



# CENTRE FOR LAW AND DEMOCRACY

## **Submission to Ideas Discussion for Canada's Action Plan on Open Government 2016–18**

**May 2016**

**Submitted By: Centre for Law and Democracy**

This is the Centre for Law and Democracy's (CLD) submission to the Government of Canada's call for ideas to help shape Canada's Action Plan on Open Government: 2016–18. CLD is a Halifax-based human rights NGO that works internationally to promote foundational rights for democracy, with a particular focus on freedom of expression and the right to information. We have participated in other Government of Canada Open Government Partnership (OGP) consultations. We have been critical of Canada's first two Action Plans for failing to address areas where reform is badly needed and for not paying sufficient attention to stakeholder inputs. However, we are hopeful that this Action Plan will incorporate strong and ambitious commitments, and mark an important step forward for transparency in Canada. We have the following suggestions as priority areas for action in Canada.

### **1. Ensure that the consultation process is robust and inclusive, not just for the development of the third Action Plan but also as regards implementation and monitoring**

The development of the first Action Plan was done in a manner that signally failed to meet OGP standards, and this was reflected in both the official and independent reporting. For the second Action Plan, there was more robust, although still in some respects inadequate, consultation.<sup>1</sup> However, the process of implementation proceeded with at best limited and rather random efforts at consultation, depending on the particular commitment.

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<sup>1</sup> See Centre for Law and Democracy, Submission to Canada's Open Government Consultations, September 2014. Available at: [http://www.law-democracy.org/live/wp-content/uploads/2014/09/Canada.OGP\\_Note\\_.pdf](http://www.law-democracy.org/live/wp-content/uploads/2014/09/Canada.OGP_Note_.pdf).

One of the challenges has been the very limited engagement with the permanent mechanism established by the government, the Advisory Panel on Open Government (see <http://open.canada.ca/en/advisory-panel-open-government>). While CLD appreciates that its Executive Director was appointed as a member of the Panel, the fact is that the Panel played an extremely limited role, which was almost non-existent when it came to implementation. This may be contrasted with the OGP's advice, which states:

7. Consultation during implementation: Countries are to identify a forum to enable regular multistakeholder consultation on OGP implementation—this can be an existing entity or a new one.<sup>2</sup>

To overcome this, the government should either substantially enhance its engagement with the current mechanism or, preferably, create a new, more democratic, permanent mechanism to consult with on an ongoing basis. We note that a number of leading civil society groups which are engaged around the OGP have formed the Canadian Open Government Civil Society Network, and dialogue with this group, along with other stakeholders, should be central to the government's plans in this area.

## **2. Review Canada's Access to Information Act and enact reforms by the end of 2016**

There can be no open government without a strong right to information system. For all the benefits of open data, governments will always resist proactive publication of information which exposes fraud or mismanagement, or which is sensitive or embarrassing. Canada's Access to Information Act (ATIA) has not been substantially improved since it was passed over thirty years ago, despite the fact that standards of openness have evolved dramatically since then. For years, CLD has called for root and branch reform of the ATIA. We were accompanied, in these calls, by virtually every major civil society group in the country whose mandate touches on access to information, as well as many official bodies working in this area. For example, during the consultation for Canada's first Action Plan, all of Canada's information oversight bodies, including the federal Information Commissioner, submitted a joint letter asking the government to reform the ATIA as part of its OGP commitments.

We are pleased to see that, at long last, improving the ATIA appears to be on the government's agenda. Canada's Prime Minister, Justin Trudeau, pledged significant

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<sup>2</sup> See Guidance for National OGP Dialogue. Available at: [http://www.opengovpartnership.org/sites/default/files/working\\_groups/Guidance%20for%20National%20OGP%20Dialogue.pdf](http://www.opengovpartnership.org/sites/default/files/working_groups/Guidance%20for%20National%20OGP%20Dialogue.pdf).

improvements to the Act while campaigning in the run up to the last election. On 5 May 2016, the government adopted the Interim Directive on the Administration of the *Access to Information Act*, which, among other things, directs public authorities to waive all fees beyond the initial \$5 application fee and to prioritise more user-friendly forms of access. At the same time, the government indicated that a full review of the Act is "scheduled for no later than 2018".

We very much welcome the commitment to revise the ATIA and the interim measures, which are positive. At the same time, we see no need or justification for delaying a full review of the Act until 2018, which may well mean that actual amendments are not tabled before Parliament until after the next election. It is our position that reform of the Act is needed urgently to restore core democratic systems in Canada. It has been put off by consecutive governments for over ten years now, and further delay signals clearly that it is not a priority. We call on the federal government to prioritise review of the ATIA, with the goal of enacting meaningful reforms within nine months of the start of implementing the new Action Plan.

**3. Create a centralised registry of the beneficial owners of all companies operated, registered and traded in Canada**

Since the release of the Panama Papers in April 2016, an increasing amount of global attention has been paid to the sophisticated international arrangements that the world's wealthy and corrupt undertake to hide their resources. The international nature of these crimes requires international cooperation to combat them. On 12 May 2016, several countries, including Britain, France, Australia, New Zealand, Ireland and Norway, agreed to establish a public registry which would list the beneficial owner of any foreign company that owned, or intended to buy, property in the country. The United Kingdom, as part of their 2013 OGP Action Plan, also pledged to create a complete list of beneficial owners of companies registered in Britain. The United States has made a similar commitment. While Canada has announced plans to join the International Anti-Corruption Coordination Centre, it should solidify its commitment to combating global corruption by creating a centralised registry of the beneficial owners of all companies operated, registered and traded in Canada.

**4. Repeal crown copyright. All materials produced by an officer or employee of the federal government as part of their official duties should be placed in the public domain**

An important part of open government is ensuring that information taken from official sources may be freely reused, including through processing the information

into new forms and potentially publishing it. Currently, works produced by the Government of Canada are protected by crown copyright. Copyright serves a legitimate function, to incentivise the creation of new content and to ensure fair compensation to a work's authors. However, neither of these purposes applies to government information. This is recognised in the United States, where, with a few exceptions, work produced by an officer or employee of the government as part of that person's official duties is automatically considered to be in the public domain, meaning it can be freely reproduced without restriction. By contrast, in Canada, while material under crown copyright can be freely reproduced for non-commercial purposes, permission is required if the reproduction is for commercial purposes, or if the work is to be revised, adapted or translated. This latter is particularly problematic since reprocessing and manipulating information is an essential feature of the open data movement. More broadly, crown copyright serves no essential purpose, and should be repealed to facilitate broad reuse of information produced at the taxpayer's expense.

#### **5. Publish more information about the decision-making process for awarding government grants, contracts and tenders**

Although open contracting has been a central plank in previous Action Plans, we suggest that an additional step forward would be to publish information about the decision-making process in awarding competitive tenders or grants. While contracts are sometimes just awarded to the lowest bidder, in other cases, the reasoning can be far more complex. There is tremendous public interest in understanding the rationale that underlies the allocation of taxpayers' resources. Decision making criteria are often published when a request for proposals first goes out, but it would also be useful to see how these criteria were actually applied to the bids received. Presently, unsuccessful bidders can request a debriefing from the federal government. However, the relevance of information about the decision-making process extends far beyond those who submitted bids, since it feeds into broader questions of public oversight and accountability. We recommend that, for every competitive award above \$10,000, the government should publish the reasons underlying their choice of recipient, including category-specific scores, where such a methodology was used in the selection process.

#### **6. Commit to publishing all contracts over \$5,000**

Since 2004, federal government departments have been required to release information on contracts over \$10,000. However, this information remains less than complete. Recognising this, in its 2014-16 Action Plan, the government made two related commitments, namely to:

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- Release data on all contracts over \$10,000 via a centralized, machine-readable database available to the public.
- Increase the level of detail disclosed on government contracts over \$10,000.<sup>3</sup>

According to the Independent Reporting Mechanism (IRM) Progress Report 2014-2015: Canada, some progress has been made on the first commitment:

A new "Search Government Contracts" feature was built into and launched with the new open.canada.ca portal in November 2014. The Service allows users to search the procurement information of 20 federal institutions.<sup>4</sup>

We note that while this is useful, it needs to be expanded to cover all federal institutions which are far greater in number than just 20. Furthermore, regarding the second commitment, the Progress Report states:

There is still no scope or schedule for releasing more detailed information on government contracts over \$10,000.

In our view, the limit should be reduced to \$5,000 and there should be a simple presumption that the whole primary contract would be provided online, linked through to clearly and simply from the central portal. One of the conditions of doing business with government is accepting higher levels of openness than apply to other commercial relationships. In most cases, primary contracts do not contain sensitive commercial information, although they may contain private information. To address this, the policy could provide some scope for redactions, at the request of the private third party contractor, such as where the contract included trade or business secrets or private information.

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<sup>3</sup> Canada's Action Plan on Open Government: 2014-16, p. 18. Available at: <http://www.opengovpartnership.org/country/canada>.

<sup>4</sup> Version for public comment, p. 51. Available at: <http://www.opengovpartnership.org/country/canada/irm>.