



## Statement on the Draft Access to Information Commitments of Canada's 2018-2020 National Action Plan on Open Government

**July 2018**

**Centre for Law and Democracy  
info@law-democracy.org  
+1 902 431-3688  
www.law-democracy.org**

On 23 July 2018, the Treasury Board of Canada Secretariat released its Draft Commitments: Canada's 2018-20 National Action Plan on Open Government (Draft Commitments), the fourth such Action Plan, along with a call for feedback and comments.<sup>1</sup> This is the Centre for Law and Democracy's (CLD) response to the call for feedback with a particular focus on Commitment 7, Access to Information. CLD has already contributed extensively to the development of this Action Plan, including by hosting the Halifax consultation on ideas for the Plan<sup>2</sup> and by providing a submission during the ideas phase.<sup>3</sup>

We welcome the fact that the government has promised a "full review" of the *Access to Information Act*. We welcome, in particular, the fact that a number of specific areas which have been of great concern to CLD and other civil society organisations and access to information

---

<sup>1</sup> The full document is available at: [https://open.canada.ca/data/en/dataset/1540d4ce-5498-4a61-a929-f810ad3c2d95?\\_ga=2.262124229.917428658.1532358238-579209013.1527541095](https://open.canada.ca/data/en/dataset/1540d4ce-5498-4a61-a929-f810ad3c2d95?_ga=2.262124229.917428658.1532358238-579209013.1527541095). The specific commitment on access to information, which is the subject of this statement, is available at: <https://docs.google.com/document/d/18K2lI00I1GgyBxcRYAsVnlnVN6Y4cIsXuiZml65EcNc/edit#heading=h.2e0m6rsvfc7a>.

<sup>2</sup> 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#>.

<sup>3</sup> *Submission to Ideas Discussion for Canada's Action Plan on Open Government 2018-20*, March 2018. Available at: <https://www.law-democracy.org/live/wp-content/uploads/2018/03/Canada.OGP-AP4-Ideas.Mar18.final.pdf>. CLD also provided ideas for the second and third Action Plans. Available, respectively, 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) and <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*

advocates – such as the extent of coverage or scope of the Act, the timeliness for responding to requests and the regime of exemptions and exclusions – have been singled out for special attention.<sup>4</sup> We also welcome the commitment to explore how technology could be used to improve the functioning of the access to information system.

At the same time, we believe that there are a number of ways in which Draft Commitment 7 could be further improved, as detailed in this Statement.

### ***Timing***

The timing for the start of the review of the *Access to Information Act* – a year from the Royal Assent for Bill C-58 – is most unfortunate since that is likely to fall during an election period, meaning that the review will in fact not commence at least until the last one-half year of this Action Plan. While it might be unseemly to commence a consultation on further reforms before Bill C-58 becomes law, there is absolutely no need to wait for a year after that for this process to start.

Bill C-58 has failed to serve its original goals. It was supposed to represent a set of quick wins, with Commitment 1 of Canada's Third Biennial Plan to the Open Government Partnership promising a full review of the Act "by no later than 2018", which has certainly not happened.<sup>5</sup> Exacerbating the delays we have already experienced is unnecessary. Furthermore, as many observers have noted, Bill C-58 is signally unimpressive in terms of the reforms it introduces. CLD's most recent analysis of the Bill, based on the version that was passed at the third and final reading of the House of Commons on 6 December 2017,<sup>6</sup> shows that it introduces only very minor improvements over the current status quo.<sup>7</sup>

*Recommendation: The review of the Access to Information Act should start as soon as possible and in any case within three months of Bill C-58 receiving Royal Assent.*

---

<sup>4</sup> See Joint letter to the Canadian government on its proposals to reform the Access to Information Act, 28 September 2017. Available at: <https://www.law-democracy.org/live/letter-to-the-president-of-the-treasury-board-demanding-access-to-information-reform/>.

<sup>5</sup> Canada's Third Biennial Plan to the Open Government Partnership (2016-18) is available at: <https://open.canada.ca/en/content/third-biennial-plan-open-government-partnership#toc5-1-1>.

<sup>6</sup> Available at: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-58/third-reading>.

<sup>7</sup> 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/>. See also CLD's analysis of the original version of Bill C-58, issued via a press release titled Canada: Net Value of Access to Information Act Reform Bill: Two Points, available at: <https://www.law-democracy.org/live/canada-net-value-of-access-to-information-act-reform-bill-two-points/>. 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 reform promises, 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).

## ***Promise***

While it is welcome that the government has promised a “full review” of the *Access to Information Act*, at the same time simply promising a review represents a very weak commitment, especially given that the Third Action Plan already promised just this.

The context for this is that Canadians have been debating the need for access to information reform for literally decades and that the nature of the reforms that are needed is very well known. Key stakeholders – including CLD,<sup>8</sup> other access to information activists,<sup>9</sup> successive Information Commissioners<sup>10</sup> and even the Standing Committee on Access to Information, Privacy and Ethics<sup>11</sup> – all agree on the main reform needs, even if minor differences remain. As a result, while it is still important to have a consultation, there is certainly no need for very protracted consultations.

*Recommendation: Instead of simply promising a review, which might lead to no further action, the government should go beyond that and promise an actual result, ideally tabling a bill in parliament but at least publishing a set of government endorsed reform proposals.*

## ***The Public Interest Override***

One of the serious weaknesses with the regime of exceptions in the *Access to Information Act* is that it provides for a public interest override for only a few exceptions. A public interest override operates so as to mandate the disclosure of information even if an exception applies, where disclosure is in the overall public interest. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,<sup>12</sup> the Supreme Court of Canada held that public authorities were required to conduct a form of public interest assessment for all exceptions that were not mandatory in nature (i.e. those which allowed but did not require the public authority to refuse to release the information). Despite this, several exceptions are still not covered by a public interest override. This issue needs to be included in the review of the Act. While the

---

<sup>8</sup> See *Response to the OIC Call for Dialogue: Recommendations for Improving the Right to Information in Canada*, January 2013, available at: <https://www.law-democracy.org/live/canada-right-to-information-law-needs-major-overhaul/>, and *Canada: Recommendations for Reforming Canada's Access to Information Act*, June 2016, available at: <https://www.law-democracy.org/live/canada-serious-access-to-information-reform-needed-now/>.

<sup>9</sup> See *Canada: Civil Society Calls for Access to Information Law Reform*, signed by some 65 organisations and activists. Available at: <https://www.law-democracy.org/live/canada-civil-society-calls-for-access-to-information-law-reform/>.

<sup>10</sup> 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>

<sup>11</sup> See 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>.

<sup>12</sup> [2010] 1 SCR 815, 2010 SCC 23. Available at: <http://www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html>.

term “the regime of exceptions and exclusions”, as used in the Draft Commitments, would presumably cover the public interest override, it would be preferable to make that explicit.

*Recommendation: The Draft Commitments should explicitly call for a review of the public interest override as part of the review of the regime of exceptions and exclusions.*

### ***Additional Issues for the Review***

CLD would also like the following additional issues to be included explicitly as subjects for review of the Act:

- Expanding the right to make requests to non-resident, non-citizens.
- Adding a duty-to-document key decision-making processes.
- Adding back in the duty to list classes of information held by public authorities, which is an important means of facilitating requesters, and which was removed by Bill C-58.
- Other procedural issues such as fees and how requesters must describe the information they are requesting, with a view to making the requesting process as user-friendly as possible.

*Recommendation: The commitment to review the Access to Information Act should explicitly refer to the issues noted above.*

### ***Timeliness***

CLD welcomes the commitment to include the issue of timely responses to requests as part of the law review process since law reform in this area is absolutely necessary. At the same time, we believe that there are other ways to tackle this problem which can be realised more quickly than law reform. The extent of this problem was revealed, once again, in News Media Canada’s 2017 *National Freedom of Information Audit*, an annual review of public authorities’ performance in responding to requests for information, which found that just one-quarter of the requests sent to federal government departments, agencies and crown corporations were answered within the initial 30-day time limit.<sup>13</sup> A number of options could be considered here, such as soft targets, for example to respond to 50% of all requests to federal ministries within 30 days and 75% within 60 days. Another option could be to require ministries to forward any delays beyond 60 days to the Information Commissioner and/or Treasury Board Secretariat for public comment. Other useful ideas could come up in a consultation.

*Recommendation: The government should commit, within the first year of the Action Plan, to hold a public consultation on ways to improve the timeliness of responses to requests that do not depend on law reform, and to putting in place some of the better ideas received during the consultation.*

---

<sup>13</sup> See pp. 76-77. 55 requests were lodged with different federal public authorities. Available at: <https://nmc-mic.ca/public-affairs/freedom-of-information/2017-freedom-information-audit/>.

## ***Ambition***

In a number of areas, the Draft Commitments refer to percentages or numbers. Thus, there is a commitment to increase the number of departments releasing summaries of previously released requests to 50% by 2019 and 75% by 2020 (Draft Commitment 7.3); to increase the number of public authorities participating in the ATIP Online Request Service by 50 each year (Draft Commitment 7.4); and to have 60 public authorities making descriptions of Canadians' personal information holdings available online by June 2019 (with no commitment for the second year) (Draft Commitment 7.6).

We believe that these are unduly modest commitments for a highly technically advanced country like Canada. We are unable to understand why 100% of departments could not be releasing summaries by the end of this Action Plan, and we believe efforts should be made to find ways to release the full text of most requests, albeit after a delay to allow the primary requester to take advantage of the information first, perhaps through a programme of informal collaboration with an open data actor. Similarly, all or at least the vast majority of public authorities should be participating in the ATIP Online Request Service by the end of the Action Plan.

A good goal to consider in this regard would be building a truly sophisticated online requesting platform along the lines of Mexico's National Transparency Platform (Plataforma Nacional de Transparencia or PNT),<sup>14</sup> in which almost all public authorities participate and through which the overwhelming majority of Mexico's requests are filed.<sup>15</sup>

*Recommendation: More ambitious targets should be incorporated into Draft Commitments 7.3, 7.4 and 7.6.*

## ***Consultations***

We welcome the commitment to have online consultations and in-person engagement on issue clusters. At the same time, we note that previous consultations on this issue have failed to engage, at least substantively, many Canadians outside of a core group of stakeholders. We suggest that the government consider a wider range of consultations options so as to ensure that all Canadians are represented in the process. We support the commitment to engage Indigenous organisations. Efforts should also be made to reach out to other groups, such as the youth and recent immigrants.

*Recommendation: Efforts should be made to ensure that the consultation process is as robust as possible and that it engages representatives of all sectors of Canadian society.*

---

<sup>14</sup> See: <https://www.plataformadetransparencia.org.mx/web/guest/inicio>.

<sup>15</sup> The PNT offers enormous functionality for both users and public authorities in a range of ways.