21 category of records containing advice or recommendations for a government institution or Minister; there should also be a comprehensive list of the records that *must* be disclosed;
- the section 23 category of records where solicitor-client privilege is claimed;
- the section 69 category of records considered to be confidences of the Privy Council; in addition, there should be a list of records that would not be considered confidences of the Privy Council; the 20-year rule should be shortened to no more than 15 years; the definition of “discussion papers” should be considerably broadened (since the shorter four-year rule applies to such records); and the rule of nondisclosure should not apply where the decision to which the confidence relates has been made public.
- The Commission favours the deletion of section 24, which says that if some other federal Act states that certain records/information must not be disclosed, then the *Access to Information Act* adopts that prohibition as part of the access to information regime.
- It endorses the creation of a public register of all documents disclosed under the *Access to Information Act*.
- It endorses limiting the Government’s authority to extend the initial 30-day default response period to instances of necessity. Where a government institution fails to respond within the time limits, a provision should state that this delay is deemed to be a refusal of the request, and the Government institution must give notice of the refusal to the applicant and to the Information Commissioner. It also endorses a change whereby the choice of examining the actual record, or receiving a copy, should be shifted from the Government to the applicant. As well, if the person requesting a record specifically asks for it in English or in French, so that the record would have to be translated by the Government institution, the rule should be mandatory translation if the request is in the public interest.

- The Commission agrees that the Act should be changed so that the limitation period for making a complaint begins when the Government institution answers a request, rather than from the making of the request.
- It supports broadening the Information Commissioner's powers to initiate a complaint under the Act and to apply to the Federal Court in relation to any matter investigated by the Office. It also supports allowing the Information Commissioner to grant access to representations made to him in the course of his investigations.

There may well be other desirable amendments to the current access to information regime. Any proposal for change must be considered in light of the critical importance of public access to information on the activities of government. While certain sensitive information must still be protected from public disclosure, the key distinction is the likelihood of injury to critical government interests. The Commission is confident that this difficult balance has been addressed by amendments proposed by the Information Commissioner.

Whistleblower Legislation

In 2005, in the *Merk* decision, the Supreme Court of Canada endorsed the critical importance of laws protecting employees making good-faith disclosures of wrongdoing by their employers.⁶ Although the facts of the case were about an employee's disclosure of wrongdoing by her private sector employer, the Court's comments about the purpose of "whistleblower" legislation apply to public sector employees as well:

Whistleblower laws create an exception to the usual duty of loyalty owed by employees to their employer. When applied in government, of course, the purpose is to avoid the waste of public funds or other abuse of state-conferred privileges or authority. In relation to the private sector (as here), the purpose still has a public interest focus because it aims to prevent wrongdoing "that is or is likely to result

in an offence.” (It is the “offence” requirement that gives the whistleblower law a public aspect and filters out more general workplace complaints.) The underlying idea is to recruit employees to assist the state in the suppression of unlawful conduct. This is done by providing employees with a measure of immunity against employer retaliation.⁷

Parliament should be congratulated for passing Bill C-11 before its dissolution on November 28, 2005.⁸ This bill marks the first time that federal legislation has included any protection for public service whistleblowers. While the passage of this type of protection is a positive step, the Commission has concerns about whether this new legislation will achieve what parliamentarians wanted. We must wonder if legislation of this nature would have made a difference in how Allan Cutler was treated.⁹

The Commission takes the position that the new Act could be significantly improved if it were amended. It suggests that

- the definition of the class of persons authorized to make disclosures under the Act (“public servants”) should be broadened to include anyone who is carrying out work on behalf of the Government;
- the list of “wrongdoings” that can be disclosed should be an open list, so that actions that are similar in nature to the ones explicitly listed in the Act would also be covered;
- the list of actions that are forbidden “reprisals” should also be an open list;
- in the event that a whistleblower makes a formal complaint alleging a reprisal, the burden of proof should be on the employer to show that the actions taken were not a reprisal;
- there should be an explicit deadline for all chief executives¹⁰ to establish internal procedures for managing disclosures; and

- the Act's consequential amendments to the *Access to Information Act* and to the *Privacy Act* should be revoked as unjustified.

The Commission agrees in general with the scheme for disclosure, which has employees disclosing the information to their supervisors or to designated persons in their public service “units.” Disclosure to the Public Sector Integrity Commissioner or to the public is permitted only in exceptional (listed) circumstances.

Sanctions under the *Financial Administration Act*

During the Commission's hearings, it came to light that certain public servants knowingly avoided complying with their obligations under the *Financial Administration Act*. The requirements under sections 32, 33 and 34 of that Act and the events in question are described in some detail in the Commission's *Fact Finding Report*.¹¹ The proper administration of public funds is a matter of the utmost importance, and the confidence of the public in government institutions depends on trust in the integrity of the public service. Public servants who are given the responsibility for the administration of public funds must be fully accountable for their actions. The Commission is convinced that strong incentives to comply should be entrenched in legislation.

To highlight the critical importance of the *Financial Administration Act* to the good administration of public funds, there should be specific sanctions in particular for any breach of section 34 of the Act, which requires a certification that all work has been performed or all services have been provided before payment is made. Employees in the public service ought to be bound to the same standard as private sector employees, if not a higher one. Individuals in the private sector who fail to meet the financial responsibilities of their positions would, in most cases, be summarily dismissed.

The Commission recommends strongly that a new section be added to the *Financial Administration Act* providing that actions proven to be in breach of section 34 of that Act would constitute grounds for dismissal.

Recommendation 17: The *Financial Administration Act* should be amended to add a new section stipulating that deliberate violation of section 34 of the Act by an employee of the federal government is grounds for dismissal without compensation.

Appointments to Crown Corporations

On February 17, 2005, the Treasury Board Secretariat announced a comprehensive package of reforms to the governance of Crown Corporations, entitled *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada's Crown Corporations*.¹² The package, which the Commission endorses, announced the Government's intended actions in seven key areas:

- clarifying the accountability structure for Crown Corporations;
- reinforcing the notion of active ownership;
- choosing qualified directors to sit on boards;
- drawing on the best private sector practices, including independence of boards from management; orientation and continuing education programs for directors; mandating the use of evaluations; and revising the composition and oversight responsibilities of audit committees;
- improving transparency by extending the *Access to Information Act* to 10 of the 18 currently exempt Crown Corporations and examining the means to include the remaining corporations under the Act while protecting their commercially sensitive information;

- establishing the Auditor General of Canada as auditor or joint auditor of all Crown Corporations; and
- subjecting Crown Corporations to the proposed whistleblower legislation, which has since been enacted.

The numerous political appointments to Crown Corporations that have been made over the years have been a smudge on the integrity of the appointments process and have often stood in contradiction to the merit principle. The persons best qualified to appoint or to remove the chief executive of a Crown Corporation are those most familiar with the corporation's operations and needs, the Board of Directors. Once named by the Government, the directors themselves are the most appropriate persons to fill any vacancies on the board due to retirement, death or removal.

Of related interest, a 1994 Inquiry in the United Kingdom¹³ led to the creation of an Office of the Commissioner for Public Appointments. The first incumbent of this new office established a Code of Practice to govern all public appointments. After 10 years of experience, an independent assessment was commissioned. It found good progress but identified ongoing tension between, on the one hand, a desire to respect the merit principle at all times and, on the other, attempts to deal with emerging views on balancing boards and human rights issues such as respecting diversity. To date, the experiment has been cautiously successful, but with growing pains.

Reflecting on Canada's needs and taking into account the policies adopted in other jurisdictions, the Commission concludes that the recently announced reform package addresses many of the concerns that relate to Crown Corporations. It recommends, however, that appointments to management posts should be free of political influence.

Recommendation 18: The Chief Executive Officer of a Crown Corporation should be appointed, evaluated from time to time, and, if deemed advisable, dismissed by the Board of Directors of that corporation. Initial appointments to the Board of Directors of a Crown Corporation should be made by the Government on the basis of merit. Thereafter, the remaining directors should be responsible for filling any vacancies on a corporation's board.

Internal Audit

The final element for improving transparency consists of the effort to enhance and expand the internal audit function. The Comptroller General's role in this respect is described elsewhere in this Report. The Commission believes that this area is critically important to achieving transparency and accountability. It found, in phase I of this Inquiry, that the internal and other audits of the organization within PWGSC which handled advertising all failed to produce the corrective measures that should have prevented the Sponsorship scandal.

The problems associated with the internal audit process at PWGSC at that time included

- evidence of audit officials changing findings in response to management pressure, explicit or implied;
- outside audit firms being subject to internal departmental direction;
- incomplete or poor explanation of audit findings being made to senior officials;
- unacceptably long delays occurring between the completion of audits and the reporting of findings to an audit review committee;
- managers of the program audited being made responsible for implementing the corrective measures; and
- a complete lack of any follow-up.

Before the enactment of the *Access to Information Act*, internal audit reports were never made public. As internal and confidential documents, these findings were the business of no one other than the Deputy Minister and other senior departmental managers. In permitting public disclosure of these internal reports through the Act, the Government failed to anticipate any public misunderstanding of the differences among the various types of internal and external audits, or how the media and Opposition parties might exploit this misunderstanding for their own purposes. The basic objective of internal audits as an oversight tool was placed at cross purposes with the natural tendency of departments to protect themselves and their Minister from public criticism. As a consequence, audit reports were written in vague and unspecific terms, with limited utility for the ultimate recipients. In a very real sense, the Act turned every internal audit into a public accounting.¹⁴

Some aspects of an internal audit may, to varying degrees, have an impact on the reliability of the process. These aspects include the classification and status of auditors within the bureaucracy; the perception by public servants being audited that auditors play an adversarial role, thereby undermining public service confidence and creativity; the professionalism and quality of the auditors; and the objectivity with which auditors approach their assignments.

There is reason to hope that these gaps can be closed through recent efforts initiated by the Office of the Comptroller General (OCG) in the context of the current sweeping reforms introduced by the Treasury Board. The OCG has an opportunity to help by adding new resources, providing more expertise, building capacity through training and certification programs, clarifying audit guidelines and procedures, and creating genuine independence for the internal audit function through the concept of the departmental Chief Financial Officer (CFO) and external audit committee. A CFO will have parallel accountability within the department and to the Comptroller General. In such a regime, political

interference would still impede efforts to achieve independence. However, the use of external audit committees is a positive step forward. Outside members can bring an objective perspective and help to ensure a more independent review of audit findings.

The Commission commends the reform efforts in the package introduced by the President of the Treasury Board. It contains many elements that promise to become useful tools in public sector management. Indeed, the only question to ask is whether this package may be too much. As the Auditor General noted in reviewing the Sponsorship Program, rules were already in place at that time, but some people simply did not follow them.

Endnotes to Chapter 10

- ¹ Canada, Information Commissioner of Canada, Press Release - Submission to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, October 14, 2005.
- ² RSC 1985, c. A-1.
- ³ Similar language can be found in Canada, Treasury Board of Canada Secretariat, *Policy on the Management of Government Information* (May 1, 2003), section 2. This policy is not, however, legally enforceable in the same way that a statute or a regulation could be.
- ⁴ Canada, Information Commissioner of Canada, *Proposed Changes to the Access to Information Act - Presentation to the Committee on Access to Information, Privacy and Ethics*, October 25, 2005.
- ⁵ Alasdair Roberts, "Two Challenges in Administration of the *Access to Information Act*," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. II.
- ⁶ *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing IronWorkers, Local 771*, 2005 SCC 70.
- ⁷ The decision continues by citing E.S. Callahan, T.M. Dworkin and D. Lewis, "Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest," *Virginia Journal of International Law* 44 (2004), p. 882: "[R]eports from insiders allow for early detection and reduction of harm, reduce the necessity for and expense of public oversight and investigation and may ultimately deter malfeasance."
- ⁸ *Public Servants Disclosure Protection Act*, SC 2005, c. 46.
- ⁹ Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who Is Responsible? Fact Finding Report* (2005), pp. 200-3.
- ¹⁰ The *Public Servants Disclosure Protection Act* defines "chief executive" to mean "the deputy head or chief executive officer of any portion of the public sector, or the person who occupies any other similar position, however called, in the public sector." *Ibid.*, section 2.
- ¹¹ The Act's requirements for Appropriation, Requisition and Payment are described in Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who Is Responsible?* pp. 45-46.
- ¹² Canada, Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada's Crown Corporations - Report to Parliament* (2005).
- ¹³ Known as the Nolan Commission, this Inquiry studied the issue of public appointments in response to concerns that the appointments process had been veiled in secrecy and characterized by patronage.
- ¹⁴ Liane E. Benoit and C.E.S. (Ned) Franks, "For the Want of a Nail: Internal Audit and the Sponsorship Scandal," Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, vol. II.

