Follow-up Submission on Access to Information Reform in Quebec

September 2015

In August, the Centre for Law and Democracy (CLD) provided a Submission to the process of consultation on access to information law reform in Quebec (available at: http://www.law-democracy.org/live/quebec-access-to-information-reform-proposals-only-a-start/). On 3 September 2015, Toby Mendel, Executive Director of the Centre for Law and Democracy, appeared before the Commission des institutions of the Quebec National Assembly to present the CLD Submission and answer questions. During the question period, requests for follow-up material were made by some members of the Commission. This Follow-up Submission provides further material in response to those questions.

1. Examples of Laws Which Empower Oversight Bodies to Impose Structural Reforms on Public Authorities

Members of the Commission asked Mr. Mendel to provide examples of countries where the access to information law gives the oversight body (such as the information commission) the power to order public authorities to take structural measures to bring themselves into compliance with the rules in the law. India is a key example of a country which has empowered its oversight bodies, the Central and State Information Commissions, to impose structural remedies on public authorities. The power to do so arises in the context of an individual appeal arising from a request for information. In deciding such an appeal, section 19(8) of the Indian Right to Information Act, 2005, provides:

> In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to—
>
> (a) require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including—
>
> (i) by providing access to information, if so requested, in a particular form;
>
> (ii) by appointing a Central Public Information Officer or State Public Information Officer, as the case may be;

(iii) by publishing certain information or categories of information;
(iv) by making necessary changes to its practices in relation to the maintenance, management and destruction of records;
(v) by enhancing the provision of training on the right to information for its officials;
(vi) by providing it with an annual report in compliance with clause (b) of sub-section (1) of section 4;

(b) require the public authority to compensate the complainant for any loss or other detriment suffered;
(c) impose any of the penalties provided under this Act;
(d) reject the application.

Some other examples of oversight bodies which have this power include:

Antigua and Barbuda: Freedom of Information Act, 2004:

Article 42(4):
In a decision pursuant to subsection (1) [on a complaint], the Commissioner may-
(a) dismiss the application; or
(b) require the public authority or private body to take such steps as may be necessary to bring it into compliance with its obligations pursuant to Part II.

Article 43(1):
Where Commissioner decides that a public authority has failed to comply with an obligation pursuant to Part II, the Commissioner may require the public authority to take such steps as may be necessary to bring it into compliance with its obligations under Part II, including the following-
(a) appointing an information officer;
(b) publishing the relevant information and categories of information;
(c) making relevant changes to its practices in relation to the keeping, management and destruction of records, and the transfer of records to the Archives and Records Office;
(d) enhancing the provision of training on the right to information for its officials;
(e) providing the Commissioner with an annual report, in compliance with section 14.

Brazil: Article 16(2) of Law n. 12.527 of November 18, 2011:

After upholding the appeal, the Office of the Comptroller General [the local oversight body] shall require the organ or entity [i.e. public authority] to take the necessary steps to comply with this Law.

Maldives: Section 64(a) of the Right to Information Act, 2014:

Having examined an appeal or complaints lodged before the Information Commissioner, the matter can be settled in the following ways:
…
(8) to order to strengthen the document management system of a specific state-office, or to order to reform relevant procedure;

Sierra Leone: Section 45(1) of the Access to Information Act, 2013:

The Commission shall, on the receipt of an application for review under section 43, as soon as is reasonably possible, and in any case not later than fifteen days after giving both the

complainant and the relevant public authority an opportunity to respond in writing, make an order–

(a) rejecting the application; or

(b) requiring the public authority to take such steps as may be necessary to bring it into compliance with its obligations under this Act, including–

(i) providing access to information;

(ii) providing access to information in a particular form;

(iii) requiring a public or private body to compensate the complainant for any loss or other detriment suffered; or

(iv) imposing a fine on the public authority.

2. Examples of Public Interest Overrides from Other Laws

During question period in his presentation to the Commission, Mr. Mendel was also asked about the form which public interest overrides from other countries took. Such overrides operate so that, even where information is covered by a relevant exception in the access to information law, the information shall still be disclosed when this is in the overall public interest.

Bosnia and Herzegovina: Article 8 of the Law on Freedom of Access to Information:

> 1. A competent authority [i.e. public authority] shall disclose the requested information, notwithstanding that it has claimed an exemption under Articles 6, 7 or 8, where to do so is justified in the public interest having regard to both any benefit and harm that may accrue from doing so.
> 2. In determining whether disclosure is justified in the public interest, a competent authority shall have regard to considerations such as but not limited to, any failure to comply with a legal obligation, the existence of any offence, miscarriage of justice, abuse of authority or neglect in the performance of an official duty, unauthorized use of public funds, or danger to the health or safety of an individual, the public or the environment.

Colombia: Article 21 of Law 1712 of 2014:

> (2) No public authority may refuse to indicate whether a document in its possession or deny the disclosure of a document, unless the damage this will cause to the protected interest outweighs the public interest in access to information. [Spanish original: (2) Ninguna autoridad pública puede negarse a indicar si un documento obra o no en su poder o negar la divulgación de un documento, salvo que el daño causado al interés protegido sea mayor al interés público de obtener acceso a la información.]
>
> (3) The exceptions to access to information contained in this Act do not apply in cases of violation of human rights or crimes against humanity, and in all cases the rights of the victims of such violations must be protected. [Spanish original: (3) Las excepciones de acceso a la información contenidas en la presente ley no aplican en casos de violación de derechos humanos o delitos de lesa humanidad, y en todo caso deberán protegerse los derechos de las víctimas de dichas violaciones.]

India: Section 8(2) of the Right to Information Act, 2005:

Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1) [which sets out the exceptions in the access to information law], a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

Liberia: Section 4.8(c) of the Freedom of Information Act, 2010:

Exemption must be justified; not merely Claimed: A public authority or private entity may not refuse access to or disclosure of information simply by claiming it as "confidential or secret". In order to qualify to be exempted from disclosure, it must be clearly demonstrated that:

…

(c) The harm to be caused by the disclosure is greater than the public interest in having the information disclosed.

Maldives: Section 20(b) of the Right to Information Act, 2014:

Notwithstanding anything in any section of this Chapter [which deals with exceptions], a state-office shall disclose information upon request where larger public interest warrants the disclosure of such information rather than denial of access and where the interest protected by non-disclosure is outweighed by the interests of the larger public upon disclosure.

Mexico: Article 14(3) of the Federal Transparency and Access to Public Government Information Law (2002):

Information may not be classified [i.e. rendered secret] when the investigation of grave violations of fundamental rights or crimes against humanity is at stake.

South Africa: Section 46 of the Promotion of Access to Information Act, 2000:

Despite any other provision of this Chapter [which deals with exceptions], the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if—

(a) the disclosure of the record would reveal evidence of—

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

3. Examples of Better Practice Rules on Internal Exceptions

India: Section 8(1) of the Right to Information Act, 2005:

Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

…

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Mexico: Article 14(1) of the Federal Transparency and Access to Public Government Information Law (2002):

The following will also be considered exempted information:

…

(vi) That which contains the opinions, recommendations or points of view that are part of a public servant's deliberative process, until that time when a final decision is adopted, which itself must be documented.

Slovenia: Article 6(1) of the Access to Public Information Act (2003):

The body shall deny the applicant access to requested information if the request relates to:

…

7. Information acquired or drawn up for the purposes of administrative procedure, and the disclosure of which would prejudice the implementation of such procedure;

…

9. Information from the document that is in the process of being drawn up and is still subject of consultation by the body, and the disclosure of which would lead to misunderstanding of its contents;

…

11. Information from the document drawn up in connection with internal operations or activities of bodies, and the disclosure of which would cause disturbances in operations or activities of the body.

South Africa: Section 44 of the Promotion of Access to Information Act, 2000:

(1) Subject to subsections (3) and (4), the information officer of a public body may refuse a request for access to a record of the body—

(a) if the record contains—

(i) an opinion, advice, report or recommendation obtained or prepared; or

(ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting,

for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or

(b) if—

(i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid—

(aa) communication of an opinion, advice, report or recommendation; or

(bb) conduct of a consultation, discussion or deliberation; or

(ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

(2) Subject to subsection (4), the information officer of a public body may refuse a request for access to a record of the body if—

(a) the disclosure of the record could reasonably be expected to jeopardise the effectiveness of a testing, examining or auditing procedure or method used by a public body;

(b) the record contains evaluative material, whether or not the person who supplied it is identified in the record, and the disclosure of the material would breach an express or implied promise which was—

(i) made to the person who supplied the material; and

(ii) to the effect that the material or the identity of the person who supplied it, or both, would be held in confidence; or

(c) the record contains a preliminary, working or other draft of an official of a public body.

(3) A record may not be refused in terms of subsection (1) if the record came into existence more than 20 years before the request concerned.

(4) A record may not be refused in terms of subsection (1) or (2) insofar as it consists of an account of, or a statement of reasons required to be given in accordance with section 5 of the Promotion of Administrative Justice Act, 2000.

4. Examples of Western Countries Which Include Private Bodies Which Undertake Public Functions Within the Scope of Their Laws

Croatia: Article 5.2 of the Act on the Right of Access to Information (2013):

> "Public authority bodies" for the purpose of this Law, are … legal entities performing public service, legal entities which in line with special provisions are financed partly or entirely from the state budget or budget of local and regional units of government or from public funds (taxes, contributions, etc.), as well as companies in which Republic of Croatia and local and regional units of government have separate or joint majority ownership rights;

Poland: Article 5(5) of the Act of 6 September 2001 on access to public information:

> [E]ntities representing other persons or organisational units, which perform public functions or dispose of public property as well as legal persons, in which the State Treasury, units of local authority or economic or professional local authority hold dominant position in the understanding of the provisions of competition and consumer protection.

Portugal: Article 4 of Law no. 46/2007 of 24 August 2007:

> 1. The present Law shall apply to the following bodies and entities:
>
> …
>
> g) Other bodies which engage in administrative functions or exercise public authority.
>
> 2. The provisions of the present Law shall also apply to documents held or drawn up by any body which possesses legal personality and has been created to fulfil needs of general interest that do not possess an industrial or commercial nature in a specific manner, and to which any of the following circumstances applies:
>
> a) The majority of the funding for the body's activities is provided by any of the entities referred to by the previous paragraph or the present paragraph;

Serbia: Article 3 of the Law on Free Access to Information of Public Importance (2003):

In terms of this Law, a public authority body (hereinafter: public authority) shall denote notably:

1) A state body, territorial autonomy body, a local self-governance body, as well as an organization vested with public authority (hereinafter: state body);

2) A legal person founded by or funded wholly or predominantly by a state body."

South Africa: Section 1 of the Promotion of Access to Information Act, 2000:

'public body' means—

…

(b) any other functionary or institution when—

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation;

United Kingdom: Section 5(1) of the Freedom of Information Act, 2000:

The Secretary of State may by order designate as a public authority for the purposes of this Act any person who is neither listed in Schedule 1 nor capable of being added to that Schedule by an order under section 4(1), but who—

(a) appears to the Secretary of State to exercise functions of a public nature, or

(b) is providing under a contract made with a public authority any service whose provision is a function of that authority.