

Legal opinion on the scope of the Guidelines for interpreting Section 68.1 of the *Access to Information Act*

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The Guidelines for interpreting Section 68.1 of the *Access to Information Act* (“the Guidelines”) were developed to help employees of CBC/Radio-Canada understand the scope of that legislative provision. The Guidelines explain the principles applied by CBC/Radio-Canada when recourse to Section 68.1 of the *Access to Information Act* (“the AIA”) is necessary.

This document evaluates those Guidelines with respect to the scope of the exclusion contemplated in Section 68.1. It analyzes the provisions of the *Broadcasting Act* (“the BA”) as well as the principles to be considered in discerning the meaning and scope of this provision of the AIA. A reading of the Guidelines follows, with suggestions of avenues to follow in promoting their proper use and facilitating enforcement of Section 68.1.

The document concludes by noting that the Guidelines put forward an interpretation that is far more favourable of a right of access and administrative transparency than what is required of CBC/Radio-Canada under applicable legislation. The *Guidelines*, however, must be read and interpreted while keeping in mind the need for continual evaluation, on a case by case basis, of the concrete context of individual documents in order to determine whether disclosure may have a significant incidence on the Corporation’s ability to meet its journalistic, programming and creative obligations.

The exclusion under Section 68.1 of the AIA

To ensure CBC/Radio-Canada’s independence in matters of journalism, creation and programming, Parliament excluded information relating to these aspects from the application of the AIA. Section 68.1 of the AIA reads as follows:

This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration.

La présente loi ne s'applique pas aux renseignements qui relèvent de CBC/Radio-Canada et qui se rapportent à ses activités de journalisme, de création ou de programmation, à l'exception des renseignements qui ont trait à son administration.

This provision contains an exception to the exclusion, as regards “information that relates to [CBC/Radio-Canada’s] general administration.” The excepted material remains within the scope of the AIA, but in the case of information relating to CBC/Radio-Canada’s journalistic, creative or programming activities, the law does not apply.

The goal here is to determine the scope of the exclusion provided for in the AIA and clarify where the Guidelines stand with regard to the scope of that exclusion. Parliament’s intent is

to guarantee, via Section 68.1, that CBC/Radio-Canada enjoys the independence inherent to its status as a broadcasting undertaking, while ensuring that its management is transparent to the members of the Canadian public, who constitute the source of funds for its activities.

If a set of information is said to be under the control of CBC/Radio-Canada and relates to its journalistic, creative or programming activities, then it is not covered by the *AIA* and the *AIA* does not apply to it. The connecting link triggering application of the exclusionary principle is that the information must “relate to” one or another of the activities conducted by CBC/Radio-Canada contemplated in Section 68.1.

The procedure used by Parliament was to introduce an exception to a provision that excludes application of the *AIA* to a given set of information. As a result, the *AIA* applies to information that “relates to” the general administration of CBC/Radio-Canada but that does not relate to its journalistic, creative or programming activities.

The concept of general administration is stated in the *AIA* in an open definition to the effect that the information “includes” that relating to “expenses paid by the institution for travel, including lodging, and hospitality.” The provision specifies that these categories of information are included in the concept of general administration.

As for the concepts of “journalistic, creative or programming activities,” they must be read in the wider context of CBC/Radio-Canada’s activities. Indeed, these concepts of “journalistic, creative or programming activities” lie within the scope of the *BA*, which confers upon them a broad range of meaning. The principles of interpretation operate on the presumption of consistency among statutes enacted by the same legislative authority. Authors Côté, Beaulac and Devinat write, with regard to presumption of consistency, that:

*It is supposed that the same harmony governs the various legislative texts enacted by one and the same authority as that found among the various elements of a single law: the set of those laws is supposed to form a consistent whole. The interpreter must therefore favour the harmonization of laws amongst themselves rather than their contradiction, because the meaning in the law that gives rise to harmony with the other laws is deemed to represent more faithfully the thought of its author than does that which gives rise to antinomies. [Pierre-André Côté, Stéphane Beaulac and Mathieu Devinat, *Interprétation des lois*, 4th ed. Cowansville: Éditions Yvon Blais, 2009, p. 395, no. 1269]*

These authors further note that the “The presumption of the consistency of laws amongst themselves is all the more manifest in that the laws in question deal with the same matter or subject—‘*in pari materia*,’ to employ the customary maxim.” [ibid., p. 395, no. 1270]

Côté, Beaulac and Devinat explain that the justification of this principle rests on the following supposition:

(. . .) when a statute is developed by its author, he takes into account the laws already in effect, specifically those dealing with the same matter or subject, and crafts the new

law in such manner that it is suitably integrated into the existing law, both from the point of view of form and that of content. [ibid., p. 396, no. 1272]

Thus, the meaning conferred in the context of the *BA* on expressions containing the phrase “journalistic, creative and programming” is relevant for delineating their scope in the context of the *AIA*.

The Broadcasting Act

The *Broadcasting Act* states, on four occasions, the principle of broadcasting undertakings’ editorial freedom as well as their journalistic, creative and programming independence.

Section 2(3) of the *BA*, applicable to all broadcasters, demands an interpretation of the Act that is compliant with the editorial freedom and independence of all broadcasters. It reads as follows:

This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

Specifically with regard to CBC/Radio Canada, Section 46(5) of the *BA* states that:

The Corporation shall, in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and journalistic, creative and programming independence.

In the same vein, Section 35(2) provides that:

[Part III of the Act] shall be interpreted and applied so as to protect and enhance the freedom of expression and the journalistic, creative and programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers.

This provision states a principle of interpretation and a legislative directive regarding the method of application of the provisions in Part III of the *BA* relative to the status and operations of CBC/Radio-Canada, for everything to do with the fulfillment of its mission conferred upon it by said Act.

With respect to the general administration of CBC/Radio-Canada, the *BA* contains a more specific provision regarding provisions relative to the Corporation’s financing; Section 52 states:

(1) Nothing in sections 53 to 70 shall be interpreted or applied so as to limit the freedom of expression or the journalistic, creative or programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers.

(2) Without limiting the generality of subsection (1), and notwithstanding sections 53 to 70 or any regulation made under any of those sections, the Corporation is not required to [. . .] submit to the Treasury Board or to the Minister or the Minister of Finance any information the provision of which could reasonably be expected to compromise or constrain the journalistic, creative or programming independence of the Corporation; or [. . .] include in any corporate plan or summary thereof submitted

to the Minister pursuant to section 54 or 55 any information the provision of which could reasonably be expected to limit the ability of the Corporation to exercise its journalistic, creative or programming independence.

If care has been taken in the *BA* to stipulate that even ministers lack the right to obtain certain information, the provision of which is likely to constrain the independence of CBC/Radio-Canada, it must be postulated that it is particularly true that no person who may invoke the *AIA* can be in a position more favourable than ministers with regard to such information. It follows that the concept of “information that relates to its general administration” in Section 68.1 of the *AIA* covers only such information that is not concerned by journalistic, creative and administrative matters as contemplated in Section 52 of the *BA*.

In summary, the intent that emerges from all of these provisions taken together is the guarantee of a domain of independence for broadcasters in general, and for the broadcaster charged with providing the national broadcasting service—CBC/Radio-Canada—in particular. The point is to ensure that the broadcasters do in fact enjoy conditions suitable to the fulfillment of their obligations under the *BA*.

Consequently, the meaning of expressions containing the terms “journalistic,” “creative” and “programming” is associated with the corporation covered by the Act; it must extend within an organizational dimension characteristic of the particular broadcasting undertaking. Put another way, the *BA* sets up a legal framework guaranteeing full editorial independence for broadcasting undertakings. The targeted area is the set of processes within the corporations that combine to generate elements of information to be communicated to the public (journalism) as well as to allow for the exercise of creative activity (creativity) and for the implementation of programming elements (programming).

The concepts of programming, creativity and journalism

Section 3(1) of the *BA* specifies that CBC/Radio-Canada conducts its activities in the capacity of “national public broadcaster.” Given that CBC/Radio-Canada exists to provide the national public broadcasting service envisioned in Section 3 of the *BA*, it stands to reason that that the whole of its activities is connected with the provision of programming contemplated in Section 3 of the *BA*. CBC/Radio-Canada was indeed instituted to provide Canadians with a service consisting essentially of “journalistic, creative and programming” elements. It is in this spirit that one must delineate the scope of what these concepts cover in the context of CBC/Radio-Canada.

CBC/Radio-Canada can act only to serve the purposes determined in its incorporating statute, that is, the *BA*. In this regard, Section 46(1) of the *BA* provides that the Corporation “is established for the purpose of providing the programming contemplated by paragraphs 3(1)(l) and (m), in accordance with the conditions of any licence or licences issued to it by the Commission and subject to any applicable regulations of the Commission.” This speaks to the central importance of journalistic, creative and programming activities in CBC/Radio-Canada operations.

Section 3 of the *BA* states the principles applicable to CBC/Radio-Canada, with subsections (l), (m) and (n) providing that:

- l) *the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;*
- m) *the programming provided by the Corporation should:*
- (i) be predominantly and distinctively Canadian,*
 - (ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,*
 - (iii) actively contribute to the flow and exchange of cultural expression,*
 - (iv) be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,*
 - (v) strive to be of equivalent quality in English and in French,*
 - (vi) contribute to shared national consciousness and identity,*
 - (vii) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and*
 - (viii) reflect the multicultural and multiracial nature of Canada;*
- n) *where any conflict arises between the objectives of the Corporation set out in paragraphs (l) and (m) and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved in the public interest, and where the public interest would be equally served by resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in paragraphs (l) and (m).*

CBC/Radio-Canada's purpose is to provide Canadians with programming compliant with the provisions of the *BA*. All of the features of the programming to be provided by CBC/Radio-Canada refer all at once to activities of creation as well as production of programs, programming and information that must be original and diversified. This is why it can appear difficult to identify elements of activities conducted by CBC/Radio-Canada that may be construed as not coming under its journalistic, creative or programming activities.

The concept of programming

The concept of "programming" as it is understood in the *BA* was defined by Justice Spence, in handing down the majority decision of the Supreme Court in *CKOY Ltd. v. R.*, [1979] 1 S.C.R. 2. Justice Spence wrote to this effect that:

"the word 'programming' extends to more than the mere words which go out over the air but the total process of gathering, assembling and putting out the programmes generally which is covered by the requirement of a high standard of programming."
[page 13]

Thus defined, the concept of programming is absolutely not limited to only the content of words or images broadcast; it also encompasses the set of processes rendering such broadcast possible. This necessarily includes activities aimed at developing programming elements, regardless of whether they result in a broadcast. In that sense, strategies for generating revenue, including advertising revenues, logically have to do with the processes aimed at putting in place and broadcasting programming elements.

The concept of creativity

The concept of creativity appears to be even broader: in view of the wording of Section 68.1, it encompasses “creative activities.” A creative activity is any activity relating to the creation of works, be they original or not. More generally, the concept refers to creativity, another concept that encompasses a great deal, and concerns the various methods and situations that contribute to the generation of ideas. In the *Dictionnaire des sciences cognitives*, under the direction of Georges Tiberghien (Paris: Armand Colin, 2002, p. 95), creativity is defined as:

The capacity to produce an idea expressible in an observable form or to mount a production (pictorial, sculptural or musical composition; literary or scientific text; advertising copy; sketch, plan or model of a technical object, etc.) that is at once innovative (and unexpected), adapted to the situation and deemed to be of value.

As can be seen in the *Dictionnaire des sciences cognitives*, the concept of creativity has given rise to many definitions. All, however, posit that the concept concerns activities or processes by which are developed ideas, concepts or ways of doing things. In the context of a broadcasting undertaking, creative activity is part of an organizational process that must generate the conditions necessary for its performance.

The concept of journalism

The concept of journalism encompasses a very broad set of activities and situations. It refers to the set of processes by which all manner of information is gathered, processed and communicated to the public. In the Wikipedia online encyclopedia, this concept is defined as “the practice of investigation and reporting of events, issues and trends to a broad audience.” [See Wikipedia entry “Journalism,” <<http://en.wikipedia.org/wiki/Journalism>>, viewed on September 12, 2011]

Mike Ward, in his work *Journalism Online*, emphasizes the fact that journalism is a process, that is, a set of operations the goal of which is to gather, process and broadcast information to the public:

This statement will be anathema to many journalists, but journalism is a process. It can be articulated as requirements, structure and outcomes. It does not have to be a sterile process, lacking in flair and imagination; but these are not the only ingredients.

At its core, the process has four stages: identify and find news and/or information which will attract and interest the key audience/readers; collect all the materials

needed to tell the story/provide the information; select from the collection the best material; and present that material as effectively as possible. [Mike Ward, Journalism Online, Oxford: Focal Press, 2002, p. 30]

To sum up, “journalistic” activity refers to an overall organizational and decision-making process the end product of which is to collect and process information, and broadcast it to the public. But above all it refers to a process that takes place within an organization, specifically, a corporation.

The concept of journalism stated in the provisions of the *BA* mentioned above, as well as in Section 68.1 of the *AIA*, concerns a much broader set of information than merely the journalistic materials or the documents gathered and held as part of journalistic investigations.

In the *BA* and in Section 68.1 of the *AIA*, the concept of journalism is related to an organizational context. It is the set of means devoted to the accomplishment of processes whereby the information is gathered and processed and then presented to the intended audience. Randall P. Bezanson in this way writes about the principal facets of the journalistic process understood as the exercising of a set of decisions about the presentation of news and information to the public. He writes:

*Process looks for example, to independence, a central quality of purpose too. Is the editorial choice unencumbered by forces that would make judgments oriented to audience and public need impossible? Process looks to habits of verification and objectivity in the context of nonfiction publication. Was attention paid to seeking and achieving factual accuracy in the content and presentation of the information? Process concerns bear also on whether decisions were made and steps were undertaken as part of a process leading to publication, animated by the anticipation of publication of material protected as the product of the editorial judgment. Were decisions about investigative process and newsgathering undertaken as part of an iterative series of editorial judgments leading to publication as “news”? [Randall P. Bezanson, “The Developing Law of Editorial Judgment” [1999] 78 *Nebraska L.R.* 754, p. 852].*

To be sure, this author’s reasoning springs from concerns relative to the application of the right of responsibility to media outlets in the United States context. Its importance here is that it draws attention to the fact that journalism, as understood in the relevant provisions of the *BA* and in Section 68.1 of the *AIA*, is not simply the accumulation of the individual procedures of gathering, processing and presentation of information, but indeed a corporate process, i.e., one that is organized and comprises multiple facets that combine directly or indirectly to make up the researching, processing and presentation of news and information.

“Information that relates to its general administration”

With regard to CBC/Radio-Canada, Parliament sought to include within the scope of the *AIA* “information that relates to its general administration.” Such inclusion must be given its full meaning, but it must be understood as not rendering meaningless the exclusion founded on the principles of independence inherent in the concept of a broadcasting undertaking, as it is understood in *BA*. Obviously, with regard to information to which the *AIA* applies, the exceptions provided for in that legislation may cause certain information or documents to be inaccessible or accessible, at the discretion of CBC/Radio-Canada. Likewise, the fact of CBC/Radio-Canada making accessible a document having to do with journalistic, creative or programming activities would not make that document a document that relates to administration.

It is the nature of individual documents that determines whether they are within the scope of Section 68.1 of the *AIA*, not the fact that CBC/Radio-Canada agrees, or has in the past agreed, to make them accessible. The fact of CBC/Radio-Canada making accessible a document that relates to its journalistic, creative or programming activities cannot cause such a document to be included in the area of application of the *AIA*.

Given the central role of journalistic, creative and programming activities within CBC/Radio-Canada, it is very difficult to demarcate exactly what might come under CBC/Radio-Canada programming activities and what would not. Taking an abstract view, everything that CBC/Radio-Canada possesses is directed toward its programming, creative and journalistic activities. It is possible, however, in specific situations, to agree that specific elements of information relate mainly to the general administration of CBC/Radio-Canada.

A priori, everything that CBC/Radio-Canada does—the entirety of its activities, its actions and, consequently, the information under its control—is necessarily related in one way or another to journalism, creation and programming, since the Corporation is established essentially for those purposes. There is thus an assumption according to which any information possessed by CBC/Radio-Canada “relates to” its journalistic, creative and programming activities. For this reason, the exception to the exclusion in Section 68.1 must be given a narrow interpretation.

Application of the concepts used in Section 68.1 of the *AIA* demands evaluation of the circumstances, *in concreto*, whereby documents can be described as having to do with, or not having to do with, journalistic, creative or programming activities. Such an approach necessarily implies evaluation of the circumstances to which such and such a set of information, or such and such a document, belongs. Such *in concreto* evaluation is the only way to identify which information does not relate to journalistic, creative or programming activity.

There is no such thing as a *corpus* of information that in and of itself would be alien to the functions that constitute the very essence of CBC/Radio-Canada, namely, journalistic, creative and programming activities. It is therefore impossible to articulate a definition of information that relates to general administration.

The approach that makes it possible to determine whether a particular document has to do exclusively or essentially with general administration and not journalistic, creative or programming activities is an evaluative approach. That approach demands that individual documents be evaluated so as to establish that they do not disclose information that relates to CBC/Radio-Canada's journalistic, creative and programming activities. This in turn enables determination of whether, concretely, a given document relates to CBC/Radio-Canada's general administration.

It is within this dynamic that the role of the Guidelines lies. The Guidelines' purpose is to help determine whether, concretely, a document can be considered as being part of CBC/Radio-Canada's general administration. This goes to show the extent to which the Guidelines can be a useful tool for those whose task it is to determine whether a particular document falls within the scope of the *AIA*.

The role of the Guidelines

The Guidelines frame a set of factors that help distinguish what, in a normal situation, can reasonably be considered as not hindering the fulfillment of CBC/Radio-Canada's mandate. Their purpose is to enlighten decision makers within CBC/Radio-Canada as to which factors are relevant, so that they may evaluate the extent to which it is possible to conclude that a set of information possessed by CBC/Radio-Canada can constitute information that relates to its general administration, in the meaning ascribed to the term by Section 68.1 of the *AIA*.

Section 68.1 of the *AIA* designates a set of information that, while it is part of the information possessed by CBC/Radio-Canada for the purpose of accomplishing its objectives, is accessible—but only provided that disclosure of that set of information poses no threat to the free and independent performance by CBC/Radio-Canada of its mandate.

Given the necessarily broad nature of the concepts of programming, creation and journalism, however, it is practically impossible to articulate guidelines that would allow one to establish that, at all times and under all circumstances, a given type of information has no bearing on journalistic, creative and programming activities.

This exercise of distinguishing between administrative information and that which relates to journalistic, creative and programming activities can only be conducted on a case-by-case basis, and necessarily must proceed from an evaluation of the issues that, in each specific context, may be important with regard to the performance of such activities.

The Guidelines must therefore be understood as a document explaining the factors to be considered as a tool for assisting in the evaluation of the connecting links that exist between information that may be subject to an access request and information that pertains to the activities covered by the exclusion set out in Section 68.1.

Given the crucial role necessarily played by *in concreto* analysis of the context of a set of information for which one must decide whether it comes under the exclusion, the

Guidelines quite rightly specify that analysis must always be contextual. The definitions and examples provided in the Guidelines must therefore be read and understood from this perspective.

The Guidelines foster transparency

It is difficult to apply the provisions of the *AIA* without recourse to principles and concepts that assist in the distinguishing exercise, in the course of the situations and claims invoked in support of one argument or position or the other. The Guidelines mainly play this role in situations like this. They provide and give concrete expression to reasons that legitimize the boundaries that can be placed on the concepts of journalism, creation and programming so as to reconcile them with the requirements of administrative transparency with which an entity such as CBC/Radio-Canada must comply.

Clearly testifying to a desire for transparency on the part of CBC/Radio-Canada, the Guidelines reflect an approach that, *a priori*, includes in the area of application of the *AIA* more documents than what the reading of the applicable statutes reveals.

The concepts found in Section 68.1, however, relate to the environment in which they are to be applied. The Guidelines necessarily demand that the situation to which a specific set of information belongs must be elucidated. They do so by advancing an application more conducive to transparency while simultaneously recalling the importance of concretely analyzing each document involved so as to evaluate in what way it pertains to journalistic, creative or programming activities.

As such, the definition of “journalistic activities” put forward in the Guidelines must be understood as an illustration of what such activities generally aims at. It appears certain that this definition corresponds in very large measure to what constitutes the activity of journalism. The same is true of the definitions of creation and programming stated in the Guidelines. In certain specific situations, however, those definitions may not reflect that which must be protected so as to guarantee the free exercise of CBC/Radio-Canada’s freedom and independence in journalistic, creative or programming matters.

There is always a risk that such definitions will eventually crystallize and come to be applied, in their strictest sense, as if they had been articulated in a statutory text. This is why it may be dangerous to formulate Guidelines such as these without including the proviso that the definitions they contain are merely illustrations of what is normally meant by journalistic, creative or programming activities, and that these definitions and examples must never be applied as if they were exhaustive. For example, journalistic activities also encompass the development of policies governing journalistic activities. As part of these policies, information about the “positions and salary ranges” of journalists or other categories of staff may under certain circumstances be related to the development of policies or practices pertaining to journalistic activities.

Conclusion

Given the wording of Section 68.1, application of the right of access to CBC/Radio-Canada documents consists essentially in applying a rule that excludes *a priori* any information that pertains to CBC/Radio-Canada's journalistic, creative or programming activities. Consequently, only documents that relate to the general administration of CBC/Radio-Canada are accessible.

The Guidelines provide clarifications as to the method of "applying the exclusion." They reflect a decision to widen the right of access beyond what is provided for in the *AIA*: the Guidelines stipulate that in case of doubt, it is advisable to advocate disclosure. In advancing an approach whereby doubt with regard to a particular document is resolved in favour of disclosure, the Guidelines reflect CBC/Radio-Canada's willingness to go beyond the transparency requirements provided for in the *AIA* with regard to it. Indeed, analysis of the applicable statutes leads one instead to consider that in case of doubt, a document should be considered as "relating to" CBC/Radio-Canada's journalistic, creative or programming activities.

It must, however, be kept in mind that the fact of CBC/Radio-Canada making accessible a document pertaining to its journalistic, creative or programming activities cannot cause that document to be included in the area of application of the *AIA*. As such, even a document voluntarily made accessible and relating to journalistic, creative or programming activities remains excluded from the area of application of the *AIA*.

Another clue to the broader nature of the right of access as advocated in the Guidelines stems from the decision to put forward definitions of the activities covered by the exclusion (journalistic, creative and programming activities). Though their purpose is one of guidance, these definitions reflect the political decision to circumscribe the essential scope of journalistic, creative and programming activities, while the *AIA*, on the other hand, appears to circumscribe, in light of the broader scope of these three concepts, what constitutes documents relating to general administration activities.

The risks inherent in this choice in favour of transparency that is reflected in the Guidelines are offset by the caveats that they contain, and according to which the concrete context to which a specific document belongs must always be evaluated.

Pierre Trudel, Professor, Member of the Quebec Bar
Holder of the L. R. Wilson Chair in Information Technology and E-Commerce Law
Centre de recherche en droit public
Faculty of Law
Université de Montréal
C.P. 6128, succursale Centre-ville
Montreal, QC, Canada H3C 3J7
Phone: 514 343-6263 / Fax: 514343-7508 / www.chairelrwilson.net