



Hon. Tony Clement
Treasury Board of Canada Secretariat
L'Esplanade Laurier, 9th Floor, East Tower
140 O'Connor Street
Ottawa, K1A 0R5

CC: Corinne Charette
Chief Information Officer
Treasury Board of Canada Secretariat

Dear Mr. Clement,

In February 2013, the Centre for Law and Democracy (CLD) was contacted by Dean Beeby, a Canadian Journalist, asking if we had seen a Memorandum to the President, presumably of the Treasury Board of Canada, although this is not specified, from Michelle D'Auray. The Memo was about the poor score received by the Canadian federal framework for the right to information (mainly contained in the Access to Information Act or ATIA) in the Centre for Law and Democracy's RTI-Rating.¹ In the latest Rating, the Canadian federal framework scores a mere 79 points out of a possible 150, placing it in 55th place from among the 93 countries globally that have right to information (RTI) or access to information laws. This Memorandum was neither provided to CLD nor made public by the Treasury Board.

The Memorandum makes two key points in defence of Canada's performance on RTI. The first is that the RTI Rating only measures the letter of the law and not the strength of its implementation and the second is that, notwithstanding problems in the legal framework, Canada's overall commitment to openness, and to open data in particular, is strong. The Memorandum also criticises the specific score allocated to Canada under two of the 36 indicators where the Canadian legal framework lost points (out of the total of 61 indicators in the Rating).

¹ Available at: <http://www.law-democracy.org/live/global-rti-rating/>.

The Centre for Law and Democracy is a non-profit human rights organisation working internationally to provide legal expertise on foundational rights for democracy.

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CLD welcomes the interest by the Treasury Board in our RTI Rating and its concern with the poor score obtained by Canada. It is true, as the Memorandum claims, that the Rating only addresses the strength of the legal framework. This has always been clear in the way that the Rating has been presented, and CLD has never made claims to the contrary. There is still no accepted global methodology for assessing implementation, which is an extremely complex matter.

It is also true that a strong score on the legal framework does not necessarily mean strong implementation, and some countries in the top ten, such as Liberia and Ethiopia, have very poor implementation records. But the relevant point for Canada is that strong implementation is not possible without a strong underlying legal regime, as experience around the world has amply demonstrated. This is supported by local assessments of implementation in Canada. For example, the *National Freedom of Information Audit*, an annual review of Canadian public authorities' performance in responding to access requests, regularly finds severe problems with implementation at the federal level. The 2012 Audit assigned the federal government a D grade on its speed in responding to requests and a C grade on the completeness of its disclosures.²

CLD welcomes Canada's commitment to transparency as demonstrated through its strong proactive disclosure policies and membership in the Open Government Partnership (OGP). However, this has no bearing on the serious structural deficiencies at the heart of Canada's right to information framework, which is what the RTI Rating exposes. Although proactive disclosure is important, it does not guarantee access to categories of sensitive information – such as information which could expose significant malfeasance or which is embarrassing for government – which are essential to broad public accountability.

In terms of the specific critiques contained in the Memorandum regarding the RTI Rating, they are very minor and, even if correct, which we do not consider them to be, would alter Canada's score by only a couple of points. We welcome the fact that the Memorandum does not dispute the substance of our indicators. Inasmuch as it contests only two of the scores, we take this as an indication that the Treasury Board implicitly accepts the RTI Rating's conclusion that the legal framework for RTI in Canada is seriously flawed, and is therefore in need of reform.

The first critique is that although there is no specific legislative statement to the effect that the ATIA should be interpreted broadly, judicial precedent in Canada has created a presumption along these lines. The Rating is an international tool, and we specifically decided not to give credit for general jurisprudential statements along these lines for purposes of this indicator, because they have a very indeterminate impact on the way public bodies actually apply RTI laws.

² Canadian Newspaper Association, *National Freedom of Information Audit 2012* (2012), pp. 20-21; 55 requests were made at different federal public bodies. Available at: <http://www.newspaperscanada.ca/public-affairs/FOI2012>.

The other critique regards Canada's score on scope of the law, with the Memorandum noting that in 2006 the scope of the law was expanded so that it now applies to over 250 organisations, including crown corporations and subsidiaries. This remains very limited compared to better practice RTI laws, which apply not only to all three branches of government but also to all bodies which can be said to form part of the executive branch. Despite the 2006 additions, the Canadian ATIA still does not cover the full range of bodies treated as part of the executive branch by better practice RTI laws. As a result, its score under the relevant indicator, Indicator 7, is justified. Canada gets full points on Indicator 10 relating to state-owned enterprises.

The Centre for Law and Democracy has consistently called for root and branch reform of the ATIA, along with a major shift in official attitudes towards openness. In line with our comments above, we hope that the Treasury Board does indeed recognise the shortcomings of the Canadian ATIA. If the Government of Canada were to put in place a process to reform the ATIA, CLD would be more than happy to participate in and support this. Only in this way could we return Canada to a position in the global rankings that is becoming of a democracy of its stature. It would be my pleasure to talk to you about this at your convenience.

Yours truly,



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