



MICHEL DRAPEAU

---

LAW OFFICE  
CABINET JURIDIQUE

192, rue Somerset Street Ouest/West  
Ottawa, Ontario, Canada K2P 0J4  
Tel/Phones: (613) 236-2657 or (866) 263-1607  
Téléc./Fax: (613) 236-7476  
[www.mdlo.ca](http://www.mdlo.ca)

**MATTER : 07-1825**

**Colonel (Ret'd) Me Michel W. Drapeau, OMM, CD, LL.L. LL.B.**  
Barrister/Solicitor and Notary – Avocat/Notaire  
Lecturer, Faculty of Law, University of Ottawa  
Member, *International Society of Military Law and the Law of War*  
[mdrapeau@mdlo.ca](mailto:mdrapeau@mdlo.ca)

June 6, 2008

**Me Zorica Guzina, B.C.L. LL.B, LL.M**  
Barrister and Solicitor – Avocate  
[zguzina@mdlo.ca](mailto:zguzina@mdlo.ca)

Mr. Robert Marleau  
Information Commissioner of Canada  
112 Kent Street, 22nd Floor  
Ottawa, Ontario, K1A 1H3

Dear Mr. Marleau,

As you know, I have had regular contact and communications with the Office of the Information Commissioner as far back as 1992. Over the past two decades, in my various professional occupations, I have also come to rely upon the *Access to Information Act* (ATIA) to gain access to information in records under the control of government institutions on literally thousands of occasions.<sup>1</sup> In the meanwhile, I have filed thousands of ATIA complaints.<sup>2</sup> Obviously, I have more than a passing interest in ATIA matters.

Throughout the period, I have also demonstrated a genuine interest in promoting the use of the ATIA by ordinary Canadians in the pursuit of their democratic and quasi-constitutional '*right to know*' via the publication of numerous articles and the co-authorship of a legal text on the subject. I have also been lecturing on access to information and privacy at the Faculty of Law, University of Ottawa for the past six years.

Moreover, in the intervening years, I have always shown much admiration and respect for the Office of the Information Commissioner and its people because of their magnificent and noble service to Canadians as well as their general efficacy in acting as the Champion for the access rights of Canadians.

---

<sup>1</sup> On this particular point, I wish to assure you that contrary to an opinion recently expressed before a Committee of Parliament, I, as do many frequent users of the *Access to Information Act*, do not sell information gained. *Au contraire*, what we offer a client, in addition to a professional knowledge of the ATIA statute and how to use it, but more importantly, is on another level, a client-solicitor privilege which protects the identity of the requester. Amazingly, you seem not to have recognized this function as a necessary reaction to the "leaks" in the system.

<sup>2</sup> Mostly on behalf of clients whose occupations run the full gamut from parliamentarians to media outlets, businesses, professionals, associations, public servants, litigants and the general public.

It is with this background that, after anxious consideration, I provide you with my own thoughts on your facile notion of 'triage' which you first raised during your address to the *Canadian Association of Journalists*, National Capital Chapter, at a breakfast meeting held in the Parliament Building on February 26<sup>th</sup>, 2008 as the cure-all for the reduction of the growing backlog of complaints now building up in your office. However, the decision to write this open letter was made in response to your resolve to hold a purportedly 'public' consultation process on the subject at the chic *Rideau Club* in Ottawa on June 10, 2008 while restricting attendance to a select group of officials from your office, other government departments and a handful of journalists.

## A GROWING BACKLOG OF COMPLAINTS

Then and now, you have freely admitted that your office is faced with an unprecedented number of ATIA complaints and that, under your tutelage, your office has amassed a record backlog. A backlog which, I believe, is due in large part to a number of factors the origins of which coincide with your determination to move the Office of the Information Commissioner into a 'New Direction'.<sup>3</sup> This includes, I believe, your 2007 seminal decision to simultaneously let go three of the most senior executives who had loyally and with bravura served the Office of the Information Commissioner for decades in the best traditions of the 'public service.'

In my opinion, this 'changing of the guard' decision, combined with the current government's penchant for increased obscurity not transparency as well as delays as opposed to disclosure of information in records within the statutory time limits, has produced a stalemate in which users of the ATIA are stymied in their ability to either obtain disclosure of records within the statutory period or, failing that, to obtain from your office a prompt and effective investigation of their complaints.

It is my understanding that to address this developing problem you plan the following:

- a. The present. Effect a 'triage' of the existing complaints by giving precedence to some while pushing others to the back of the line. This re-arrangement, therefore, does nothing to eliminate or reduce the backlog. It simply moves some complaints around the long waiting queue.
- b. The future. Nothing is known about your plans, if any, to reduce or stop the growth of the existing backlog of complaints.

---

<sup>3</sup> Under your towering picture, the Opening Chapter of the 2007-08 Annual Report of the Information Commissioner of Canada is titled "A NEW DIRECTION" in which you proclaim: "*The Office of the Information Commissioner required profound institutional changes to address inherent weaknesses that were significantly limiting our ability to do our job and to respond to new (sic) responsibilities stemming from the Federal Accountability Act.*"

## UNFAIR HEAD-OF-THE LINE SERVICE TO SOME ATIA USERS

### Triage, defined

Respectfully, I must advise that I very much object to your concept of introducing a so-called “triage” system into how the Office of the Information Commissioner would treat complaints, particularly, the suggestion that there should be some sort of priority system dependent upon who the *ATIA* user is and, by inference, his her standing or occupation in the Canadian society.

But ‘triage’ implies more than the prioritization of complaints. The word triage comes from the French verb “*trier*” which, according to the Larousse Dictionary means: “*action de trier, de repartir en choisissant . . .*”. In common day language, this means that whoever does the ‘triage’ must make an arbitrary selection in accordance with his or her own criteria.

The English usage of the word ‘triage’ has a similar meaning:

“The action of sorting samples of a commodity according to quality”

Concise Oxford Dictionary

“Assign a degree of urgency.”

Concise Oxford Dictionary

In the context of ATIA complaints, this means that your office will now assess the relative quality and urgency of complaints and rank them according to your own criteria. Obviously, complaints which, in your wisdom, do not meet your established standard of quality will be pushed to the bottom of the pile and will be assigned to an investigator when and only when the investigation of the prioritized complaints is effectively completed. Given that there is a substantial backlog of complaints from year to year, it is not unreasonable to assume that some of the complaints which do not measure up to your own quality standard could take years before being investigated by your office.

Therefore, the ‘triage’ implies that some of the complaints will be assigned a higher degree of urgency,<sup>4</sup> obviously at the expense of those which do not merit such attention. In

---

<sup>4</sup> Your website contains details of your Early Resolution Pilot Project including Annex C which lists the alleged criteria for prioritizing complaints. The first two criterions being: 1. Urgency (Complaints that require immediate attention.) 2. Impact (Complaints that have an effect on public policies and programs). Given that at present, there is no requirement for an ATIA user to advise an institution or the Office of the Information Commissioner of the *purpose* or *motive* behind his access request, or the factors that might give his complaint more or less *urgency* or more or less *impact* on public policies and programs, we do not understand how your office can possibly ‘read in’ such criteria in each of the existing 2,000 plus complaints now being part of your backlog. In our considered opinion, by adopting and implementing such criteria to assign a priority of service to an ATIA complaint over another, your office is effectively doing indirectly what the court (see note 7 below) held to be illegal, that is to take into account the motive, purpose or occupation of an ATIA user in the satisfaction of his/her “right to know”.

practical terms, this means that those second-tier complaints will be allowed to languish even longer than the current turn-around time for the investigation of complaints. Given that at present, some of your investigations do take two years<sup>5</sup> or more, this will be a most unhappy scenario for several complainants.<sup>6</sup>

### **An un-Canadian and undemocratic treatment of a quasi-constitutional right**

To permit a two-tier complaint process, particularly without parliamentary approval, for such a derogatory practice, is, in our opinion, offensive to the very notion that the access right is quasi-constitutional in nature. It is also contrary to the judicial interpretation of the ATIA statute which, in essence, says that the motive, purpose or occupation of a requester is irrelevant.<sup>7</sup>

In the face of this unequivocal judicial direction, that all ATIA users are to be treated equal before the law, I simply do not understand the basis for your triage system<sup>8</sup> particularly since in this day and age, distinctions by class or occupation are seen as not only *passé* but plainly discriminatory.

### **PARADOX: 'PUBLIC CONSULTATION' BEHIND 'CLOSED DOORS'**

Before closing, we note that you have hired, at some considerable expense, a public research firm to host on your behalf the one-day conference on June 10, 2008 to provide feedback on the changes advocated by you in the delivery of your statutory mandate, *inter alia*, the 'triage' system. Upon reviewing the list of potential attendees, I note that in excess of twenty-five percent of those who have been invited to attend this closed-in session at the Rideau Club are bureaucrats from the Office of the Auditor General, the Treasury Board

---

<sup>5</sup> See page 28 of the 2007-2008 Annual Report of the Office of the Information Commissioner.

<sup>6</sup> At this juncture, it might surprise you to know that, prior to your taking office, my staff used to meet on a regular basis to review, with OIC officials, our complaints with a view of prioritizing them or cancelling those which had become stale-dated. This process proved very effective and, in fact, was very much in keeping with the mediation mandate of your position. Please note also that our requests for a similar initiative have fallen on deaf ears since your assuming office.

<sup>7</sup> See *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner* 2003 SCC 8 (S.C.C.) paras 31-33; *Intercontinental Packers Ltd. v. Canada (Minister of Agriculture)* (1987), 14 F.T.R. 142 (Fed. T.D.) affirmed (1988), 87 N.R. 99 (Fed. C.A.) at 145; *Canada (Information Commissioner) v. Canada (Minister of Citizenship & Immigration)*, 2002 FCA 270; *Whyeth-Ayerst Canada Inc. v. Canada (Attorney General)*, 2002 FCT 133; *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 (Fed. C.A.) at 106-107; *Canada (Attorney General) v. Canada (Information Commissioner)*, [1981] 1 F.C. 337.

<sup>8</sup> We find it very difficult to believe that any politician, regardless of stripe, would espouse such discrimination. It seems to me that if the impulse for introducing such a scheme were a lack of appropriate resources on your part, as opposed to a desire to discriminate for or against a particular class of users, that an appeal on your part to the Committee on Access to Information, Privacy and Ethics might have been more productive and to an allocation of additional resources.

Secretariat, Justice Canada and, Public Works and Government Services. I wonder why any of them, particularly in such a large number, are being asked to collaborate in the development of a complaint process the responsibility of which belongs to you and whose beneficiaries are the ATIA users, not public servants.

The over-representation of public servants, including your own advisers, at this closely controlled meeting is obviously at the expense of users/complainants that, more than anyone else, have a vested interest in the investigation of their complaints in a timely fashion. Wittingly or not, such a heavy representation from the central government agencies at this consultative session is possibly a tell-tale sign of your own disposition and bias in the discharge of your mandate where, rightly or wrongly, you appear to be more sensitive, attentive and protective of the views and concerns of federal institutions instead of 'promoting' the 'right to know' of ordinary Canadians as my fellow ATIA users.

## CONCLUSION

To end on a positive note, I believe that emphasis should now be placed on how to return the Office of the Information Commissioner to its former grandeur and reputation for providing a sterling and second-to-none service to complainants. Notwithstanding my critique, which is aimed at being constructive, I would be pleased to join in that enterprise and build on the successes and legacies of your three predecessors in office rather than engage in unmerited criticism of their efforts and commitment to the cause of freedom of information.

What is required, in my humble opinion, is not such much a "New Direction" but a renewed commitment to the cause of access to information and a continuation of the pioneering work of your three predecessors in office.

Yours truly,



Michel Drapeau, Counsel

Copies: *Ad Hoc* Information Commissioner  
Standing Committee on Access to Information, Privacy and Ethics