

Centre for Law and Democracy – M. Toby Mendel

toby@law-democracy.org 1 902 431-3688

Selon le CLD, pour que le droit à l'information soit effectif, des efforts doivent être faits pour amener le Québec parmi les leaders en la matière.

Le Québec occuperait la 10^e place au Canada et la 58^e place des 102 législations analysées à travers le monde.

Les engagements du premier ministre d'offrir le gouvernement le plus transparent jamais connu et les mesures proposées dans le document d'orientations, si elles sont mises en place, représenteraient un pas significatif vers l'objectif.

Les propositions du CLD ont pour objectifs de permettre au Québec d'avoir une loi qui réponde aux standards internationaux dans ce domaine. Voici donc une série de questions (**en gras**) visant à approfondir les arguments présentés dans leur mémoire et en commission parlementaire.

ORIENTATION 1 : Le CLD est favorable à l'ajout de principes et d'objets dans la Loi. Toutefois, ces principes et objets doivent également faire référence aux bénéfices externes de la transparence.

- **Pouvez-vous préciser les autres principes externes, ou bénéfices de la transparence qui pourraient se retrouver dans la Loi, en plus de ceux mentionnés dans votre mémoire (combattre la corruption; faciliter la participation du public; augmenter l'imputabilité)?**

These are the main ones, but there are also other benefits such as promoting sustainable development, in particular good environmental practices, supporting respect for human rights, promoting a good environment for business and helping individuals achieve their personal goals.

ORIENTATION 5 : Le CLD est favorable à l'ajout de règles d'interprétation. Cependant, un lien doit être fait entre les règles d'interprétation et les principes, principalement ceux relatifs aux bénéfices externes, afin que la Loi soit interprétée de manière à leur donner plein effet. Par exemple, il est important d'établir une interprétation moins restrictive de l'exception lorsque l'accès porte sur une information d'intérêt public.

- **Pouvez-vous identifier, par des exemples, ce que vous entendez par bénéfices externes (« external benefits of transparency »).**

The specific external benefits are outlined above (combating corruption, facilitating participation, etc.) Our point here is that the law should include a specific provision calling for interpretation not only to do the things listed in Orientation No. 5 (which we support) but also to best facilitate the external benefits identified. For example, decision-makers in the United Kingdom have often held that the fact that disclosure of information would facilitate participation in decision-making was enough to engage the public interest override. Such a conclusion would be supported by listing participation as an external benefit and calling for interpretation so as to give effect to participation.

ORIENTATION 7 : La proposition de distinguer les documents préparés par l'appareil administratif et ceux préparés par le personnel politique est un pas dans la bonne direction. Toutefois, cette distinction n'est pas claire et laisse un important pouvoir discrétionnaire pour répondre à la demande.

Le CLD est d'avis que l'article 34 devrait être aboli puisque la Loi prévoit déjà plusieurs dispositions qui protègent le secret des délibérations notamment les articles 29.1, 30, 33(6) et 35.

- Vous dites que la proposition sur l'article 34 est un pas dans la bonne direction, mais serait incomplète parce que, dites-vous, la distinction entre le personnel administratif et politique n'est pas claire. Qu'y a-t-il de ne pas clair dans la différence entre un attaché politique de cabinet et un fonctionnaire ?

In our experience, officials try to take advantage of whatever distinctions they can to exercise discretion in the application of access to information laws. However, we are not intimate with the particular staffing arrangements in Quebec and it is possible that this distinction is clearer there than it might be in some other contexts. However, even if the measures are drafted in a sufficiently clear manner to distinguish administrative from political staff, our dominant point here is that there is already sufficient (indeed excessive) protection for internal documents. We thus feel that there is simply no need for the discretionary powers created by section 34 even in the case of political staff.

- Ne reconnaissez-vous pas, par ailleurs, qu'au niveau fédéral, c'est l'entièreté du cabinet politique qui est littéralement exclues de la Loi?

Yes, we are aware of that and we have strongly criticised this approach (see our *Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada*, Part 1: Scope, attached here). We also note that there are many access to information laws around the world which do not seek to provide this sort of blanket coverage to cabinet. An important part of our whole Submission on Quebec calls for the Government of Quebec to look beyond the poor practices of Canada to better global practice.

ORIENTATION 10 : Selon le CLD, des délais d'inaccessibilité (« Sunset Clause ») devraient être prévus pour toutes les exceptions qui protègent l'intérêt public.

- Pour quelles exceptions de la Loi actuelle ajouteriez-vous des délais d'inaccessibilité (Sunset Clause)?

We believe that a sunset clause should additionally apply to the following exceptions: 18, 19, 20, 21, 28, 28.1, 29, 31, 34 and 41. We also believe that the sunset period for the following exceptions should be reduced: 27, 35 and 36. However, we also believe that an exceptional procedure should be put in place for cases where information covered by these exceptions continued to be genuinely sensitive after the sunset period. Such a procedure might, for example, require the approval of the CAI.

Selon le CLD, les organismes publics devraient avoir l'obligation de répondre aux demandes d'accès aussitôt que possible, tout en conservant les délais de rigueur actuels (article 47 de la Loi).

- Quelle serait la différence, au niveau pratique, entre cette obligation de répondre aussitôt que possible et le devoir de diligence actuellement prévu à l'article 47?

In English translation, Article 47 currently refers to an obligation to process requests 'promptly'. We are not aware of how this has been interpreted in Quebec but we

believe that the term 'as soon as possible' is clearer and would not leave any room for differing interpretations.

- Vous dites notamment que le délai proposé de 15 à 10 ans, à l'article 47, est vraiment trop large et que ce ne sont pas toutes les recommandations qui doivent faire l'objet du secret. Vous mentionnez que « *There are languages that we can find in other countries legislation which has created this balance that you're looking for, I would say more successfully than your legislation.* » Pouvez-vous nous identifier les meilleurs exemples?

We are not sure we understand this question (Article 47 does not include an exception) but we believe it might refer to our comments on the various exceptions which we categorise as 'internal or deliberative information' exceptions. We have included information on this a supplementary submission to follow-on from our original submission we provided, which is attached here.

Selon le CLD, afin de favoriser une réduction des délais de réponse, il est proposé d'utiliser l'approche de la carotte et du bâton. La carotte peut inclure davantage de formation et de ressource pour l'organisme, alors que le bâton peut impliquer de retirer le droit de l'organisme public d'exiger des frais après le délai légal ou l'obligation d'obtenir la permission du Commissaire pour refuser l'accès après le délai.

- Avez-vous des exemples de juridictions qui ont utilisé l'approche de la carotte et du bâton et quels ont été les effets de cette approche sur le délai de traitement des demandes d'accès?

We believe that the proposals in the Orientations constitute good carrots and that what is additionally needed are the sticks. Some examples from other countries. In Mexico and Uruguay, breach of the time limits places an obligation on the public authority to provide the information, for free, unless the oversight body gives permission for the information to be withheld. So the public authority loses both the right to charge for the request and the power to decide whether or not the information is confidential (which is handed over to the oversight body). In Guatemala, as well, the information must be provided for free if the timelines are breached and a failure to provide it will result in criminal responsibility. Similarly, in Colombia, a failure to provide information within the established timelines leads to a requirement to provide the information, failing which the official risks losing his or her job.

ORIENTATION 11 : Selon le CLD, la Loi devrait s'appliquer à toute personne morale qui est contrôlée par un organisme public à plus de 50 %.

- Est-ce que votre proposition se limite à ce seul critère de 50 % et plus? Ce critère est-il suffisant ou devrait-il être associé à d'autres critères comme la participation de l'organisme à une mission publique, ou le nombre de représentants du gouvernement sur le conseil d'administration.

Our first proposal is to cover all bodies which are effectively controlled by public bodies, which would occur whenever ownership was 50% or more, but could also at much lower levels of ownership. The mere fact that a public body owns a controlling share in another body should be enough, in our view, to bring it within the purview of the law (in other words, this fact is enough to establish a public link for the body). Such rules are in place in many countries.

- Pouvez-vous nous donner des exemples où le critère de 50 % et plus a été retenu et comment est appliquée la Loi sur l'accès?

Some examples (noting that in several the idea of control, which 50% automatically gives, is used):

- Slovenia: "legal entities of private law and subject to direct or indirect dominant influence" by the State.
 - India: "any— (i) body owned, controlled or substantially financed" by the State
 - Croatia: "companies in which Republic of Croatia and local and regional units of government have separate or joint majority ownership rights".
 - Bosnia-Herzegovina: "a body that is either owned or controlled by a public authority".
 - South Korea: The Framework Act on the Management of Government Invested Institutions includes any institution in which the government invests 50% capital or more.
 - Jamaica: "any government company which— (i) is wholly owned by the Government or an agency of the Government, or in which the Government holds more than 50% shares".
 - Italy: "Le disposizioni della presente legge si applicano, altresì, alle società con totale o prevalente capitale pubblico, limitatamente all'esercizio delle funzioni amministrative." (Google assisted translation: "The provisions of this Act shall apply also to companies with full or majority public ownership, limited to the exercise of their administrative functions.")
 - Spain: "Las disposiciones de este Título se aplicarán a: g) Las sociedades mercantiles en cuyo capital social la participación, directa o indirecta, de las entidades previstas en este artículo sea superior al 50 por 100." (Google assisted translation: "The provisions of this Title shall apply to: g) commercial companies in which the ownership of public shares, directly or indirectly, of entities under this article exceeds 50%").
 - Chile: "las empresas del Estado y sociedades en que éste tenga participación accionaria superior al 50% o mayoría en el directorio". (Google assisted translation: "State enterprises and companies in which they have shareholding above 50% or majority on the board".)
- Dans ces cas, la Loi sur l'accès devrait-elle s'appliquer sur l'ensemble des documents de l'organisme?

Yes, in this case, the body should be treated in the same way as a public body. Basically, public bodies should not be controlling other bodies unless they undertake public functions. Theoretically, if there were limited cases where purely commercial bodies were in fact owned by public bodies, there could be a mechanism (with clear conditions) for taking them outside of the ambit of the law (for example, in such cases the responsible minister could adopt a regulation to that effect).

- Si on retient le critère de 50 %, quel est la pertinence d'assujettir des centres commerciaux ou des résidences privées détenus par la Caisse de dépôt et de placement du Québec à plus de 50 %, mais moins de 100 %?

We do not know enough about this particular case to be able to answer that question. However, the question for us would be whether there would be any harm to covering these entities in the law. It is hard to see how there would be a difference between a private residence 100% owned by the Caisse de dépôt and one which was 50% owned in terms of this notion of harm. But if there is a harm of which we are not aware, then

perhaps the special mechanism noted above could be used to exempt this particular case. The bigger issue is that under your proposal, a public body could sell 1% of the shares of another body and it would then no longer be covered by the law.

ORIENTATION 30 : Selon le CLD, la CAI devrait conserver le volet juridictionnel en plus de jouer le rôle de médiateur et une réflexion approfondie doit être faite au regard du rôle de promotion de la CAI considérant son expertise et son devoir d'indépendance.

- **Le devoir de réserve inhérent à un organisme juridictionnel ne vous semble pas contraire au rôle actif de défense et de promotion du droit d'accès à l'information des citoyens?**

There are many bodies around the world that do this, including the UK Information Commissioner (just as an example from a country where the issue of conflicts of interest are taken very seriously). However, it should be noted that when we talk of a promotional role we are not thinking of an advocacy role, apart from making recommendations for reform as part of a general reporting role, but more one of public education and awareness, as well as commenting on law reform proposals, training of officials, etc. In other words, activities that would be circumscribed by the specific rules in the law. So in both of its areas of work – adjudication/mediation and promotion – the body would simply be applying the same law (and making recommendations for reform of that law).

- **Comment concilier le maintien d'un organisme juridictionnel avec l'Orientation visant à favoriser le rôle de promotion, de défense du droit d'accès et de critique de la Loi et de son application?**

We do not, with the caveats noted above, see a problem here. Many administrative bodies with binding powers also provide reports on the shortcomings of the system they oversee. It is important to take advantage of the specific expertise such bodies have and the particular viewpoint they have in relation to implementation. Two points are perhaps relevant here. First, these bodies are not courts and for particularly difficult issues the option of court appeals always remains. It is understood that less stringent both procedural and conflict of interest rules will apply to these types of bodies. Second, it is normal to have different sections of these bodies undertaking different functions and, in particular, to have dedicated units dealing with complaints/appeals. If there is concern about this, structural internal divisions can be strengthened to bolster the independent functioning of these units.

Selon le CLD, la CAI devrait pouvoir imposer aux organismes publics qui ne respectent pas la Loi de manière répétitive de mettre en place des mesures appropriées pour résoudre le problème.

- **Pouvez-vous donner des exemples de mesures qu'un organisme pourrait imposer en vertu de ce pouvoir?**

Please refer to our supplementary submission which provides concrete examples of this.

- **Ce type de mesures seraient-elles prises sous forme d'ordonnance?**

Normally, yes. However, it would also be possible to design open systems of reporting that might be quite effective too. For example, where the CAI had 'recommended' structural measures, public bodies could be required to report back to the CAI (with both recommendations and report-back being public) as to why how they

implemented the measures or, if they did not, why not. There might also be a role here for ministerial oversight.

- Quelles seraient les conséquences du non-respect, par l'organisme public, des mesures imposées?

This is a bit difficult. Presumably the courts have residual powers to impose sanctions on public bodies which flout the law. In serious cases, this should even involve the power (of the courts) to impose fines on public bodies. But such measures would need to be designed to fit in with the administrative law systems in Quebec with which we are not sufficiently familiar to make precise recommendations.

ARTICLE 41.1 DE LA LOI : Le CLD propose d'amender l'article 41.1 pour inclure un test d'intérêt public applicable à toutes les exceptions et qui impose aux organismes publics de divulguer l'information si l'intérêt public l'emporte sur l'intérêt sur lequel se fonde l'exception.

- Quels seraient les critères à prendre en considération pour évaluer l'intérêt public?

Some examples of public interest overrides are provided in the supplementary submission that we provided, which is attached here. Courts around the world have generally refused to define the public interest, both in the case of access to information and more generally (for example, as a way of balancing freedom of expression and privacy interests). As the examples in the supplementary submission make clear, there are two main approaches here. One is to provide for a very general public interest override and then let decision-makers (information officers, oversight bodies, courts) interpret them. The other is to provide a list of key public interests. This is sort of the approach taken in article 41.1 except that the list is far too short. This approach is narrower but it can also be clearer. A third, hybrid, approach is to provide for a general public interest override and then provide a non-exclusive list of types of public interests to be considered.

Otherwise, as noted, the many laws which provide for a general public interest override do not indicate the criteria to take into account. These should be set out or argued by the applicant but the decision-maker should also simply think about it him- or herself. The problem here is that different situations can give rise to many different public interest considerations. As noted above, for example, in the United Kingdom, the value of information in underpinning participation has been taken into account.

- Est-ce que cet intérêt public serait lié aux bénéfices externes que vous proposez d'ajouter dans les principes de la Loi (corruption, imputabilité et participation citoyenne)?

Yes, in the sense that these would help point to public interest possibilities. But they would not be specifically determinative of public interests. Those benefits should also help inform interpretation of the scope of exceptions in the first place.

- À votre connaissance, comment cette clause d'intérêt public est-elle appliquée dans les provinces qui ont ce type de clause?

In jurisdictions – both provinces and other countries – which have general public interest overrides, it should be applied at all stages of the decision-making process

(i.e. by information officers, by oversight bodies and by courts). It can be difficult for information officers to apply the override in borderline cases, but there are also clear cases (e.g. where a case involves corruption or other forms of wrongdoing). Better practice is to encourage applicants to make public interest arguments where they can and wish to (although in some cases this may require them to disclose the purpose of their request, which should always be voluntary).

- **Avez-vous des analyses sur son application?**

There are not too many specific studies on this. We are attaching one.

- **Les bénéfices et les impacts ont-ils été mesurés?**

Again, not too many studies have focused specifically on this but there are a lot of cases and also anecdotal evidence of the importance of this.

- **Comme le disait la Commission Paré, (cité à la page 53 du document d'orientations) « il arrive que l'intérêt public soit mieux servi par l'accès aux documents administratifs; il arrive qu'il soit mieux servi par la confidentialité ».**

- **Ne reconnaissez-vous pas que votre proposition reviendrait à laisser cette appréciation entre les mains des tribunaux plutôt qu'entre les mains des élus?**

A few points here. First, while we fully agree with this assessment (i.e. that there are times when the public interest favours disclosure and times when it favours secrecy) this very general observation is not helpful in providing guidance when designing the public interest override in an access to information law because it is simply too general. For example, none of the better practice laws (and almost none even of the weaker laws) provide for a negative public interest override (i.e. the power to refuse to disclose information in the public interest). Instead, the approach towards protecting the public interest in secrecy is to define secrecy interests carefully in the law and to allow or require non-disclosure in such cases. Second, including a general public interest override in the law is just as much a way of giving effect to the wishes of elected officials as including a specific list of types of public interests. Furthermore, there are many cases where legislators have included general public interest references in laws, without this in any way being seen as undermining their legislative powers. Third, we believe that a proper constitutional analysis in this area requires a public interest override, just as it does when freedom of expression comes into conflict with privacy. Where access to information is required for an expressive purpose, the Supreme Court has said that it receives constitutional protection. On this analysis, when constitutionally protected access comes into conflict with other social values, including other rights (such as privacy), the conflict must, in accordance with the section 1 constitutional analysis, essentially be resolved through what amounts to a public interest balancing (among other things).

Lors de votre présentation, vous avez mentionné avoir produit un mémoire en 2013.

- **Est-ce possible d'avoir le mémoire que vous avez présenté en 2013?**

Of course. It is attached.

Lors de votre présentation, vous mentionné faire l'utilisation du « RTI Rating » pour évaluer les différentes juridictions.

- **Est-ce possible d'avoir les critères et les résultats pour chaque critère évoqué pour votre RTI rating à l'égard du Québec?**

Yes, I am attaching the Rating we did for Quebec. Please note that we were unable to have this reviewed by a local expert in Quebec, which is normally part of our process. As a result, it is possible that there are some minor points in the Rating which may be debatable.

- **Les droits humains semblent primer dans les critères, pouvez-vous expliquer pourquoi?**

The Rating is based on 61 different indicators which correspond to the positive features of a strong access to information law. These are derived in part from international standards (which, in turn, are found in various authoritative statements, decisions and declarations adopted by international actors) but also in part from better national practice in this area (based on a review of that practice). The development of the indicators was supported by an advisory panel of leading international experts on this issue from around the world.

- **Est-ce possible d'avoir votre définition du droit à l'information?**

This is a bit complicated! We have a simple definition along the following lines: "The right to information establishes a presumption in favour of the disclosure of all information held by all public authorities, subject only to a limited regime of exceptions to protect overriding public and private interests." But in a way, the 61 indicators in our RTI Rating could be said to represent a combination of a definition of the right and a set of practical measures to deliver it.

Lors de votre présentation, vous mentionné certaines juridictions en guise d'exemples de transparence et d'accès à l'information (UK, New-Foundland, South Africa, India, Bulgaria and Mexico).

- **Pouvez-vous identifier des mesures (législatives) qui devraient inspirer le Québec?**

All of these cases have their strengths (and all are generally very strong laws), but they also have their weaknesses (none score perfectly on the RTI Rating!). The top scoring law is Serbia, but it is also a bit complex and derives from a very different legal system. Slovenia is in second place. As a practical matter, however, we would suggest looking at the examples listed above, as well as Liberia, Sierra Leone, El Salvador and perhaps the Maldives.

- **Vous présentez le modèle de Terre-Neuve comme pouvant inspirer le Québec, avez-vous une analyse de ce modèle que vous pourriez partager?**

In April 2015 we did a Rating of the Newfoundland proposals. This shows the various strengths (and weaknesses) of their law. We also did a note at that time on areas where (then) draft law could be further improved. We are attaching both of those documents here.

- Si le Québec adoptait toutes les recommandations contenues dans son document d'orientations gouvernementales en matière de transparence, selon vous, à quel rang se placerait-il?

This is rather difficult to answer because it is not entirely clear how some of the orientations would be put into effect. For example, Orientation 6 suggests that all exceptions would be subject to a harm test but, as we noted in our analysis, it is not clear how that would be operationalised in practice. If, in fact, every exception was subjected to a harm test, Quebec would gain 4 points on that alone. What we can offer in this regard, however, is to do a rating of any draft law that you prepare, so you would at that point be able to see where the various strengths and weaknesses were.

- La transparence d'un État possède toujours un enjeu de communication, politique comme administrative. Avez-vous une opinion à ce sujet? Comment l'enjeu de la transparence devrait être abordé par un gouvernement?

Well, this is perhaps a bit philosophical ☺ It is true that many factors and considerations affect the broader issue of transparency and that the access to information law is only one part of this. For example, the way government presents information to the public (sometimes called 'spin') is an essential part of that. For us, an important point here is that while it is of course part of governing to 'manage' information and transparency through communication, there needs to be a structure for this, a minimum level of openness for all information, and the access to information law represents this structure. The law will never be used by most citizens and even with the best procedures in the world it will remain a rather time-consuming and difficult way of getting information. But it will at the same time remain important as a way of ensuring that there is always a way of getting information that should be public.

Merci.