

June 18, 2012

**MEMORANDUM OPINION
FOR THE PARLIAMENTARY BUDGET OFFICER**

Summary

On April 12, 2012, the Parliamentary Budget Officer (“PBO”) requested from certain deputy heads “information pertaining to the savings measures undertaken within your department” relating to Budget 2012. The PBO cited s 79.3(1) of the *Parliament of Canada Act*¹ as authority for making the request.

Eighteen of eighty-two departments complied.

On May 15, 2012, the Clerk of the Privy Council responded on behalf of all deputy heads. The Clerk raised concerns about providing the information requested, including a concern about the government’s contractual obligations under collective agreements.

The Clerk said that the government will provide “information” to affected employees and their unions, begin to implement the reductions, and “communicate accordingly”. The Clerk enclosed a summary of planned spending reductions and undertook to provide further summary-type information.

On May 30, 2012, the PBO renewed his request to the Clerk. The PBO observed that deputy heads are required to provide the information requested and that the statutory exceptions to this requirement are inapplicable to the April 12, 2012 request.

This memorandum reviews the legal basis for the requirement to provide the information requested by the PBO. The memorandum concludes that the sixty-four departments that have not yet provided the requested information to the PBO are not acting in compliance with the *Act*.

The *Act* requires the provision of financial and economic data in a timely manner. No legal exception to this requirement has been advanced, and none appears from the analysis of the correspondence exchanged. Accordingly, the non-compliant departments have statutory obligations to provide the information.

¹ *Parliament of Canada Act* RSC 1985, c P-1 (“the Act”), as amended by the *Federal Accountability Act* SC 2006, c 9.

Facts

On April 12, 2012, the PBO requested certain departments and agencies² to provide:

... information pertaining to the savings measures undertaken within [the] department that have been presented in Annex I of Budget 2012.³

The PBO requested that the information be provided “as soon as possible.” Eight organizations complied.⁴ Seventy four entities did not respond.

On May 9, 2012, the PBO renewed his request to those entities that did not respond⁵ and provided May 23, 2012 as a firm deadline.⁶ Eight further organizations complied.⁷

On May 15, 2012, the Clerk of the Privy Council wrote to the PBO on behalf of all deputy heads. The Clerk provided summary information on planned spending reductions but suggested that the PBO would not receive the level of detail necessary to satisfy the April 12, 2012 request. The letter referred to the government’s contractual obligations under collective agreements.⁸

² For a complete listing, see: http://www.parl.gc.ca/PBO-DPB/documents/InformationRequests/Requests/IR0080_Distribution_List.pdf

³ Letter from Kevin Page, Parliamentary Budget Officer, to various Deputy Ministers (April 12 2012), Original Information Request made to Deputy Heads (IR0080). See: http://www.parl.gc.ca/PBO-DPB/documents/InformationRequests/Requests/IR0080_letter_EN.pdf

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- the Patented Medicine Prices Review Board (April 23, 2012);
- Jacques-Cartier and Champlain Bridges Incorporated (April 23, 2012);
- the Office of the Public Sector Integrity Commissioner of Canada (April 24, 2012);
- the National Battlefields Commission (April 25, 2012);
- the National Capital Commission (April 25, 2012);
- the Transportation Safety Board of Canada (April 26, 2012);
- the Canadian Nuclear Safety Commission (April 27, 2012); and
- the International Development Research Centre (April 27, 2012)

⁵ For a complete listing, see: http://www.parl.gc.ca/PBO-DPB/documents/Monitoring_the_Budget_2012_EN.pdf

⁶ Letter from Kevin Page, Parliamentary Budget Officer, to various Deputy Ministers (May 9 2012), Follow-up letter amending Information Request IR0080. See: http://www.parl.gc.ca/PBO-DPB/documents/InformationRequests/Requests/Revised_IR0080_letter_EN.pdf

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- the Courts Administration Service (May 10, 2012);
- the Privacy Commissioner of Canada (May 17, 2012);
- the Auditor General of Canada (May 18, 2012);
- the Office of the Commissioner of Lobbying (May 22, 2012);
- Via Rail Canada Incorporated (May 24, 2012);
- the Canadian Space Agency (May 25, 2012);
- the Public Service Commission (May 25, 2012); and
- Telefilm Canada (May 25, 2012).

⁸ Letter from Mr. Wayne Wouters, Clerk of the Privy Council, to Mr. Kevin Page, Parliamentary Budget Officer (May 15, 2012), Response to IR0080 on behalf of Deputy Heads. See: http://www.parl.gc.ca/PBO-DPB/documents/InformationRequests/Responses/Response_IR0080_PCO_May_15_2012.pdf

On May 30, 2012, the PBO replied to the Clerk. The PBO observed:

1. the PBO is entitled to receive information as per s 79.3(1) of the *Parliament of Canada Act*, 1985;
2. deputy heads are required to provide “free and timely access to financial or economic data in the possession of the department”;
3. the reasons advanced by the Clerk are not legal exceptions to the disclosure requirement;
4. deputy heads are required to provide the information requested;
5. the PBO welcomes the provision of information as requested on April 12, 2012; and
6. the PBO was taking steps to review its power and draft a legal opinion outlining its understanding of the facts of this case.⁹

Following the Clerk’s letter, only two federal organizations responded to the PBO’s request. Currently, sixty-four organizations have not provided the requested information.¹⁰

⁹ Letter from Kevin Page, Parliamentary Budget Officer, to Wayne Wouters, Clerk of the Privy Council (May 30, 2012), Response to Mr. Wouters’ letter of May 15, 2012. See: http://www.parl.gc.ca/PBO-DPB/documents/InformationRequests/Responses/Response_Wouters_PCO_May_30.pdf

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- Aboriginal Affairs and Northern Development Canada
- Agriculture and Agri-Food Canada
- Atlantic Canada Opportunities Agency
- Canada Agricultural Review Tribunal
- Canada Border Services Agency
- Canada Mortgage and Housing Corporation
- Canada Revenue Agency
- Canada School of Public Service
- Canadian Air Transport Security Authority
- Canadian Dairy Commission
- Canadian Food Inspection Agency
- Canadian Heritage
- Canadian Institutes of Health Research
- Canadian Intergovernmental Conference Secretariat
- Canadian International Development Agency
- Canadian International Trade Tribunal
- Canadian Northern Economic Development Agency
- Canadian Radio-television and Telecommunications Commission
- Canadian Security Intelligence Service
- Canadian Tourism Commission
- CBC/Radio-Canada
- Citizenship and Immigration Canada
- Communications Security Establishment
- Correctional Service Canada
- Director of Public Prosecutions
- Economic Development Agency of Canada for the Regions of Quebec
- Environment Canada
- Farm Products Council of Canada
- Federal Economic Development Agency for Southern Ontario
- Finance Canada
- Financial Transactions and Reports Analysis Centre of Canada
- Fisheries and Oceans Canada

Discussion

The Act

The *Parliament of Canada Act*, RSC 1985, c P-1 (“the Act”) was amended by the *Federal Accountability Act* SC 2006, c 9. The amendments created a Parliamentary Budget Officer (“PBO”).¹¹ The *Act* also endowed the PBO with powers to obtain data necessary for discharging his mandate. Section 79.3 (1) of the amended *Act* provides:

Except as provided by any other Act of Parliament that expressly refers to this subsection, the Parliamentary Budget Officer is entitled, by request made to the deputy head of a department within the meaning of any of paragraphs (a), (a.1) and (d) of the definition “department” in section 2 of the *Financial Administration Act*, or to any other person designated by that deputy head for the purpose of this section, to free and timely access to any financial or economic data in the possession of the department that are required for the performance of his or her mandate.

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- Foreign Affairs
 - Hazardous Materials Information Review Commission
 - Health Canada
 - Human Resources and Skills Development Canada
 - Human Resources and Skills Development Canada (Labour)
 - Immigration and Refugee Board
 - Industry Canada
 - International Trade
 - Justice Canada
 - Library and Archives Canada
 - Marine Atlantic Inc.
 - National Arts Centre
 - National Defence
 - National Film Board of Canada
 - National Parole Board
 - National Research Council of Canada
 - Natural Resources Canada
 - Natural Sciences and Engineering Research Council of Canada
 - Parks Canada
 - PPP Canada Inc.
 - Privy Council Office
 - Public Health Agency of Canada
 - Public Safety Canada
 - Public Works and Government Services Canada
 - Royal Canadian Mounted Police
 - Shared Services Canada
 - Social Sciences and Humanities Research Council
 - Statistics Canada
 - Transport Canada
 - Treasury Board of Canada
 - Veterans Affairs Canada
 - Western Economic Diversification Canada

¹¹ *Parliament of Canada Act*, RSC 1985, c P-1 as amended by the *Federal Accountability Act* SC 2006, c 9 s 79.1(1).

Section 79.3(1) is followed by a limitations section:

79.3 (2) Subsection (1) does not apply in respect of any financial or economic data

(a) that are information the disclosure of which is restricted under section 19 of the Access to Information Act or any provision set out in Schedule II to that Act; or

(b) that are contained in a confidence of the Queen's Privy Council for Canada described in subsection 69(1) of that Act, unless the data are also contained in any other record, within the meaning of section 3 of that Act, and are not information referred to in paragraph (a).¹²

Conditions for Valid Requests

By s 79.3(1), PBO requests for information must meet these conditions:

1. The request must be directed to a head of a department or designee and be for information in the possession of the department.
2. The information must be for:
 - a. financial or economic data; and
 - b. required for performance of the PBO's mandate.
3. The information must not be:
 - a. information, the disclosure of which is restricted by s 19 of the *Access to Information Act* or any provision set out in Schedule II thereof; or
 - b. contained in a Cabinet confidence.

Analysis of Conditions

Condition 1

In this case, the PBO's requests were made directly to deputy heads or equivalents thereof.¹³ The information is not disputed to be within the possession of the departments.

Conclusion on Condition 1

These conditions for a valid request are satisfied.

¹² *Parliament of Canada Act*, RSC 1985, c P-1 s 79.3(1)(2).

¹³ For the purposes of this section, reference must be made to the *Financial Administration Act*, RSC 1985, c F-11 s 2. The section 2 definition of "department" includes: (a) any of the departments named in Schedule I, (a.1) any of the divisions or branches of the federal public administration set out in column 1 of Schedule I.1, (d) any departmental corporation; "departmental corporation" means a corporation named in Schedule II. This opinion does not address the issue of whether there may be other government entities whose absence from Section 79.3 of the *Parliament of Canada Act* might impede the work of the Parliamentary Budget Officer and which should be included.

Condition 2

Whether the information requested is “financial or economic data” is a question of statutory interpretation. In *Re Rizzo and Rizzo Shoes Ltd* the Supreme Court of Canada explained the modern approach to statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹⁴

This approach mirrors s 12 of the federal *Interpretation Act*:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.¹⁵

While interpretation of a legislative text begins with its plain and ordinary meaning, interpreters must also consider the purpose of the legislative text within the statutory scheme under consideration. “Data” is defined in the *Concise Oxford Dictionary* as:

Datum / n. (pl. data: see data as main entry). 1 a piece of information. 2 a thing known or granted; an assumption or premise from which inferences may be drawn (see sense-datum). 3 a fixed starting-point of a scale etc. (datum-line). [L, = thing given, neut. past part. of dare give]¹⁶

The French version of the legislation uses the word “données”. This is defined in *Petit Robert* as:

Donnée n. f. (1771; de donner). 1 Sc. Ce qui est donné, connu, déterminé dans l'énoncé d'un problème, et qui sert à découvrir ce qui est inconnu. Les données de problème. 2 Ce qui est admis, connu ou reconnu, et qui sert de base à un raisonnement, de point de départ pour une recherche (Cf. Point de départ, élément de base). Les données d'une science, d'une recherche expérimentale. Données statistiques. Manque de données. V. Élément, renseignement. « Pour traiter l'ensemble du problème, nous devons le plus possible partir de données exactes » (Romain). – Psycho. Le donné* (4°). « Les données immédiates de la conscience » (Bergson). – Inform. Représentation conventionnelle d'une information (fait, notion, ordre d'exécution) sous une forme (analogique ou digitale) permettant d'en faire le traitement automatique. 3° Élément fondamental (circonstances principales, caractères) sur lequel un auteur bâtit un ouvrage. Les données d'un roman, d'une comédie.¹⁷

These definitions show that the primary meaning of “data” is the facts and information used for the purpose of study and research, including studies, research or conclusions that have been reached.

The *Oxford English Dictionary* defines “financial” as:

“[o]f, pertaining, or relating to finance or money matters,” with “finance” defined as “[t]he pecuniary resources: ... of a sovereign or state [or] ... of a company or an individual.” The term “economic” is defined as “[o]f, relating to, or concerned with the science of economics or with the

¹⁴ *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193.

¹⁵ *Interpretation Act*, RSC 1985, c I-21 s 12.

¹⁶ *The Concise Oxford English Dictionary*, 9th ed, *sub verbo* “data.”

¹⁷ *Le Petit Robert*, 1st ed, *sub verbo* “données.”

economy in general ...; relating to the development and regulation of the material resources of a community or state.”¹⁸

The French version of the legislation uses the terms “financières” and “économiques.” *Le Petit Robert* defines “financière” and “économique” respectively as :

financier : 1. Relatif aux ressources pécuniaires, à l'argent. ... 2. Relatif aux finances publiques. ... 3. Relatif aux affaires d'argent.

économique : Qui concerne la production, la distribution, la consommation des richesses ou l'étude de ces phénomènes.¹⁹

The ordinary or plain meaning of the words “financial or economic data” is therefore facts and information that relate to Canadian pecuniary resources and the regulation and development of Canadian material resources.

The terms “financial or economic data” must be interpreted within the context of their section and the purpose of the *Act* as a whole. While the *Act* does not contain a purpose statement, it is clear that s 79.3’s main objective is to permit the PBO access to the information and data required to fulfill his or her mandate. The definition of “financial and economic data” is therefore closely tied to the PBO’s mandate.

The PBO’s mandate is set out in s 79.2 of the *Act*:

79.2 The mandate of the Parliamentary Budget Officer is to

- (a) provide independent analysis to the Senate and to the House of Commons about the state of the nation’s finances, the estimates of the government and trends in the national economy;
- (b) when requested to do so by any of the following committees, undertake research for that committee into the nation’s finances and economy:
 - (i) the Standing Committee on National Finance of the Senate or, in the event that there is not a Standing Committee on National Finance, the appropriate committee of the Senate,
 - (ii) the Standing Committee on Finance of the House of Commons or, in the event that there is not a Standing Committee on Finance, the appropriate committee of the House of Commons, or
 - (iii) the Standing Committee on Public Accounts of the House of Commons or, in the event that there is not a Standing Committee on Public Accounts, the appropriate committee of the House of Commons;
- (c) when requested to do so by a committee of the Senate or of the House of Commons, or a committee of both Houses, that is mandated to consider the estimates of the government, undertake research for that committee into those estimates; and
- (d) when requested to do so by a member of either House or by a committee of the Senate or of the House of Commons, or a committee of both Houses, estimate the financial cost of any proposal that relates to a matter over which Parliament has jurisdiction.

¹⁸ *The Oxford English Dictionary*, 2nd ed, *sub verbo* “financial.”

¹⁹ *Le Petit Robert*, 1st ed, *sub verbo* “financière.”

The PBO's mandate consists of three core objectives:

1. Independent and self-directed analysis about the state of the nation's finances, the estimates of the government, and trends in the national economy (para a);
2. Activities at the request of one of the committees referenced in subparagraphs (b)(i), (ii), (iii), as well as research at the request of any committee of the Senate or House of Commons or a joint committee that is mandated to consider the estimates of the government (para c);
3. Estimate the financial cost of any proposal relating to a matter over which Parliament has jurisdiction at the request of any member of either House or by a committee of either House or a joint committee (para d).²⁰

This is an extremely broad mandate to conduct research and prepare analyses. The mandate is meant to be independent, thorough and reliable. The statute intends that the most senior legislators of Canada will rely on the results.

Accordingly, the PBO must have access to sufficient "financial or economic data" to carry out this mandate.

It follows that "financial or economic data" is used in the *Act* in a sense sufficiently broad so as to allow the PBO adequate information to conduct analysis on "the state of the nation's finances, the estimates of the government and trends in the national economy".

In the present case, the information requested under s 79.3(1) was made in pursuance of the PBO's first mandate above. The information was sought to support analysis of the Government's Direct Program Expense ("DPE") projection, which was presented in Budget 2012. Expenditure reductions in DPE are a key contributor toward the anticipated return to fiscal surplus. Approximately 70 per cent of these reductions pertain to unspecified "efficiencies".²¹ Given the uneven track record of public sector jurisdictions, including the federal government, in achieving sustainable operating efficiencies without material service impacts or necessary fiscal adjustments, the PBO requested details regarding the implementation plans of federal organizations to achieve the fiscal "savings". An assessment of the underlying risk and uncertainties related to these "savings" initiatives would inform consideration of the nation's finances, as well as the government's estimates.

Conclusion on Condition 2

It follows that the second condition for the PBO making a valid request is satisfied. The PBO's request was for financial or economic data required for performance of the PBO's mandate.

²⁰ *Parliament of Canada Act*, RSC 1985, c P-1 s 79.2(a)–(d).

²¹ Department of Finance, *Jobs Growth and Long Term Prosperity: Economic Action Plan 2012*, (Ottawa: Department of Finance, 2012) at 212. Online: <http://www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf>

Condition 3

The PBO's mandate is subject to two limitations stated in s 79.2(a) of the *Act*. The PBO has no right to access financial or economic data that falls under the definition of s 19 of the *Access to Information Act* ("AIA"), any provision in Schedule II of that AIA or that is contained in a confidence of the Queen's Privy Council as described in s 69(1) of the AIA.²² Neither of these limitations apply to this case.

Section 19 of the AIA describes information that is exempted from disclosure under the AIA:

Personal information

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

- (a) the individual to whom it relates consents to the disclosure;
- (b) the information is publicly available; or
- (c) the disclosure is in accordance with section 8 of the Privacy Act.²³

Section 8 of the *Privacy Act*, which is incorporated into paragraph (c), is lengthy and is attached to this memorandum.

"Personal Information" is defined in s 3 of the *Privacy Act* as "information about an identifiable individual that is recorded in any form".²⁴

The PBO requested deputy heads to provide "information pertaining to the savings measures undertaken within [the] department." This is not "personal information" within the meaning of s 3 of the *Privacy Act*. It does not concern specific, identifiable employees whose positions may be affected by staffing reductions. The table "Savings Measures by Category", attached to the information request, which deputy heads were asked to complete and return to the PBO, confirms that the data requested would not identify particular individuals.²⁵

²² *Parliament of Canada Act*, RSC 1985, c P-1 s 79.2(a).

²³ *Access to Information Act*, RSC 1985, c A-1 s 19.

²⁴ *Privacy Act*, RSC 1985, c P-21 s 3. The definition then lists a non-exhaustive set of examples. The *Privacy Act* definition applies to s 19.

²⁵ Parliamentary Budget Officer, "Information Request: Information pertaining to the savings measures undertaken within the department that have been presented in Annex I of Budget 2012" (12 April 2012), online: Parliament of Canada http://www.parl.gc.ca/PBO-DPB/documents/InformationRequests/Requests/IR0080_letter_EN.pdf.

Information on planned cuts to specific areas of the department or agency would only disclose the number of positions that may be affected, not the identity of the specific individuals affected. Even if the requested data would somehow identify a specific individual, that data could be rendered anonymous to protect any personal information before being disclosed to the PBO.

Personal information is distinct from the category of “financial or economic data”. To the extent that personal information becomes involved, the PBO is not entitled to access it unless the personal information falls into one of the exceptions found in subsection 19(2) of the *AIA*.

Schedule II of the *AIA* is incorporated into that statute by s 24. Section 24(1) of the *AIA* requires a refusal to disclose any record containing information the disclosure of which is restricted by or pursuant to any of the provisions set out in Schedule II. Schedule II lists a number of statutes that contain their own confidentiality or privilege provisions.

These provisions relate to information provided pursuant to the listed statute by a third party. The provision of this information by the third party is often required by the statute and therefore relates to information which is provided to the government by a third party under compulsion. Other provisions relate to the mandate which the government institution has been given.

For example, Schedule II includes reference to s 37 of the *Business Development Bank of Canada Act*. This provision legislates the general common law duty of confidentiality, which a banker has to its customers, and is directed toward preserving that relationship in the context of the legislated mandate of the Business Development Bank.²⁶ Schedule II is, therefore, irrelevant to this case.

Section 69 of the *AIA* provides that the *AIA* does not apply to confidences of the Queen’s Privy Council. This section lists seven non-exhaustive types of information that, as Cabinet confidences, would be exempted from disclosure:

- (a) memoranda the purpose of which is to present proposals or recommendations to Council;
- (b) discussion papers the purpose of which is to present background explanations, analyses of problems, or policy options to Council for consideration by Council in making decisions;
- (c) agenda of Council or records recording deliberations or decisions of Council;
- (d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);
- (f) draft legislation; and
- (g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).²⁷

²⁶ *Business Development Bank of Canada Act*, SC 1995, c 28 s 37.

²⁷ *Access to Information Act*, RSC 1985, c A-1 s 69(1)(a)–(f).

Certain of the categories indicate information the PBO is unlikely to request—Cabinet agenda or draft legislation for example.

It is possible the PBO would request some data found in a Cabinet confidence. This would occur if it were included in a memorandum to Cabinet or in communications between Ministers that relate to the formulation of government policy. Paragraphs a), b), d), e), or g) could possibly apply to the type information requested by the PBO.

This does not imply that this information can be excluded from disclosure. The Cabinet confidence exception applies to information, not merely documents. Each piece of information within a document must be evaluated to determine whether it falls into any of the categories in s 69 of the *AIA*. The paragraphs that could apply to information requested by the PBO all describe information in a purposive manner. It is only information that has the purpose described (e.g., “to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council” or “to present proposals or recommendations to Council”) that is considered a Cabinet confidence.²⁸ It is doubtful that any financial or economic data of the type requested by the PBO would meet the criteria for a Cabinet confidence. This data is likely to exist in forms other than that provided to Cabinet or to a Minister for the purpose of Cabinet discussions in any event. The data in this other form would not fall into any of the categories of s 69.²⁹

Conclusion on Condition 3

It follows that the third condition for the PBO’s request to be valid is satisfied.

General Conclusion

As the information the PBO requested constitutes financial or economic data, necessary for carrying out the PBO’s mandate, and is neither personal information, the disclosure of which is restricted by the *AIA*, nor information contained within a Cabinet confidence, the deputy heads are required to comply with the PBO’s request.

Joseph Magnet, F.R.S.C., B.A., LL.B., LL.M., Ph.D., of the Bar of Ontario, Full Professor – University of Ottawa

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²⁸ *Access to Information Act*, RSC 1985, c A-1 s 69(1)(a), (e).

²⁹ For more information on s 69 of the *AIA*, see Tolga R Yalkin & Michelle Bloodworth, “Cabinet Confidential: Limiting Freedom of Information” (2012) 30 NJCL 85 at 91.