



Submission to Ideas Discussion for Canada's Action Plan on Open Government 2018–20

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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 fourth Action Plan on Open Government: 2018–20. CLD is a Halifax-based human rights NGO that works internationally to promote foundational rights for democracy, including freedom of expression, the right to information, the freedoms of association and assembly, and the right to participate. CLD has been actively engaged in the OGP since the outset, both in Canada and internationally. This has included participating in and even facilitating consultations,¹ contributing to the progress review of the implementation of the first Action Plan² and contributing to the ideas discussion for the second and third Action Plans.³

¹ CLD helped the Canadian government organise a consultation in Halifax on 16 March 2018. Details are available at: <https://www.eventbrite.com/e/canadas-2018-2020-open-government-plan-provide-your-input-tickets-43765002300#>.

² CLD, Open Government Partnership (OGP): Progress Review of First Year Implementation of the Action Plan, September 2013. Available at: <http://www.law-democracy.org/live/wp-content/uploads/2013/09/Canada.Y1-assessment.pdf>. There was very limited opportunity to provide written inputs into the development of the first Canadian Action Plan.

³ CLD, 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; CLD, Submission to Ideas Discussion for Canada's Action Plan on Open Government 2016–18, May 2016. Available at: <http://www.law-democracy.org/live/wp-content/uploads/2016/05/Canada.OGP-AP3-Ideas.May16.pdf>.

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

In CLD's previous submissions, we focused on a range of issues, including the consultative process, the issue of a lack of suitable ambition in the plans and providing specific suggestions for what the next plan should address. In this submission, we focus solely on the urgent need for real and substantial review of Canada's sorely outdated Access to Information Act. At the same time, we note priorities we have raised previously – such as ensuring that the consultation process is robust and inclusive, creating a centralised registry of beneficial ownership for all companies, and publishing more information about the decision-making process for awarding government grants, contract and tenders – remain important for us.

Our Specific Suggestion

CLD recommends that the government include the following as a key commitment in the fourth Action Plan:

The Government of Canada will conduct a broad review of Canada's Access to Information Act and place a bill before Parliament to bring the Act into line with international standards and better practice within the first year of this Action Plan (i.e. by mid-2019)

Underneath that heading, we call on the government to make the following reform commitments:

- to expand the application of the Act to cover all public bodies, including full coverage of the Cabinet, Ministers' and the Prime Minister's offices, courts and Parliament, as well as private bodies conducting public functions with public funds;
- to create a duty to document important decision-making processes;
- to create binding timelines for responding to requests in order to fix one of the most complained about problems with the Act which are the long delays in responding to requests that the Act allows;
- to narrow the Act's very broad regime of exceptions, including by subjecting all exceptions to a harm test and a mandatory public interest override; and
- to put in place an effective system for enforcing the orders of the Information Commissioner (which are due to become binding through Bill C-58).

We call on the government to avoid including flexible language in this set of commitments. A most unfortunate example of this is the following commitment in Canada's *Third Biennial Action Plan to the Open Government Partnership (2016-18)*, under its more general commitment to reform the Access to Information Act:

Ensuring that the *Access to Information Act* applies appropriately to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts;⁴

⁴ Available at: <https://open.canada.ca/en/content/third-biennial-plan-open-government-partnership>.

The government chose to interpret “appropriately” here as only creating an obligation to publish on a proactive basis certain types of information, most of which were already being published. Given that the overwhelmingly dominant thrust of the Act is to require public bodies to respond to requests for information, it is hard to see how this could be considered an “appropriate” application to these other bodies, but the language in this commitment is flexible enough to accommodate that possibility. As the mid-term Independent Reporting Mechanism (IRM) report for Canada's plan noted, “uncertainty regarding the nature and extent of reforms which will ultimately be enacted (if any) substantially reduces the potential for impact”.⁵

The Need

Open data is a very important element of transparency, but alone it is not enough. Open data is a form of proactive disclosure and better practice here is to reach out to citizens to try to align what is provided proactively to what they are interested in receiving. Despite this, even in best practice systems, the scope of open data which is published remains significantly within the control of government. It is quite different with access to information, where citizens pull down the specific information they want. As a result, good access to information systems are able to combat the tendency of governments to resist publishing information that exposes wrongdoing or corruption, or which may be embarrassing, something proactive disclosure is almost entirely unable to do. As such, the true goals of open government cannot be achieved with a weak or dysfunctional access to information system.

There can be no doubt that Canada's access to information system is weak and that at least an important part of the problem lies with the Access to Information Act. The Act was passed in 1982 and has not been substantially updated or improved since (see below). The RTI Rating, prepared by CLD and Access Info Europe, gives the Act just 90 points out of a possible 150, well below top-scoring Mexico at 136 points. This places Canada in 49th position in the world, far below where a leading democracy should be.⁶ CLD, along with other access to information activists and, indeed, official actors such as the Information Commissioner of Canada and the Standing Committee on Access to Information, Privacy and Ethics,⁷ have long been calling for major reform of the Act. Even the government of Canada accepts that reform is needed. In the *Third Biennial Action Plan to the Open Government Partnership (2016-18)* it committed to a quick

⁵ Michael Karanicolas, *Independent Reporting Mechanism (IRM): Canada Progress Report 2016-2017*, March 2018, p. 32. Available at: <http://ogp.civicomment.org/canada-midterm-report-2016-2018-public-comment>.

⁶ See: <http://www.rti-rating.org/country-data/>. Canada's ranking of 49th is as of end 2017.

⁷ See, for example, Office of the Information Commissioner, *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, March 2015, available at: <http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report.aspx>; and Parliament of Canada, *Review of the Access to Information Act: Report of the Standing Committee on Access to Information, Privacy and Ethics*, June 2016, available at: <http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-2>.

round of initial reforms and then: “Once this first round of improvements has been implemented, undertake a full review of the *Access to Information Act* by no later than 2018.”⁸

Current Situation

In the 2015 election campaign, the Liberal Party, led by Justin Trudeau, promised to reform the Access to Information Act, something CLD welcomed.⁹ When the Liberals won a majority in the elections, this was duly followed up by including instructions along these lines in the November 2015 mandate letters provided to various ministers.¹⁰ The first concrete step towards reform came with the May 2016 Interim Directive on the Administration of the *Access to Information Act* which, among other things, waived all fees for information requests beyond the initial \$5 lodging fee and required public bodies to release information in machine-readable and reusable formats wherever possible.¹¹

As noted above, the *Third Biennial Action Plan to the Open Government Partnership (2016-18)* promised a round of quick amendments to the Act, followed by, “a full review of the Act by no later than 2018”.¹² In our submission on the draft Plan in May 2016, we stated that we saw no need or justification for delaying a full review of the Act until 2018 given the urgency of the need for reform and our worry that this would mean that actual amendments might not be tabled before Parliament until after the next election.¹³ These concerns appear to have been justified. In March 2017, the government announced that there would be delays in the first phase. This prompted CLD to mobilise over 60 Canadian organisations and individuals to sign a letter to the Prime Minister expressing their concerns and urging the government to continue to move forward with the promised reforms.¹⁴ As we prepare this submission, the first round of reforms have just gone through the first reading in the Senate,¹⁵ rendering it almost impossible that a second round of reforms would be completed by the end of 2018 as promised.

These concerns are significantly exacerbated by the at best extremely modest nature of the first round of reforms, in the form of Bill C-58 to amend the Access to Information Act, introduced in the House of Commons on 19 June 2017.¹⁶ Bill C-58 signally failed

⁸ Note 4.

⁹ CLD, Liberals and NDP Pledge Access to Information Reform, 16 October 2015. Available at: <https://www.law-democracy.org/live/liberals-and-ndp-pledge-access-to-information-reform/>.

¹⁰ They were made public on 13 November 2015 and are available at: <https://pm.gc.ca/eng/mandate-letters>.

¹¹ Available at: www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18310.

¹² Note 4.

¹³ Note 3, p. 3.

¹⁴ Available at: <https://www.law-democracy.org/live/wp-content/uploads/2017/04/17.04.04.ATIA-delay.let1.pdf>.

¹⁵ See <https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=9057528&Language=E>.

¹⁶ Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts, 19 June 2017. Available at: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-58/first-reading>.

both to do what the government had promised¹⁷ and to introduce the needed reforms to the Access to Information Act. Indeed, in her report on the Bill, the Information Commissioner of Canada claimed that, if passed, the Bill would, “result in a regression of existing rights.”¹⁸ On International Right to Know Day, 28 September 2018, CLD, together with 38 organisations and 26 other stakeholders, sent a joint letter to the President of the Treasury Board, Scott Brison, demanding that Bill C-58 be scrapped and that a bill that would address seriously the broken Canadian access to information system be brought forward.¹⁹

CLD's initial analysis of Bill C-58 indicated that, if passed in that form, it would only earn Canada an additional two points on the RTI Rating.²⁰ Our more recent analysis of the version of the Bill that was passed at the third and final reading of the House of Commons on 6 December 2017²¹ shows that only very minor improvements have been made.²² It is more than clear that the previous need to reform the Act remains as poignant as ever.

¹⁷ In her report on the reform proposals, *Failing to Strike the Right Balance for Transparency: Recommendations to Improve Bill C-58: An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, the Information Commissioner of Canada listed a series of government promises to introduce reforms, followed by the statement, in relation to Bill C-58, that “It does not”. September 2017, p. 3. Available at: [http://www.ci-oic.gc.ca/telechargements-downloads/userfiles/files/eng/reports-publications/Special-reports/OIC_SpecialReport2017_ENG_Online\(1\).pdf](http://www.ci-oic.gc.ca/telechargements-downloads/userfiles/files/eng/reports-publications/Special-reports/OIC_SpecialReport2017_ENG_Online(1).pdf).

¹⁸ *Ibid.*

¹⁹ Joint letter to the Canadian government on its proposals to reform the Access to Information Act, Centre for Law and Democracy, 28 September 2017. Available at: <https://www.law-democracy.org/live/letter-to-the-president-of-the-treasury-board-demanding-access-to-information-reform/>.

²⁰ CLD, Canada: Net Value of Access to Information Act Reform Bill: Two Points, 23 June 2017. Available at: <https://www.law-democracy.org/live/canada-net-value-of-access-to-information-act-reform-bill-two-points/>.

²¹ Available at: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-58/third-reading>.

²² CLD, Canada: Stumbles Badly on Access to Information Reforms, 7 February 2018. Available at: <https://www.law-democracy.org/live/canada-stumbles-badly-on-access-to-information-reforms/>.