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AND DEMOCRACY

Canada

Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada

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Introduction

It is neither revolutionary nor even controversial to note that Canada's right to information (access to information) system is broken. There have been a host of studies and articles documenting the problems. The RTI Rating, a comparative analysis of national right to information legislation by the Centre for Law and Democracy (CLD) and Access Info Europe, ranks Canada's Access to Information Act (ATIA) 55th out of 93 countries with right to information laws globally, with a score of just 79 out of a possible total of 150 points (53%).¹ A Canadian rating carried out using the same methodology found that the national ATIA tied with Alberta and New Brunswick for last place among Canadian jurisdictions.²

The RTI Rating only measures the letter of the law, but several other studies and commentators have highlighted operational problems with the system. The *National Freedom of Information Audit*, an annual review of public authorities' performance in responding to access requests, regularly finds severe problems with implementation at the federal level. The most recent report assigned the federal government a D grade on its speed in responding to requests and a C grade on the completeness of its disclosures.³ Significant deficiencies regarding the right to information were also noted in at least two submissions to the 16th Session of the UN Human Rights Council's Universal Periodic Review, one by CLD, Lawyers' Rights Watch, Canadian Journalists for Free Expression, the British Columbia Freedom of Information and Privacy Association and PEN Canada,⁴ and the other by the Association for Progressive Communications, OpenMedia.ca, the Canadian Internet Policy and Public Interest Clinic and Web Networks.⁵

The federal government's problems with the right to information have also been widely documented in the media. In 2012 alone there were articles lamenting the government's poor performance on this issue in the *Toronto Star*,⁶ the *Globe and*

¹ The full results are available at www.rti-rating.org.

² Available at <http://www.law-democracy.org/live/global-rti-rating/canadian-rti-rating>.

³ 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>.

⁴ The submission is available at: <http://www.law-democracy.org/live/canada-un-universal-periodic-review-submission/>.

⁵ Available at: https://www.apc.org/en/system/files/UPR_Canada_Coalition_InternetRights.pdf. For more discussion of Canada's failings in this area, see Mike Larsen & Kevin Walby, *Brokering Access* (Vancouver: UBC Press, 2012); Robert Hazel & Benjamin Worthy, "Assessing the Performance of Freedom of Information" (2010) 27 *Government Information Quarterly* 352-59; and Stanley Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context* (2008), available at: <http://www3.telus.net/index100/report>.

⁶ Kathy English, "Freedom of expression is more than an international issue: Public Editor", *Toronto Star*, 7 December 2012. Available at:

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Mail,⁷ the *Halifax Chronicle Herald*,⁸ the *Montreal Gazette*,⁹ the *Vancouver Sun*¹⁰ and *Macleans*,¹¹ among many others.

Canada's well-documented shortcomings on a major human rights indicator should naturally lead Canadians to question how we got here. The answer is simple: we did nothing. When the ATIA was first passed in 1982, Canada was among the early countries to enact such legislation, and was considered to be something of a world leader in this area. But in the decades since, standards for the right to information have advanced significantly, while Canada's system has stagnated and even regressed.

A particularly important development in recent years has been the clear recognition of the right to access information held by public bodies as a human right. Under international law, recognition started with a 2006 decision by the Inter-American Court of Human Rights, *Claude Reyes and Others v. Chile*,¹² in which the Court explicitly held that the right to freedom of expression, as enshrined in Article 13 of the American Convention on Human Rights, included the right to information. In April 2009, the European Court of Human Rights followed suit,¹³ while the UN Human Rights Committee explicitly recognised the right to information in its 2011 General Comment on Article 19 of the ICCPR (which guarantees freedom of expression).¹⁴

There has also been limited constitutional recognition of the right to information by the Supreme Court of Canada, inasmuch as access to information is required for the purpose of engaging in an expressive activity.¹⁵ While this would not cover certain requests – for example for personal information or for business purposes – it does

<http://www.thestar.com/opinion/publiceditor/article/1299427--freedom-of-expression-is-more-than-an-international-issue-public-editor>.

⁷ Jim Bronskill, "Federal access to information law 'not up to par,' watchdog says", *Globe and Mail*, 28 September 2012. Available at: http://www.theglobeandmail.com/news/politics/federal-access-to-information-law-not-up-to-par-watchdog-says/article4574060/?cmpid=rss1&utm_source=dlvr.it&utm_medium=twitter.

⁸ "Canada falls in openness standings", *Chronicle Herald*, 23 June 2012. Available at: <http://thechronicleherald.ca/canada/110127-canada-falls-in-openness-standings>.

⁹ "Canada needs to improve access to information", *Montreal Gazette*, 6 July 2012. Available at: <http://www2.canada.com/montrealgazette/news/editorial/story.html?id=348647de-1ad6-4b97-b53f-6ff698186824>.

¹⁰ "McKnight: Canada's reality suffers from Tory spin", *Vancouver Sun*, 14 July 2012.

¹¹ Jim Bronskill, "Info czar kicks off review of federal access to information law", *Macleans*, 28 September 2012. Available at: <http://www2.macleans.ca/2012/09/28/info-czar-kicks-off-review-of-federal-access-to-information-law/>.

¹² *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151.

¹³ *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05.

¹⁴ General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.

¹⁵ See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

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cover many requests. The implications of this ruling for the right to information in Canada remain unclear as of yet, but they will certainly be very important.

The failure of successive Canadian federal governments to update the ATIA has not been due to a lack of understanding of the scope and nature of the problem. Calls for the law to be improved began as early as 1987, when the House of Commons Standing Committee on Justice and the Solicitor General tabled a report, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, with a series of recommendations for amending the ATIA.¹⁶ Successive Information Commissioners – including John Reid (1998-2006), Robert Marleau (2007-2009) and Suzanne Legault (2009-present) – have called for legislative action to update and strengthen the law. When Canada announced it was joining the Open Government Partnership (OGP), a collection of nations which make specific commitments to enhance their openness policies and practices, Canada's thirteen federal and provincial information commissioners together published an open letter urging the government to include a commitment in the Canadian OGP Action Plan to modernise the ATIA.¹⁷ There have been numerous other parliamentary studies and reports into the matter, all which have reached the same conclusion: that the ATIA is out-dated and badly in need of an overhaul. Unfortunately, all of these calls for reform have been ignored by successive federal administrations. Indeed, apart from a few minor changes, some of which actually served to further limit the disclosures required by the ATIA, the law remains very similar to what it was 30 years ago.

This Response, which identifies four areas where improvement is most needed, was prepared in response to a call for dialogue by the current Information Commissioner. CLD believes that the problems with the current legal regime for the right to information are profound, and that a serious and far reaching response is warranted. Our recommendations reflect that.

We commend the Information Commissioner for launching this worthy initiative, and we hope that the federal government will finally take responsibility for this important human rights issue and put in place a long process of genuine reform. Only then may the ATIA become the effective mechanism of government accountability that Canadians deserve.

¹⁶ Referenced in Parliamentary Information and Research Service, *The Access to Information Act and Proposals for Reform* (6 June 2012), p. 2. Available at: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2005-55-e.pdf>.

¹⁷ Office of the Information Commissioner of Canada, Letter on Open Government to the President of the Treasury Board (Ottawa: January 2012). Available at: http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_1.aspx.

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Institutional Attitudes Towards Disclosure

The main body of this Response focuses on shortcomings in the legal framework for access to information in Canada. However, by way of context, it is necessary to look beyond the formal rules and to point out that there is a need for a wholesale change in attitudes towards openness and disclosure in the country. In their joint letter to the federal government regarding the Open Government Partnership, Canada's information commissioners cited statistics which suggest that institutional compliance with the ATIA is getting worse, including the facts that only one-fifth of requests result in information actually being released and that, across the federal government, international affairs and defence are cited as the operative exceptions fully 22% of the time, up from 5% in 2001.

It is, therefore, important to recognise that in addition to specific legal reforms, there is a wider need for a wholesale shift in Canada's bureaucratic attitude away from what two former Information Commissioners – John Grace (1990-1998) and John Reid (1998-2006) – described as a “culture of secrecy”.¹⁸ We believe, however, that the problem goes well beyond official attitudes and practices towards openness, although these are perhaps easier to identify and decry. We believe that the problem has become entrenched at many levels in Canada: problematic legal rules, negative official attitudes towards disclosure, an adversarial approach on the part of many civil society groups and actors, and general public apathy on this issue.

These problems feed on each other. By excluding themselves from the ATIA's ambit (see below), Canada's legislators set a problematic precedent for shirking openness, one which it is almost natural for senior and mid-level bureaucrats to follow. Overly broad and unnecessary exceptions, and weak procedural guarantees, lend themselves to abuse. This, in turn, makes the requesting process far more frustrating and time-consuming than it should be, leading to an adversarial attitude on the part of requesters and fostering public apathy about the process. This makes it increasingly difficult both to change official practices and to generate the political will to improve the ATIA.

If we compare the approach in Canada to countries like Bulgaria, Mexico and India, the most obvious difference is the foundational attitude towards access to information as a human right in those countries, which is signally absent in Canada. There are important implications from treating a social value as a human right which have simply not been realised in Canada. Canadians – whether in government,

¹⁸ John Reid, “Introductory Remarks for the Workshop on Strategies for Changing Bureaucratic Cultures”, Manchester, England, June 2006. Available at: http://www.infocom.gc.ca/eng/media_room-speeches-2006-junex.aspx. Tim Chorney and Jay Innes, *On the Money Trail: Investigating How Government Decisions are Made* (Toronto: Breakout Educational Network/Dundurn Press, 2003), p. 247.

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business, civil society or as citizens – understand that freedom from discrimination is a fundamental human right, and that it requires significant social effort and resources to realise. Canadian governments at all levels devote enormous time, money and effort to promote equality. They understand that where a choice needs to be made between a possible threat to equality and costs to government, including political costs such as relations with other countries, for the most part equality must prevail.

The same attitude is conspicuous by its absence in relation to the right to information. Officials think nothing of manipulating the rules to delay or deny satisfaction of this right, there is a significant body of resistance based on the rather marginal costs of implementing our right to information laws, and across Canada, we even have to pay just to exercise the right (i.e. to make a request), unlike in the large majority of countries with right to information laws.

Perhaps the most significant problem in Canada is the approach towards exceptions. A human rights based approach accepts that the importance of realising human rights justifies sometimes significant disadvantages to government. We accept this in relation to international relations, where Canadians expect their government regularly to raise human rights concerns with other countries, even though this may affect trade or other relations. We even accept this where human rights come into conflict with each other. Thus, in conflicts between freedom of expression and privacy, we assess which interest is more important (through a sort of public interest balancing approach, which in practice accords significant weight to freedom of expression).

In stark contrast, in the area of access to information, the dominant approach in Canada is to deny requests if there is even a small risk that disclosure of the information may cause even minor harm to a protected interest. The requirement of harm to a protected interest is not interpreted rigorously, as it should be to override a fundamental human right. And the public interest override is applied only where there is a clearly dominant interest in the information in question, and not at all for many exceptions, including privacy.

More systemically, our regime of access fails to take into account the real impact of factors like delay and cost in undermining realisation of this right. Instead, our systems allow officials to engage in extensive consideration of whether or not some type of harm may result, even if the risk is remote and this significantly delays providing a response, or significantly increases the cost of a response (to the requester). Contrast this with the Canadian approach towards discrimination, which assiduously roots out systemic forms of bias and requires substantial accommodation of difference.

As noted, these problems are most evident in the way public authorities respond to requests for information. However, they are also manifested in the way oversight bodies (i.e. the information commissioners) deal with complaints and in the way civil society and the citizenry reacts. The latter treat problems with the right to information as, at best, a governance challenge but more often simply as part of the hurly-burly of politics, instead of as a much more profound problem of human rights abuse.

In their joint letter, Canada's Information Commissioners offered a number of specific recommendations to address problems with the right to information. In addition to calling for review of the legislation, they called for expanded support to access to information and privacy professionals in the form of training and resources, improved records management policies, the institution of a formal declassification process, and the use of technology and a unified data portal to facilitate requests for information.

We support all of these suggestions, but we believe that they could be successful only if accompanied by a significant change in attitude towards the right to information, in particular through its recognition as a human right. In relation to the subject matter of this Response, reform of the legal regime, this change in attitude would result in the political will, at all levels of Canadian society, for very major changes in the text of the ATIA.

1. Scope

One of the serious problems with the ATIA is its narrow applicability. This was among the earliest recognised weaknesses in the legislation. The call to remove section 69, which excludes Cabinet records, goes all the way back to the 1987 Standing Committee recommendations noted above.

Under international law, the right to information is a human right, protected as part of the wider right to freedom of expression. As a result, openness obligations extend to all information held by all authorities which engage the responsibility of the State. This includes all information held by the executive, legislative and judicial branches of government, crown corporations, constitutional, statutory and oversight bodies, and any other body which is owned, controlled or substantially funded by a public authority or which performs a statutory or public function.

Only a small proportion of these authorities are actually subject to the ATIA. The definition of 'government institution' in the ATIA covers government departments and ministries, bodies listed in Schedule 1 and Crown corporations and their wholly owned subsidiaries. As a result, in addition to the specific exclusion for Cabinet

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records, the law does not apply to key types of public authorities such as the House of Commons, the Senate and the judiciary.

Arguments that subjecting these types of authorities to disclosure obligations would harm the judicial, legislative or governing process simply do not hold water. In countries around the world – including less established democracies than Canada such as India, Serbia and South Africa – the law applies to all three branches of government, not only without any negative consequences, but with positive consequences along the lines of the benefits, for example in terms of good governance, that openness brings to the executive branch of government.

It may be noted that the ATIA has exceptions specifically targeted at protecting any functions of these authorities which may need to be kept confidential. For example, section 16(1)(c) excludes information whose disclosure would be prejudicial to the enforcement of any law and section 21 excludes information related to government deliberations, positions or plans.

The fact that the ATIA contains blanket exclusions that overlap with targeted exceptions is troubling in what it reveals about the general attitude of Canadian authorities towards disclosure. By constructing multiple lines of defence against information requests, the law treats openness as a threat to be neutralised rather than as a human right to be promoted.

Beyond the exclusion of these key categories of public authorities, Schedule 1 fails to include a large number of the authorities which, according to international law, should be covered by a right to information law. Experience in other countries demonstrates the shortcomings of a list approach, which almost always fails to keep pace with the almost constant creation of new bodies. A better approach is to provide for a generic definition of public bodies, potentially in combination with a non-exclusive list, which has the virtue of creating certainty.

Another clear weakness in the ATIA is that it applies only to citizens and residents. This not only runs counter to international and constitutional guarantees of rights, which apply to everyone, but is contrary to established international practice. The laws of only a few countries include this sort of limitation, which is not found in countries such as the United States and the United Kingdom, and which can only be described as xenophobic. Requests by foreigners are generally in the national public interest, whether they are from researchers, who contribute to our national understanding, or companies, which help create a more competitive business environment in the country.

Recommendations:

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- Section 69 should be removed.
- The ATIA should be extended to remove the exclusions currently applicable to the legislative and judicial branches of government.
- The ATIA should be amended to include a generic definition of public authorities that covers all bodies created by law, which perform a public function, or which are owned, controlled or substantially funded by a public authority.
- Everyone, not just citizens and residents, should have the right to request and receive information under the ATIA.

2. Exceptions and Exclusions

Another major structural weakness in Canada's ATIA is its regime of exceptions. While the right to information is not, under international law, absolute, it may be overridden only in limited and justifiable circumstances. Specifically, information should be withheld only if its disclosure would be materially harmful to a legitimate interest, and if the likely harm caused by the disclosure outweighs the public interest in the information's release. This effectively leads to a three-part test for exceptions: they should protect only legitimate interests, they should only extend to information the disclosure of which would pose a serious risk of harm to those interests, and they should be subject to a public interest override. The ATIA fails to pass muster in relation to all three parts of this test.

A key issue here is the relationship of the right to information law with secrecy laws. Better practice is for the right to information law to indicate all legitimate grounds to refuse access, although these may be further elaborated upon in another law, such as a privacy or data protection law, for the privacy exception. While there is nothing inherently wrong with preserving secrecy laws, in practice this almost always leads to breaches of the three-part test due to the fact that these laws almost never conform to those standards.

The approach taken in the ATIA is to preserve, in Schedule II, a list of 59 laws that contain secrecy provisions. While this is better than leaving all secrecy laws in place, this list is far too long. Furthermore, the laws included in this list contain many unnecessary and non-harm tested exceptions to disclosure, which breach the three-part test and so fall foul of international standards. To give just one example, section 107 of the Customs Act forbids the disclosure of any information obtained by or on behalf of either the Minister of Public Safety and Emergency Preparedness or the Minister of National Revenue involving customs or the collection of public debts. This excludes a category of information, rather than protects an interest, and both is unacceptably broad on its face and lacks any harm test.

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Returning to the three-part test, several exceptions in the ATIA are either overbroad or protect illegitimate interests. For example, section 20.4 specifically excludes information about National Arts Centre contracts or donations, while section 14 protects federal-provincial relations. There is no reason why either of these warrants special protection. It is legitimate to protect Canada's financial interests, for example by preventing the release of information that could damage Canada's negotiating position with the provinces or with particular artists. However, section 18(b) already excludes information that "could reasonably be expected to prejudice the competitive position of a government institution or to interfere with contractual or other negotiations of a government institution." Given that any risk of harm to a legitimate interest is already protected, there is no justification for the section 14 and 20.4 exceptions. This argument also applies to sections 20.1 and 20.2, which exclude advice or information provided to the Public Sector Pension Investment Board or the Canada Pension Plan Investment Board which relates to investments.

Sections 16.1, 16.2, 16.3 and 16.4, which exclude information about investigations by the Auditor General, the Commissioner for Lobbying, the Commissioner of Official Languages for Canada, the Information Commissioner, the Privacy Commissioner, the Chief Electoral Officer and the Public Sector Integrity Commissioner, are unnecessary for the same reason. Indeed, there is a significant public interest in obtaining much of the information that falls within the scope of these institutional exceptions, and there is no reason why the law enforcement exception in section 16(1)(c) would be insufficient to protect against disclosures that would harm these agencies' investigative and enforcement functions. Once again, specific information the disclosure of which would be harmful is already covered elsewhere in the Act.

Several of the exceptions in the ATIA also lack proper harm tests, which begs the question as to why it could possibly be considered necessary to withhold information the disclosure of which would not cause any harm. Exceptions which lack a harm test include those in favour of government advice (section 21), law enforcement information (section 16(1)(a)), information received in confidence from other States or governments (section 13(1)), information related to law enforcement investigative techniques (section 16(1)(b)), information obtained or prepared by the Royal Canadian Mounted Police while performing their duty (section 16(3)), financial or commercial information which is treated as confidential by a third party (section 20(1)(b)), draft reports or internal working papers related to government audits (section 22.1) and information treated as confidential by crown corporations (18.1(1)). These exceptions protect legitimate interests, but they go beyond what is necessary by failing to include a harm test. In the case of the latter example, for example, crown corporations need to be able to refuse requests for information the disclosure of which would harm their commercial interests, but

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this does not necessarily cover all information which they happen to have treated as confidential. By failing to specify a harm test, each of these exceptions covers important amounts of information the disclosure of which would not be harmful to any legitimate interest.

The third key ingredient in a good regime of exceptions, a blanket public interest override, is also signally absent from the ATIA. The only explicit public interest test included in the ATIA applies to the section 20 exception for third-party trade secrets. The scope of the public interest test was effectively extended by the Supreme Court's decision in *Criminal Lawyers' Association v. Ontario (Public Safety and Security)*, which held that the public interest must be taken into account when deciding whether or not to apply discretionary exceptions.¹⁹ As a result, every discretionary exception within the ATIA is now deemed to contain at least some form of public interest test, albeit a weak one.

However, the ATIA contains many exceptions which are not mandatory, and which therefore lack any form of public interest test. These include the exceptions for information obtained in confidence (section 13), information obtained or prepared by the Royal Canadian Mounted Police (section 16(3)), information obtained or created by the Auditor General, the Commissioner of Official Languages for Canada, the Information Commissioner, the Privacy Commissioner, the Chief Electoral Officer or the Public Sector Integrity Commissioner (sections 16.1-16.4), information created for the purpose of making a disclosure under the Public Servants Disclosure Protection Act or in the course of an investigation into a disclosure under that Act (section 16.5), personal information (section 19(1)), information relating to investments by the Public Sector Pension Investment Board or the Canada Pension Plan Investment Board (section 20.1 and 20.2), and information about National Arts Centre contracts or donations (section 20.4).

Recommendations:

- The ATIA should override all secrecy provisions in other laws, to the extent of any inconsistency, and Schedule II, preserving secrecy laws, should either be deleted or limited to provisions which meet the three-part test.
- Sections 14, 16.1, 16.2, 16.3, 16.4, 20.1, 20.2 and 20.4 should be deleted.
- Sections 13(1), 16(1)(a) and (b), 16(3), 18.1(1), 20(1)(b), 21 and 22.1 should be amended to exclude only information the disclosure of which would be harmful to the enumerated interest.
- A broad public interest test should be applied to all exceptions, whereby information should be able to be withheld only if the potential for harm to the protected interest outweighs the public interest in disclosure.

¹⁹ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, note 15, para. 48.

3. Procedures

Among the most significant and recurring problems reported by users of the ATIA are long delays in responding to access requests. In accordance with section 7 of the ATIA, the legislative intent is that public authorities should generally respond to access requests within 30 days. However, section 9 allows public authorities to extend this by “a reasonable period of time” by giving notice to the requester and, if their extension runs longer than 30 additional days, by giving notice to the Information Commissioner as well. Formally, these extensions may only be invoked in exceptional cases where “the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution” or where “consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit”.

The 2012 *National Freedom of Information Audit* found that response times exceeded 30 days in fully 50% of all cases, and 16% of requests were either completely ignored or were not responded to at all within the timeframe of the study. This resulted in the award of a D grade on timeliness. Other studies have shown that public authorities regularly exceed their own, discretionary and often already unduly long timeframes for responding to requests.²⁰

There is a saying that justice delayed is justice denied. This is doubly true when it comes to access to information. Long delays in access can often render requests moot, for example if the information is sought by a journalist working under a deadline. Studies have suggested that Canadian authorities not infrequently use their power to delay in responding to requests with the specific purpose of controlling information flows.²¹

Another problem with the ATIA is that it does not formally even require authorities to respond to requests as soon as possible. This should be the core goal for public authorities in dealing with requests, and the legislation should certainly set it as a requirement.

²⁰ A study by the Office of the Information Commissioner, for example, found that more than 25% of all requests were not responded to even within the extended deadlines public authorities gave to requesters. See Office of the Information Commissioner, *Out of Time: 2008–2009 Report Cards and Systemic Issues Affecting Access to Information in Canada* (2010), p. 3.

²¹ See, for example, Alasdair Roberts, ‘Administrative Discretion and the Access to Information Act: An internal law on open government?’ (2002) 45 *Canadian Public Administration* 175.

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One solution which has been proposed to address delays is to require the Information Commissioner's consent for any extensions beyond 60 days.²² This, however, does nothing to address the systemic problem of requests routinely being delayed beyond the original 30 days, which suggests a lack of sufficient priority being given to dealing with requests expeditiously. Furthermore, the presumed maximum delay of up to 90 days that this solution envisages is simply unnecessary. Once again, an international perspective is instructive. Several developing countries place far stricter timeframes on responding to requests. For example, India imposes a firm limit of 30 days with no possibility of extension, while Indonesia requires a response within 10 working days with the possibility of one extension of seven working days. Many other countries have timelines of 30 days with a maximum extension of another 30 days. Finally, this could place an undue and unnecessary burden on the Information Commissioner.

Instead of ideas which continue to allow public authorities to take unduly long to respond to requests, solutions should be more along the lines of putting in place regimes to enforce timeframes. In Mexico, for example, breach of the time limits places an obligation on the public body to disclose the information, unless the oversight body gives permission for the information to be withheld. Furthermore, where the time limits have been breached, the information must be provided for free. The same is true in Uruguay. In India, the information commissions can impose sanctions on officials who have unduly delayed in responding to requests.

Another area where the ATIA lags behind global standards is in the cost of access. This problem begins with the requirement that an application fee must be paid simply to lodge a request for information. Although the fee is only five dollars, it still exerts a chilling effect on the making of requests and, in any case, Canadians should not have to pay simply to exercise a human right. Once the idea of fees is in place, they may be increased. In 2011, the federal government did actually propose a hike in access fees. Remarkably, this was claimed to be "in order to control demand."²³ In other words, at that time, the government was specifically seeking to use fees as a means of discouraging Canadians from exercising their right to information.

In addition to the initial requesting fee, requesters may be required to pay access fees based on the resources spent in responding to the access request. Once again, this approach is wrongheaded. Responding to access requests is a core government responsibility. Rather than attempting to recoup the costs from individual

²² Parliament, Standing Committee on Access to Information, Privacy and Ethics, "The Access to Information Act: The First Steps Towards Renewal" 40th Parl. 2nd sess. (June 2009). Available at: http://www.parl.gc.ca/content/hoc/Committee/402/ETHI/Reports/RP3973469/402_ETHI_Rpt10/402_ETHI_Rpt10-e.pdf.

²³ Dean Beeby, "Feds eye access-to-information fee hike to 'control-demand'", *The Globe and Mail*, 13 March 2011. Available at: <http://www.theglobeandmail.com/news/politics/feds-eye-access-to-information-fee-hike-to-control-demand/article571747/>.

requesters, these resources should be included within the agency's overall budget. In many cases, the fees which may be charged under the Access to Information Regulations²⁴ go far beyond the costs that agencies actually incur. For example, public authorities are allowed to charge \$16.50 per minute for computer processing time. The regulations also set photocopying costs at \$0.20 per page, when the market rate is a fraction of that. While these costs might seem comparatively small, they can add up. In 2009, a request to the Canadian Broadcasting Corporation for information about contracts valued at less than \$10,000 was returned with a fee estimate of \$20,825.²⁵ It goes without saying that fees of that magnitude disenfranchise Canadians from exercising their right to information.

The reluctance of public authorities to devote significant resources to enabling the right to information is also reflected by the fact that there are almost no systems in place for filing access requests electronically, even though this makes it far easier to lodge requests. The Canadian OGP Action Plan²⁶ does include a commitment to establish electronic requesting mechanisms on a pilot basis, but the sluggishness with which this enabling technology has been adopted is glaring. Electronic requests are already standard procedure in many developing countries, including India and Mexico.

Recommendations:

- Public authorities should be required to respond to requests as soon as possible.
- The 30 day time limit should be allowed to be extended by only a fixed period of time, which should not be longer than another 30 days, before public authorities are deemed to be in breach of the rules for processing requests.
- Consideration should be given to putting in place systems or penalties which put pressure on public authorities to respond to requests in a timely fashion.
- Requesting fees should be eliminated.
- Access fees should be limited to the costs actually incurred by public authorities in copying and delivering information.
- All public authorities should establish electronic requesting mechanisms.

4. Appeals Procedures

²⁴ Available at: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-83-507/FullText.html>.

²⁵ Canadian Newspaper Association, *National Freedom of Information Audit 2009-2010* (2010), p. 4. Available at:

<http://www.newspaperscanada.ca/system/files/CNA%20FOI%20Audit%202010%20efinal.pdf>.

²⁶ Available at: <http://www.opengovpartnership.org/countries/canada>.

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One of the more controversial issues in relation to reform of Canada's right to information legislation is whether or not to grant order-making power to the Information Commissioner. Canada's jurisdictions have adopted different approaches on this. Oversight bodies in Alberta, British Columbia, Manitoba, Ontario, Prince Edward Island and Quebec have the power to issue legally binding orders, while oversight bodies in the other provinces and territories can only make recommendations.

There are opposing perspectives on this issue. On the one hand, it has been argued that order-making power serves to enhance the efficacy of the informal dispute resolution process, as well as overall compliance. According to David Loukidelis, British Columbia's Information and Privacy Commissioner:

Speaking only to the situation and experience in British Columbia, we have found, over the 16 years of our office's experience, that order-making power has served, in fact, to encourage dispute resolution. Using mediation, we consistently resolve some 85% to 90% of the access appeals that come to our office.²⁷

The opposing argument is that making the Information Commissioner's orders legally binding will turn the administrative appeal into a more cumbersome, procedurally rigorous and time consuming process. In part citing these two contrasting positions, the House of Commons Standing Committee on Access to Information, Privacy and Ethics in 2009 recommended that the Information Commission be granted order-making power over procedural matters (such as timeline extensions and access fees) but not over substantive refusals (i.e. the application of exceptions).

International standards call for oversight bodies to have order-making power in relation to all kinds of appeals, both procedural and substantive. Canada's problems with institutional compliance and bureaucratic resistance to transparency are hardly unique, and international experience reinforces the view that an empowered oversight body is essential to an effective right to information regime. We believe that order-making powers will significantly bolster the far more rapid and less confrontational mediation options, will generally enhance the status of the Information Commissioner, will enhance compliance by public authorities with the decisions of the Commissioner and will actually enable her to put in place much more rapid complaints processing systems.

We believe that the argument about increasing the pressure on the administrative process and thereby extending the timelines is based on a misconception of how these processes should work. Evidence suggests that the appeals process is already

²⁷ Report of the Standing Committee on Access to Information, Privacy and Ethics, *The Access to Information Act: First Steps Towards Renewal* (June 2009), p. 6. Available at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3999593&Language=E>.

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far too complicated and lengthy. According to the Information Commissioner's Annual Report for 2011-2012,²⁸ the average turnaround time for complaints was 432 days, up from 413 days in 2010-2011. Going into the 2011-2012 period, the Information Commissioner had 115 long-standing active cases originating from before 1 April 2008, many of which have been closed (which would have increased the average 2011-2012 timelines), although 51 remain active. Significantly, of the 1,495 complaints closed during the 2011-2012 cycle, 642 (43%) were discontinued at the request of the complainant, including 56% of appeals against refusals to provide access (i.e. substantive appeals). It is reasonable to assume that there is at least some connection between the length of these appeals and the high proportion of requesters that are giving up on the process.

We note that one of the main reasons for establishing an administrative review procedure (as opposed to a judicial one) is that it is supposed to be quick and simple. Where an average review takes over a year (432 days) to resolve, clearly these benefits are lost. Another systemic advantage of administrative review procedures is the involvement of expert, specialised review officers. Because they deal full time with access to information appeals, these officers should have the expertise to determine, in relatively short order in most cases, whether or not information is being legitimately withheld.

The Information Commissioner's *Overview of the ATIA Investigative Procedure*²⁹ makes it clear that the process is almost judicial in its procedural rigour. For example, it includes opportunities for representation by the complainant, the public authority's access and privacy office, other authority officials and the authority as a whole. This is unnecessarily complex. It is difficult to understand, for example, why the authority should not be required to present one consolidated case before the Commissioner, instead of allowing for representations from multiple corners of the authority resisting disclosure.

In other countries, a serious review process is conducted in much less time. In Indonesia, for example, every complaint proceeds by way of mediation followed, where necessary, by an in-person hearing, and yet the Central Information Commission there has largely managed to meet the 100-day deadline for resolving complaints. Admittedly, the number of complaints in Indonesia remains modest, although so do the resources of the Commission. In India, in contrast, the volume of complaints is huge, and yet turnaround times for resolving complaints at the Central Information Commission (CIC) remain relatively short. As of October 2010, for example, the CIC had no cases outstanding that had been on their docket for more than three months.³⁰

²⁸ Available at: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx.

²⁹ Available at: <http://www.oic-ci.gc.ca/eng/investigations-enquetes.aspx>.

³⁰ See: <http://cic.gov.in/AnnualReports/AR-2010-11/AR2010-11E.pdf>.

We recommend a complete paradigm shift, even in the context of binding order powers, where disclosure complaints are dealt with speedily, if not summarily, based on *prima facie* evidence and the experience of the investigator, and with a strong presumption towards disclosure in line with the status of the right to information as a human right. Stripping out the many layers of procedure will necessarily lead to some instances where harm is caused to a protected interest, although this will be rare.

We believe that this is an appropriate balance taking into account the importance of the human right to information and the need for rapid resolution of disputes. Minor and occasional harm to the secrecy of an institution's deliberative process, to the ability of the National Arts Centre to negotiate contracts, or even to relations with other countries are vastly preferable to a breakdown of Canada's system for giving effect to the right to information. Furthermore, in those cases where the government feels that a particular disclosure would be seriously problematical, they retain the option of lodging a judicial appeal against the Information Commissioner's decision (and this would remain the case even if the Commissioner had binding order powers).

Recommendations:

- The Information Commissioner should be granted order-making power.
- The appeals process should be significantly simplified and shortened, and operate with a strong presumption in favour of disclosure.

Conclusion

There is broad agreement among most stakeholders that the ATIA is in dire need of a major overhaul. The problems have repeatedly been discussed, and solutions proposed, in some cases going back decades. There is one notable stakeholder which has not participated in this agreement, namely successive Canadian governments, which essentially hold the real power to move forward with a reform agenda.

The time has finally come to fix this festering problem. Canada currently finds itself languishing at 55th in the world in a major human rights indicator, a ranking that will continue to decline as more and more countries pass laws that are superior to Canada's, or update their legislation to overtake us. It is time for Canadians and their government to recognise that the right to access information held by public bodies is a human right. An initial step towards recognition as a human right has been made

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by the Supreme Court of Canada;³¹ this now needs to be matched by action, initially in terms of amending the ATIA.

The Centre for Law and Democracy has repeatedly called for root and branch reform of the ATIA, along with a major shift in attitude towards openness. We believe that the resistance successive Canadian administrations have demonstrated towards even quite significant changes in the law is not well founded, and it is certainly not supported by either international standards or practice. Mere tinkering with the ATIA and its systems, such as has been tried in the past, will no longer do. Since the ATIA was first passed, the world has moved on. Canada cannot afford to be left behind. Canadians expect our country to be a world leader in human rights and democratic development. Once that was true in the area of the right to information. Canada's government needs to act decisively to restore our global standing.

³¹ See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, note 15.

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