Government to make criminals of anyone with leaked information, lawyer argues

By Kate Jaimet
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Any journalist who skirts the Access to Information Act to gain government information will become a criminal, if the government prevails in its court case against Citizen reporter Juliet O'Neill, her lawyer argued in court yesterday.

David Paciocco argued that the Security of Information Act -- originally intended to prevent spies and traitors from gaining secret information that might jeopardize Canada's national security -- is now being re-interpreted by the government as "the enforcement arm of the Access to Information Act." "They are asking you to take a definition of 'protected information' from an administrative statute (the Access to Information Act) and use it to give length, breadth and definition to a crime," Mr. Paciocco told Superior Court Justice Lynn Ratushny.

The Access to Information Act, passed in 1983, allows journalists and the general public to apply for disclosure of government records. Theoretically, the records are to be disclosed within 30 days, with only some narrow exemptions for protected information. In reality, however, disclosure of government records under Access to Information commonly takes months or years, and large parts of the records are often blacked out. Journalists frequently circumvent the act and turn to sources within political circles or the public service to receive more complete and timely information about the inner workings of government. But that activity would become criminal if the Crown prevails against Ms. O'Neill, Mr. Paciocco argued. "If you couldn't get it on application under the Access to Information Act, it's a crime under the Security of Information Act," he said.

The current court case stems from RCMP raids on Ms. O'Neill's home and workplace in January 2004. The Mounties raided Ms. O'Neill after she wrote a story in the Citizen about Maher Arar, an Ottawa man who had been under surveillance by Canadian security forces for alleged terrorist links. Alleging that Ms. O'Neill had based her story on documents leaked by a government source, the RCMP obtained search warrants under Section 4 of the Security of Information Act. That law makes it a criminal offence, punishable by up to 14 years in prison, for anyone to either give or receive "any secret official code word, password, sketch, plan, model, article, note, document or information" or to possess "any official document ... issued for the use of a person other than himself."

Lawyers for Ms. O'Neill and the Citizen immediately applied to have the warrants quashed as unconstitutional, arguing that Section 4 of the Security of Information Act is too broad, too vague and infringes on freedom of the press. But in its factum filed in court, the Crown argued that the Security of Information Act is not vague or broad, if it is interpreted in conjunction with the Access to Information Act (ATIA). "Both leakers and recipients of leaked material must know that absent authorization, releasing information that could not be given out pursuant to a request under the ATIA is highly questionable activity," the factum states. "Leakers and recipients ought not be allowed to institute a parallel disclosure system which leaves it to these individuals to determine what information ought to be releasable. It is inherently harmful to the operation of government to allow breaches of trust to occur."

Crown lawyer Robert Frater declined to answer questions about the factum yesterday, saying he will make full arguments in court later in the week. But Mr. Paciocco argued that the Crown's interpretation is wrong, that the access law is completely distinct from the Security of Information Act and that Parliament never intended to make it a crime to circumvent the Access to Information Act. "Criminal measures should be reserved for the most serious disclosures which can cause serious harm," he said. "You don't trot out the criminal law lightly."